138 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Analysis of Horizontal Market Power under the Federal Power Act — Docket No. RM11-14-000

ORDER REAFFIRMING COMMISSION POLICY AND TERMINATING PROCEEDING

(Issued February 16, 2012)

1. On March 17, 2011, the Commission issued a Notice of Inquiry[1] seeking comment on whether, and, if so, how, the Commission should revise its approach to examining horizontal market power concerns under section 203 of the Federal Power Act (FPA)[2] to reflect the Horizontal Merger Guidelines issued by the Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, Antitrust Agencies) on August 19, 2010 (2010 Guidelines). The Commission also sought comment on what impact, if any, the 2010 Guidelines should have on the Commission's analysis of horizontal market power in its electric-market based rate program under section 205 of the FPA.[3] Seventeen parties filed comments in response to the NOI.[4]

2. As discussed below, after reviewing the comments received, the Commission has decided to retain its existing policies regarding the analysis of horizontal market power when reviewing transactions under section 203 of the FPA and in its electric market-based rate program. Accordingly, we will terminate the proceeding in Docket No. RM11-14-000.

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[1] *Analysis of Horizontal Market Power under the Federal Power Act*, Notice of Inquiry, 76 Fed. Reg. 16,394 (Mar. 23, 2011), FERC Stats. & Regs. ¶ 35,571 (2011) (NOI).

[2] 16 U.S.C. § 824b (2006).

[3] 16 U.S.C. § 824d (2006).

[4] A list of the commenters is provided in Appendix A.

I. Background

A. Section 203

3. Under section 203 of the FPA, Commission authorization is required for public utility mergers and consolidations and for public utility acquisitions of jurisdictional facilities. Section 203(a) provides that the Commission shall approve such transactions if they are consistent with the public interest. The Commission has stated that it will consider three factors when analyzing a proposed merger: the effect on competition, the effect on rates, and the effect on regulation.[5] The Energy Policy Act of 2005 added the further requirement that the Commission determine whether a proposed transaction would result in cross-subsidization, and if so, whether the resulting cross-subsidization would be consistent with the public interest.[6]

4. The Commission adopted the five-step framework set out in the Antitrust Agencies' 1992 Horizontal Merger Guidelines (1992 Guidelines)[7] as the basic framework for evaluating the competitive effects of proposed mergers.[8] The Commission also adopted an analytic screen (Competitive Analysis Screen), based on the 1992 Guidelines and outlined in Appendix A of the Merger Policy Statement, which focuses on the first step in the analysis: whether the merger would significantly increase concentration in relevant markets. The components to a screen analysis are as follows:

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[5] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement).

[6] Energy Policy Act of 2005, Pub. L. No. 109-58, 1289, 119 Stat. 594, 982-83 (2005), *codified*, 16 U.S.C. 824b(a)(4).

[7] U.S. Dept. of Justice & Federal Trade Commission, "Horizontal Merger Guidelines" (1992), as revised (1997) (1992 Guidelines).

[8] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118, 30,130. The five steps are: (1) assess whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured; (2) assess whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects; (3) assess whether market entry would be timely, likely and sufficient either to deter or counteract the competitive effects of concern; (4) assess whether the merger would result in increases in efficiency that cannot reasonably be achieved through the parties by other means; and (5) assess whether either party to the merger would fail without the merger, causing its assets to exit the market. *Id.* at 30,111.

(1) identify the relevant products; (2) identify customers who may be affected by the merger; (3) identify potential suppliers to each identified customer (includes a delivered price test (DPT) analysis, consideration of transmission capability, and a check against actual trade data); and (4) analyze market concentration using the Herfindahl-Hirschman Index (HHI)[9] thresholds from the 1992 Guidelines.[10]

5. The Commission stated that the Competitive Analysis Screen is intended to identify mergers that clearly do not raise competitive concerns early in the process and that it believes that the screen produces a reliable, generally conservative analysis of the competitive effects of a proposed merger.[11] The Commission acknowledged, however, that the screen is not infallible. Accordingly, the Commission stated that claims that the screen has failed to detect certain market power problems or disputes about the way that a particular analysis has been conducted can be raised by intervenors and Commission staff. The Commission also stated that intervenors may file alternative competitive analyses, accompanied by appropriate data, to support their arguments.[12]

B. Market-Based Rates

6. The Commission allows sales of electric energy, capacity, and ancillary services at market-based rates if the applicant and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.[13] The Commission adopted two indicative screens, the wholesale market share screen and the pivotal supplier screen, to

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[9] The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Both the Antitrust Agencies and the Commission use HHI to assess market concentration.

[10] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119-20, 30, 128-37.

[11] *Id.* at 30,119.

[12] *Id.*

[13] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 1, 4, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

identify sellers that raise no horizontal market power concerns and can otherwise be considered for market-based rate authority.[14] The wholesale market share screen measures whether a seller has a dominant position in the market in terms of the number of megawatts of uncommitted capacity owned or controlled by the seller, as compared to the uncommitted capacity of the entire market.[15] A seller whose share of the relevant market is less than 20 percent during all seasons passes the market share screen.[16] The pivotal supplier screen evaluates the seller's potential to exercise market power based on the seller's uncommitted capacity at the time of annual peak demand in the relevant market.[17] A seller satisfies the pivotal supplier screen if its uncommitted capacity is less than the net uncommitted supply in the relevant market.[18] Failing either screen creates a rebuttable presumption that the seller has horizontal market power.[19] If a seller passes both screens, however, there is a rebuttable presumption that it does not possess horizontal market power.

7. A seller that fails either indicative screen has several procedural options. It has the right to present alternative evidence to rebut the presumption of horizontal market power, including a DPT.[20] In the alternative, a seller may accept the presumption of market power and adopt some form of cost-based mitigation.[21] Sellers use the results of the DPT to perform pivotal supplier and market share analyses. In addition, sellers use the results of the DPT to analyze market concentration using HHI. The Commission stated that a showing of an HHI less than 2,500 in the relevant market for all season/load periods for sellers that have also shown that they are not pivotal and do not posses a market share of 20 percent or greater in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. The Commission stated that, as with the indicative screens, a seller may submit alternative evidence to rebut or support the results of the DPT, such as historical sales or transmission data.[22]

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[14] *Id.* P 13, 62.

[15] *Id.* P 43.

[16] *Id.* P 43-44, 80, 89.

[17] *Id.* P 35.

[18] *Id.* P 42.

[19] *Id.* P 44.

[20] *Id.* P 63; 18 C.F.R. § 35.37(c)(2) (2011).

[21] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 63; 18 C.F.R. § 35.37(c)(3) (2011).

[22] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 117.

