



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

## II. Expanded Data Requirements for Merger Analysis

Merger analysis under the Horizontal Merger Guidelines is by its nature an information-intensive task once a preliminary analysis reveals a potential for anticompetitive effects. Many important questions about the competitive effects of mergers are best answered with documents, interviews, and data from many sources.<sup>(5)</sup> The evolution of our Horizontal Merger Guidelines reflects an expanded consideration of facts and approaches. FERC may be better able to protect the public interest as it reviews proposed mergers in the rapidly changing electric industry by revising its information-gathering process to more closely match the information requirements of the Horizontal Merger Guidelines and to improve understanding of vertical competition issues.

To analyze prospective competitive effects of a proposed merger beyond reviewing market share statistics submitted by the merging parties, as well as to assure the accuracy of market share statistics, we have found various sources of data to be important in our merger investigations. Although only some of these sources are likely to be relevant in any

bias, particularly when the submitting parties have incentives to portray markets as highly competitive. In contrast, by subpoenaing data from both merging parties and third parties, the FTC staff obtains information about individual competitors that is more likely to be accurate. We also obtain the ability to cross-check important facts, such as

economic arena is defined geographically as well as with respect to the product or service likely to be affected. Both product and geographic market assessments under the Horizontal Merger Guidelines are carried out by asking whether a hypothetical monopolist would profitably impose a small but significant and nontransitory price increase.<sup>(16)</sup> Typically, the price increase is applied to pre-merger prices to conduct the analysis. Thus, in defining the market, the Horizontal Merger Guidelines generally focus on the possibility of incremental market power due to a merger.

This approach may not be appropriate in a newly deregulating industry, such as the electric industry, where pre-merger market power may have been created or protected by regulations that are no longer in place or are likely to be relaxed. The Horizontal Merger Guidelines recognize this possibility in Section 1.11, where they specify that "the Agency may use likely future prices, absent the merger, when changes in the prevailing prices can be predicted with reasonable reliability." Changes in price may be predicted on the basis of, for example, changes in regulation which affect price either directly or indirectly by affecting costs or demand."<sup>(17)</sup> FERC may wish to recognize explicitly that this alternative definition of price may be particularly relevant in the electric industry, where past restrictions on entry, regulatory limitations on the variety of services offered, and reduced incentives to operate efficiently and competitively (associated with rate-of-return regulation) may have elevated prices above competitive levels.

(2) Duration of Anticompetitive Effects<sup>(18)</sup> -- FERC asks how long a binding transmission constraint must persist to be deemed significant. This problem commonly arises in electricity markets where peak demand periods, with binding transmission constraints, are likely to be limited to certain hours of the day during certain seasons of the year. A typical example would be weekday afternoons during the summer months. Because electricity cannot be economically stored in large quantities,<sup>(19)</sup> electricity supply and demand must be continuously balanced. Consequently, supply and demand conditions within short time intervals are interdependent.





(2) Native Load -- The Notice raises questions regarding the treatment of native load in merger analysis. In simple terms, native load encompasses certain contractual and regulatory ob

(2) Self-Reporting on Raising Rivals' Cost Scenarios<sup>(48)</sup> -- FERC proposes to require that applicants provide their own review of raising rivals' cost scenarios. In our experience, depending on a firm to supply analysis that is contrary to the firm's own interests may not produce reliable information. To provide independent verification of self-reported materials, it is important to have access to assessments by third parties, documents developed in the normal course of business, and independent assessments of market conditions. Our analysis in the PacifiCorp/Peabody merger, for example, benefited greatly from an ability to examine potential raising rivals' cost scenarios under different demand conditions







effects are especially unlikely. Similarly, in our review of merger filings under the Hart- Scott-Rodino premerger reporting program, certain classes of transactions are exempted from reporting because, based on our experience, they are highly unlikely to harm competition. Where that determination cannot be made on an a priori basis, merging companies are required to submit a basic amount of information. In the vast majority of cases, we are able to determine very quickly, based on that information, that further investigation is unnecessary. But in many other cases, a more detailed examination, based on a variety of information sources, is needed to check for the possibility of anticompetitive effects. A fraction of the latter become full investigations and litigated matters.

The presence of a safe harbor provision creates strong incentives for firms to portray acquisitions in such a way that the acquisition qualifies for the safe harbor treatment. The incentive to "shoe horn" the evidence to fit within the safe harbor is greater when failure to fit within the safe harbor causes substantially greater reporting and litigation costs to merger applicants. In our experience, it is important in these circumstances to seek independent verification of the information used to qualify the proposed acquisition g ( )Tj 0.0e

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