

Section	Page no.	Topic	Comments / Recommendations	
1.	General Comment	Bid caps	<p>In addition to distinctions between structural and conduct analysis, the Rules and Guidelines should consider recognizing a distinction between market power as a competition enforcement issue, and as a regulatory issue. Use of market power to raise prices would generally not be considered anticompetitive, but if anything pro-competitive, in the sense that it tends to induce entry. At the same time, such use of market power may well contravene regulatory standards of “just and reasonable” pricing. As a result, several competitive wholesale power markets, as well as the FERC’s proposal for a Standard Market Design, feature market monitoring and mitigation procedures to ensure that prices based on market power do not reach unjust and unreasonable levels. A key consideration in designing such procedures is to ensure that prices are allowed to rise to the level of legitimate scarcity prices, even if those prices are quite high. A key feature in effective, minimally intrusive market monitoring and mitigation schemes is the use of bid caps rather than price caps. Bid caps can be based on the competitive bidding history of a unit, or a reasonable cost-based proxy if the unit does not have a sufficient bidding history, and a generator subject to a bid cap would remain eligible to receive the applicable market clearing price. Thus, a properly designed market monitoring scheme would ensure that mitigation outcomes closely mimic competitive market outcomes. This is likely to be highly preferable to treating market power price increases as a competition enforcement issue, that would subject the respondent to fines and penalties, and likely require the enforcement agency to make very difficult, if not imponderable, decisions on reasonable pricing and profit levels.</p>	
2.	General Comment		See comments on corresponding Rules provisions.	
3.	General Comment		Definitions of market should be clearer. e.g. with time some constraints may appear, when do these lead to market power capability: e.g. Australia uses 50 hours of constraints to create a new price zone.	
4.	General Comment		Issue what the person would not have done if they did not have the market power is very hard to fix. E.g. a peaker could be “waiting” for an outage with a high price – why not? Peakers will not allow fee loaders so will always try to bid high. They also seek opportunities and can perhaps set price between 2-3% a year.	
5.	1.1.3	4	Grammar	Instead of “ <i>competition</i> regulatory regime”, use competitive .
6.	1.1.5	4	Legal Force	Query: Why does the guideline have no legal force? Since it contains provisions for penalties and some procedures on filing (i.e. filing for clearance application, p. 33 [4.2.15]), instead of explicitly stating that the Guidelines do not have legal force and effect, it is better to state that it will be supplementary to the Competition Rules in the same way as an IRR is to the EPIRA; thus, should be complied with.

Section	Page no.	Topic	Comments / Recommendations
7.	1.3.1	6	justified use of market power Consider a minimum effective period of 1 year; six months is quite short. Compare the time periods used in relevant market determinations in the Guidelines.
8.	1.3.1	5	Exception on price fixing prohibition The exception in 1.3.5 should be mentioned in the overview.
9.	1.3.1	6	Scope / Definition of Misuse of Market Power Prohibition Query: The Guidelines prohibits the misuse of power by a person who possesses “substantial degree of power”. Query: A misuse of power by a person who possesses “power less than substantial degree” should also be prohibited. The misuse of such power or influence by a person who do not possess substantial power may be starting point of such person’s emergence as a person with powerful influence or could cause substantial damage to the public. If “substantial power” is retained, such must be particularly defined. The definition in the Competition rules is very vague.
10.	1.3.2	6	“functional dimension” of a relevant market Is specifying a new “functional dimension” of relevant markets necessary? Why is this not subsumed by the supplier side of the standard product and geographic dimensions?
11.	1.4	8	amendment of the Guidelines Replace “relevant persons” with “notice to the electric power industry” (see term used in the preceding sentence). Particular persons should not be singled out and given a special ability to comment.
12.	1.7	9	Definition in EPIRA Capitalization Affiliate is defined in the EPIRA differently. The wordings in the EPIRA should be used in order to prevent any errors in construction. The word “affiliate”, “control”, “market” and “person” should be capitalized in the document.
13.	2.1.5		case in point for setting a market - - if this changes from one hearing to the next and often, the ERC has the opportunity to determine market power issues at any time, step in and regulate prices again – this becomes heavy handed regulation.
14.	2.2.2	12	market definition If goods or services are substitutes, then they should be considered to be in the same market.