C. Notice of Inquiry

8. The NOI highlighted some features of the 2010 Guidelines and how those guidelines differ from the Commission's process for reviewing mergers under section 203 of the FPA. In particular, the Commission noted that the 2010 Guidelines modify the thresholds used to classify the relative concentration of a market and to assess the competitive significance of a post-merger change in HHI, as summarized in the table below.[23]

HHI (Market Concentration) Thresholds		
Market	**1992 Guidelines**	**2010 Guidelines**
Unconcentrated	<1000	<1500
Moderately Concentrated	1000-1800	1500-2500
Highly Concentrated	>1800	>2500
HHI Changes Potentially Raising Significant Competitive Concerns		
Moderately Concentrated Markets	>100	>100
Concentrated Markets	>50	>100, <200
HHI Changes Presumed Likely to Enhance Market Power		
Concentrated Markets	>100	>200

9. In addition, the Commission explained that the 2010 Guidelines deemphasize market definition as a starting point for the Antitrust Agencies' analysis and depart from the sequential analysis of the 1992 Guidelines. Instead, the 2010 Guidelines state that the Antitrust Agencies will engage in a fact-specific inquiry using a variety of analytical tools, including direct evidence of competition between the parties and economic models that are designed to quantify the extent to which the merged firm can raise prices as a result of the merger.[24] The Commission further noted that the 2010 Guidelines address the potential competitive effects arising from partial acquisitions and minority ownership. Specifically, the Commission stated that the Antitrust Agencies' analysis of partial acquisitions and minority ownership focuses on: (1) whether the acquiring company will be able to influence the competitive conduct of the target firm; (2) whether the partial acquisition will reduce the financial incentive to compete because losses from one owned firm are offset by gains at the other; and (3) whether the partial acquisition enables

[23] NOI, FERC Stats. & Regs. ¶ 35,571 at P 12.

[24] *Id.* P 13.

companies to access non-public competitive information that can lead to coordinated activity by the firms.[25]

10. The NOI sought comment on whether the Commission should revise its approach for examining horizontal market power when analyzing proposed mergers or other transactions under section 203 of the FPA and when analyzing market-based rate filings under section 205 of the FPA to reflect the 2010 Guidelines. The Commission asked whether the Commission should, like the 2010 Guidelines, place less emphasis on market definition as the first step in its analysis and move away from the use of a sequential analysis for analyzing horizontal market power under section 203 of the FPA. Additionally, the Commission asked what elements of the 2010 Guidelines the Commission should adopt and sought comments on whether the Commission should adopt the HHI thresholds contained in the 2010 Guidelines. Finally, the Commission sought comment on what impact, if any, the 2010 Guidelines should have on the Commission's analysis of horizontal market power in its electric market-based rate program.[26]

II. Discussion

11. As further discussed below, after careful consideration of the comments submitted in response to the NOI, the Commission has decided to retain its existing approaches to analyzing horizontal market power under section 203 of the FPA and in its analysis of electric market-based rates under section 205 of the FPA.

A. Section 203 Analysis

1. Comments in support of retaining the Commission's Current Analysis

a. Market Definition and Market Concentration

12. A number of commenters argue that the Commission should continue to emphasize market definition and the calculation of market shares and market concentration as the first step in its analysis. EEI, EPSA, and Dr. Morris, a consultant

[25] *Id.* P 14. The Commission noted that issues relating to partial acquisitions are among the issues before the Commission in Docket No. RM09-16-000. *Id.* P 14, n.27 (citing *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,650 (2010) (Control and Affiliation NOPR)).

[26] *Id.* P 15-21.

with Economists Incorporated, state that the Competitive Analysis Screen provides certainty to applicants and, as a result, produces better filings and assists applicants in determining whether their proposals raise competitive concerns and require remedies.[27] Dr. Morris adds that preparing a Competitive Analysis Screen is relatively inexpensive when compared with computer simulation models. Dr. Morris observes that, while the DOJ conducts competitive effects analyses and the models used by the agency have advanced, the modeling that DOJ uses has not yet provided more reliable information on the competitive effects of a merger than the market concentration screens used by the Commission.[28] EEI states that the Commission's methodology strikes the appropriate balance in identifying transactions that pose a threat of competitive harm while providing a streamlined process for approving ones that do not.[29]

13. Additionally, several commenters maintain that the analysis embodied in the 2010 Guidelines is incompatible with the realities of the Commission's process of reviewing mergers and other transactions under section 203 of the FPA. In particular, these commenters note that, unlike the procedures used by the Antitrust Agencies, proceedings under section 203 are required to be on-the-record and the Commission's decision must be presented in a published order, subject to the requirements of reasoned decision making and the possibility of judicial review.[30] Commenters also claim that it would be infeasible to conduct the type of analysis envisioned by the 2010 Guidelines in the 180-day time period prescribed by Congress and that the Commission's current methodology facilitates timely decisions by the Commission.[31]

14. Moreover, commenters explain that the Commission need not resort to the open-ended process embraced in the 2010 Guidelines to protect the public interest and that the Commission has the experience necessary to determine what methodologies are appropriate for assessing market power in electricity markets.[32] Modesto states that application of the Commission's current analysis will better protect consumers from the anticompetitive effects of mergers.[33] Similarly, APPA, NRECA, ELCON, and NASUCA state that the Antitrust Agencies' efforts to revise their analysis and the changes embodied in the 2010 Guidelines are tied to the characteristics of markets with

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[27] Morris Comments at 21-22; EEI Comments 5-9; EPSA Comments at 7-8.

[28] Morris Comments at 21.

[29] EEI Comments at 6-8.

[30] *Id.* at 9-12; EPSA Comments at 5-6.

[31] EEI Comments at 12-14; EPSA Comments at 5-6; Morris Comments at 20.

[32] EEI Comments at 9, 14-15; EPSA Comments at 6-7.

[33] Modesto Comments at 4.

differentiated products where, unlike markets for electricity, ascertaining the relevant market and assessing market concentration are less relevant for identifying competitive concerns.[34] ELCON and NASUCA add that the Commission has already adopted an approach that reflects those changes that are most relevant to electricity markets by expressing a willingness to look beyond changes in HHI.[35] APPA and NRECA state that while the Commission should consider whether some of the analytical tools described in the 2010 Guidelines would prove useful in the Commission's merger analysis, these tools should not act as substitutes for market definition and market concentration.[36]

15. A number of commenters argue that the Commission's current analytical framework already permits the consideration of the evidence identified in the 2010 Guidelines when appropriate. Mr. Cavicchi, Senior Vice President at Compass Lexecon, notes that the Commission has already acknowledged that the Commission should consider additional evidence of competitive effects where an applicant fails the Competitive Analysis Screen. Mr. Cavicchi asserts, however, that it would be appropriate in such circumstances to collaborate with the Antitrust Agencies to reduce the burden on the applicant.[37] TAPS and TDU Systems state that the 2010 Guidelines highlight the need for the Commission to consider intervenor theories of competitive harm, regardless of whether the proposed transaction passes the Competitive Analysis Screen.[38]

b. HHI Thresholds

16. A number of commenters argue that the Commission should retain its existing HHI thresholds. TAPS, TDU Systems, ELCON, and NASUCA caution the Commission against selectively incorporating particular aspects of the 2010 Guidelines, especially the HHI thresholds.[39] These commenters state that the 2010 Guidelines should be viewed as a comprehensive whole and that the 2010 Guidelines' relaxation of the HHI thresholds is merely one small element of a broader analytical overhaul. TAPS and TDU Systems further note that the Antitrust Agencies have different statutory obligations than the Commission and that, even before the Antitrust Agencies adopted the 2010 Guidelines,

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[34] APPA and NRECA Comments at 9-10; ELCON and NASUCA Comments at 4.

