UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

JOINT COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP AND TRANSMISSION DEPENDENT UTILITY SYSTEMS

The Transmission Access Policy Study Group ("TAPS") and Transmission Dependent Utility Systems ("TDU Systems") appreciate the opportunity to comment on the Commission's March 17, 2011, Notice of Inquiry ("NOI")[1] regarding whether, and if so, how, the Commission should revise its approach for examining horizontal market power concerns in transactions under Federal Power Act ("FPA") Section 203 and issues of market-based rate authorization under FPA Section 205 to reflect the Horizontal Merger Guidelines issued by the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in August 2010 ("2010 DOJ/FTC Guidelines").

TAPS and TDU Systems generally support the joint comments being filed separately by the American Public Power Association ("APPA") and National Rural Electric Cooperative Association ("NRECA") in response to the NOI. TAPS and TDU Systems comment here principally to express their strong concern that the Commission not "cherry pick" from the 2010 DOJ/FTC Guidelines and in doing so weaken its analysis of horizontal market power issues in addressing mergers and other transactions under Section 203 and market-based rate authority under Section 205. Specifically:

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[1] *Analysis of Horizontal Market Power under the Federal Power Act*, 134 FERC ¶ 61,191 (2011) ("NOI").

- The Commission should continue to apply its 1996 Merger Policy Statement, as supplemented in 2007, for purposes of analyzing horizontal market-power issues in Section 203 proceedings. The Commission should not selectively incorporate into its merger review process the revised HHI concentration thresholds and triggers used in the 2010 DOJ/FTC Guidelines' more flexible, fact-specific approach. Particularly given the attributes of electric markets, to do so would undermine the Commission's ability to fulfill its statutory mandate.
- For like reasons, the Commission should not selectively adopt elements of the 2010 DOJ/FTC guidelines for purposes of analyzing horizontal market power for purposes of assessing market-based rate applications. Further, the Commission has limited experience reviewing market-based rate updates under its Order No. 697 screens and should not depart from an approach that it has only recently implemented.
- The 2010 DOJ/FTC Guidelines confirm the need for the Commission to continue its case-by-case approach to assessing control and affiliation in Section 203 proceedings where an entity seeks to acquire more than 10% of the voting securities of a jurisdictional utility or holding company, an issue pending in Docket No. RM09-16-000. The Commission should also consider adopting filing requirements for partial acquisitions.
- The 2010 DOJ/FTC Guidelines highlight the need for the Commission to adhere to the portions of its 1996 Merger Policy Statement, as supplemented in 2007, that provide for consideration of intervenor theories of competitive harm, regardless of whether the proposed merger passes the HHI screens.
- Particularly if the Commission selectively adopts elements of the 2010 DOJ/FTC guidelines and relaxes its screens, it should (at a minimum): (i) require applicants to submit supply-curve analyses for the relevant geographic markets; and (ii) provide intervenors limited rights to discovery during the initial notice period in a Section 203 proceeding.

I. INTEREST OF TAPS AND TDU SYSTEMS AND COMMUNICATIONS

TAPS is an association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.[2] TAPS members depend not only on non-discriminatory transmission access but, also, on well-functioning wholesale markets in order to meet their load-serving obligations at reasonable cost.

[2] Tom Heller, Missouri River Energy Services, chairs the TAPS Board. Cindy Holman, Oklahoma Municipal Power Authority, is Vice Chair.

TAPS has long promoted vigorous and meaningful Commission review into possible market power concerns arising from utility mergers and related Section 203 transactions and with respect to MBR authority in order to safeguard against market power abuses and further and enhance competitive wholesale power and ancillary services markets. Accordingly, TAPS has a direct and substantial interest in the outcome of this proceeding.

