STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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May 23, 2011

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. RM11-14-000 - <u>Analysis of Horizontal Market Power Under the Federal Power Act</u>

Dear Secretary Bose:

For filing, please find the Notice of Intervention and Comments of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler

David G. Drexler
Assistant Counsel

Attachment

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

NOTICE OF INTERVENTION AND COMMENTS
OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

BACKGROUND

On March 17, 2011, the Federal Energy Regulatory Commission (FERC or Commission) issued a Notice of Inquiry (NOI) seeking comments on whether to revise the Commission's 1996 Merger Policy Statement used to identify horizontal market power issues that may arise in connection with a proposed merger. The 1996 Merger Policy Statement adopted the screening analysis implemented by the Department of Justice (DOJ) and Federal Trade Commission (FTC) in 1992 to evaluate whether a merger would have an adverse impact on competition, using the Herfindahl-Hirschman Index (HHI).

The Commission classifies a market as unconcentrated, moderately concentrated, or highly concentrated, based on the applicable HHI, while it applies certain presumptions to that market depending on the change in the HHI that would occur as a result of a proposed merger. In particular, where a merger occurs in an unconcentrated market and it would not cause a change in the HHI that affects that designation, the Commission presumes that the merger is unlikely to have an adverse effect on competition. Where a merger occurs in a moderately concentrated market and would increase the HHI by more than 100 points, the merger is considered to potentially raise significant competitive concerns. A change of more than 50 points in the HHI within a highly concentrated market is also presumed to have a potentially significant impact, while an increase of more than 100 points in such a market is presumed to create or enhance market power.

On August 19, 2010, the DOJ and FTC issued new horizontal merger guidelines that replaced those adopted in 1992 and increased the HHI thresholds used in the screening analysis. The Commission's NOI requests input on whether the 1996 Merger Policy Statement should be revised to be consistent with the DOJ and FTC's higher thresholds for identifying market power concerns.

NOTICE OF INTERVENTION

The New York State Public Service Commission (NYPSC) hereby submits it's Notice of Intervention and Comments pursuant to the NOI published in the Federal Register on March 23, 2011, and Rule 214 of the Commission's Rules of Practice and

Procedure. Copies of all correspondence and pleadings should be addressed to:

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DISCUSSION

The NYPSC appreciates this opportunity to provide comments on the Commission's NOI. In response to the Commission's inquiry whether the 1996 Merger Policy Statement should be revised to be consistent with the DOJ and FTC's 2010 modified horizontal merger guidelines, the NYPSC supports the Commission's emphasis on fact-specific evidence similar to the approach contained in DOJ/FTC's new horizontal merger guidelines. We note that the HHI thresholds in the DOJ/FTC guidelines are not intended to be a rigid screen, but rather one way to identify those mergers that are unlikely or likely to raise competitive concerns. Therefore, a focus on fact-specific information should be incorporated into FERC's merger analysis.

However, the NYPSC supports the retention of the Commission's current HHI thresholds, which are appropriate for merger analysis in electric and natural gas markets. There does not appear to be a sufficient basis for FERC to increase the current HHI thresholds in order to be consistent with the DOJ/FTC guidelines. It is important to recognize that the DOJ and FTC look at mergers across all industries, while FERC focuses on mergers within electricity and natural gas markets. The very nature of the electricity and gas markets makes them more susceptible to abuses of market power then other types of markets.

For example, the electricity and natural gas industries have unique characteristics, typified by large dedicated capital investments and long lead-times for market entry. Therefore, the competition provided by suppliers that can ordinarily enter and exit the market expeditiously, and thus limit the ability of incumbent suppliers to exert market power, is limited within electricity and natural gas markets. Moreover, there are no substitute products for electricity available for many uses, and substitute products for natural gas are limited. There is also limited storage capability in the electricity market. These factors suggest that more stringent thresholds are appropriate when analyzing mergers within electricity and natural gas markets

CONCLUSION

In accordance with the foregoing discussion, the Commission should maintain its current merger guidelines that it considers, along with fact-specific information, when analyzing whether a proposed merger is consistent with the public interest finding required under the Federal Power Act.[1]

Respectfully submitted,

Peter McGowan
General Counsel
Public Service Commission
of the State of New York

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Dated: May 23, 2011
Albany, New York

[1] 16 U.S.C. §824b(a).