[35] ELCON and NASUCA Comments at 4.

[36] APPA and NRECA Comments at 2-3.

[37] Cavicchi Comments at 6-7 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253, at P 65).

[38] TAPS and TDU Systems Comments at 16-17.

[39] *Id.* at 4, 6-7; ELCON and NASUCA Comments at 5.

the Commission and the Antitrust Agencies implemented merger review in the context of the electric industry differently.[40]

17. Commenters also claim that the more relaxed HHI thresholds embodied in the 2010 Guidelines are inappropriate in electricity markets. The New York Commission, ELCON, NASUCA, APPA, NRECA and Monitoring Analytics state that the Commission's current thresholds remain appropriate because electricity markets are more susceptible to the exercise of market power—due to the large capital investments associated with entry, the lack of substitutable products, the lack of storage, and the relative inelasticity of demand—than many of the industries that the Antitrust Agencies review.[41] APPA and NRECA add that there is no evidence that the current thresholds are too low, result in too many false positives, or that the electricity industry has undergone changes that warrant relaxing the Commission's thresholds.[42] TAPS and TDU Systems agree that there have been no changes supporting modification of the thresholds and that adopting the revised thresholds would undermine the Commission's ability to fulfill its statutory mandate and to accurately assess the competitive impact of a merger.[43] Similarly, Modesto notes that the Commission faces challenges in identifying the scope of market power in analyzing section 203 applications and argues that relaxing the HHI thresholds would serve to frustrate those efforts by easing scrutiny over affiliates and companies whose relationship to the applicant company is not readily apparent.[44] AAI states that lower thresholds may be appropriate in electric markets because the adverse effects of electric utility mergers are not likely to be mitigated by entry or efficiencies.[45]

18. Berkeley argues that the Commission should not make any decision to change its HHI thresholds without first directing Commission staff to study consummated electric mergers in order to determine whether the current thresholds have been effective, and compare the results to alternative predictions of competitive impacts.[46]

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[40] TAPS and TDU Systems Comments at 6-7.

[41] New York Commission Comments at 3-4; ELCON and NASUCA Comments at 4-5; APPA and NRECA Comments at 2; Monitoring Analytics Comments at 6.

[42] APPA and NRECA Comments at 2, 10-17.

[43] *Id*. at 11-12.

[44] Modesto Comments at 4-5.

[45] AAI Comments at 15.

[46] Berkeley Comments at 5.

c. Other Aspects of the 2010 Guidelines

19. While, as noted below, EPSA supports the adoption of the HHI thresholds contained in the 2010 Guidelines, EPSA contends that the Commission should refrain from adopting other aspects of the 2010 Guidelines. In particular, EPSA states that the Commission should not adopt the 2010 Guidelines' approach to partial acquisitions and minority ownership and that the Commission's analysis should continue to focus on control. EPSA notes that the provisions of the federal antitrust statutes that the Antitrust Agencies are charged with enforcing apply to transactions involving one firm's partial acquisition of a competitor and the minority position that may result, whereas the Commission has made clear that transactions that do not transfer control of a public utility do not fall within the meaning of the "or otherwise dispose" language of section 203(a)(1)(A) and that the requirement to obtain the Commission's approval under the "merge or consolidate" clause in section 203(a)(1)(B) depends upon whether the transaction directly or indirectly would result in a change of control over the facilities.[47] EPSA states that there is no justification for engaging in a case-by-case consideration of virtually every single direct or indirect acquisition of interests in a public utility and, as the Commission has previously recognized, requiring case-by-case approval under section 203 would be contrary to the intent of Congress that the Energy Policy Act of 2005 increase investment in the utility sector while protecting customers.[48] EPSA urges the Commission to move forward with a final rule in Docket No. RM09-16-000.[49]

2. Comments in Support of Adopting the 2010 Guidelines

a. Market Definition and Market Concentration

20. Several commenters argue that the Commission should adopt the 2010 Guidelines because the Competitive Analysis Screen may not accurately identify competitive concerns in all circumstances. FTC Staff and the PPL Companies state that over-reliance on measures of HHI, particularly in electricity markets, can yield conclusions that are too lenient or too restrictive in an assessment of market power.[50] FTC Staff states that it believes that consideration of other types of evidence identified in the 2010 Guidelines would enrich the Commission's analysis of mergers, including observations about the actual effect of consummated mergers, direct comparison based on experience, evidence of substantial head-to-head competition, and the potentially disruptive role of a merging

[47] EPSA Comments at 10-11.

[48] *Id.* at 12 (citing *Transactions Subject to Federal Power Act Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 144 (2005)).

[49] *Id.* at 13.

[50] FTC Staff Comments at 2; PPL Companies Comments at 5-8.

party, unilateral and coordinated effects of a transaction, and the competitive effect of the transaction on dimensions of competition other than price.[51] The PPL Companies argue that the Commission's over-reliance on HHI thresholds has allowed applicants to tailor their applications to avoid triggering the HHI thresholds without truly addressing the likely anticompetitive effects of a proposed transaction. Therefore, they argue that the Commission should supplement its use of market concentration statistics with evidence of whether a merger may enhance or lessen competition.[52]

21. AAI argues that the Commission should supplement its analysis of market concentration by considering additional evidence of competitive effects. AAI maintains that the differences between the Commission's review process and those of the Antitrust Agencies do not pose an impediment to adopting the 2010 Guidelines because all of the agencies tend to focus on competitive concerns and much of the information necessary to assess competitive effects, such as prices, identity of rivals, and capacity, are public.[53] AAI states, for example, that evidence could be used to ensure that the markets established by the DPT accurately reflect the potential impact of the merger, to corroborate the findings of the concentration analysis, and to determine whether merging parties have been or, absent the merger, would become head-to-head competitors.[54]

22. Similarly, while acknowledging that many aspects of the 2010 Guidelines are inapplicable to electricity markets, Monitoring Analytics recommends that the Commission consider some of the additional evidence identified in the 2010 Guidelines, such as the actual effects observed in wholesale electricity markets, the competitiveness of isolated wholesale electricity markets with varying market concentration, and whether, absent the merger, the merging firms would have become substantial head-to-head competitors.[55]

23. The Brattle Group maintains that the Competitive Analysis Screen may not always yield conservative results because the DPT, by examining a merger's effect on one market at a time, ignores whether suppliers may have a better opportunity to sell in markets where they may obtain higher prices. Thus, the Brattle Group maintains that the Commission should look beyond HHI, focus on whether a merger will change incentives such that there will be an increase in market price, and not wait for a merger to fail the screen to implement a case-specific theory of competitive harm. The Brattle Group

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[51] FTC Staff Comments at 2, 4-7.

