UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Control and Affiliation for Purposes of the	)	
Commission's Market-Based Rate Requirements	)	Docket No. PL09-3-000
Under Section 205 of the Federal Power Act and the	)	
Requirements of Section 203 of the Federal Power Act	)	

COMMENT OF THE FEDERAL TRADE COMMISSION

April 28, 2009

The Federal Energy Regulatory Commission (FERC) has under consideration in this proceeding a clarification request by the Electric Power Supply Association (EPSA) to the effect that if an investor in a publicly held company (1) owns less than 20 percent of such company's voting securities and (2) certifies (through the filing of Securities and Exchange Commission (SEC) Schedule 13G) that the investment is not for the purpose of controlling the company, then such investment will not be deemed to convey "control" or to result in "affiliation" for market-based rate purposes under Section 205 of the Federal Power Act (FPA) or acquisition purposes under FPA Section 203. Among other things, the presumed absence of control or affiliation apparently would relieve the parties to the transaction from having to submit market power analyses otherwise required under FERC rules, or would allow them to treat generation assets of the respective companies as not under common ownership or control for purposes of any required competitive analysis. Related premises of the proposed clarification appear to be (1) that the ability of the acquiring firm to control the acquired firm is largely determined by ownership share, and (2) that the presence or absence of such control is dispositive of the transaction's competitive effects.

The Federal Trade Commission (FTC) only recently had occasion to familiarize itself with the pendency of the issues raised by the EPSA petition. After reviewing the issues, the FTC has concluded that its experience may prove helpful to FERC's deliberations. The FTC is aware, however, that FERC provided an opportunity for public comment earlier this year, and so we respectfully request that FERC accept this comment at this time. The FTC appreciates FERC's consideration of our views.

Based upon its review of the other comments filed in this proceeding, the FTC is concerned that commentators have placed too much emphasis on the role of control in the competitive analysis, with little discussion of the incentive effects associated with partial acquisitions or of the possible increased risks of coordinated interaction from such investments. In these comments, the FTC describes the antitrust analysis of the competitive effects of partial acquisitions, including those in the energy industry.[1] As developed below, legal and economic scholarship, judicial decisions, and the work of the federal antitrust agencies consistently teach that partial acquisitions can change the competitive incentives of the acquiring and acquired firms, even where the acquiring firm does not gain control of the acquired firm. In addition, passive investments can create opportunities and incentives for firms with partial common ownership to share information that facilitates collusion. The FTC encourages FERC to avoid adopting policies that assess competitive effects based solely on control and that foreclose examination of these non-control-related competitive effects associated with partial acquisitions.

[1] Although FERC is not responsible for enforcement of the antitrust laws, over the years its competitive analyses in both the Section 203 and Section 205 contexts increasingly have reflected the approaches of the antitrust agencies, including perspectives set forth in the U.S Department of Justice/Federal Trade Commission Horizontal Merger Guidelines.

Interest of the FTC

The FTC is an independent agency of the United States Government responsible for maintaining competition and safeguarding the interests of consumers, both through enforcement of the antitrust and consumer protection laws and through competition policy research and advocacy. The FTC often analyzes regulatory or legislative proposals that may affect competition or allocative efficiency in the electric power industry. The FTC also reviews proposed mergers that involve electric and natural gas utility companies, as well as other parts of the energy industry. In the course of this work, as well as in antitrust and consumer protection research, investigation, and litigation, the FTC applies established legal and economic principles and recent developments in economic theory and empirical analysis.

The energy sector, including electric power, has been an important focus of the FTC's antitrust enforcement and competition advocacy.[2] The FTC's competition advocacy program has produced two staff reports on electric power industry restructuring issues at the wholesale and retail levels.[3] The FTC staff also contributed to the work of the Electric Energy Market

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[2] *See*, *e.g.*, Deborah Platt Majoras, Chairman, Federal Trade Commission, Opening Remarks at the FTC Conference on *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10, 2007), *available at* http://www.ftc.gov/speeches/majoras/070410energyconferenceremarks.pdf**.** FTC merger cases involving electric power markets have included *DTE Energy/MCN Energy* (2001) (consent order), *available at* http://www.ftc.gov/os/2001/05/dtemcndo.pdf; and *PacifiCorp/Peabody Holding* (1998) (consent agreement), *available at* http://www.ftc.gov/os/1998/02/9710091.agr.htm. (The FTC subsequently withdrew the *PacifiCorp* settlement when the seller accepted an alternative acquisition offer that did not pose a threat to competition.)