The TDU Systems sponsoring these comments include the following six rural electric generation and transmission ("G&T") cooperatives: Arkansas Electric Cooperative Corporation, Golden Spread Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., North Carolina Electric Membership Corporation, PowerSouth Energy Cooperative and Seminole Electric Cooperative, Inc. Through their member distribution cooperatives and other wholesale customers, these G&T cooperatives serve approximately three million metered accounts in seven states stretching from the Blue Ridge Mountains to the Texas Panhandle. All of the TDU Systems are, first and foremost, load-serving entities, and they and their distribution cooperative members were formed to provide reliable service to their member-owners at the lowest reasonable cost. They rely to varying extents upon purchases of power in wholesale electricity markets to reliably and economically satisfy the needs of their member cooperatives and the retail consumers they serve, and to round out their supply portfolios, which include their own generation or shares thereof. Additionally, while some of the TDU Systems own substantial transmission facilities, all of them rely on the transmission systems of neighboring investor-owned utility transmission owners regulated by the Commission in order to move their power supplies to their member distribution cooperatives' loads.

Like TAPS' members, they therefore have a strong interest in issues affecting the competitiveness of wholesale energy markets.

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II. COMMENTS

A. The Commission Should Continue to Use the 1996 Merger Policy Statement, as Supplemented by the 2007 Supplemental Policy Statement, for Purposes of Assessing Horizontal Market Power in Section 203 Proceedings

1. Selective Adoption of Elements of the 2010 DOJ/FTC Guidelines Would be Inconsistent with the Intent of the Guideline Changes and the Commission's Role and Statutory Responsibilities

As explained in the APPA/NRECA Comments, the issuance of the 2010 DOJ/FTC Guidelines does not warrant a change to the FERC Merger Policy Statement,[3]

[3] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act* Order No. 592, FERC

either as to the thresholds used in the screens or the amounts of merger-related change that the Commission will consider as potentially raising a competitive concern or creating a presumption that a merger creates or enhances market power.

In assessing whether a proposed transaction is consistent with the "public interest", the Commission is required to "consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws." *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 759 (1973) (emphasis supplied). These broad purposes are "to curb abusive practices of public utilities by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Id.* at 758. Congress enhanced the Commission's merger review authority in the Energy Policy Act of 2005[4] in recognition of the increasing reliance on competition to discipline prices to just and reasonable levels.

Informing the Commission's Section 203 merger review analysis is its core obligation to ensure that jurisdictional sales of wholesale power and the provision of transmission and ancillary services are just and reasonable and not unduly discriminatory. The Commission stands as a "first line of defense"[5] for consumers against competitive abuses in jurisdictional power markets. Its statutory mandate and duties are separate and apart from the federal anti-competition statutes that fall within the purview of the DOJ

Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) ("1996 Merger Policy Statement"). *See also FPA Section 203 Supplemental Policy Statement,* FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008) ("2007 Supplemental Policy Statement") (collectively, "Merger Policy Statements").

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

[5] *Gulf States*, 411 U.S. at 760.

and FTC (collectively "Antitrust Agencies") and private civil enforcement, and its mission stands separate and apart from that of the DOJ and FTC, as recognized by the Commission: "the Commission was not intended to enforce antitrust policy in conjunction with the Antitrust Agencies." NOI, P 6.

Accordingly, for purposes of assessing the anticompetitive impact and horizontal market power concerns arising from a proposed Section 203 transaction, the Commission has not blindly adopted the 1992 DOJ/FTC Guidelines in their entirety but has instead brought to bear its own "judgments" (NOI, P 6) and expertise, informed by considerations particular to the electric power industry, to develop its Merger Policy Statements. Thus, the Commission has not mechanistically adopted and implemented the 1992 DOJ/FTC Guidelines, nor should it do so with respect to the 2010 DOJ/FTC Guidelines.

In assessing whether and the extent to which the Commission should alter its Merger Policy Statements in light of the 2010 DOJ/FTC Guidelines, it is important to recognize that the Antitrust Agencies have developed the Guidelines as a comprehensive whole for purposes of carrying out their statutory responsibilities, which are different than the Commission's. The revised methodological approach set forth in the 2010 DOJ/FTC Guidelines cautions against the Commission's selective adoption of the Guidelines' revised HHI market concentration analysis, which is meant to function as only a part of the Antitrust Agencies' more flexible, fact-specific, and holistic approach to assessing the likelihood of seller market power post-merger under the 2010 DOJ/FTC Guidelines. Even before the Antitrust Agencies adopted their more comprehensive approach with the 2010 Guidelines, the Commission and the Antitrust Agencies

implemented merger review in the context of the electric industry differently, as seen in the divergent regulatory positions of the Commission and DOJ to the proposed merger between Exelon Corporation and Public Service Enterprise Corporation in 2005.[6]

In the NOI, the Commission itself has noted that, compared with the 1992 DOJ/FTC Guidelines, the 2010 DOJ/FTC Guidelines employ a revised and more flexible approach that relies less on market definition and employs HHI analysis as but one of many inquiries:

> [T]he 2010 Guidelines place less emphasis on market definition and the use of a prescribed formula for considering the effects of a merger than 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 firms can raise prices as a result of the merger.

