FERC, MAY I? WHEN IS FERC AUTHORIZATION NEEDED FOR TRANSFERS OF PUBLIC UTILITY ASSETS AND EQUITY INTERESTS IN PUBLIC UTILITIES?

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Synopsis: Section 203 of the Federal Power Act requires parties engaging in certain transactions involving public utilities to obtain prior authorization from the Federal Energy Regulatory Commission (FERC).[1] This requirement generally applies to transfers of public utility assets, such as electric transmission lines, as well as "paper facilities," such as tariffs and contracts for sale of electric energy at wholesale or for interstate electric transmission service. It also applies to many change-in-control transactions and acquisitions of securities in public utilities. This article examines the scope of FERC jurisdiction under section 203, discusses certain questions about whether the FERC has, or should have, jurisdiction over these transactions, and suggests how the FERC could clarify the scope of its jurisdiction and, in some instances, even reduce it.

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1. References to "FERC" and the "Commission" in this article mean the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission.

I. INTRODUCTION

Parties to transactions involving transfers of public utility assets and equity interests in public utilities face an important question: do they need advance authorization from the FERC under section 203 of the Federal Power Act (FPA)?[2] The answer can affect the timing of a transaction, since obtaining FERC authorization requires preparing and filing a comprehensive application, including a copy of the agreement documenting the transaction (or at least a draft agreement or term sheet that accurately reflects the material provisions), and then waiting for the FERC to process the application and issue an order. It also affects the risks to the parties, since, if FERC approval is required, there is always a possibility that the FERC may not grant it (or may grant it with unacceptable conditions) or that the time needed to obtain it may interfere with the closing of the transaction.

The FERC has provided guidance in its orders, regulations, and policy statements, but in many instances the guidance does not resolve the issue of whether authorization is required in particular circumstances. When faced with uncertainty about their section 203[3] obligations, parties either proceed without obtaining authorization, assuming they are sufficiently convinced that authorization is not required, or they seek FERC approval to ensure their transaction is compliant, despite knowing it might not be required. Because parties typically will not proceed without a clean opinion of counsel that all necessary regulatory authorizations have been obtained, they generally choose the latter course: to file an application with the FERC "out of an abundance of caution," without necessarily agreeing that the FERC has jurisdiction.[4] The result is that parties to planned transactions often end up filing unnecessary

2. 16 U.S.C. § 824b (2012).

3. Unless otherwise indicated, "section 203" refers to FPA § 203, codified at 16 U.S.C. § 824b (2012).

4. *See, e.g.*, *Pasco Cogen, Ltd.*, Application for Authorization Under Section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities and Request for Expedited Consideration and Confidential Treatment, FERC Docket No. EC13-74-000 (Feb. 8, 2013). A search by the author in the FERC's online records information system (eLibrary (http://elibrary.ferc.gov/idmws/search/fercgensearch.asp)) indicates that approximately 15% or more of all section 203 applications filed over the past seven years were filed out of an abundance of caution in the face of uncertainty regarding the scope of the FERC's jurisdiction. This is only a rough estimate; a more definitive number would require an examination of each of the more than 1,000 section 203 applications filed during this period.

applications—an impediment that could be avoided if the FERC were to provide different, or clearer, answers.

Unnecessary section 203 applications increase transactional costs and risks for public utilities, their owners, and investors. They also increase the workload for the FERC and make it more likely that other parties facing similar circumstances in the future also will file an application. Deciding not to file a section 203 application in the face of uncertainty also creates risks for the parties to a transaction, since the FERC might later claim jurisdiction over the transaction, which could lead to civil penalties and even arguments that the transaction should be voided.

This article discusses the bases for the FERC's jurisdiction to approve public utility transactions under section 203 of the Federal Power Act and examines some of the sources of uncertainty about section 203's application. It also discusses those areas in which the FERC could resolve questions about its jurisdiction, or disclaim jurisdiction, thereby reducing the burden of unnecessary filings.[5]

II. Overview of Section 203 of the FPA

FERC jurisdiction under section 203 has two separate bases—one for transactions by public utilities[6] and one for transactions by holding companies.[7] Section 203(a)(1) requires prior authorization from the FERC before a *public utility*[8] may:

> (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000;
> (B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;
> (C) purchase, acquire, or take any security with a value in excess of \$10,000,000 of any other public utility;
> (D) purchase, lease, or otherwise acquire an existing generation facility — (i) that has a value in excess of \$10,000,000; and (ii) that is used for interstate wholesale sales over which the Commission has jurisdiction for ratemaking purposes.[9]

Section 203(a)(2) requires prior authorization from the FERC before a *holding company*[10] in a holding company system that includes a transmitting utility or an electric utility[11] may:

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5. The standards applied by the FERC to approve or deny applications under section 203 are beyond the scope of this article. For a recent discussion of the substantive standards applied by the FERC in considering merger applications, see Mark J. Niefer, *Explaining the Divide Between DOJ and FERC on Electric Power Merger Policy*, 33 ENERGY L.J. 505 (2012).

6. 16 U.S.C. § 824b(a)(1).

7. 16 U.S.C. § 824b(a)(2).

8. A "public utility" is any person who owns or operates facilities used for the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce but does not include the United States, a state or any agency, authority, or instrumentality of, or any corporation that is wholly owned by, the United States or any state. 16 U.S.C. § 824(e); *see also* Jersey Cent. Power & Light Co. v. Fed. Power Comm'n, 319 U.S. 61, 81-82 (1943); Hartford Elec. Light Co. v. Fed. Power Comm'n, 131 F.2d 953, 955 (1942).

9. 16 U.S.C. § 824b(a)(1)(A)-(D).

> purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company,[12] or a holding company in a holding company system that includes a transmitting utility, or an electric utility company.[13]

Until 2005, the FERC's jurisdiction under section 203 was limited solely to the types of transactions addressed in what now are sections 203(a)(1)(A)–(C), with a lower dollar threshold of $50,000 instead of the current $10,000,000 threshold, where applicable.[14] The Energy Policy Act of 2005 (EPAct 2005)[15] increased the jurisdictional dollar threshold to $10,000,000, added a new section, 203(a)(1)(D), which governs acquisitions by public utilities of certain existing generating facilities, and added a new section 203(a)(2), which governs certain transactions by holding companies.[16] EPAct 2005 also reorganized the language of the existing provisions in section 203 and added, in sections 203(a)(4)–(6), standards and procedural requirements with respect to FERC action in response to applications for authorization as well as certain definitions.[17]

The reason for increasing the dollar threshold to $10,000,000 generally is understood to reflect simply an adjustment for inflation since section 203 was enacted in 1935. As discussed in Section V.B below, the new jurisdiction over

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10. A "holding company" generally is "any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company" that owns or operates facilities used for (a) "the generation, transmission, or distribution of electric energy for sale" (i.e., an "electric utility company") or (b) "the distribution at retail . . . of natural gas for heat, light, or power" (i.e., a "gas utility company"). 16 U.S.C. § 824b(a)(6); 42 U.S.C. § 16451(5), (7), (8), (14) (2012); *see also* 18 C.F.R § 33.1(b)(4); Order No. 669, *Transactions Subject to FPA Section 203*, F.E.R.C. STATS. & REGS. ¶ 31,200 at PP 69-73 (2005) (codified at 18 C.F.R. pts. 2 and 33) [hereinafter Order 669], *order on reh'g*, Order No. 669-A, F.E.R.C. STATS. & REGS. ¶ 31,214 (2006) [hereinafter Order 669-A], *order on reh'g*, Order No. 669-B, F.E.R.C. STATS. & REGS. ¶ 31,225 (2006) [hereinafter Order 669-B]. "Holding company" does not include financial institutions that own securities for certain banking purposes, 42 U.S.C. § 16451(8)(B), nor does it include a state (or a political subdivision, agency, authority, or instrumentality of a state) or an electric power cooperative, 18 C.F.R. § 33.1(b)(4).

11. A "holding company system" is "a holding company, together with its subsidiary companies." 42 U.S.C. § 16451(9). A "transmitting utility" is "an entity (including an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy – (A) in interstate commerce; (B) for the sale of electric energy at wholesale." 16 U.S.C. § 796(23) (2012). An "electric utility" is "a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy" and "includes the Tennessee Valley Authority and each Federal power marketing administration." 16 U.S.C. § 796(22).

12. An "electric utility company" is a company that "owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale." 42 U.S.C. § 16451(5); *see also* Order No. 669, *supra* note 10, at P 51; Order No. 669-A, *supra* note 10, at PP 41-54, 59-60. Note that this definition includes exempt wholesale generators, qualifying facilities, and foreign utility companies, as well as utilities operating in Hawaii, Alaska, and areas of Texas that are not engaged in interstate commerce, but it does not include power marketers that do not own or operate any facilities used for generation, transmission, or distribution of electric energy for sale. Order No. 669, *supra* note 10, at PP 51, 71; Order No. 669-A, *supra* note 10, at PP 29, 54.

13. 16 U.S.C. § 824b(a)(2).

14. Order No. 669, *supra* note 10, at P 1.

15. Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified at 42 U.S.C. §§ 15801-16524 (2012)).

16. 16 U.S.C. § 824b(a)(1)-(2).

17. *Id.* § 824b(a)(4)-(6).

acquisitions by public utilities of existing generation facilities was intended to close a loophole under which public utilities had been able to avoid FERC review of transactions by acquiring generation facilities without acquiring the associated, FERC-jurisdictional interconnection facilities. The addition of the new section 203(a)(2), providing for FERC jurisdiction over acquisitions by holding companies, was intended to compensate for the repeal (also enacted as part of EPAct 2005) of the Public Utility Holding Company Act of 1935 (PUHCA 1935), which had included a section providing for review of such acquisitions by the U.S. Securities and Exchange Commission (SEC), as discussed in Section VI.A below.

III. Application of Section 203(a)(1)(A) to Transfers of Public Utility Assets and Changes in Public Utility Ownership/Control

The majority of applications filed at the FERC for authorization under section 203 are for dispositions of facilities by public utilities pursuant to section 203(a)(1)(A). The most obvious situation in which this provision applies is when a public utility transfers to another person a facility, such as an electric transmission line, that is subject to the FERC's jurisdiction under Part II of the FPA.[18] The FERC's jurisdiction over such physical facilities commences once they are used for wholesale sales or transmission of electric energy in interstate commerce.[19] Although the FERC generally does not have jurisdiction under section 203(a)(1)(A) over dispositions of electric-generating facilities,[20] the FERC often exercises jurisdiction over transactions that include transfers of such facilities because FERC-jurisdictional transmission facilities, such as interconnection lines and step-up transformers, typically are transferred together with the generating facilities. Even if the FERC-jurisdictional assets account for only a small portion of the total assets being transferred, the FERC evaluates the overall effects of the transaction, including effects related only to the generating facilities, rather than just the effects related to the transfer of the FERC-jurisdictional facilities.[21]

18. *See, e.g.*, *Public Serv. Co. of NM*, 29 F.E.R.C. ¶ 61,282, at p. 61,576 (1984) (holding that section 203 applies only to facilities that are jurisdictional under Part II of the FPA and not to other facilities that are subject to the FERC's jurisdiction, such as facilities that are jurisdictional under the Natural Gas Act). Note that whereas electric-generating facilities are not FERC-jurisdictional, their interconnection facilities are, so that transfers of electric-generating facilities including their interconnection facilities are subject to section 203 authorization. A transfer of such generating facilities without interconnection facilities is not subject to section 203(a)(1)(A). *See, e.g.*, *Perryville Energy Partners, L.L.C.*, 109 F.E.R.C. ¶ 61,019 at P 14 (2004); *Western Ky. Energy Corp*., 83 F.E.R.C. ¶ 61,336, at p. 62,361 (1998); *Green Mtn. Power Corp.*, 53 F.E.R.C. ¶ 61,035, at p. 61,138 n.15 (1990); *KGen Enter. LLC*, 115 ¶ F.E.R.C. 62,055, at p. 64,407 (2006). Such generation-only transfers may be subject to FERC jurisdiction under section 203(a)(1)(D), however, as discussed in Section V.B., below.