[52] PPL Companies Comments at 16.

[53] AAI Comments at 5-7.

[54] *Id.* at 15-17.

[55] Monitoring Analytics Comments at 2-5.

encourages the Commission not to abandon the use of market concentration statistics, but to set out guiding principles in assessing merger effects based on a theory of competitive harm tailored to the realities of the market at issue at an early stage of the review.[56]

24. Several commenters ask the Commission to refine its approach to defining the relevant geographic market. Mr. Cavicchi argues that the Commission should pay close attention to market definition. While Mr. Cavicchi states that the Commission's current approach to defining markets is suitable in many instances, it could be enhanced by drawing on additional electric system data that is often readily available. For example, he states that an analysis of market pricing data for the purposes of delineating geographic markets can be extremely informative in some situations.[57] The PPL Companies also state that the Commission should clarify that applicants must use direct evidence to establish the relevant markets that they propose.[58] The Brattle Group states that the Commission should improve how the DPT model screens for potential suppliers by taking into account each potential supplier's opportunity costs.[59]

25. Monitoring Analytics states that the Commission should refine its approach to assessing market definition in organized markets by using actual information about market participants and operations instead of using approximations of seasonal geographic markets that assume the model of individual utility territories to define the market. Monitoring Analytics further states that it recommends that the Commission use market definitions based on actual operational substitutability and residual supplier analysis to examine the relative importance of the merging firms based on pre- and post-merger positions in every relevant market.[60]

26. Dr. Morris recommends that the Commission review its position on destination markets because the Commission has issued some inconsistent rulings on submarkets and because facts change over time. According to Dr. Morris, the Commission has acted inconsistently by accepting a study of a submarket where only one of the merging parties had assets in some cases, but not in others.[61] Therefore, Dr. Morris asks the Commission to clarify that parties do not need to analyze submarkets in Regional Transmission

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[56] Brattle Group Comments 5-10.

[57] Cavicchi Comments at 5-6.

[58] PPL Companies Comments at 11-12.

[59] Brattle Group Comments at 10-11.

[60] Monitoring Analytics Comments at 2-3.

[61] Morris Comments at 25-27 (citing *USGen New England, Inc.*, 109 FERC ¶ 61,361 (2004); FirstEnergy Corp., Application for Authorization of Disposition of Jurisdictional Assets, Docket No. EC10-68 (filed May 11, 2010)).

Organizations (RTO) when only one of the merging parties owns generation in that submarket. Additionally, Dr. Morris states that the Commission should consider whether PJM Interconnection-East and Southwest Connecticut still need to be considered separate destination markets for DPTs in light of recent developments that have reduced constraints in these areas.[62] While he expresses support for the Commission's analysis as a general matter, Dr. Morris states that the Commission could consider both the relevant market and alternate relevant markets created by regional and local constraints.

b. HHI Thresholds

27. A number of commenters argue that the Commission should adopt the 2010 Guidelines' HHI thresholds. In particular, Dr. Morris, Mr. Cavicchi, Entergy, the PPL Companies, EPSA, and EEI claim that the Commission should adopt these thresholds because they reflect the substantial experience of the Antitrust Agencies, which indicates that a merger will not enhance market power below these levels. They also argue that ongoing oversight of the electric markets by the Commission and market monitors provide protections against any perceived danger arising from adopting these thresholds.[63] Dr. Morris adds that adopting these thresholds is appropriate because, according to Dr. Morris, the Commission rigidly applies its HHI thresholds and the HHI thresholds contained in the 2010 Guidelines more accurately reflect the likelihood of anticompetitive effects than the Commission's current thresholds.[64] Mr. Cavicchi argues that data compiled by the Antitrust Agencies clearly shows that the majority of merger challenges in various industries' markets (other than petroleum markets) have been focused on markets where post-merger HHIs have been greater than 2,400.[65]

c. Other Aspects of the 2010 Guidelines

28. The PPL Companies also propose the following modifications to the Commission's analysis: (1) focus exclusively on available economic capacity because only those firms with available economic capacity could defeat any attempts by the merged firm to increase prices or reduce output;[66] (2) consider the merger's impact on the supply curve;[67] (3) consider initiating a separate proceeding to examine reforms and

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[62] *Id.* at 26.

[63] *Id.* at 23-24; Cavicchi Comments at 3; Entergy Comments at 1-2; PPL Companies Comments at 14-16; EPSA Comments at 8-9; EEI Comments at 17-19.

[64] Morris Comments at 23.

[65] Cavicchi Comments at 3.

[66] PPL Companies Comments at 13-14.

[67] *Id.* at 17-19.

clarify the criteria to simplify the calculation of Simultaneous Import Limits (SIL);[68] and (4) after the Commission adopts these changes to its analysis, consider and seek comments on whether changes to the Commission's procedures are necessary, such as permitting limited discovery and informal technical conferences upon motion of an intervenor or having separate staff investigate and comment on a proposed transaction.[69]

29. As an initial matter, AAI asks that the Commission more formally coordinate with the Antitrust Agencies, in a manner similar to the current relationship between the Federal Communications Commission and the Antitrust Agencies, to ensure greater consistency in remedies, analysis, and findings. AAI also reviewed analyses filed with the Commission between 1997 and 2004, which revealed a high degree of variation in concentration results for the same market, even when these analyses were performed by the same experts.[70] According to AAI, its analysis suggests that the Commission may want to consider initiating an inquiry into the modeling methods, data sources, and assumptions used in the Competitive Analysis Screen and that the Commission may want to take steps to build a more complete record in merger proceedings by including certain types of information discussed in the 2010 Guidelines. AAI further asserts that the Commission should consider crafting filing requirements to ensure that the Commission, intervenors, and the public have sufficient evidence to conduct competitive effects analysis, which is essential when determining if a merged firm is likely to exercise market power and, if so, what the appropriate remedy should be.[71]

30. While APPA and NRECA state that the Commission should continue to emphasize market definition and the calculation of market shares and market concentration as the first step in its analysis, they state that the Commission should adopt additional tools, such as diversion ratios and critical loss analysis, to help it in its analysis, to the extent possible. However, they emphasize that these tools should not be a substitute for the Commission's existing analysis, including the Competitive Analysis Screen.[72]

31. Several commenters argue that the Commission should adopt the 2010 Guidelines' approach to analyzing monopsony power (buyer market power). Noting that the Commission has previously acknowledged that an evaluation of buyer market power may be appropriate in some instances, AAI suggests that the Commission should take the

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[68] *Id.* at 19-20.