NOI, P 13. Others have come to similar conclusions. Professor Carl Shapiro, a member of the DOJ/FTC Horizontal Merger Guidelines working group, traces the evolution in the Antitrust Agencies Guidelines from 1968 to 2010 and explains that the initial "1968 Guidelines were based on one big idea: horizontal mergers that increase market concentration inherently are likely to lessen competition." Carl Shapiro, *The 2010*

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[6] Using its existing Merger Policy Statement, the Commission authorized the merger of Exelon and PSEG, concluding that "[b]y restoring the HHI to near pre-merger levels, Applicants will restore competition to the pre-merger level, and meet their burden to show that the merger, as mitigated, will not harm competition in wholesale energy markets." *Exelon Corp.*, 112 FERC ¶ 61,011 at P 132, *reh'g denied*, 113 FERC ¶ 61,299 (2005), *vacated*, *PPL Electric Utils. Corp. v. FERC*, 2006 U.S. App. LEXIS 31478 (D.C. Cir. 2006) (granting motions to dismiss cases as moot and vacating underlying orders). By contrast, the Department of Justice, finding that Exelon's merger with PSEG would yield a post-merger HHI in PJM East of more than 2,700, representing an increase of more than 1,100, and a post-merger HHI in PJM Central/East of approximately 2,100, representing an increase of more than 800, concluded that "[i]ncreasing Exelon's incentive and ability to profitably withhold output makes it likely that Exelon will exercise market power after its merger with PSEG, resulting in significant harm to competition and increased prices." *United States Department of Justice, Antitrust Division v. Exelon Corporation and Public Service Enterprise Group Inc.*, Case Number 1:06CV01138, Complaint at P 37, *available at*

Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 Antitrust L.J. 701, 702-03 (2010) ("Shapiro").[7] Professor Shapiro described the 2010 DOJ/FTC Guidelines as moving even further away from what he termed a hedgehog-like approach of focusing primarily on market concentration, to a fox-like, flexible, integrated and fact-specific approach:

> Many observers have noted specifically that the 2010 Guidelines place less weight on market shares and market concentration than did predecessors. This is a central example of the fox's eclectic approach, tailoring the methods used to the case at hand and to the available evidence.
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> The 2010 Guidelines also follow a more integrated and less mechanistic approach. Section 0.2 from the 1992 Guidelines described a step-by-step approach followed by the Agencies: (1) market definition and concentration; (2) competitive effects; (3) entry; (4) efficiencies; and (5) failing firm defense. Even in 1992 the Agencies did not rigidly follow these steps, and by 2009 many witnesses observed at hearings that they gave an inaccurate impression of Agency practice. The 2006 Commentary acknowledged as much, stating that "the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies of failing assets." There was a consensus at the hearings that new guidelines should reflect the movement away from the step-by-step approach described in the 1992 Guidelines to a more integrated approach that does not necessarily start with market definition or base predictions of competitive effects on market concentration.

Id. at 707-08 (footnotes omitted). The overarching thrust of the development of the DOJ/FTC Guidelines is a continued movement towards more robust regulation. "Accounting for real-world business conditions in which a merger takes place is

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http://www.justice.gov/atr/cases/f216700/216785.pdf.

[7] The citations refer to the online version of the article, *available at* http://faculty.haas.berkeley.edu/shapiro/hedgehog.pdf.

worthwhile, even if doing so means that some simplicity must be sacrificed to achieve greater accuracy in merger enforcement." *Id.* at 711.