19. *See, e.g.*, *Resources Recovery (Dade Cnty.), Inc.*, 20 F.E.R.C. ¶ 61,138, at p. 61,303 n.11 (1982). Note that such facilities may be first used upon commencement of test operations and prior to the actual commercial operation date.

20. Section 201 of the FPA provides that the FERC "shall not have jurisdiction, except as specifically provided in [Parts II and III of the FPA], over facilities used for the generation of electric energy." 16 U.S.C. § 824 (2012).

21. *Ameren Energy Generating Co.*, 108 F.E.R.C. ¶ 61,081 at P 25 & n.19 (2004).

Less intuitively, section 203(a)(1)(A) also applies to dispositions of facilities other than physical public utility assets and to certain change-in-control transactions.

A. Dispositions of "Paper Facilities"

Section 203(a)(1)(A) requires FERC authorization for dispositions by public utilities of "paper facilities," such as tariffs, contracts, and other books and records.[22] So, for example, a power marketer that has no physical facilities requires prior FERC authorization for the transfer of its FERC tariff, its contracts for sale of power at wholesale, and its related books and records (or any part of these with a value in excess of $10 million). Pursuant to section 205 of the FPA, a public utility must have a rate schedule or tariff on file with the FERC before it is authorized to engage in sales of electric energy at wholesale in interstate commerce or transmission of electric energy in interstate commerce.[23] Such a tariff or rate schedule becomes a "paper facility" subject to the requirements of section 203 upon the FERC's acceptance of the tariff or rate schedule.[24] In addition to tariffs, public utilities typically have contracts, such as power purchase agreements or transmission service agreements, setting out the terms and conditions of specific sales of electric energy[25] and transmission services.[26] Both sellers and purchasers under power purchase agreements often assign their interests in these contracts to other parties, but under section 201 of the FPA it is the sales of electric energy—not the purchases—that fall under the FERC's jurisdiction. A question sometimes arises with respect to transfers of a purchaser's interest in a power purchase agreement where the transfer results in a change in control over an electric-generating facility. As discussed below, sales of direct or indirect proprietary interests in electric-generating facilities or their

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22. *Citizens Energy Corp.*, 35 F.E.R.C. ¶ 61,198, at p. 61,453 (1986) (holding that a wholesale power marketer with no physical facilities is subject to jurisdiction under section 203 but that revenues derived from wholesale power sales are not subject to jurisdiction under section 203); Hartford Elec. Light Co. v. Federal Power Comm'n, 131 F.2d 953, 961 (2d Cir. 1942); *see also Enova Corp.*, 79 F.E.R.C. ¶ 61,107, at p. 61,489 & nn.17-20 (1997).

23. 16 U.S.C. § 824(d).

24. *See, e.g.*, *Long Lake Energy Corp.*, 51 F.E.R.C. ¶ 61,262, at p. 61,771-72 & nn.14 & 21 (1990); *Ocean State Power*, 38 F.E.R.C. ¶ 61,140, at p. 61,378 & n.4 (1987). It would appear that, more precisely, jurisdiction should attach upon the effective date of the tariff or rate schedule, which could be earlier or later than the date of the FERC's acceptance, but the FERC has not been clear on this point. *See, e.g.*, *BP Wind Energy N. Am. Inc.*, 134 F.E.R.C. 62,223, at p. 64,399 (2011) (FERC staff order issued under delegated authority stating that an applicant will become subject to FERC jurisdiction upon the effective date of its tariff filed with the FERC).

25. Although section 201 of the FPA mentions only electric energy, this has been interpreted to include certain other related products, such as electric capacity and ancillary services. *See, e.g.*, Order No. 697, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,252 at P 12, 72 Fed. Reg. 39,904 (2007) (codified at 18 C.F.R. pt. 35) [hereinafter Order No. 697].

26. Some contracts now are not really *paper* facilities, because they may be entered into using electronic platforms, such as online systems used in organized electric markets in various parts of the country for sales of FERC-jurisdictional services. The electronic records established on these systems should be considered jurisdictional to the extent that they establish the terms and conditions of a public utility's jurisdictional sales. *See, e.g.*, *Potomac Elec. Power Co.*, 124 F.E.R.C. ¶ 62,093, at p. 64,245 & n.3 (2008) (authorizing the transfer of a public utility's rights and obligations to sell capacity in the PJM Interconnection L.L.C. Reliability Pricing Model program, under which rights and obligations are auctioned and transferred on an online platform).

owners can require authorization under section 203 when there is a change in control. An assignment solely of a purchaser's interest in a power purchase agreement resulting in a change in control over an electric-generating facility, however, does not require FERC authorization under section 203.[27]

B. Change-in-Control Transactions

In addition to actual transfers of facilities, including paper facilities, section 203(a)(1)(A) applies to change-in-control transactions resulting from direct or indirect transfers of proprietary ownership interests, such as stock or partnership or membership interests, in public utilities.[28] For example, a public utility generally is required to obtain FERC authorization before one of its current owners may transfer 10% or more of the public utility's equity interests to a new owner.[29] Even though section 203(a)(1) applies only to public utilities, and not to public utility holding companies, the FERC has used the provisions in section 203(a)(1) to exercise jurisdiction over mergers between, and changes of control with respect to, such holding companies.[30] The FERC's jurisdiction under section 203(a)(1), however, does *not* extend to changes in control where there is no transfer of proprietary interests involved.[31]