[69] *Id.* at 20-23.

[70] AAI Comments at 10-14.

[71] *Id.* at 17-18.

[72] APPA and NRECA Comments at 22.

following approaches when evaluating such issues: (1) the Commission should avoid relying on market power mitigation measures in organized markets to address buyer market power issues raised in merger cases; (2) the Commission's standard, as in the 2010 Guidelines, should be whether the merged firm will be able to impose worse terms on its trading partners; and (3) the Commission should distinguish between mergers that are likely to create or enhance monopsony power and those mergers where the presence of seller market power in an upstream market may serve as an opposing force to buyer market power in a downstream market, which may be procompetitive in some circumstances.[73] Similarly, FTC Staff argues that the Commission should take into account sections 8 and 12 of the 2010 Guidelines, which relate to powerful buyers and monopsony power. FTC Staff explains that section 8 relates to the ability of powerful buyers to forestall the adverse competitive effects flowing from a merger and that, under this section, the Antitrust Agencies examine the choices available to such buyers, how these choices would change due to the merger, and whether the negotiating strength of some buyers impact the competitive effects of a merger on other buyers. FTC Staff further explains that section 12 of the 2010 Guidelines addresses the competitive effects of mergers of competing buyers and focuses on alternatives available to suppliers when a merger reduces the number of buyers.[74]

32. AAI, FTC Staff, APPA, and NRECA urge the Commission to analyze partial acquisitions in a manner consistent with the 2010 Guidelines. In particular, AAI contends that, in light of the 2010 Guidelines' discussion of partial acquisitions, the Commission should revise its analysis to ensure that the Commission fully considers the potential adverse effects of partial ownership by avoiding bright-line tests, evaluating any evidence that would help establish a competitive concern surrounding the transaction, and, if evidence points to a potential competitive concern, determining the degree to which the private investor at issue will have control, participation, or other influence over decisions that affect competitive strategy.[75] Similarly, FTC Staff notes that the 2010 Guidelines indicate that the Antitrust Agencies will consider all ways in which a partial acquisition may affect competition and focus in particular on the acquiring party's influence over the competitive conduct of the firm, reductions in the incentives of the acquiring and target firms to compete with each other, and access by the acquiring firm to non-public information.[76] Likewise, APPA and NRECA argue that the Commission should revise Part 33 of its regulations to require section 203 applications involving partial acquisitions to address the three potential adverse competitive effects identified in

[73] AAI Comments at 22-23.

[74] FTC Staff Comments at 8.

[75] AAI Comments at 20-21.

[76] FTC Staff Comments at 9.

section 13 of the 2010 Guidelines and should require applicants to demonstrate that the acquisitions do not present these anti-competitive concerns or to propose mitigation measures.[77]

33. FTC Staff also argues that the Commission should consider embracing aspects of the 2010 Guidelines addressing the competitive effects of entry and efficiencies. FTC Staff explains that the 2010 Guidelines recognize that easy, rapid, and substantial entry into the relevant market could discipline market power and that efficiencies generated by a merger could enhance competition by spurring innovation, reducing costs, or improving quality. FTC Staff notes, however, that it expects that, given the characteristics of the energy industry, reliance on entry to address adverse competitive effects will be rare and that efficiencies of a merger should only carry weight to the extent that they would not be achieved absent the merger.[78]

3. Commission Determination

34. After carefully considering the comments that were submitted, the Commission has decided to retain its existing approach for analyzing horizontal market power under section 203 of the FPA. More specifically, and as further discussed below, the Commission will retain the five-step framework for assessing the competitive effects of a proposed transaction, with the first step consisting of the Competitive Analysis Screen, because we find that the approach remains useful in determining whether a merger will have an adverse impact on competition.

35. As the Commission has previously stated, the Competitive Analysis Screen is intended to provide a standard, generally conservative check to allow the Commission, applicants, and intervenors to quickly identify mergers that are unlikely to present competitive problems.[79] Based on the comments that we have received, we believe that the Competitive Analysis Screen remains an important tool for evaluating mergers on the basis of their effect on market structure and performance while also providing analytic and procedural certainty to industry at a relatively low cost.

36. While several commenters argue that the Commission is overly rigid in its application of the Competitive Analysis Screen, we believe that the current approach is flexible enough to incorporate theories set forth in the 2010 Guidelines, while still retaining the certainty that the current approach provides. The Commission has

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[77] APPA and NRECA Comments at 25.

[78] FTC Staff Comments at 8.

[79] *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,879 (2000) (Filing Requirements Rule), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

previously made clear that it will consider other evidence of anticompetitive effects beyond HHI. As noted above, in the Merger Policy Statement the Commission stated that questions about whether the screen has accurately captured market power arising from a merger may be raised through interventions and by Commission staff.[80] The Commission reaffirmed this policy in the Filing Requirements Rule[81] and the Supplemental Policy Statement. In the Filing Requirements Rule, the Commission clarified that applicants with screen failures could address market conditions beyond the change in HHI "such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved,"[82] and identified four factors it would consider if a merger applicant fails the Competitive Analysis Screen.[83] In the Supplemental Policy Statement, the Commission stated that it will consider a case-specific theory of competitive harm, which includes, but is not limited to, an analysis of the merged firm's ability and incentive to withhold output in order to drive up prices. The Commission added that it would consider theories of competitive harm raised by intervenors, even if an applicant passes the Competitive Analysis Screen.[84]

37. Not only has the Commission stated that it will look beyond the HHI screens, the Commission has done so in practice. For example, in *FirstEnergy Corp*, the Commission found that a proposed merger would not have an adverse effect on horizontal competition despite three screen failures because these failures occurred in off-peak periods during which the applicants had a relatively low market share.[85] In addition, in response to commenters that argued that the applicants' proposal would provide the applicants with the ability and incentive to raise prices, the Commission considered the fact that any withholding strategy could be detected by the relevant market monitor and that the Commission had previously found that companies would not be able to profitably withhold output where the generating units at issue are baseload units.[86] In *National*

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[80] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119.

[81] Filing Requirements Rule, FERC Stats. & Regs. ¶ 31,111 at 31,897.

[82] *Id*.