[3] FTC Staff Report, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition* (Sept. 2001), *available at* http://www.ftc.gov/reports/elec/electricityreport.pdf**;** FTC Staff Report, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform* (July 2000), *available at* http://www.ftc.gov/be/v000009.htm (compiling previous comments that the FTC staff

Competition Task Force, which issued a *Report to Congress* in the spring of 2007 (*available at* http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf). In addition, the FTC has held public conferences on energy topics, the most recent of which was *Energy Markets in the 21st Century* on April 10-12, 2007.[4]

The FTC and its staff have filed numerous competition advocacy comments with FERC and participated in FERC technical conferences on market power issues. For example, in March 2007, Mark Frankena, the Deputy Director for Antitrust in the FTC's Bureau of Economics, served as a panelist for a technical conference in Docket No. AD07-2-000 on FERC's merger and acquisition review standards under FPA Section 203. The FTC submitted comments in July 2004 and January 2006 in FERC's proceeding in Docket No. RM04-7-000 on its FPA Section 205 standards for market-based rates. The FTC also has commented on FERC's initiatives to promote wholesale electricity competition.[5]

Background

As relevant here, FERC undertakes market power analysis in two contexts. When it determines whether acquisitions or dispositions of FERC-jurisdictional facilities subject to review under FPA Section 203 are "consistent with the public interest," 16 U.S.C. § 824b, FERC

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provided to various state and federal agencies).

[4] Conference materials are available at http://www.ftc.gov/bcp/workshops/energymarkets/index.shtml. Other programs have included the FTC's public workshop on *Market Power and Consumer Protection Issues Involved with Encouraging Competition in the U.S. Electric Industry*, held on September 13-14, 1999 (workshop materials *available at* http://www.ftc.gov/bcp/elecworks/index.shtm); and the Department of Justice and FTC Electricity Workshop, held on April 23, 1996.

[5] *See*, *e.g*., Federal Trade Commission, Comment Before the Federal Energy Regulatory Commission on Wholesale Competition in Regions with Organized Electric Markets (Apr. 17, 2008), *available at* http://www.ftc.gov/be/v070014b.pdf.

examines, *inter alia*, a transaction's effect on competition.[6] In that analysis, the acquirer (including its affiliates and associated companies) generally will be deemed not to control the acquired public utility if, post-acquisition, the acquirer owns less than 10 percent of the acquired public utility, and under such circumstances it would not need to obtain prior Commission approval for the transaction. *FPA Section 203 Supplemental Policy Statement*, Docket No. PL07-1-000, 120 F.E.R.C. ¶ 61,060, P 57 (2007). If the transaction is deemed to result in the acquisition of control, however, an applicant submits a competitive analysis in which the assets of the acquired firm will be attributed to the acquirer for purposes of the competition analysis. 18 C.F.R. §§ 33.3(a)(1), 33.4(a) (2008). In the context of market-based rate authorizations under FPA Section 205, 16 U.S.C. § 824d, FERC deems firms to be affiliated and presumes common control based upon an entity's ownership of 10 percent or more of a public utility's voting securities. The control or affiliation determination results in FERC's attributing to the seller seeking market-based rate authority the generation and generation inputs of the firm(s) that it controls or with which it is affiliated, thus enhancing the seller's competitive presence in the market being analyzed. 18 C.F.R. Part 35, Subpart H, Appendices A, B (2008).