It is not completely clear whether the FERC has jurisdiction under section 203(a)(1) over an acquisition of a larger upstream proprietary interest in a public utility by an entity that has already received authorization to acquire an interest deemed to constitute control over the public utility. Arguably, once the FERC has approved a change-in-control transaction with no limitation on the amount of interests that can be held by the acquirer, there is no further change in control as a result of the acquisition of additional ownership interests by the same acquirer,

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27. *New England Power Co.*, 82 F.E.R.C. ¶ 61,179, at p. 61,666, *reh'g denied*, 83 F.E.R.C. ¶ 61,275, at p. 62,147 (1998) (finding that a customer under an FPA-jurisdictional contract did not require section 203 approval to transfer its interests in the contract because the right to receive a jurisdictional service is not a facility used for the transmission or sale of electric energy at wholesale); *Boston Edison Co.*, 109 F.E.R.C. ¶ 61,309 at P 8 (2004) (finding the same); *see also* Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 11 (D.C. Cir. 2002) (discussed further below). An entity acquiring control over an electric-generating facility through assignment of a purchaser's interest in a power purchase agreement may have an obligation to report this to the FERC under section 205 of the FPA, however. 18 C.F.R. § 35.42(a)(2).

28. *See, e.g.*, *Central Vt. Pub. Serv. Corp.*, 39 F.E.R.C. ¶ 61,295, at p. 61,960 (1987); *Central Ill. Pub. Serv. Co.*, 42 F.E.R.C. ¶ 61,073, at p. 61,328 (1998); *Enova Corp.*, 79 F.E.R.C. ¶ 61,107, at pp. 61,493-94 (1997). The FERC has interpreted this jurisdiction over "change-in-control" transactions to derive from the "or otherwise dispose" language of section 203(a)(1) (although the FERC at times also cites the "merge or consolidate" language in section 203(a)(1)) and has noted that the standard for review of applications for authorization under section 203 specifically refers to "change-in-control" in section 203(a)(4). *See also FPA Section 203 Supplemental Policy Statement*, F.E.R.C. STATS. & REGS. ¶ 31,253 (2007), 120 F.E.R.C. ¶ 61,060 at P 45 (2007), 72 Fed. Reg. 42,277, *clarified*, 122 F.E.R.C. ¶ 61,157 (2008) [hereinafter *Supplemental Policy Statement*]; *PG&E Corp.*, 80 F.E.R.C. ¶ 61,041, at p. 61,129 (1997).

29. *See infra* notes 34-37 and accompanying text.

30. *See, e.g.*, *Illinois Power Co.*, 67 F.E.R.C. ¶ 61,136, at p. 61,351 (1994). In *Illinois Power*, the FERC "clarified" its order in *Missouri Basin Municipal Power Agency v. Midwest Energy Co.*, 55 F.E.R.C. ¶ 61,464 (1991) in which the FERC previously had disclaimed such jurisdiction. The FERC later rejected arguments relying on *Missouri Basin* in *Enova Corp.*, 79 F.E.R.C. ¶ 61,107 (1997), and *Morgan Stanley Capital Group Inc.*, 79 F.E.R.C. ¶ 61,109, at p. 61,504 (1997). *See also NorAm Energy Servs., Inc.*, 79 F.E.R.C. ¶ 61,108, at p. 61,500 (1997); *Phelps Dodge Corp.*, 121 F.E.R.C. ¶ 61,251 at PP 15-18 (2007) (affirming the FERC's interpretation after enactment of EPAct 2005).

31. *Atlantic City Elec. Co.*, 295 F.3d at 11-13.

so that no further authorization should be required. However, the FERC has not issued any clear guidance on this point.[32]

Although the requirement under section 203(a)(1)(A) to obtain FERC authorization for change-in-control transactions applies to the public utility whose upstream ownership is changing as a result of the transaction, the real party in interest often is the entity seeking to acquire the voting securities of the public utility or its holding company. Accordingly, the acquiring entity often seeks the authorization from the FERC under section 203(a)(1), either in a joint filing with the subject public utility or sometimes even without any involvement by such public utility. For example, Exelon Corporation filed an application with the FERC in connection with its hostile takeover bid for NRG Energy, seeking authorization for, among other things, a change in control with respect to NRG Energy's subsidiaries that were public utilities under the FPA, even though NRG Energy and its public utility subsidiaries did not participate in that application.[33]

Issues often arise regarding whether a particular transaction involves a change in control with respect to a public utility and therefore requires FERC authorization. Generally, the FERC presumes that a transfer of less than 10% of the voting securities of a public utility does not constitute a transfer of control.[34] But parties to a proposed transaction often cannot rely on this general presumption because the FERC has emphasized that the determination of whether a transaction results in a change of control is a fact-based inquiry and that no "bright-line standard . . . will encompass all relevant factors and possibilities."[35] Accordingly, the FERC has warned entities involved in proposed transactions that they have the burden to decide whether they need to obtain FERC authorization for the transaction.[36] As a caution against relying on the 10% presumption, the FERC has described a scenario in which multiple non-utility companies under common control might each acquire less than 10% of a public utility's voting securities but would collectively hold more than 10%; in that case, the FERC would view the transaction as potentially subject to authorization under sections 203(a)(1)(A) and (B).[37]

The FERC has made some effort to provide guidance on what constitutes a "change in control," but questions remain. In September 2008, the FERC

32. *See, e.g.*, *Supplemental Policy Statement*, *supra* note 28, at P 55 (citing *PDI Stoneman, Inc.*, 104 F.E.R.C. ¶ 61,270 at PP 15-17 (2003) (discussing that a transfer of one-third of the voting stock in a public utility may have constituted a change in control despite the existence of a supermajority voting provision and that "the material change in the proportion of membership interests [after the second transaction involving acquisition of an additional one-third of the voting shares] resulted in a change in control")); *LS Power Dev., LLC*, 125 F.E.R.C. ¶ 61,267 at PP 24, 28 (2008) (asserting jurisdiction over an increase in ownership of common stock in a public utility holding company to 40% where the FERC previously had authorized the acquisition by the same acquirers of up to 20% of such common stock).