The Commission's merger review analysis is far more towards the "one big idea" (*id.* at 702) approach than the flexible, wide variety of evidence and methods approach of the 2010 DOJ/FTC Guidelines, and relies heavily on its Appendix A process and the HHI market concentration screen. In the 2007 Supplemental Policy Statement (at PP 69-70), FERC recognized that the public nature of its process does not lend itself to the flexibility of the Antitrust Agencies in using non-public data to perform sophisticated modeling to assess competitive effects. Typically, and different from the 2010 DOJ/FTC Guidelines' approach, the Commission does not interview the applicants' customers, does not seek additional data from the applicants' competitors, does not engage in its own economic modeling, and does not undertake an independent economic review of the transaction. It relies largely upon the Appendix A analysis and publicly available intervenor comments (provided without the benefit of discovery). *Id.* P 69. In *Exelon*, the Commission noted that it was "not convinced by arguments that Applicants should have analyzed the merger's effect on their ability and incentive to harm competition by engaging in strategic bidding (which is a form of unilateral market power). The Commission's analysis focuses on a merger's effect on competitive conditions in the market. That is, we look at the merger's effect on the concentration of the relevant markets, as measured by the HHI." 112 FERC ¶ 61,011 at P 131.

The Commission has stated that it will consider intervenor theories of competitive harm, and where the HHI screen test is failed will also examine the factors that could

affect competition in the relevant market.[8] However, unlike the 2010 DOJ/FERC Guidelines' approach, the Commission does not look at the same full range of competitive considerations as the Antitrust Agencies as a necessary first step in assessing the potential competitive impact of a proposed Section 203 transaction. The Commission's 2007 Supplemental Policy Statement (P 77 and n.61) also viewed its ability to engage in a trial-type evidentiary review that might better facilitate a detailed multi-factor analysis as constrained by the amended statutory deadline for acting on Section 203 applications.

In view of the Commission's approach to merger analysis compared with the DOJ/FTC approach, TAPS and TDU Systems are particularly concerned about Commission consideration of relaxing any aspect of its existing Merger Policy Statements, and in particular, the HHI thresholds, given the heavy reliance the Commission places on these thresholds. Adopting elements of the 2010 DOJ/FTC Guidelines, and especially the reduced HHI concentration thresholds and increased change triggers, without also adopting the rest of the Antitrust Agencies' associated flexible, multi-factor approach set forth in the new Guidelines would "cherry pick" the new guidelines in a way that undermines the Commission's ability to fulfill its statutory mandate. The 2010 DOJ/FTC Guidelines reflect the Antitrust Agencies' reliance on an "improved economic toolkit" useful to address "each merger['s] . . . unique circumstances." Shapiro at 52. Raising the HHI thresholds and reducing the triggers,

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[8] 2007 Supplemental Policy Statement, P 65. TAPS and TDU Systems applaud the Commission's stated willingness to consider intervenor presentations of potential competitive harm and ask the Commission to adhere to that approach. See Part D below. As discussed in Part E, it may be appropriate for the Commission to move further in the "fox" direction reflected in the 2010 DOJ/FTC Guidelines.

without adopting the rest of the tools in the Antitrust Agencies' toolkit, can only be a recipe for less effective competition regulation.

2. The Peculiar Attributes of the Electric Industry Confirm the Need to Retain Existing Thresholds and Triggers

APPA and NRECEA explain in their Comments that the Commission should retain the existing HHIs thresholds in its 1996 Merger Policy Statement given that (i) the characteristics of electricity and electricity markets (such as lack of storage, limited product substitutes, and local market-power problems exacerbated by limited transfer capability) are unique; (ii) the Commission's existing HHI thresholds rarely detect market power (and thus there is little to no problem of "false positives"); (iii) the electric power industry continues to be more concentrated over time;[9] and (iv) the Commission's merger review process differs significantly from the Antitrust Agencies' method. Each of these considerations is significant on its own, and collectively they should carry the day against any relaxing of the current HHI thresholds.