EPSA requests clarification that the 10 percent threshold used to presume control or affiliation in the foregoing Sections 203 and 205 contexts be increased to 20 percent where a passive investor also files SEC Schedule 13G certifying that its investment is not for the purpose, and does not have the effect, of conferring control. EPSA Petition at 12-13. If granted,

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[6] 1996 Merger Policy Statement, Order No. 592, 61 Fed. Reg. 68606, FERC Stats. & Regs. ¶ 31,044 (1996) (*codified at* 18 C.F.R. § 2.26); *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70984 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16121 (Mar. 23, 2001), 94 F.E.R.C. ¶ 61,289 (2001) (*codified at* 18 C.F.R. Part 33).

EPSA's clarification presumably would mean that when a disposition or an acquisition of jurisdictional assets results in the acquirer's having less than 20 percent of the voting securities of a public utility, the acquirer would not have to obtain prior FERC approval for the transaction under Section 203. EPSA further requests that the no-control presumption be applied in the Section 205 context, such that the generation or generation inputs owned or controlled by other entities would not be attributed to the public utility seeking market-based rate authority.

EPSA's proposal and comments thereon largely have focused on the control issue and on whether a firm's having less than a 20 percent interest in the acquired firm, combined with the acquirer's submission of SEC Schedule 13G, provides sufficient assurances that the acquirer does not control the acquired public utility. Absent such control, it is claimed, the acquirer cannot dictate the operation of the acquired firm's generation, for example, to cause it to be withheld from the market, thus alleviating concerns that a transaction would adversely affect competition. Economic and legal scholarship and cases considered by courts and the antitrust agencies, however, uniformly teach that control over the acquired firm does not alone determine whether a transaction will adversely affect competition. Even partial acquisitions of passive interests can affect the competitive incentives of both the acquirer and the acquired firm. Such acquisitions also increase risks for anticompetitive information sharing.

<u>Legal and Economic Scholarship</u>

Antitrust scholarship recognizes that partial acquisitions, including by private equity firms, can lead to anticompetitive effects. "Even a non-controlling partial acquisition by a private-equity firm of a competitor to a portfolio company that the private equity firm already owns in whole or in part can lead to anticompetitive effects if it: (1) alters the *incentives* of one or both of the relevant firms to compete; (2) creates the ability to control or even *influence* any competitive decisions of the acquired firm; or (3) facilitates the exchange of competitively sensitive *information*." Laura A. Wilkinson & Jeff L. White, *Private Equity: Antitrust Concerns with Partial Acquisitions*, 21 Antitrust 28, 29 (Spring 2007) (emphasis in original); *see also* President's Council of Economic Advisers, *Economic Organization and Competition Policy*, 19 Yale J. Reg. 541, 555 (2002) ("A partial acquisition can affect the firms' subsequent decisions through three distinct channels: by altering incentives, altering information, or altering control.").

An assessment of the competitive effects of partial ownership requires that two aspects of partial ownership be distinguished and analyzed – financial interest and corporate control. Daniel P. O'Brien & Steven C. Salop, 67 Antitrust L.J. 559, 568 (2000).

> Financial interest refers to the acquiring firm's entitlement to a share of the profits of the acquired firm. Corporate control refers to the acquiring firm's ability to control or influence the acquired firm's competitive decision making, including pricing and product selection as well as sale of the company's assets.

Id.

Although our comments here focus on the relevance of incentive effects and collusion risks to the question of a partial acquisition's competitive impact, we note also that ownership share alone is not dispositive as to whether one firm has control or influence over another. A minority shareholder might be able to control a company,[7] if it is one of the largest shareholders or possesses the right to name representatives to the company's board of directors.[8] State

[7] It is not clear from the EPSA proposal whether a partial owner having the ability to name a board representative could still file SEC Schedule 13G.