33. *Exelon Corp.*, 127 F.E.R.C. ¶ 61,161 at PP 25-26 (2009), *reh'g and vacatur denied*, 130 F.E.R.C. ¶ 61,095 (2010) (denying motion for rehearing as moot given that Exelon withdrew its tender offer, and denying motion for vacatur); *see also Cincinnati Gas & Elec.*, 64 F.E.R.C. ¶ 61,237, at p. 62,682 (1993); *Kansas City Power & Light*, 53 F.E.R.C. ¶ 61,097, at p. 61,273 (1990).

34. *Supplemental Policy Statement*, *supra* note 28, at P 57.

35. *Id.* at P 43.

36. *Id.* at PP 55-56.

37. Order No. 669-B, *supra* note 10, at P 29 (citing *Goldman Sachs Group, Inc.*, 114 F.E.R.C. ¶ 61,118 at P 15, *order on reh'g*, 115 F.E.R.C. ¶ 61,303 (2006)).

established a proceeding to consider a request for "guidance with respect to the question of when investments in publicly-held companies will be deemed to convey 'control.'"[38] The FERC held a technical conference in December 2008, a number of parties filed comments in this proceeding in 2009, and the FERC issued a notice of proposed rulemaking in January 2010 to provide further guidance on this subject.[39] The proposal would have provided some clarity with respect to conveyance of "control" for purposes of section 205 of the FPA (specifically, it would have included a revised definition of "affiliate" and a new definition of "voting security").[40] With respect to section 203, the proposal would have added a new blanket authorization[41] for acquisitions of between 10% and 20% of the voting securities of a public utility or holding company, subject to certain requirements limiting the blanket authorization to situations where the acquisition was not intended to and would not have the effect of the acquiring company exercising control over the target company.[42] The proposal did not include any clarification of the definition of control for purposes of section 203.

The FERC has not yet issued a final rule in this proceeding, perhaps because of concerns raised by the American Antitrust Institute, the Federal Trade Commission (FTC), the American Public Power Association, and the National Rural Electric Cooperative Association.[43] For example, the FTC submitted comments stating that affiliation even at ownership levels below 20% can reduce the incentives for parties to compete and can provide opportunities for sharing information that facilitates collusion, even if the investors provide assurances that their investments are not intended to exercise control.[44] Given the concerns raised about the FERC's proposal for a blanket authorization based on the percentage of ownership held by the acquirer, a better approach might be for the FERC to go back to the more fundamental question of what type of interest represents a "voting security."[45] It would be interesting to hear the views of the

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38. Notice Redocketing Proceeding, *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, FERC Docket No. PL09-3-000 (Nov. 5, 2008) (originally Docket No. EL08-87).

39. Notice of Proposed Rulemaking, *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, F.E.R.C. STATS. & REGS. ¶ 32,650, 75 Fed. Reg. 4498 (2010) [hereinafter Control and Affiliation Rulemaking].

40. *Id.* at P 60. Section 205 of the FPA governs the rates and associated terms and conditions of service charged or imposed by public utilities that make sales of electric energy at wholesale in interstate commerce or provide electric transmission service. 16 U.S.C. § 824d.

41. See Section III.D. below for a general discussion of blanket authorizations under section 203.

42. Control and Affiliation Rulemaking, *supra* note 39, at PP 33-34.

43. The comments submitted in this proceeding prior to publication of the proposed rulemaking are summarized in the 2009 *Report of the Competition & Antitrust Committee*, 31 ENERGY L.J. 187, 195-98 (2010).

44. Comment of the FTC, FERC Docket No. RM09-16-000 at PP 58-59 (Mar. 29, 2010).

45. As discussed in Section III.B.(1) below, the FERC has stated that a transfer of non-voting securities is not jurisdictional under section 203(a)(1) as long as the non-voting security does not convey control. Order No. 708, *Blanket Authorization Under FPA Section 203*, F.E.R.C. STATS. & REGS. ¶ 31,265 at P 55, 73 Fed. Reg. 11,003 (2008) [hereinafter Order No. 708] (citing the Supplemental Policy Statement, *supra* note 28, at P 37; *Legg Mason, Inc.*, 121 F.E.R.C. ¶ 61,061 at P 18 (2007)), *order on reh'g*, Order No. 708-A, F.E.R.C. STATS. & REGS. ¶ 31,273, 73 Fed. Reg. 43,066 (2008) [hereinafter Order No. 708-A], *order on reh'g*, Order No. 708-B, F.E.R.C. STATS. & REGS. ¶ 31,290, 74 Fed. Reg. 25,410 (2009) [hereinafter Order No. 708-B]. But the FERC has not clearly defined the term "voting security" for purposes of section 203, even though it has

FTC and other parties on whether equity interests with limited rights with respect to management of the public utility or holding company raise the same types of concerns about possible anti-competitive effects as did the FERC's blanket authorization proposal.