	Section	Page no.	Topic	Comments / Recommendations
15.	2.2.3	12	demand-side substitutability	Note also that the demand side may not be able to be measured because of the lack of time of day metering, especially at the residential level?
16.	2.2.5			As for some areas in Australia, sometimes prices will be above 10% of LRAC – that’s good and has been recognized by the ACCC as par for the course when supply is low ! Shows the need to build quickly – noting that lead times are in the order of 4 -5 years, lack of capacity should be allowed to earn the extra. If contracts are in the market it does not matter too much, however – 10% is arbitrary and again leads to early intervention. Next it can be applied to just prices at the peak.
17.	2.2.5	13	small but significant price increase	The US Dept. of Justice & FTC Merger Guidelines, which are followed by the FERC, use 5%.
18.	2.4.3	17	demand side	Consumers can shop around for electricity, but they may not be able to shop for transmission or distribution services. Moreover, purchasers at the wholesale level would not generally be “consumers.”
19.	2.5.1	18	functional dimension	See comment above on “functional dimension”.
20.	2.6.2	19	time	Note also problems associated with lack of time of day metering, at least at the residential level.
21.	3.2.6	22	HHI thresholds	Basis for HHI thresholds? These thresholds are apparently intended to apply to both structural merger analysis, and conduct analysis; is that intended? Appropriate?
22.	3.2.7	22	residual demand	If there is “insufficient generation capacity to meet potential demand,” then there is genuine scarcity, rather than a market power problem. By contrast, a supplier can be “pivotal,” and thus in a position to exercise significant market power, when capacity is sufficient to meet demand (and perhaps exceeds demand by a substantial amount), if meeting demand requires using that supplier’s capacity.
23.	3.3.4	24	IP advantage	Development of intellectual property can confer market dominance through superior skill, foresight and industry, rather than improper means. How is this section meant to be understood in light of Rule 7(1)(d) & (e)?

	Section	Page no.	Topic	Comments / Recommendations
24.	3.3.10	26	economies of scale	This paragraph states: "Moreover, larger generators are likely to be able to offer more reliable supply, as the impact of a single failure of a generating unit will be proportionately lower." This seems counter intuitive. A large generator outage will have a large impact? Is this meant to refer to a large facility with multiple units?
25.	3.3.11	26	access to finance	The reverse may also be true, if a new entrant has a better financial condition and financing record.
26.	4.2.1	31	agreement or understanding	Consider including in description of what is sufficient to constitute an "agreement or understanding," a "conscious commitment to a common scheme."
27.	4.2.2			Do not agree with the issue of publishing bids, this can be discovered through rebidding anyway – bids should be made public 48 hours after day for transparency
28.	4.2.2	31-32	parallel conduct	Prices may be publicly available, and indeed in a clearing price auction should be the same for all sellers in a given geographic area, in the absence of constraints, but parallel conduct in bids, particularly by units with different costs, may be cause for significant suspicion.
29.	4.2.10	33	substantial lessening of competition	However, significant market power may be recurring, or episodic, rather than sustained, over a given time period.
30.	4.3	34	anticompetitive agreements	This section should make clear that the restrictions are aimed at agreements between horizontal competitors.
31.	4.3.2	34	market division agreements	Horizontal market division agreements are generally considered to be in essentially the same category as price fixing.
32.	4.3.3	34	production agreements	Horizontal agreements to limit production are generally considered to be in essentially the same category as price fixing.

Section	Page no.	Topic	Comments / Recommendations	
33.	4.3.7	35	full-line forcing	<p>Consider replacing this and the following section (third-line forcing) with, or at least adding, a discussion of tying arrangements, which is a better developed concept with a stronger economic basis. "Tying" can be defined as the sale of one product or service (the "tying product"), but only on the condition that the buyer take another product or service (the "tied product"). Establishing a tying violation should require a determination that the tying and tied products are in fact distinct items of commerce. In addition, there should be a showing of a sufficient degree of market power over the tying product to be able to impose the tying condition, and that the two products were not offered separately on reasonable terms.</p> <p>Note also that a requirements contract (supplying all of a customers requirements) can have legitimate pro-competitive benefits.</p>
34.	4.3.10	35	joint ventures	<p>Joint ventures should be analyzed under the structural analysis of the section on mergers. If the formation of the joint venture is acceptable, then it should be able to function as a single entity, including for pricing, etc. Of course, the joint venture partners should not be able to use their joint venture as a pretext to restraint their competitive efforts outside the joint venture.</p>
35.	4.3.11	35	joint buying	<p>Joint buying may also entail legitimate efficiencies, and genuine monopsony power is fairly rare.</p>
36.	4.3.12	36	agreements to share information	<p>Reducing "market uncertainties" should not be enough to condemn information sharing, unless the uncertainties relate to the present or future conduct of competitors.</p>
37.	4.4.2	36	definition of price fixing	<p>See comment above on "price fixing provision"</p>
38.	4.4.2	36	Inclusion of supply activity	<p>In order not to create any misunderstanding, the last sentence should state: "..... directly or indirectly related to or used in connection with the generation, transmission, distribution, supply, or sale of electricity.</p>
39.	4.4.4	36	Concept of fixing, controlling, maintaining of price	<p>The concept only considers the continuing element of restraint on price changes. Query: Shouldn't it include any form of manipulation of price which may also increase in the price in relation to misuse of power wherein the powerful participants may use power to fix prices.</p>
40.	4.4.7	37	joint venture pricing	<p>See comment above on "joint ventures".</p>