[8] In contrast to the opportunities of major holders to exert disproportionate influence in corporate governance, the views of investors with very small individual holdings may be underrepresented because of the difficulties associated with organizing such investors, even if they hold a large proportion of shares in the aggregate.

corporate law governing the rights of shareholders and the obligations of directors likely would need to be considered to determine the extent to which an ownership share of 20 percent may permit control over decision-making in such a context.[9] Moreover, even if a particular ownership share does not confer control, it may still confer influence. For example, in the context of Time Warner Inc.'s acquisition of Turner Broadcasting System, Inc., the FTC investigated and obtained relief in the form of divestiture and limits on voting rights of, *inter alia*, minority shareholders (Tele-Communications, Inc. (TCI) and Liberty Media Corp.) that were anticipated to own less than 10 percent of the stock of Time Warner.[10] The relief addressed competitive concerns associated with those minority shareholders' potential influence over the conduct of Time Warner in light of their own operation of cable television systems and development of programming.

<u>Effects on Competitive Incentives</u>

Turning to the incentive effects associated with partial acquisitions, the financial interest that accompanies partial ownership can affect the acquirer's competitive interests and possibly the acquired firm's interests. If an acquiring firm were to raise prices, leading to a loss of sales

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[9] The Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) includes an exemption from that statute's notification requirements for acquisitions "solely for the purpose of investment" where the acquiring person would hold 10 percent or less of the outstanding voting securities of the issuer. 15 U.S.C. § 18a. The FTC's HSR regulations state: "Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1). Among other things, an acquiring person's "being a competitor of the issuer" could be viewed as evidence of intent inconsistent with investment purposes. 43 Fed. Reg. 33450, 33465 (1978).

[10] *Time Warner, Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp.*, FTC File No. 961-0004, Analysis of Proposed Consent Order to Aid Public Comment, *available at* http://www.ftc.gov/os/1996/09/twanalys.pdf.

due to customers' migration to other sellers, the acquirer could recoup some of its losses to the extent those customers migrate to an acquired firm. O'Brien & Salop*, supra*, 67 Antitrust L.J. at 574. This recoupment occurs even if control is not acquired and increases the incentive for the acquirer to raise price. *Id.* "This incentive analysis applies directly to the case in which the acquiring firm purchases less than a 100 percent financial interest in the acquired firm." *Id.* at 575. Although "the incentive of the acquired firm to increase prices is smaller than it would be in a full merger," it is still present. *Id.* For example, suppose that firm A acquires a passive, 5 percent stake in a direct competitor, firm B. "If firm A raises its price, for example, the five percent stake in firm B could reduce the effect of any loss of customers on firm A's profits because some of the lost customers would be purchasing from firm B." Council of Economic Advisers, *supra*, 19 Yale J. Reg. at 556. In this case, A gets the full benefit of its price increase as well as its share of the increased sales that B achieves through A's loss of customers.

One can illustrate this incentive effect in the electricity context. Assume a market having 1,050 MW of load served by three suppliers. Baseload Energy has 1,000 MW of capacity, with a marginal cost of $20 per MWh and an offer cap of $30 per MWh; Acquisitive Energy has 100 MW of capacity, with a marginal cost of $100 per MWh and an offer cap of $120 per MWh; and Combustion Turbine Energy has 50 MW of capacity, with a marginal cost of $200 per MWh and an offer cap of $250 per MWh. Acquisitive takes a 5 percent stake in Baseload. Baseload, which is always inframarginal in this market, bids its marginal cost to ensure that it is dispatched. Acquisitive bids at its offer cap, $120 per MWh. Combustion Turbine will bid no lower than $200 per MWh. In the 1,050 MW market example, Acquisitive's $120 per MWh offer will set the clearing price, and the firm will sell 50 MW at a profit of $1,000 (50 x $20). Baseload's profit will be $100,000 (1,000 x $100). With partial ownership, Acquisitive will get

5 percent of Baseload's profit, so Acquisitive ends up with a total profit of $6,000 ($1,000 + (.05 x $100,000)).