1. Uncertainty About Whether Interests Are "Voting Securities"

In the absence of clear advice from the FERC, public utilities and their equity investors often face the challenge of determining whether equity interests constitute "voting securities" under section 203(a)(1)(A). The FERC has disclaimed jurisdiction under section 203(a)(1)(A) over transfers by public utilities of "non-voting" securities that do not convey control, while noting that jurisdiction does attach if securities that may be labeled "non-voting" nevertheless convey control—for example, through veto rights.[46] Public utilities that issue "non-voting" securities with limited consent or veto rights often cannot determine with certainty whether they benefit from this disclaimer of jurisdiction, however, because there is no bright line for establishing when such securities convey control. In *D.E. Shaw Plasma Power*, the FERC disclaimed jurisdiction under section 203 over certain transfers of passive interests in a public utility, where the investors had only limited consent rights with respect to actions of the public utility in which they held interests.[47] The FERC explained that the passive equity investors "will not have authority to manage, direct or control the activities of [the public utility] in its day-to-day operations, as it engages in wholesale power transactions" and that the consent rights "do not impart control of jurisdictional facilities to the [p]assive [i]nvestors and will not affect the ability of [the public utility] to conduct jurisdictional activities."[48]

In Order No. 669, the FERC provided a hint as to what types of veto rights over management actions could be retained by holders of non-voting securities without having such securities be considered to convey "control" triggering jurisdiction under section 203.[49] The FERC stated that it "anticipate[d] that [its] treatment of such issues" would "generally be consistent" with precedents developed in connection with the Commission's evaluation of the independence

provided clearer guidance for purposes of section 205 of the FPA. *See, e.g.*, *AES Creative Res., L.P.*, 129 F.E.R.C. ¶ 61,239 at PP 21-28 (2009).

46. Order No. 708, *supra* note 45, at P 55.

47. *D.E. Shaw Plasma Power, L.L.C.*, 102 F.E.R.C. ¶ 61,265 at PP 15, 19 (2003). The consent rights included material amendments to the indirect parent company's LLC Agreement under certain specified circumstances; issuance of new interests senior to the then-existing member interests of the indirect parent company; adoption of new limited liability company agreements (or other operative or constituent documentation) in connection with mergers, consolidations, combinations, or conversions in certain cases; appointment of a liquidator in certain circumstances; and assignment of investment advisory contracts under certain circumstances. *Id.* at PP 6 n.3, 19. This order predated the enactment of section 203(a)(2) of the FPA and involved the prior version of section 203(a), which is generally similar to the current section 203(a)(1) of the FPA. *But see PDI Stoneman, Inc.*, 104 F.E.R.C. ¶ 61,270 at P 17 (2003) (holding that a transfer of membership interests in a public utility constituted a change-in-control transaction subject to FERC jurisdiction under section 203, even though the number of membership interests held did not surpass the 80% level required for approval of certain "major investment and broad-level actions" under the supermajority provisions of the operating agreement).

48. *D.E. Shaw Plasma Power, L.L.C.*, 102 F.E.R.C. ¶ 61,265, at P 19.

49. Order No. 669, *supra* note 10, at P 141 n.101.

of entities seeking Regional Transmission Organization (RTO) status[50] and the "no action" letter process of the SEC as applied to PUHCA 1935.[51] Perhaps the most significant SEC precedent to which the FERC likely was referring is an SEC no-action letter involving General Electric Capital Corporation (GE Capital).[52] In *GE Capital*, the SEC staff declined to recommend enforcement action under PUHCA 1935 in connection with a transaction in which GE Capital and its subsidiary would become holders of certain interests in a partnership (which would be a "holding company" under PUHCA 1935) and would be granted consent rights with respect to certain actions of the general partner in this limited partnership.[53] Although GE Capital and its subsidiary had numerous consent rights, these generally had the purpose of protecting the investors' interests in the partnership rather than directing the day-to-day management of the partnership.[54]

In additional guidance provided after Order No. 669 in the section 203 context, however, the FERC has not addressed the voting rights discussed in the SEC's no-action letter process in any detail. In its *Supplemental Policy Statement*, the FERC stated that an investment in a public utility that does not convey control will be considered to be a passive investment not subject to section 203(a)(1)(A) if, among other things:

> (1) the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity; and (2) the acquired interest gives the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities); and (3) the acquiring entity has a principal business other than that of producing, selling, or transmitting electric power.[55]

Diluting the value of this guidance, the FERC added that "the circumstances that convey control in section 203 analysis vary depending on a variety of factors" and that "the burden remains upon the entities involved in a proposed transaction to decide whether they need to obtain Commission authorization under section 203 to undertake a proposed transaction."[56] The

50. *Id*. The FERC has issued several orders addressing whether market participants' veto and consent rights with respect to certain actions of entities proposing to establish RTOs would interfere with the independent functioning of such RTOs as required by section 35.4(j)(1) of the FERC's regulations (issued under section 205 of the FPA as Order No. 2000, F.E.R.C. STATS. & REGS ¶ 31,089, 65 Fed. Reg. 809 (Jan. 6, 2000)). *See, e.g.*, *ITC Holdings Corp.*, 102 F.E.R.C. ¶ 61,182 at PP 26-28, 41-42 (2003); *Trans-Elect, Inc.*, 98 F.E.R.C. ¶ 61,142, at pp. 61,421-22 (2002); *GridFlorida LLC*, 94 F.E.R.C. ¶ 61,363, at pp. 62,331-32 (2001); *GridSouth Transco, LLC*, 94 F.E.R.C. ¶ 61,273, at pp. 61,985-88 (2001).

51. Order No. 669, *supra* note 10, at P 141 n.101.

52. *GE Capital Corp.*, 2002 SEC No-Act. LEXIS 496 (Apr. 26, 2002). Other relevant precedents include *Berkshire Hathaway Inc.*, 2000 SEC No-Act. LEXIS 368 (Mar. 10, 2000); *ITC Holdings Corp.*, 102 F.E.R.C. ¶ 61,182, at P 31 n.24 (finding a lack of control where limited partners had majority or supermajority (75%) consent rights with respect to twenty-three specified actions as set forth in an agreement of limited partnership), *reh'g denied*, 104 F.E.R.C. ¶ 61,033 (2003).

53. *GE Capital Corp.*, 2002 SEC No-Act. LEXIS 496, at *1-2, *21 (Apr. 26, 2002).