[83] *Id.* at 31,898. The four factors listed by the Commission are: (1) the potential adverse competitive effects of the merger; (2) whether entry by competitors can deter anticompetitive behavior or counteract adverse competitive effects; (3) the effects of efficiencies that could not be realized absent the merger; and (4) whether one or both of the merging firms is failing and, absent the merger, the failing firm's assets would exit the market.

[84] Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 60, 65.

[85] *FirstEnergy Corp*, 133 FERC ¶ 61,222, at P 49 (2010).

[86] *Id.* P 50.

Grid, the Commission found that a proposed transaction would not have an adverse impact on competition, despite the presence of screen failures, because the applicants lacked the ability to withhold output due to provider of last resort obligations and to the applicants' obligations under long-term power sale agreements in the relevant geographic markets.[87]

38. Given this flexibility and the benefits of the Competitive Analysis Screen, we decline to adopt the 2010 Guidelines as the framework for the Commission's analysis of horizontal market power. We reiterate, however, that the Commission may consider arguments that a proposed transaction raises competitive concerns that have not been captured by the Competitive Analysis Screen. Likewise, while applicants must continue to provide a Competitive Analysis Screen, we will also consider any alternative methods or factors, if adequately supported. Further, we note that the Commission has various procedural methods to obtain additional information where appropriate.[88]

39. In addition, the Commission declines to adopt the HHI thresholds contained in the 2010 Guidelines. As the Commission has previously stated, the Competitive Analysis Screen is intended to be "conservative enough so that parties and the Commission can be confident that an application that clears the screen would have no adverse effect on competition."[89] In light of the purpose of the Competitive Analysis Screen, we agree with commenters who state that more stringent thresholds are appropriate, especially given the distinctive characteristics of electricity markets. We also agree with commenters that it is an inappropriate application of the 2010 Guidelines to selectively incorporate the HHI thresholds from the 2010 Guidelines without other aspects and that doing so could undermine the Commission's ability to accurately assess the competitive effects of a merger. While a number of commenters claim that the Commission should adopt the 2010 Guidelines' HHI thresholds because the thresholds reflect the experience of the Antitrust Agencies, we note that the Antitrust Agencies administer antitrust law across multiple industries. In contrast, the Commission has extensive experience with electrical markets and shapes its analysis to reflect the realities of those markets. Based on that experience, we will retain the current HHI thresholds.

40. With respect to the PPL Companies' request that we clarify the calculation of SILs, we note that the Commission recently issued an order providing further direction and clarification on the performance and reporting of such studies in connection with

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[87] *National Grid, plc*, 117 FERC ¶ 61,080, at P 26-28 (2006).

[88] *See, e.g.*, 18 C.F.R. § 33.10 (2011) (stating that the "Director of the Office of Energy Market Regulation . . . may, by letter, require the applicant to submit additional information as is needed for analysis of an application filed under this part").

[89] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119.

market-based rate filings.[90] The Commission believes that the direction provided in that order can also assist with the preparation of SIL studies for section 203 purposes and ensure that applicants have the guidance necessary to prepare SIL studies consistent with the Commission's requirements. At present, we see no need to modify the requirements with respect to the preparation of SIL studies. Our experience is that studies that are performed consistently with the Commission's current requirements provide reasonably accurate and conservative estimates of the supply of electricity that can be simultaneously imported into a given geographic market.

41. With regard to the 2010 Guidelines' analysis of partial acquisitions and minority ownership we note that the Commission's existing approach to control is not contrary to the approach set out in the 2010 Guidelines. For instance, the Commission has found that a minority interest can confer control over the acquired company and has conditioned its approval of such transactions on restrictions limiting the ability to exercise control.[91] The Commission has also imposed certain restrictions on information sharing as a condition of its approval under section 203 in order to remedy competitive concerns arising from a partial acquisition.[92] We also note that issues relating to partial acquisitions are among the issues before the Commission in Docket No. RM09-16-000.[93]

42. Turning to the suggestion that the Commission should incorporate the 2010 Guidelines' discussion of monopsony power, we note that in the Merger Policy Statement the Commission stated that "an analysis of monopsony power should be developed if appropriate" and that "[l]ong-term purchases and sales data for interconnected entities . . . could be used to assess buyer concentration in the same way that seller concentration is calculated."[94] The Commission left open the possibility that buyer market power created by a merger may need to be evaluated to find that a transaction is consistent with the

[90] *See Puget Sound Energy, Inc.*, 135 FERC ¶ 61,254 (2011).

[91] *See Entegra Power Group, LLC*, 125 FERC ¶ 61,143, at P 40 (2008) (imposing conditions to prevent possible control of multiple public utilities in the same relevant geographic market through the acquisition of minority ownership interests that would create market power).

[92] *See Mach Gen, LLC*, 127 FERC ¶ 61,127, at P 37 (2009) (conditioning approval of a partial acquisition on the commitment to not share information regarding (a) planned maintenance windows, (b) outages, (c) marketing strategies, (d) contracts, (e) volumes, (f) prices, or (g) other operational data).

[93] Control and Affiliation NOPR, FERC Stats. & Regs. ¶ 32,650.

[94] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at P 80.

public interest. As we have done in the past,[95] we will continue to consider the issue of buyer market power on a case-by-case basis.

43. We note that, while Dr. Morris asks the Commission to clarify that it will consider alternative relevant markets that are created by regional and local constraints, the Commission has previously done so when provided with evidence in support of the existence of such a market. The Commission will remain flexible in its approach and will reevaluate whether a previously recognized submarket continues to exist if the evidence shows that the persistent transmission constraints that led to the recognition of that submarket are no longer present. We clarify that we will not require applicants to submit a DPT for an identified submarket if the applicants do not have overlapping generation within the submarket and lack firm transmission rights to import capacity into that market.

44. With respect to commenters' suggestions that the Commission use actual operational data in defining markets or that the Commission should consider opportunity costs in market definition, we are not persuaded to require section 203 applicants to provide that information on a generic basis. While we recognize that the Commission's current methodology may not precisely capture market conditions in all circumstances, we continue to believe that the DPT provides an appropriate method for determining suppliers in a market and is a well-established test for the electric industry. Further, we are concerned that information about actual market information may not be equally available to all applicants and, therefore, will not require all applicants to craft their analyses using such data. Nevertheless, the Commission will consider adequately supported alternative analyses based on such data.

45. Regarding AAI's request that the Commission formally coordinate with the Antitrust Agencies, we note that Commission staff has had discussions with staff from the Antitrust Agencies regarding several mergers.[96] We acknowledge that coordination is valuable and will continue to coordinate with staff from the Antitrust Agencies in the future, as appropriate, on a case-by-case basis. Accordingly, we find no need to initiate a more formal coordination procedure with the Antitrust Agencies. Further, we will decline to initiate further formal general inquiry into the procedure for merger review, the modeling methods used and data sources relied upon in those models, or the hypothetical results that may arise if the Commission had relied on alternative methodology. However, the Commission may perform any of the above inquiries on a case-by-case basis.

