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Milton A. Marquis
Jenner & Block, LLC

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DOJ, FTC and FERC Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?

*Milton A. Marquis**

I. INTRODUCTION

Electric utility mergers in the United States are subject to review not only from a federal antitrust agency—either the Federal Trade Commission (FTC) or the Department of Justice (DOJ)—but must also obtain approval from the Federal Energy Regulatory Commission (FERC). As I will discuss, the federal antitrust agencies and the FERC operate under different statutes and regulatory regimes. Shared federal merger jurisdiction between sectoral regulators and competition authorities is strictly an American phenomenon. In the rest of the world, the competition agency almost always reviews transactions involving every industry sector.

Shared merger enforcement increases transaction costs and regulatory uncertainty. In light of these additional costs, I pose the simple question: Do the benefits of having two federal agencies review the same transaction outweigh the costs? In other words: Are there too many (or one too many) cooks in the regulatory review kitchen? This issue has prompted a fair amount of recent discussion among commentators, and there has been a recent legislative proposal introduced by Joe Barton, the chairman of the Energy and Air Quality Subcommittee of the House Committee on Energy and Commerce, to eliminate FERC's merger review authority.¹

After a great deal of thought, I have concluded that having two federal agencies review the same transaction for possible harm to competition can no longer be defended. And, for the reasons that I will explain, evaluating the competitive aspects of electric utility mergers should be left exclusively to one of the federal antitrust agencies, the

* Jenner & Block, LLC, Washington, D.C.

1. Electric Supply and Transmission Act, H.R. 3406, 107th Cong. §141 (2001).

federal entities that are responsible for examining mergers in almost every other segment of the American economy.

II. STATUTORY AUTHORITY

FERC derives its authority to review mergers involving electric utilities from section 203 of the Federal Power Act, which reads in part:

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission . . . without first having secured an order of the Commission authorizing it to do so. . . . [I]f the Commission finds that the proposed . . . [transaction] will be consistent with the public interest, it shall approve the same.²

Merger applicants bear the burden of proving that their transaction is consistent with the public interest. Until recently, the FERC examined six nonexclusive factors, commonly referred to as the *Commonwealth Edison* factors:

1. the merger's likely effect on operating costs and rate levels of the combined company;
2. the merger's effect on competition;
3. the reasonableness of the purchase price;
4. whether the acquiring firm coerced the to-be-acquired firm into acceptance of the merger;
5. the merger's effect on federal and state regulation; and
6. the contemplated accounting treatment of the merged entity.³

In light of the unmistakable trend to competition in the electric power industry, FERC wisely revised its merger policy by adopting the substance of the merger guidelines of the federal antitrust agencies.⁴ The current FERC merger policy generally limits FERC's review to a merger's effect on competition, rates and regulation, with the effect on competition constituting the most critical of these factors.

The federal antitrust enforcement agencies enforce section 7 of the Clayton Antitrust Act, which outlaws acquisitions of assets or stock the effect of which "may be substantially to lessen competition, or tend to create a monopoly."⁵ The government, when seeking to challenge a merger under the Clayton Act, must file a civil action in federal district court. As the plaintiff, the government also bears the burden of proving

2. 16 U.S.C. § 824b(a) (2000).

3. *In re Commonwealth Edison Co.*, 36 F.P.C. 927 (1966).

4. *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act*, Order No. 592, 77 F.E.R.C. ¶ 61,263, 1996 FERC LEXIS 2367 (1996).

5. 15 U.S.C. §18 (2000).

that a transaction is likely to harm competition. In the FERC process, however, merger applicants bear the burden of demonstrating in an administrative proceeding that the transaction is consistent with the public interest.

The following chart summarizes several of the key differences between the FERC merger review process (“regulatory approach”) and the merger review process of the federal antitrust agencies (“law enforcement approach”).