54. *Id.* at *21-29.

55. *Supplemental Policy Statement*, *supra* note 28, at P 54 (footnotes omitted).

56. *Id.* at PP 55-56; *see also PDI Stoneman*, 104 F.E.R.C. ¶ 61,270 at P 19 (2003).

FERC did disclaim jurisdiction under section 203 in one case where the passive investors had very limited voting rights.[57]

Because the FERC has not provided clear guidance on this issue, parties to such passive investment transactions regularly file section 203 applications requesting FERC authorization without seeking a ruling on jurisdiction for the purpose of obtaining prompt approval.[58] This situation frequently arises in the context of "tax equity" transactions in renewable energy generation projects.[59] Financial institutions making such investments typically seek to qualify for equity treatment under the tax laws due to requirements related to tax incentives offered to those projects; they do not seek an active role in management but rather seek consent rights with certain major actions, such as issuing new equity securities, taking on new debt or other obligations, changing the organizational documents, changing the tax treatment, or entering into, amending, or terminating certain material contracts (which often includes power purchase agreements).[60] In the context of market-based rate determinations under section 205 of the FPA, the FERC has determined that these types of investments do not make the investors "affiliates" of the electric-generating companies in which they invest,[61] but the FERC has not extended this determination to the section 203 context.

Parties' willingness to submit to FERC jurisdiction in these cases stems in part from the reluctance of their counsel to issue clean opinions that no FERC authorization is required on transfers of non-controlling equity interests, given the lack of clear FERC guidance. The FERC generally grants applications for such authorization within thirty to sixty days of filing, so that parties often decide that it is more expedient and less costly to request authorization than it would be to obtain a disclaimer of jurisdiction in any particular case. One negative consequence of asking for FERC authorization under section 203, however, is that the FERC requires parties to such transactions that have market-based rates to assume that they also are affiliated for purposes of their market-based rate reporting obligations.[62] This assumption requires the parties to make a "change in status" filing under section 205 of the FPA describing the

57. *Solios Power LLC*, 114 F.E.R.C. ¶ 61,161 at PP 5, 10 (2006) (holding that there would be no change in control, and thus no need to obtain section 203 authorization, resulting from transfers of equity interests in a company that held passive shares in a public utility where the holder of such shares "ha[d] the right to vote only at class meetings where matters concerning any proposed changes to its share rights [were] to be determined" and otherwise "no right to receive notice of, attend, or vote at general [shareholder] meetings"); *cf. Entegra Power Group LLC*, 125 F.E.R.C ¶ 61,143 (2008), *clarif. granted and reh'g denied*, 129 F.E.R.C. ¶ 61,156 (2009) (holding that certain restrictions on the exercise of voting rights were necessary in order for a company to be granted a blanket authorization to hold up to 20% of the voting interests in two public utilities where the transaction otherwise raised concerns regarding effects on competition).

58. The FERC typically acts on these applications without making any determination on whether it has jurisdiction, based on the precedent established in *Ocean State Power*, 43 F.E.R.C. ¶ 61,466 (1988).

59. *See, e.g.*, *AES Creative Res., L.P.*, 129 F.E.R.C. ¶ 61,239 (2009).

60. *See, e.g.*, *id.* at P 10.

61. *Id.* at P 21. This order discusses the meaning of the terms "affiliate" and "voting security" at length, but only in the context of the FERC's market-based rate regulations pursuant to section 205 of the FPA. *Id.* at PP 21-28.

62. Order No. 697, *supra* note 25, at P 1033 ("To the extent the seller has made a Section 203 filing that it submits is being made out of an abundance of caution without conceding that the Commission has Section 203 jurisdiction, the seller will be required to incorporate this same assumption in its market-based rate change in status filing . . . ." (citing *Calpine Energy Servs., L.P.*, 113 F.E.R.C. ¶ 61,158 at P 14 (2005))).

consequences of the "affiliation" on their market power (or explaining, pursuant to *AES Creative Resources*, why they are not affiliated).[63] Of course the section 203 filings themselves impose burdens both on the filing parties and FERC staff, which in turn can delay the completion of the transactions or even interfere with their closing due to a change in circumstances during the approval process.

2. Secondary Market Transactions

Recognizing that a public utility may not have any control over, or even knowledge about, transfers of its direct or indirect upstream equity interests, the FERC established in its *Supplemental Policy Statement* that public utilities do not require prior authorization under section 203(a)(1) for "secondary market transactions."[64] The FERC defined these as "purchases or sales of the securities of a public utility or its upstream holding company by a third-party investor."[65] Notwithstanding the FERC's broad definition of secondary market transactions, the FERC clarified that this exemption does not apply in all cases of purchases or sales of public utility or holding company securities by a third-party investor.[66] The FERC initially granted this exemption in the context of the following circumstances:

> (1) [the public utility or holding company's] common stock is publicly traded; (2) huge volumes may change ownership every day between third-party investors in arm's-length transactions; (3) neither the holding company nor its public utility subsidiaries are parties to the transactions; (4) neither the holding company nor its public utility subsidiaries have any control over transfers of the common stock; and (5) neither the holding company nor its public utility subsidiaries are required to be given prior notice of these transactions.[67]

To the extent that any one of these circumstances does not apply, it is not clear whether the FERC would find that a transfer of the securities of a public utility or holding company is exempt from the requirements of section 203(a)(1).[68]

C. *Application of $10 Million Threshold*

The FERC has interpreted the $10 million threshold for purposes of section 203(a)(1)(A) to apply only in cases involving a part of a public utility's FERC-

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63. *Id*. at PP 1015, 1032-33; 129 F.E.R.C. ¶ 61,239, at PP 20, 28.

64. *Supplemental Policy Statement*, *supra* note 28, at P 36.

65. *Id.*

66. *Id.*

67. *FPA Section 203 Supplemental Policy Statement*, 122 F.E.R.C. ¶ 61,157 at P 4 (2008).