Nothing has changed fundamentally in the electric industry in recent years that would warrant a relaxing of the HHI thresholds to measure market concentration in Section 203 applications. To the contrary, recent orders point to the ability of even small increments of supply to exercise market power in electricity markets. *See, e.g.*, *PJM Interconnection L.L.C.*, 135 FERC ¶ 61,022 P 196 (2011) ("even small amount of additional supply can result in large price reductions," and the withholding of small amounts of supply can result in substantial price increase); *Electric Market Transparency*

[9] As discussed in the APPA/NRECA Comments, since repeal of the Public Utility Holding Company Act in 2005, industry consolidation has been on an upward trend. According to the Edison Electric Institute, the number of investor-owned electric utilities declined by 41% between 1995 and 2009. Edison Electric Institute, 2009 Annual Report of the U.S. Shareholder-Owned Electric Utility Industry, at 46, *available at* http://www.eei.org/whatwedo/DataAnalysis/IndusFinanAnalysis/finreview/Documents/09_FinRevF.pdf.

Provisions of Section 220 of the Federal Power Act, 135 FERC ¶ 61,053 at P 71 n.90 (2011) ("EQR NOPR") ("It is important to note that electricity markets can be comprised of markets that are regional, local, and even nodal. For example, exerting market power does not necessarily involve a large volume of physical sales. In fact, small volumes of power sales can influence market pricing, particularly when transmission limitations and other dynamics exist."). Particularly given these findings, and the Commission's express identification of merger review as supporting the need for its EQR NOPR,[10] relaxing the thresholds and triggers used in the Commission's review of mergers would prevent the Commission from fulfilling its statutory mandate to ensure that mergers are consistent with the public interest.

B. The Commission Should Continue to Use the Thresholds Applied in the Market-Based Rate Context

The Commission asked whether it should incorporate aspects of the 2010 DOJ/FTC Guidelines into its market power analysis. NOI, P 19. TAPS and TDU Systems advocate a "stay the course" approach.

With respect to the issue of market shares, the Commission explained in the NOI that its current policy is based upon considerations particular to the electric industry and its own expert judgment. The Commission chose to rely upon a 20 percent market share threshold for identifying sellers that may present market power concerns rather than rely upon the higher 35 percent figure in the 1992 DOJ/FTC Guidelines:

> Several protesters argued that the 20 percent threshold was too low in light of the 1992 Guidelines' statement that

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[10] *See* EQR NOPR P 27 (proposing the filing of EQRs by any market participant who has more than a *de minimis* market presence because, among other things, "obtaining more complete price and volume information would provide a better basis for considering whether to approve merger and acquisition proposals").

> firms with 35 percent or more market share have market power. The Commission rejected these arguments, stating that a market with five equal-sized firms with 20 percent market shares will have an HHI of 2,000, which is above the HHI threshold used in the 1992 Guidelines for a highly concentrated market, and that market power is more likely to be present at lower market shares for commodities with low demand price-responsiveness, like electricity, than in markets with high demand elasticity.

NOI, P 9 (footnotes omitted). The issuance of the 2010 DOJ/FTC Guidelines presents no good reason to depart from this practice. The new Guidelines "do not retain the presumption that the merging firms are significant direct competitors if their combined market share is at least 35 percent." Shapiro at 69. Among the reasons for discarding this presumption is the Antitrust Agencies' recognition that "a merger combining two products that are close substitutes can lead to substantial unilateral price increases for those products even if their combined market share is less than 35 percent." *Id.* at 70.

To like effect, and consistent with their demonstration above that the Commission should not look to the 2010 DOJ/FTC Guidelines as a reason to revisit and revise its existing HHI screen levels, TAPS and TDU Systems urge the Commission to continue to use the existing HHI threshold for delivered price test ("DPT") analysis after the initial screens are failed. As the Commission notes in the NOI (at P 10), at present, pursuant to Order 697,[11] the Commission's DPT uses an HHI threshold of 2500 as indicative of seller market power. In this regard, the DPT is already in substantial accord with the 2010 DOJ/FTC Guidelines, because the new Guidelines identify the 2500 HHI level as the

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[11] *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 PP 110-11, *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).

outermost limit of a moderately concentrated market.[12] *See* NOI, P 12 (HHI level of 2501 indicative of highly concentrated market).

Moreover, as the APPA/NRECA Comments point out, the Commission only adopted its current standards for analyzing horizontal market-power issues in market-based rate applications in 2004, and codified these standards in 2007.[13] The Commission has only been reviewing market-based rate updates using the new Order No. 697 screens under its staggered schedule over the last few years. There simply is not sufficient experience under the existing standards to warrant changing them.