Suppose, however, that Acquisitive experiences problems with its plant, requiring it to go off line, and has to decide how quickly to try to get it back on line. Acquisitive's absence from the market will increase the market clearing price – possibly as high as $250 per MWh, if Combustion Turbine bids its offer cap – which will increase Baseload's profit to $230,000 (1,000 x $230). Prior to its acquisition of a 5 percent interest in Baseload, Acquisitive would have had an incentive to return quickly to service, because it makes no money without any sales. By contrast, post-acquisition, Acquisitive's 5 percent share of Baseload Energy's profits will be $11,500 (.05 x $230,000), making it very profitable for Acquisitive Energy to stay off line (since $11,500 exceeds $6,000). Thus, Acquisitive Energy's passive investment could adversely affect competition in this market.

Similarly, a passive investment could prompt the acquiring firm to compete less vigorously, if aggressive competition would lower the value of an investment in which it had partial ownership. David Gilo, *The Anticompetitive Effect of Passive Investment*, 99 Mich. L. Rev. 1, 4 (2000); *see also* Phillip E. Areeda & Herbert Hovenkamp, V Antitrust Law ¶ 1203c at 280-83 (2d ed. 2003). Returning to the foregoing example, suppose that rather than Combustion Turbine Energy, the third seller in the 1,050 MW market is Renewable Energy, with 30 MW of capacity having a marginal cost of $110 per MWh. Prior to acquiring its 5 percent interest in Baseload Energy, Acquisitive Energy bids $109.99 per MWh (which is below its $120 per MWh offer cap) so that Acquisitive (rather than Renewable) is dispatched, for a resulting profit of $499.50. Note, however, that even if Acquisitive bid $120 per MWh, giving Renewable the opportunity to underbid it, Acquisitive could still be dispatched at 20 MW (because Renewable has only 30 MW of capacity) and earn a profit of $400 (20 MW x $20 MWh). Absent partial ownership in Baseload, Acquisitive has the incentive to compete aggressively with Renewable, because its aggressive bidding generates larger profits ($499.50) than its less aggressive bidding ($400).

Post-acquisition, Acquisitive no longer has the incentive to undercut Renewable Energy's offer of $110 per MWh and instead bids at its offer cap of $120 per MWh. Under this strategy, Acquisitive would sell 20 MW at $120 per MWh for a profit of $400, but also would get 5 percent of Baseload's $100,000 profit, for a total of $5,400. As a partial owner of Baseload, Acquisitive could still choose to compete aggressively with Renewable by bidding $109.99, but this would now decrease total profits because Acquisitive would earn $499.50 from its own sales plus 5 percent of Baseload's profits, which (at a market clearing price of $109.99 per MWh) would be $89,990, for a total profit to Acquisitive of $4,999. The benefit to Acquisitive from increasing its sales by underbidding Renewable is now more than offset by the adverse effect such aggressive bidding would have on Acquisitive's share of Baseload's diminished profits.

Increased Collusion Risks

Passive investment also increases the likelihood of sustaining collusive pricing, such as through avoidance of price wars. Gilo, *supra*, 99 Mich. L. Rev. at 8, 13. Consider an oligopolistic market with prices that reflect tacit collusion. When firms tacitly collude, they recognize that they could deviate from the collusive outcome, increasing their own short-run profits at the expense of the other firms, but choose not do so because they expect a stream of future profits that are sufficiently higher if the collusion persists. When a firm has partial ownership of another firm in the collusive group, the short-term gains from deviation are diminished, because the deviation decreases the profits of the partially owned firm. Thus, there is less incentive to cheat on the collusive strategy.

The change in incentives can affect the acquiring firm as well as the acquired firm. *Id*. at 9. Suppose that Acquisitive Energy acquired a partial interest in Renewable Energy. Pre-acquisition, if it anticipates that Acquisitive might deviate from a collusive outcome in the future, Renewable might take the first step in deviating from collusion so as to get the short-term gains. If Acquisitive is less likely to deviate, however, then Renewable's need to anticipate and preempt Acquisitive's deviation diminishes. Acquisitive's ownership share in Renewable can make such deviation less attractive to Acquisitive, which may then have the secondary effect of making Renewable less likely to engage in a preemptive deviation.