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[95] *See NSTAR*, 136 FERC ¶ 61,016, at P 51-52 (2011).

[96] *See Duke Energy Corp.*, Notice of Proposed Communication with Department of Justice, 135 FERC ¶ 61,213, (2011); *Exelon Corporation*, Notice of Proposed Communication with Department of Justice, 136 FERC ¶ 61,161 (2011).

46. Additionally, we will decline to adopt the PPL Companies' suggestion to modify our analysis to focus exclusively on available economic capacity. We believe that both the economic capacity and available economic capacity measures remain useful. While we have acknowledged that one measure may be more relevant in certain circumstances, we continue to believe that requiring applicants to provide analyses using both economic capacity and available economic capacity will ensure that the Commission has a more complete record on which to make its determination of whether the proposed transaction will have an adverse effect on competition.[97]

B. Electric Market-Based Rate Program

1. Comments in Support of Retaining the Current Analysis

47. TAPS, TDU Systems, APPA, and NRECA support retaining the Commission's current analysis because the Commission's analysis of HHI is already consistent with the 2010 Guidelines and the Commission does not yet have sufficient experience with the existing standards to warrant changing its analysis.[98] APPA and NRECA add that the Commission's analysis of horizontal market power in its electric market-based rate program is not directly tied to the Antitrust Agencies' merger guidelines and there is no evidence that the thresholds used by the Commission are too high and are denying market-based rate authority to public utilities that should have it.[99] Similarly, TAPS and TDU Systems state that there is no reason to change the Commission's threshold for the market share screen and that the 2010 Guidelines actually discard the presumption that merging firms are significant direct competitors if their combined market share is at least 35 percent in recognition of the fact that a merger can present market power concerns even if the market share of the combined companies is less than 35 percent.[100]

48. Additionally, Monitoring Analytics, ELCON, and NASUCA state that the thresholds for the market share, pivotal supplier, and market concentration analyses remain appropriate because the electricity markets are still characterized by significant barriers to entry, limited substitutes, lack of storage, and inelastic demand.[101] Modesto believes that the continued application of the Commission's current market-based rate

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[97] *Kansas City Power and Light Co.*, 113 FERC ¶ 61,074 at P 30-32, 35 (2005).

[98] TAPS and TDU Systems Comments at 12-14; APPA and NRECA Comments at 26-28.

[99] APPA and NRECA Comments at 28.

[100] TAPS and TDU Systems Comments at 12-13.

[101] Monitoring Analytics Comments at 8-9; ELCON and NASUCA Comments at 5-6.

analysis will better protect consumers than embracing the 2010 Guidelines.[102] Finally, EPSA states that the Commission should refrain from adopting the 2010 Guidelines' analysis of partial acquisitions and minority ownership.

2. Comments in Support of Modifying the Current Analysis

49. AAI maintains that the Commission should consider bringing its market-based rate analysis in line with the 2010 Guidelines for the same reasons that it argues the Commission should conform its analysis under section 203 to the 2010 Guidelines. AAI argues that there are a number of problems with the indicative screens that challenge the goal of consistent and transparent competition policy. Specifically, AAI states that both the pivotal supplier and market share screens address unilateral effects scenarios, which ignore the complex dynamics among firms in oligopoly markets that determine price and output levels, and are bright-line tests that determine whether an applicant is presumed to have market power as opposed to whether the firm has the ability and incentive to exercise it.[103]

50. FTC Staff states that the same types of information that are discussed in the 2010 Guidelines are useful in the determination of whether a supplier already has market power, although the inquiry may be somewhat different than in the merger context. FTC Staff states that market definition in a non-merger matter seeks to identify customer alternatives at the competitive price. According to FTC Staff, a failure to ensure that customer alternatives are analyzed at the competitive price can result in a serious error, such as defining the market too broadly if customers are searching more widely for alternatives in response to an already supracompetitive price. FTC Staff claims that the proper application of the 2010 Guidelines in the context of market-based rate reviews will help avoid such errors.[104]

51. Dr. Morris contends that the wholesale market share screen is flawed, as approximately 75 percent of traditionally vertically-integrated utilities outside of an RTO fail the screen in their own balancing authority area regardless of the competitive conditions in that area. Accordingly, he recommends replacing the wholesale market share screen for utilities outside of RTOs or, in the alternative, allowing applicants that fail the wholesale market share screen to conduct a screen comparing the wholesale load to be served during the next three years in a market to the number of available suppliers in the area. He states that the Commission would need to specify the number of suppliers that are necessary to obtain workably competitive prices and would grant market-based

[102] Modesto Comments at 4-5.

[103] AAI Comments at 25-26.

[104] FTC Staff Comments at 10.

rate authority if there are a sufficient number of suppliers. He notes that his own research has indicated that three suppliers are sufficient to drive competitive rates down to the level achieved by cost-based regulation.[105]

52. EPSA argues that the Antitrust Agencies' decision to increase the HHI thresholds contained in the 2010 Guidelines warrants a corresponding increase in the threshold used for the wholesale market share indicative screen from 20 percent to 30 percent, or, at the very least, to 25 percent. EPSA claims that the Antitrust Agencies' decision to increase the HHI threshold from 1,800 to 2,500 has eliminated the basis for the Commission's objections to the use of a market share threshold higher than 20 percent. EPSA states that any further proposed changes to the Commission's market-based rate analysis should be explored in depth in a separate proceeding or supplemental NOI.[106]

53. The PPL Companies state that the Commission should not modify the indicative screens, but state that there are some aspects of the reforms adopted in the 2010 Guidelines that would merit consideration where there has been an initial screen failure, such as a fact-specific analysis of relevant markets, a focus on available economic capacity, and any reforms the Commission adopts for the determination of SILs in the section 203 context.[107]

3. Other Issues

54. Mr. Reutter argues that, if the Commission modifies its market-based rate analysis to reflect the HHI thresholds contained in the 2010 Guidelines, the Commission should adopt the same criteria for gas storage facilities that request market-based rate authority.[108]

4. Commission Determination

55. The Commission will not modify the current market power analysis utilized for electric market-based rate applications to reflect the 2010 Guidelines.[109] The

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[105] Morris Comments at 28-30.

[106] EPSA Comments at 13-16.

[107] PPL Companies Comments at 24-26.

[108] Reutter Comments at 1-2.

[109] Since the Commission is not modifying its market-based rate analysis to reflect the HHI thresholds contained in the 2010 Guidelines, Mr. Reuter's request that if we did make such a change we adopt the same criteria for gas storage facilities that request market-based rate authority is moot.