C. The 2010 DOJ/FTC Guidelines Highlight Competition Concerns Associated With Partial Acquisitions and the Need to Enhance the Filing Requirements for Partial Acquisitions

The NOI (at P 14) notes that the 2010 DOJ/FTC Guidelines contain a new section addressing the "potential competitive effects arising from partial acquisitions and minority ownership." The new Guidelines confirm that these anticompetitive concerns are real and warrant the Commission's attention. The new Guidelines (at 33-34) note that an acquiring partial owner, by means of voting rights giving rise to governance rights (*e.g.*, a board of directors seat) "can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm." In

[12] The Commission's use of the 2,500 HHI threshold for purposes of the DPT is another example where the Commission has not mechanically relied upon the DOJ/FTC Guidelines for purposes of its own analysis. The Commission rejected arguments of TAPS, TDU Systems and others (*see* Order No. 697 at P 98) that the Commission should have set the threshold at 1,800 consistent with the then current 1992 DOJ/FTC Guidelines. As TAPS argued, DOJ's assessment was that the higher threshold of 2,500 was appropriate for purposes of assessing market based-rate authority for oil pipelines, which are distinguishable from power companies. *See* Comments of the American Public Power Association and the Transmission Access Policy Study Group, filed March 14, 2005, in Docket No. RM04-7-000, at 21-22 (Accession No. 20050314-5178). TAPS and TDU Systems continue to believe that electric power supply differs in fundamental respects from oil pipeline services because unlike power customers, oil pipeline customers can avail themselves of storage and substitutability options.

[13] Order No. 697, P 12 (noting codification of approach in 2004 orders).

addition, "[a]cquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival." *Id.* A third area of general concern is that "a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm." *Id.*

The NOI (at P 14 n.27) notes that "[i]ssues relating to partial acquisitions are among the issues before the Commission in Docket No.RM 09-16-000." TAPS has filed comments[14] in response to the pending NOPR in that docket[15] identifying the dangers of expanding blanket exemptions for certain Section 203 partial acquisitions and recommending that the Commission continue its current case-by-case approach to assessing control and affiliation where more than 10% of the voting securities are held by one entity. Consistent with the anticompetitive risk of undue influence identified in the 2010 DOJ/FTC Guidelines, TAPS explained in its comments (at 9) that "[a]ny entity that owns between 10 to 20 percent of the voting securities of a public utility will necessarily be one of only a small number of major shareholders, and may in fact be the major shareholder." The FTC also filed Comments in Docket No. RM09-16-000 and, based upon current academic scholarship and recent real world examples, highlighted the very set of competition concerns laid out in the 2010 DOJ/FTC Guidelines.[16] "FERC's assessment of partial acquisitions and its standards for granting blanket authorizations

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[14] Comments of the Transmission Access Policy Study Group filed March 29, 2010, in Docket No. RM09-16-000 (Accession No. 20100329-5139).

[15] *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).

[16] Comments of the Federal Trade Commission filed March 29, 2010, in Docket No. RM09-16-000 (Accession No. 20100329-5078) ("FTC Comments").

should consider both the control/influence and incentive aspects of partial ownership." FTC Comments at 11. The competitive concerns identified in the 2010 DOJ/FTC Guidelines associated with partial acquisitions support TAPS' and TDU Systems' recommendation here that the Commission stay the course with respect to the policies and practices at issue in Docket No. RM09-16-000.

TAPS and TDU Systems further agree with the NRECA/APPA Comments, supported by the declaration of Professor John E. Kwoka, Jr., that partial acquisitions can lessen competition by creating the very problems that are also identified in the 2010 DOJ/FTC Guidelines: (i) influence and control of a rival's operations and affairs; (ii) revelation and exchange of non-public, competitively sensitive information between rival companies; and (iii) profit sharing with a rival firm that inevitably results from partial or common ownership. Thus, TAPS and TDU Systems support the APPA/NRECA Comments' recommendation that the Commission consider adopting filing requirements for partial acquisitions.