The incentive effects associated with a partial owner's financial interest can be even more pronounced if the investment is made, not by the acquiring firm itself, but by its controller (such as a private equity firm). *Id.* at 22-23. For example, suppose that Acquisitive's controller holds only 20 percent of Acquisitive and nothing else. That controller would have the incentive to run Acquisitive in order to maximize Acquisitive's profits, just as if it owned 100 percent of Acquisitive. Now suppose that this controller also has a passive ownership of 20 percent of Renewable. If a pricing strategy were to cause Acquisitive to gain a dollar but Renewable to lose two dollars, the controller would not have the incentive to pursue this strategy. Rather, the controller would have the incentive to take actions that maximize the sum of Acquisitive's and Renewable's profits, so the passive partial ownership would make Acquisitive less likely to act as an aggressive competitor.

Information Sharing

Beyond effects on the acquiring and acquired firms' incentives, partial acquisitions can facilitate coordinated interaction through information sharing. Council of Economic Advisers, *supra*, 19 Yale J. Reg. at 556.

> Competitive effects, in the form of traditional coordination concerns, can arise from a partial investment in a competitor through the facilitation of information sharing, exchange, or access among competing companies. In the private-equity context, in particular, the acquisition of a partial ownership interest in a competitor of a private-equity firm's other wholly or partially owned portfolio companies could provide the private-equity firm with access to competitively sensitive information that could be shared between the two companies. This concern can arise even in situations where the private equity firm does not own a controlling interest in either competitor. Rather, the concern simply could be that the partial acquisition places the private-equity firm in a position to act as a conduit for the flow of competitively sensitive information between the two companies.

Wilkinson & White, *supra*, 21 Antitrust at 30; *see also* Areeda & Hovenkamp, *supra*, V *Antitrust Law* ¶ 1203c at 282. Although in cases of explicit collusion the participants in an information-sharing scheme could be pursued through government or private antitrust enforcement for violations of Section 1 of the Sherman Act, FERC can play a role in discouraging tacit collusion and other types of anticompetitive conduct that may not violate Section 1. *See Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 760 (1973) ("Consideration of antitrust and anticompetitive issues by [FERC], moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.").

As the foregoing discussion demonstrates, the mere fact that an investor's passive investment does not exceed 20 percent fails to address concerns that the partial acquisition could change the competitive incentives faced by the firms in which the investor also holds interests.

Whether a specific partial acquisition may harm competition depends on the facts, including the size of the partial investment, whether it is accompanied by control, and the ability and incentives to exchange competitively sensitive information. For these reasons, "an across-the-board lenient attitude toward passive investments in rivals may be misguided." *See* David Gilo, Yossi Moshe, and Yossi Spiegel*, Partial Cross Ownership and Tacit Collusion*, 37 RAND J. Econ. 81, 93 (2006). Because the EPSA proposal focuses only on the control factor, however, it appears to preclude consideration of other factors relevant to the competitive analysis.

Judicial and Enforcement Agency Actions

The need to assess more than control in the context of partial acquisitions, as described in legal and economic scholarship, finds resonance in courts and the antitrust agencies. In *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 860-62 (6th Cir. 2005), the Sixth Circuit held that the absence of control did not preclude a finding that an acquisition could lessen competition. The Antitrust Guidelines for Collaborations Among Competitors promulgated by the FTC and the Department of Justice (Collaboration Guidelines) prescribe examination of more than just control in an assessment of whether participants in a collaboration will have the ability and incentive to compete against the collaboration as well as each other. Collaboration Guidelines § 3.34.[11] The Collaboration Guidelines note that the "potential impact [of financial interests] may vary depending on the size and nature of the financial interest (*e.g.*, whether the financial interest is debt or equity)," and that "the analysis is sensitive to the level of financial interest in the collaboration or in another participant relative to the level of the participant's

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[11] Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

investment in its independent business operations in the markets affected by the collaboration." *Id*. § 3.34(c).[12]

Both agencies have exercised their enforcement authority in connection with partial acquisitions. The most recent case was the FTC's action in *TC Group, LLC, et al*.[13] There, the Carlyle Group and Riverstone Holdings, LLC, both private equity firms, jointly owned a private equity fund, CR-II, that held a 50 percent interest in MCG Midstream Holdings GP, LLC. MCG Midstream, in turn, served as the general and controlling partner of Magellan Midstream Partners, LLP, a publicly traded limited partnership primarily engaged in the storage, transportation, and distribution of refined petroleum products and ammonia. CR-II had the right to designate two of MCG Midstream's four-member Board of Managers. Magellan also competed directly against Kinder Morgan Inc. (KMI).