Commission's market-based rate analysis is not explicitly tied to the Antitrust Agencies' merger guidelines and commenters fail to identify any feature within those guidelines that warrant a change to the program. We note that the HHI threshold used by the Commission in the market-based rate analysis (2,500) is already consistent with the thresholds recently adopted in the Antitrust Agencies' 2010 Guidelines (also 2,500).

56. With respect to the use of the indicative screens, we will retain the current thresholds. While EPSA argues that the Antitrust Agencies' decision to raise the threshold for a highly concentrated market undercuts the Commission's reasoning in retaining the existing threshold for the market share screen, we disagree. In Order No. 697, the Commission found that a conservative approach at the indicative screen stage of the Commission's analysis is appropriate because a seller is presumed not to possess horizontal market power if the seller passes both of the screens.[110] The Commission has found that a 20 percent threshold is appropriate because a firm with a 20 percent market share is not likely to be a "fringe" firm that is not a significant factor in the market,[111] and in markets characterized by relatively low elasticity of demand, such as markets for electricity, market power is more likely to be present at lower market shares than in markets with high demand elasticity.[112] As the Commission has noted in the past, the 20 percent threshold strikes the appropriate balance between having a conservative but realistic screen and imposing undue regulatory burdens.[113] Thus, while the Commission mentioned the 1992 Guidelines in its discussion in Order No. 697, the Antitrust Agencies' decision to modify its thresholds does not warrant a concomitant change to the market share screen in the Commission's electric market-based rate program, as the Commission's reasoning was tied to the nature of the Commission's review of market-based rate filings and the physical and economic characteristics of markets for electricity. Also, while EPSA points to a recent Commission order[114] as support for the idea that the 20 percent threshold is too low and results in "false positives," EPSA fails to point to anything in that order that shows that the indicative screens resulted in a "false positive" and that the applicants' filing did not warrant further scrutiny and the consideration of additional evidence.

57. The Commission disagrees with AAI's assertion that the indicative screens are flawed because they focus only on unilateral effects. While the pivotal supplier screen focuses on the ability of a seller to exercise market power unilaterally, as the Commission

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[110] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 89.

[111] *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026, at P 96 (2004).

[112] *Id.*; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 89.

[113] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 90-91.

[114] *BE Louisiana, LLC*, 132 FERC ¶ 61,118 (2010).

observed in Order No. 697, the market share screen focuses on both "unilateral market power and the ability of a seller to effect coordinated interaction with other sellers."[115] Additionally, while AAI criticizes the screens on the basis that they do not focus on the ability and incentive to exercise market power, the Commission has previously found and reiterates here that requiring sellers to submit screens that focus on the sellers' potential (i.e., ability) to exercise market power is consistent with the Commission's obligation to set policies that ensure that rates remain just and reasonable.[116]

58. Further, with respect to Dr. Morris's argument that the Commission should modify the market share screen because traditional vertically-integrated utilities outside of an RTO typically fail the screen, we note that Dr. Morris does not provide evidentiary support for this claim. Moreover, the Commission addressed and rejected a similar claim in the Order No. 697 proceeding.[117] Additionally, even assuming that Dr. Morris's assertion is accurate, the fact that a particular class of market participant often fails the market share screen does not mean that the screen is flawed. The screen is intended to be a conservative measure to identify those sellers that may raise market power concerns and merit additional scrutiny; it is not intended to ensure that a particular class of market participant routinely passes the Commission's analysis. Moreover, the alternative analysis that Dr. Morris proposes is a contestable load analysis, which the Commission has previously rejected.[118] There is no evidence that market conditions have changed such that the Commission should now accept this analysis.

59. As far as the suggestion that the Commission should consider fact-specific evidence of competitive harm or that the Commission should consider additional evidence when determining the relevant geographic market, we believe that the Commission's current analysis provides adequate flexibility to consider such arguments when raised by an applicant or an intervenor. The Commission has stated that an applicant that fails one of the indicative screens may submit alternative evidence, including a DPT or actual historical sales data, to rebut the presumption of market power. Thus, to the extent that an applicant has additional evidence regarding the competitive situation in a market, it is free to present that to the Commission and the Commission will

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[115] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 65.

[116] *Id.* P 70; *see also Westar Energy, Inc.*, 123 FERC ¶ 61,123 at P 22 (2008).

[117] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 82, 93 (rejecting the argument that a threshold of 20 percent was inappropriate due to the fact it is difficult for investor-owned utilities outside of RTOs/ISOs to fall below the threshold because the Commission already allowed applicants to deduct native load and had decided elsewhere in the order to increase the permissible deduction).

[118] *See, e.g., id.* P 66-67.

consider that evidence on a case-by-case basis.[119] The Commission has further stated that intervenors may present alternative evidence, such as historical sales or transmission data, to support or rebut the results of the indicative screens.[120] In addition, in Order No. 697, the Commission stated that it would continue to allow sellers and intervenors on a case-by-case basis to show that some other geographic market should be considered as the relevant market in a particular case.

The Commission orders:

The proceeding in Docket No. RM11-14-000 is hereby terminated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[119] *See, e.g., Dogwood Energy, LLC*, 135 FERC ¶ 61,089 (2011); *Shell Energy North America (US), L.P.*, 135 FERC ¶ 61,090 (2011).

[120] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 70; *see, e.g., AEP Power Marketing, Inc.*, 124 FERC ¶ 61,274, at P 34-36 (2008).

Appendix A: List of Commenters

Short Name or Acronym	Commenter
AAI	American Antitrust Institute
APPA	American Public Power Association
Berkeley	Carl Danner, Henry Kahwaty, Keith Reutter, and Cleve Tyler of the Berkeley Research Group
Brattle Group	Romkaew Broehm, Peter Fox-Penner, Oliver Grawe, and James Reitzes of The Brattle Group
Cavicchi	A. Joseph Cavicchi
EEI	Edison Electric Institute
ELCON	Electricity Consumers Resource Council
EPSA	Electric Power Supply Association
Entergy	Entergy Services, Inc.
FTC Staff	Staff of the Federal Trade Commission
Modesto	Modesto Irrigation District
Monitoring Analytics	Monitoring Analytics, LLC
Morris	Dr. John Morris
NASUCA	National Association of State Utility Consumer Advocates
NARECA	National Rural Electric Cooperative Association
New York Commission	New York State Public Service Commission
PPL Companies	PPL Electric Utilities Corporation; Louisville Gas & Electric Company; Kentucky Utilities Company; LG&E Energy Marketing, Inc.; PPL

	EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; PPL Renewable Energy, LLC; PPL Montana, LLC; PPL Colstrip I, LLC; and PPL Colstrip II, LLC.
Reutter	Keith Reutter
TAPS	Transmission Access Policy Study Group
TDU Systems	Transmission Dependent Utility Systems