D. The 2010 DOJ/FTC Guidelines Highlight the Need for the Commission to Adhere to Previous Merger Policy Commitments to Look Beyond the HHI Screens

The 2010 DOJ/FTC Guidelines reinforce the wisdom of, and importance of adhering to, the Commission's commitments in its Merger Policy Statements to consider and address intervenor theories of harm, regardless of whether the applicant passes the HHI screen. In its 2007 Supplemental Policy Statement, the Commission explained that if the applicant fails the screen, then the Commission examines factors that could affect competition in the relevant market, including the merged firm's ability to withhold output

in order to drive up prices.[17] In addition, the 2007 Supplemental Policy Statement provides: "even where an applicant passes the HHI screen, the Commission also considers intervenor theories of competitive harm."[18] Further, at Paragraph 11 of the 2008 Order on Clarification of the 2007 Supplemental Policy Statement,[19] the Commission emphasized that it also "typically considers 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."

Consideration of the 2010 DOJ/FTC Guidelines support this aspect of the Commission's Merger Policy Statements. Specifically, Sections 2.2.2 and 2.2.3 of the 2010 DOJ/FTC Guidelines highlight the value of information from customers and other industry participants. In particular, the Guidelines explain that "[t]he conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers."[20] Thus, the 2010 DOJ/FTC Guidelines confirm the importance of the 2007 Supplemental Policy Statement's commitment to consider intervenor theories of harm, regardless of whether the applicant passes the HHI screen, and the need for the Commission to adhere to this aspect of its Merger Policy Statements in practice, by giving full consideration to intervenor theories of harm when reviewing proposed mergers.

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[17] 2007 Supplemental Policy Statement at P 65.

[18] *Id.*

[19] 122 FERC ¶ 61,157.

[20] 2010 DOJ/FTC Guidelines § 2.2.2, at 5.

E. Particularly if the Commission Selectively Adopts Elements of the 2010 DOJ/FTC Guidelines and Relaxes its Screens, It Should Adopt Certain Protections

Particularly if, despite the objections of TAPS and the TDU Systems, the Commission modifies its merger analysis to adopt selectively the higher HHI thresholds and triggers of the 2010 DOJ/FTC Guidelines, the Commission should also adopt measures to help mitigate against the potential adverse consequences of this new policy. In 1996, TDU Systems filed comments on the Commission's then-proposed Merger Policy Statement, expressing concern that "[t]he Commission has borrowed parts of the analytical process worked out by the Federal Trade Commission and Department of Justice in their 1992 Horizontal Merger Guidelines; unfortunately, it has ignored other integral parts which help determine whether actual buyers are likely to be injured by the merger."[21] TAPS and TDU Systems urge the Commission not to make this mistake here. Particularly if the Commission raises the HHI thresholds or triggers, it should, at a minimum,[22] also implement the following measures:

First, the Commission should require applicants to submit supply-curve analyses for the relevant geographic markets. As TAPS explained in detail in its comments in Docket No. RM05-34, HHIs generally are not useful at indicating competitive harms associated with applicants' ownership of strategic assets on a market's supply curve,

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[21] Comments of Transmission Dependent Utility Systems filed May 7, 1996, in Docket No. RM96-6-000, at 22 (Accession No. 19960509-0242).

[22] As discussed in Part II.A.1, the increased thresholds used in the 2010 DOJ/FTC Guidelines are inexorably intertwined with the Antitrust Agencies' use of a more expansive and flexible "economic toolkit" to evaluate horizontal market power and potential competitive effects. Consideration of selective adoption of elements of the 2010 DOJ/FTC Guidelines would require the Commission to undertake a grounds-up reevaluation of its own approach to review of mergers and market-based rates to ensure that, as in the case of the Antitrust Agencies' new Guidelines, FERC's new guidelines would increase, rather than dilute, the robustness of the analysis, thereby enabling the Commission to fulfill its statutory responsibilities.

given that even a relatively small market share can translate into considerable market power.[23] The 2010 DOJ/FTC Guidelines implicitly recognize this problem, providing that for markets involving relatively undifferentiated products, the Antitrust Agencies "may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price."[24] The Guidelines note that the circumstances in which a unilateral output suppression strategy is more likely to be profitable include situations in which "the margin on suppressed output is relatively low" and "the supply responses of rivals are relatively small."[25]

