



## FERC Issues Notice of Inquiry Regarding Market Power Analysis

On March 17, 2011, in Docket No. RM11-14-000, the Federal Energy Regulatory Commission (FERC) issued a Notice of Inquiry (NOI) in which it solicited comments on how, if at all, it should revise its method for analyzing market power when considering: (a) transactions that require approval under Section 203 of the Federal Power Act; and (b) requests for market-based rate authority.

For nearly 20 years, FERC has been analyzing market power based on guidelines that were adopted in 1992 by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). For transactions subject to Section 203, FERC has been identifying relevant products, customers that may be affected by the transaction and potential suppliers. FERC would then examine market concentration using the Herfindahl-Hirschman Index (HHI). For market-based rate requests, as a preliminary screen, FERC has been applying a "wholesale market share" indicative screen and a "pivotal supplier" indicative screen. If the applicant failed either of those preliminary screens, it would then provide data to rebut the presumption that it had market power. That could be accomplished in many ways, including by submitting a delivered price test analysis.

In 2010, DOJ and the FTC adopted new guidelines, which implemented many changes. The HHI thresholds used to determine the level of market concentration (high, medium or not concentrated) were raised. Less emphasis is now placed on market definition, in favor of fact-specific inquiries that include examining evidence of competition and use of economic models that quantify the extent to which a firm can raise prices as a result of a merger. The guidelines also address competitive effects arising from partial acquisitions and minority ownership.

Through this NOI, FERC seeks comment on whether it should adopt any particular elements of the revised guidelines and how it should incorporate those elements into its analysis. Of particular interest to FERC is whether it should follow DOJ and the FTC in adopting these revisions given that, unlike those other agencies, FERC's analysis is done publicly and a decision is rendered based on a factual record that is the product not only of the applicant's submission, but also intervenor submissions and FERC's own analysis.

Comments must be filed with FERC no later than May 23, 2011.

For more information on the content of this alert, please feel free to contact Richard Lorenzo, Arthur Adelberg, Jay Matson, or any other member of our Energy Practice Group.

If you received this alert from someone else and would like to be added to the distribution list, please send an email to [alerts@loeb.com](mailto:alerts@loeb.com) and we will be happy to include you in the distribution of future reports.

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

Circular 230 Disclosure: To ensure compliance with Treasury Department rules governing tax practice, we inform you that any advice contained herein (including any attachments) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer; and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

© 2011 Loeb & Loeb LLP. All rights reserved.

*This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.*

*For more information about Loeb & Loeb's Energy Practice,  
please contact:*

ARTHUR W. ADELBERG	AADELBERG@LOEB.COM	202.618.5020
KENNETH A. ADLER	KADLER@LOEB.COM	212.407.4284
ROBERT S. BARRY, JR.	RBARRY@LOEB.COM	310.282.2258
NORWOOD P. BEVERIDGE, JR.	NBEVERIDGE@LOEB.COM	212.407.4970
GREGORY J. BLASI	GBLASI@LOEB.COM	212.407.4236
ALBERT M. COHEN	ACOHEN@LOEB.COM	310.282.2228
ANGELA M. SANTORO DOWD	ADOWD@LOEB.COM	212.407.4097
THEODORE F. DUVER	TDUVER@LOEB.COM	212.407.4158
JON HOLLIS	JHOLLIS@LOEB.COM	212.407.4281
FRANK LEE	FLEE@LOEB.COM	212.407.4825

RICHARD M. LORENZO	RLORENZO@LOEB.COM	212.407.4288
ELIZABETH L. MAJERS	EMAJERS@LOEB.COM	312.464.3142
JAY MATSON	JMATSON@LOEB.COM	202.618.5010
RONELLE C. PORTER	RPORTER@LOEB.COM	212.407.4110
STEVE A. SEMERDJIAN	SSEMERDJIAN@LOEB.COM	212.407.4218
JOHN F. SETTINERI	JSETTINERI@LOEB.COM	212.407.4851
AKIBA STERN	ASTERN@LOEB.COM	212.407.4235
MARK A. STREAMS	MSTREAMS@LOEB.COM	310.282.2326
NICOLE A. TRAVERS	NTRAVERS@LOEB.COM	202.618.5030