Carlyle/Riverstone proposed to acquire an 11.3 percent interest in KMI, accompanied by the right to name a KMI board representative. Carlyle also proposed to acquire its own 11.3 percent interest in KMI, again with a board representative. The FTC identified a number of competitive harms from the transaction, including reduced competition between Magellan and KMI and the risk of an exchange and use of competitively sensitive information between them. The parties agreed to settle the FTC's competition concerns by eliminating Carlyle/Riverstone's control over Magellan and prohibiting exchanges of competitively sensitive information. The FTC's remedy thus focused on Carlyle/Riverstone's ability to cause Magellan to compete less

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[12] The Guidelines also underscore the fact-specific nature of the inquiry.

[13] *In the Matter of TC Group, L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P.,* File No. 061-0197, Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comments, *available at* http://www.ftc.gov/os/caselist/0610197/analysis.pdf.

vigorously against KMI, the firm in which Carlyle/Riverstone proposed to acquire partial ownership. In so doing, it addressed Carlyle/Riverstone's changed incentives resulting from their investments in KMI.

The aforementioned *Time Warner* case also involved concerns that the minority shareholder, TCI/Liberty, would compete less aggressively against Time Warner once it acquired Time Warner stock. Among other things, the FTC was concerned that once it had an interest in Time Warner, TCI would refrain from placing non-Time Warner programming on its cable systems or from investing in programming that would compete against Time Warner's own. The FTC required the cancellation of long-term agreements that would have obligated TCI to carry certain Time Warner programs, thus restoring incentives for TCI to place non-Time Warner programming on its cable system.[14]

The Department of Justice similarly obtained relief in a proposed transaction in which U S West, a telecommunications provider, indirectly would have acquired a partial interest in a competing provider.[15] U S West proposed to acquire all the stock and assets of Continental Cablevision, Inc., which held a 20 percent interest in Teleport Communications Group (TCG), a direct competitor of U S West in several geographic markets. After the acquisition was announced, Continental reduced its interest in TCG from 20 percent to 11 percent and relinquished its seats on the TCG board. To address the Department's concerns that U S West's

[14] *Time Warner, Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp.*, File No. 961-0004, Analysis of Proposed Consent Order to Aid Public Comment, *available at* http://www.ftc.gov/os/1996/09/twanalys.pdf.

[15] *United States v. U S West, Inc. and Continental Cablevision, Inc.*, No. 96 2529, Competitive Impact Statement (D.D.C. Nov. 5, 1996), *available at* http://www.usdoj.gov/atr/cases/f0900/0973.pdf.

11 percent ownership interest in TCG could influence U S West's competitive decisions and lessen its competitive vigor – and also could provide U S West with competitively sensitive information about TCG's business decisions – U S West agreed to divest all of Continental's interest in TCG.

Conclusion

The competitive effects of partial acquisitions depend on more than whether the acquiring firm can control the acquired firm. Legal and economic scholarship, judicial decisions, and antitrust agency policies and enforcement actions demonstrate that the financial interests acquired and the resulting effects on the competitive interests of both the acquiring firm and the acquired firm must be examined to determine whether the transaction can increase the risk of an exercise of unilateral or coordinated (collusive) market power, as well as create opportunities for exchanges of competitively sensitive information. Whether and how these factors will affect competition depends upon the facts of the specific transaction. The FTC thus encourages FERC to avoid adopting policies that assess competitive effects based solely on control, and to engage in a careful, case-by-case analysis of the potentially significant competitive effects that may stem from partial – but not control-conferring – acquisitions.