A supply-curve analysis would enable the Commission to address such situations whereas typical HHI analyses would not capture competitive concerns associated with supply curve harm theories. Under such theories, sellers with market shares below those considered problematic from an HHI perspective may still have the ability and incentive to raise prices above competitive levels. The concern in supply-curve harm theory is less the amount of capacity owned and more the *kind* of capacity owned, including the location and characteristics of specific units. Paul Joskow and Edward Kahn recognized the importance of supply curves when examining withholding behavior in California markets, finding that whether a generator has an incentive to withdraw capacity "will depend critically upon the slope of the supply curve. It must be steep enough to result in

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[23] Comments of the Transmission Access Policy Study Group, filed November 7, 2005, in Docket No. RM05-34-000, (Accession No. 20051107-5128) at 25-30.

[24] 2010 DOJ/FTC Guidelines § 6.3, at 22.

[25] *Id.* at 23.

[market-clearing prices] sufficiently high so that the increase in profit on generation still tendered to the market more than offsets the profits lost on the capacity withdrawn."[26]

Consider the simplified example of a buyer with a baseload unit in a load pocket with locational marginal pricing that purchases another company's peaking unit in the same load pocket. Assume also that the next peaking unit to the right on the supply curve has marginal costs 30% higher than the peaking unit subject to acquisition. Before the transaction, the buyer with the baseload unit would likely not have withheld from that unit because the foregone infra-marginal rents associated with the withholding likely would not have been recovered with the added profit on the unit's remaining output. The seller of the peaking unit likely would not have withheld the unit, because it would not have infra-marginal capacity on which to earn extra profits from the price increase. However, once the owner of the baseload unit acquires the peaking unit, it will have the ability to withhold at a far lower loss of infra-marginal revenue and will earn added profits on the output of the baseload unit. Even if the buyer's total post-acquisition market share were less than 20%, and the market had an HHI below 1800, the fact that the next most expensive peaking unit has marginal costs 30% higher gives the buyer the ability to raise price by that amount through withholding, and its ownership of the baseload unit gives it the incentive to do so. Examining the supply curve reveals that the applicant has market power within a portion of the supply curve and has the incentive to exercise it.

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[26] Paul Joskow and Edward Kahn, *A Quantitative Analysis of Pricing Behavior in California's Wholesale Electricty Market During Summer 2000*: *The Final Word*, at 20 (February 4, 2002), *available at* http://www.ksg.harvard.edu/hepg/Papers/Joskow-Kahn%20Final%20Word%20Feb2002.pdf.

The Commission should thus examine whether the addition of a seller's plants to the buyer's fleet gives the buyer an ability and incentive to withhold capacity. The analysis would consider the composition and shape of the supply curve, the elasticity of supply along the curve, and the location of the seller's and buyer's units on the curve.

Second, the Commission should give intervenors limited rights to discovery during the initial notice period in a Section 203 proceeding to provide affected parties the ability to obtain the information needed to analyze a transaction. This is particularly important as markets have become more complex and mergers take place across the seams of different RTOs, with the far-reaching consequences of the resulting market rules that go beyond a strict market concentration analysis. Discovery should be available only to parties that have filed a motion to intervene so that applicants can determine whether the requesting party would have a legitimate interest in using the discovery for purposes of the Commission's review of the transaction. Reasonable limitations to prevent discovery from being unduly burdensome could be considered, and the use of properly fashioned protective orders can address concerns related to commercially sensitive information.[27] Discovery requests and responses should also be filed with the Commission so that its staff has access to the information.

CONCLUSION

Consistent with Comments above and the APPA/NRECA Comments, the Commission should not selectively incorporate the thresholds and triggers used in the 2010 DOJ/FTC Guidelines into its merger and market-based rate policies. Rather, it

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[27] Standard Commission protective orders contain provisions precluding "competitive duty personnel" from access to certain competitively sensitive information and/or limiting use of materials produced to the proceeding in which they are submitted, and could be made available to intervenors.

should stay the course, and otherwise consider the Comments of TAPS and TDU Systems.

Respectfully submitted,

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