FERC (Regulatory) vs. DOJ/FTC (Law Enforcement)

| FERC | DOJ/FTC |
|--|--|
| Relies upon parties merger application for information | HSR filing alerts agencies to larger transactions and possible competitive problems |
| No subpoena power | Can issue “second requests” to parties and CIDs to nonparties compelling testimony, documents, answering of interrogatories under oath |
| Interested parties may intervene | No formal role for interested parties |
| Confidential treatment of information the exception rather than the rule | HSR and CID materials subject to strict confidentiality |
| Can reject mergers | Must go to court to block mergers |
| Applicants bear burden of proving transaction is consistent with the public interest | Government bears the burden of proving that the merger will substantially lessen competition |

As the chart illustrates, a major difference between the two processes is that under the regulatory approach, the sectoral regulator does not have the power to compel information from third parties and is thus dependent on the application of the merger partners and voluntary submissions of third party interveners for information. By contrast, Congress has provided federal antitrust enforcers with the tools to compel third parties, such as customers and competitors of the merger partners, to produce documents and testify under oath. Information from these sources, particularly customers, is invaluable to antitrust

enforcers. Merger review is fact intensive, and FERC's lack of investigative tools hampers its ability to obtain the information it needs. As the Federal Trade Commission staff explained:

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. 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.⁶

Another key distinction between the two approaches is the strict confidentiality protections afforded information provided to the government under the law enforcement approach. Under the regulatory approach, in contrast, a presumption against confidential treatment of information exists. Firms have a legitimate interest in maintaining the confidentiality of sensitive business information. Although the FERC in recent years has become more sensitive to the need to maintain the confidentiality of sensitive company information, the fact remains that the regulatory approach relies a great deal upon the participation of interveners. Thus, in order to ensure that merger applicants are afforded due process, the FERC is not in a position to afford the same levels of confidentiality to sensitive business information as the federal antitrust agencies. In addition to the harm to a firm's business of disclosure of sensitive company documents, the public dissemination of sensitive information can harm competition. As a long line of Supreme Court cases recognizes, the exchange of competitively sensitive information among competitors such as pricing data can adversely affect competition by facilitating the coordination of pricing.⁷

III. ARGUMENTS IN FAVOR OF SHARED JURISDICTION

Although it is clear, in my view, that the law enforcement approach of the federal agencies is the superior means of evaluating the likely competitive effects of a proposed transaction, there are strong arguments in favor of FERC review of electricity mergers. Probably the

6. Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, 18 C.F.R. Part 33, Revised Filing Requirements, FERC Docket No. RM98-4-000 (1998), available at <http://www.ftc.gov/be/v980022.htm> (citations omitted).

7. *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969).

strongest argument is that FERC unquestionably has superior knowledge of the electric power industry by virtue of its oversight of transmission and wholesale electric generation markets. Supporters of FERC jurisdiction can also point to the fact that FERC evaluates market power in connection with applications by incumbent utilities to sell power at market based rates.⁸ This analysis, supporters argue, is similar to the analysis the agencies perform in the merger review process.

Supporters of FTC and DOJ merger enforcement can argue, on the other hand, that both agencies have attorneys and economists with many years of experience in the electricity industry. In addition, the agencies frequently examine mergers in other network industries such as telecommunications that share many of the characteristics of the electricity industry. That said, the expertise of the antitrust agencies with respect to this industry does not compare to that of the FERC.

Another argument made by proponents of FERC merger jurisdiction is that the public interest standard is more appropriate for industries that are in transition from pervasive regulation to competition. Because there has been little or no competition in these industries, the merging firms may not have historically been competitors. As a consequence, antitrust standards, which are designed largely to measure the impact on competition from the loss of existing competition between the merging firms, make it difficult to challenge mergers that threaten to diminish future competition. This point was made by Joel Klein, the former Assistant Attorney General for Antitrust, in a speech at FERC in 1998:

To be specific about electricity, there is nowhere in the United States today that can we observe a fully restructured market in actual operation, and, in large parts of the country, we have little idea, for example, of what the basic nature of transmission pricing will be. This lack of experience presents practical analytic challenges for us. For example, the paradigm of the Merger Guidelines requires us to examine the effects of a five or ten percent increase by a hypothetical monopolist above levels likely to prevail in the near future. In almost all cases, currently prevailing prices provide the best indication of prices in the near future, and they are used as the benchmark for analyzing price increases.⁹

8. See, e.g., AEP Power Marketing, Inc., Order on Triennial Market Power Updates and Announcing New, Interim Generation Market Power Screen and Migration Policy, FERC Docket No. ER96-2495-015, 97 F.E.R.C. ¶ 61,219, 2001 FERC LEXIS 2788 (2001).

