

### **III. THE DEPARTMENT OF JUSTICE’S PROPOSED PARTIAL DEREGULATION OF OIL PIPELINES AND GUIDELINES ON MARKET POWER**

In 1986, shortly after Opinion No. 154-B was issued, the Department of Justice (DOJ) issued a report on the state of competition in the oil pipeline sector.<sup>125</sup> The report concluded that most existing crude oil and refined petroleum products pipelines could be safely deregulated, and all new crude oil pipelines could be deregulated. This report by the DOJ is often cited in oil pipeline market-based rate cases, and a copy of the report is provided in the Handbook.

During this same timeframe, the DOJ and the Federal Trade Commission also issued guidelines on assessing market power for horizontal mergers.<sup>126</sup> As provided in detail below, FERC is concerned with the existence of market power. In contrast to a violation of the antitrust provisions for monopolization or attempted monopolization, the Commission is generally not concerned with intent or the unlawful nature of the conduct undertaken to achieve the monopoly.<sup>127</sup> Therefore, the Commission’s inquiry more closely resembles the antitrust statute’s prohibition on mergers and acquisitions “where ... the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly...”<sup>128</sup> The DOJ and Federal Trade Commission guidelines are designed for this type of market power determination, and therefore, they have been cited by the Commission and the participants in market-based proceedings before the Commission. The 1997 version is provided in the Handbook. The guidelines were recently updated in 2010. The Commission has declined to take into account changes in the updated guidelines in the context of merger requests of electric utilities and applications for market-based rates by wholesale electric providers under the Federal Power Act.<sup>129</sup>

It should be noted that while persuasive, the Commission has not strictly adhered to the 1997 guidelines. For example, the guidelines provide a particular methodology for calculating HHI and market share (DOJ Adjusted Capacity Method), which is discussed in Section V below. While parties sometimes provide the numbers derived from the DOJ methodology and the Commission will cite them, the Commission has not required use of this DOJ methodology for calculating HHI or market share.<sup>130</sup> In addition, the guidelines find an HHI of 1800 reflects a highly concentrated market, but the Commission has approved markets with HHIs above 1800

---

<sup>125</sup> ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, OIL PIPELINE DEREGULATION (1986).

<sup>126</sup> U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1992) (revised 1997 and 2010).

<sup>127</sup> To establish a Sherman Act § 2 violation for attempted monopolization, a private plaintiff seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving “monopoly power”; and (4) causal antitrust injury. *See Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432-33 (9th Cir. 1995); *see also Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

<sup>128</sup> 15 U.S.C. § 18.

<sup>129</sup> *See Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012).

<sup>130</sup> *See, e.g., Longhorn Partners Pipeline, L.P.*, 83 FERC ¶ 61,345, at 62,379, 62,381 (1998) (citing HHI and market share numbers calculated from various methodologies including the DOJ method as all in line with a finding of no market power based on Commission precedent); *Colonial*, 92 FERC ¶ 61,144 at 61,534-39 (Commission cited HHI statistics based on DOJ and other methods to find the applicant pipeline did not have market power in its contested destination markets); *Sunoco*, 114 FERC ¶ 61,036 at 61,105 (citing HHI and market share numbers derived from DOJ and other methodologies in finding a lack of market power in a contested destination market).

on numerous occasions.<sup>131</sup> Likewise, the Commission has varied from the guidelines in other respects, such as the level of waterborne alternatives in a market that will raise a presumption an applicant pipeline lacks market power.<sup>132</sup>

---

<sup>131</sup> See, e.g., *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 61,670-71 (finding in a litigated proceeding that pipeline lacked market power in a region where HHI was calculated at 2102); *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,682 (finding in a litigated proceeding that applicant pipeline lacked market power in regions where HHI was 2381 and 2048 respectively).

<sup>132</sup> See *Williams*, Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,137-38.