	Section	Page no.	Topic	Comments / Recommendations
41.	4.6.1	38	clearances	Consideration should be given to promulgation of group clearances, for practices that, at least with certain conditions, can be deemed to pass competitive muster. The EU, for example, as a number of "block exemptions." This would both provide certainty for market participants, and reduce the ERC workload.
42.	4.6.5	39	effective period of clearances	Given the introductory statements in the Guidelines about the relative status of the Guidelines and the Rules, and the importance of this point to enabling parties to complete transactions, this needs to be clear in the Rules.
43.	4.6.24			Public benefits should be the net sum of benefits including transmission, distribution generators and customers
44.	4.7.1	44	misuse of market power	This paragraph should make clear that the reference to price fixing is to vertical price fixing.
45.	5.1.2	46	misuse of market power	This paragraph states that: "Conduct amounting to a misuse of market power cannot be authorized by the ERC." Can this statement be squared with the possible authorization of price fixing?
46.	5.2.13	49	justification of market power misuse	See comment above on the "determination of misuse of market power".
47.	5.3.2	50	excessively high prices	See general comment above re bid caps. Query whether charging high prices should be considered a regulatory problem, rather than a problem of competition enforcement, since high prices will encourage entry. Note also that determining the profitability of a pricing strategy may be very difficult, and may require analysis of all the supply, hedging and other contracts a party may have entered.
48.	5.3.9	52-53	predatory pricing	This discussion should include a recoupment requirement in order to establish predatory pricing. Generally, predatory pricing will not make economic sense, and thus is not likely to have occurred, unless the pricing entity will be able to succeed both in driving competitors from the relevant market, and in imposing a subsequent price increase sufficient both to offset the losses from the predatory prices, and to generate enough supra-competitive returns to make the strategy worth while. This usually means that the relevant market must exhibit significant barriers to entry.
49.	5.3.10	53	ii	Suggest adding the word "contractual" in front of "store" on the last line
50.	5.3.14	54	full-line forcing	See comment above on "full-force lining".

	Section	Page no.	Topic	Comments / Recommendations
51.	5.3.15	55	full-line forcing	If the concept is retained, it would be useful to introduce the concept of inter-brand vs. intra-brand competition. If a strategy restrains intra-brand competition (i.e., competition in a manufacturer's own goods), but does so in order to enhance inter-brand competition (i.e., competition with goods of other manufacturers), then the restraint should be deemed pro-competitive.
52.	6.1.1	57	mergers and acquisitions	Consider dealing with joint ventures here rather than as an anticompetitive agreement problem.
53.	6.1.2	57	acquisition of assets	Consistent with a structural analysis, the second bullet should refer to the entity that acquired the assets. If the assets are the subject of some sort of agreement to be used in another business, that would be a conduct rather than a structural problem.
54.	6.2.1	59	directly or indirectly acquire	See comments above on "scope of merger rule" and "indirect acquisitions"
55.	6.3.4	62	mergers that do not confer control	This section appears to be mixing structural with conduct concerns. Structural concerns should focus on control. Otherwise the standards become too vague, and subject to misapplication. Correspondingly, if there is no control between two entities, it would seem to follow that coordination between would entail some sort of agreement or understanding. The concerns here should be addressed with an analysis of whether there is in fact some sort of improper coordination between separate entities. Indeed, this is one reason why the "agreement or understanding" standard does not require a formal contractual agreement. Moreover, as the Guidelines note, "control" does not necessarily require a majority share.
56.	6.3.5	62	incremental mergers	See comment above on "mergers that do not confer control".
57.	6.3.9	64	HHI thresholds	These are fairly generous standards.
58.	6.3.12			3 years too short
59.	6.3.12	65	timely entry	The US DOJ/FTC Horizontal Merger Guidelines use two years.
60.	6.4.5	69	clearance timing	See comment on "60 day waiting period".

	Section	Page no.	Topic	Comments / Recommendations
61.	6.4.22	72	other public benefits	What is meant by “business efficiency” as opposed to “economic efficiency”? Need to distinguish between merger-related efficiencies, and cost savings that could be realized by contract or other non-merger means?
62.	7.1.2	74	Cease and desist	The issuance of a cease and desist order may only be made after due notice and hearing so such must be explicitly stated.
63.	7.1.6	75	price limits	See general comments above re bid caps.
64.	7.2.1	75	Deterring violations	In deterring violations, you cannot impose fines and penalties but the ERC may order the party to desist from performing an act which may lead to a violation of the Competition rules.
65.	8.2.1	78	penalties	At the end of the second bullet, “and” should read “or”?
66.	8.3.2	79	right to counsel	See comment above on “ERC Searches”. This is an important protection, and should be in the Rules, not just the Guidelines.
67.	9.1	80	misspelled	License
68.	9.1	80	exclusions	See comment on “scope of exceptions”.
69.	10.3	82	disclosure of confidential information	See comments above on “ERC disclosure of confidential information”.
70.	11.1.1	83	Associated firm engaged in generation	<p>The second item should be reworded to comply with the EPIRA and consistent with the technical meaning of an associated firm, as follows: “prohibit a distribution utility from sourcing more than 50% of its total demand from an associated firm engaged in generation.”</p> <p>Define an Associated Firm to mean: any person which, alone or together with any other person, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such entity.</p>