9. Joel I. Klein, Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process of Electric Power Restructuring, Address Before the FERC (Jan. 21, 1998), at <http://www.usdoj.gov/atr/public/speeches/1332.htm>.

It is undeniable that it is more difficult for the government to prevail in merger challenges under the Clayton Act. Long gone are the days when the guiding principle of antitrust merger jurisprudence was “the government always wins.”¹⁰

As a result of the difficulty of challenging electricity mergers under the Clayton Act, it is argued that the public interest standard, which as explained earlier places the burden on merger applicants, is more appropriate for the electricity industry. This standard gives government regulators much more flexibility than the Clayton Act to protect potential competition because the public interest test is not limited to antitrust principles. As the First Circuit explained in *Northeast Utilities v. FERC*:

Although the Commission must include antitrust considerations in its public interest calculus under the [Federal Power Act], it is not bound to use antitrust principles when they may be inconsistent with the Commission’s regulatory goals [I]ndiscriminate incorporation of antitrust policy into utility regulation “could undercut the very objectives the antitrust laws are designed to serve.”¹¹

IV. ARGUMENTS AGAINST SHARED JURISDICTION

Critics of FERC merger review authority make several arguments. The most effective argument, in my view, against shared jurisdiction is that FERC does not possess the necessary expertise to review mergers. Although FERC clearly has superior knowledge of the electric power industry when compared to either of the federal antitrust agencies, FERC is not an antitrust agency. Investigating the likely competitive effects of proposed mergers requires a different set of skills than regulating rates. As a consequence, critics contend, FERC’s lack of antitrust expertise may result in the agency blocking procompetitive mergers or failing to challenge anticompetitive transactions.

The antitrust agencies, on the other hand, review mergers in every segment of the American economy, including industries that were previously subjected to pervasive regulation, such as airlines and telecommunications. The agencies can compensate for their relative lack of industry expertise by consulting with FERC staff during the course of a merger investigation. Indeed, the federal antitrust agencies commonly confer with sectoral regulators in connection with mergers involving the regulators’ areas of expertise.

10. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

11. *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993) (quoting *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990)).

In addition, critics contend, overlapping merger review imposes upon parties to a transaction additional costs and delay. Obtaining government approval of a transaction can be a costly proposition, which becomes even more costly when the transaction is subject to review by multiple agencies. In addition to attorneys' fees that are incurred as a result of having to respond to separate inquiries from the FERC and either the DOJ or FTC, shared jurisdiction imposes indirect costs such as the drain on company executives' time and productivity.

Finally, opponents of shared jurisdiction are concerned about the use of the public interest standard to evaluate mergers. As I stated earlier, the public interest standard is broader than the Clayton Act. How much broader is unclear. This uncertainty raises concerns that the public interest test may be too broad and lacks standards, which may result in the FERC having the ability to block any merger that it deems to be contrary to the public interest with few apparent limitations.

V. CONCLUSION

I believe that critics of shared enforcement have the stronger argument. Overlapping merger review assumes that the federal antitrust agencies are not fully capable of reviewing mergers in this sector or that the antitrust laws are inadequate, or both. Neither statement is true. The antitrust agencies are staffed with well-respected attorneys and economists who have years of experience in the electric power industry. And contrary to the concerns expressed regarding the "difficulty" of challenging mergers under the Clayton Act, the government has a fairly impressive record in recent years of successful challenges of alleged anticompetitive transactions in the electric power industry¹² as well as other network industries.¹³ In my view, the benefits of shared jurisdiction simply do not outweigh the costs.

12. *See, e.g.*, *United States v. Enova Corp.*, 107 F. Supp. 2d 10 (D.C. 2000) (electric/gas merger).

13. *See, e.g.*, Complaint, *United States v. WorldCom & Sprint Corp.*, (filed June 27, 2000), available at <http://www.usdoj.gov/atr/cases/f5000/5051.htm> (telecommunications); Press Release, Department of Justice, Department of Justice and Several States Will Sue to Stop United Airlines from Acquiring US Airways (June 27, 2001), available at <http://www.usdoj.gov/opa/pr/2001/July/361at.htm> (airlines).