68. In the FERC's order on reconsideration and clarification of the *Supplemental Policy Statement*, the FERC declined to adopt a broad interpretation of the scope of this policy and, in particular, rejected an interpretation under which it would apply to "what may be an indirect disposition of control of jurisdictional facilities in circumstances in which the public utility knows of and has a role in such transactions." 122 F.E.R.C. ¶ 61,157, at P 6. In at least one case, however, the FERC did not object to application of the secondary market transaction policy to an acquisition of certain trusts and investment funds that indirectly held the voting securities of several public utilities where it appears that some of the circumstances described in Order No. 697 (e.g., publicly traded shares and large volumes of transactions) were not met. *BlackRock, Inc.*, 131 F.E.R.C. ¶ 61,063 at P 5 (2010) (the FERC held at P 13 that the transaction otherwise required authorization under section 203(a)(2), however). In another case, the FERC declined an opportunity to further clarify the application of its policy regarding secondary market transactions. *Cascade Inv., L.L.C.*, 129 F.E.R.C. ¶ 61,011 at P 18 n.20 (2009).

jurisdictional facilities and not to the whole of those facilities.[69] For transfers of less than all of the voting securities in a public utility, it appears that the $10 million threshold does apply.[70] The calculation of the $10 million threshold is discussed in Section VII below.

D. Transactions That Are Preapproved Under Blanket Authorizations

The FERC has established in its regulations a number of blanket authorizations that apply to transactions for which specific approval under section 203(a)(1)(A) otherwise would be required. A transaction covered by a blanket authorization is approved pursuant to the regulation itself rather than pursuant to an order resulting from an adjudicatory proceeding at the FERC. The concept of blanket authorizations existed in certain other portions of the FERC's regulations, in particular with respect to regulation under the Natural Gas Act,[71] prior to enactment of EPAct 2005, but the regulations did not include blanket authorizations for purposes of section 203. Beginning in Order 669, the FERC began adding a number of blanket authorizations for purposes of section 203, which have the effect of reducing the number of section 203 applications that need to be filed at the FERC.[72]

The Appendix to this article provides a summary of various blanket authorizations available for purposes of section 203. The discussion below addresses issues arising with respect to some of the blanket authorizations under section 203(a)(1):

- Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. § 33.1(c)(2)(ii) for acquisition of any voting security in a transmitting utility or an electric utility company (or a holding company with respect to either of them) "if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10[%] of the outstanding voting interests of such public utility."[73] Participants in the rulemaking proceeding resulting in this blanket authorization argued that the blanket rule is unnecessary given the FERC's guidance in the *Supplemental Policy Statement* that it has made a rebuttable presumption that transfers of less than 10% of a public utility's voting securities do not constitute a change in control and accordingly do not invoke FERC jurisdiction under section 203(a)(1).[74] The FERC responded that this blanket authorization helps eliminate uncertainty due to the fact that the *Supplemental Policy Statement* guidance was only a rebuttable presumption and that in some cases a transfer of less than 10%

69. Order No. 669-B, *supra* note 10, at P 28 & n.41 ("Because of the placement of the comma in [section 203(a)(1)(A)], we do not interpret the $10,000,000 threshold as applying to dispositions of the whole of a utility's jurisdictional facilities."). The FERC stated in its notice of proposed rulemaking that this same interpretation applied for the pre-EPAct 2005 section 203. Notice of Proposed Rulemaking, *Transactions Subject to FPA Section 203*, F.E.R.C. STATS. & REGS. ¶ 32,589 at P 27 n.21, 70 Fed. Reg. 58,636 (2005).

70. Order No. 708, *supra* note 45, at PP 24, 27.

71. *Natural Gas: Blanket Certificates*, FERC.GOV, http://www.ferc.gov/industries/gas/indus-act/blank-cert.asp (last visited Mar. 12, 2013).

72. Order No. 669, *supra* note 10, at P 3.

73. 18 C.F.R. § 33.1(c)(12)(i) (2012).

74. Order No. 708, *supra* note 45, at PP 23, 25-26.

of a public utility's voting stock may be jurisdictional.[75] Although it may be a distinction without a difference, public utilities may be unclear whether these types of transactions are simply non-jurisdictional or instead are jurisdictional but preapproved by the FERC under this blanket authorization.

- Transfer by a public utility of its outstanding voting securities to "[a]ny person other than a holding company if, after the transfer, such person and any of its associate or affiliate companies in aggregate will own less than 10[%] of the outstanding voting interests of such public utility."[76] This blanket authorization is subject to certain reporting requirements.[77] As for the similar blanket authorization discussed above for transfers of securities to holding companies under section 33.1(c)(12)(i), it is not clear why this blanket authorization is required, since transfer of such securities generally should not be considered to constitute a change in control triggering FERC jurisdiction. Here, however, the distinction between a transaction being non-jurisdictional and being jurisdictional but covered by a blanket authorization is meaningful because of the reporting requirements attached to the blanket authorization. Based on the very small number of entities that have ever filed reports in connection with this blanket authorization, it appears that public utilities have not found this blanket authorization useful.[78]

- Internal corporate reorganizations of nontraditional public utilities that do not have captive customers or own or provide transmission service over jurisdictional transmission facilities and that present no cross-subsidization issues.[79] The FERC has not defined "internal corporate reorganizations," making it difficult in some cases for parties contemplating a proposed transaction to determine whether this authorization applies to their specific circumstances. This authorization does not cover transfers of assets, unless the transfer is between two nontraditional utility subsidiaries and only one survives the transaction.[80]

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75. *Id.* at P 26.

76. 18 C.F.R. § 33.1(c)(12)(ii).

77. 18 C.F.R. § 33.1(c)(17). A public utility engaging in a transfer pursuant to this blanket authorization is required to file a report with the FERC within thirty days after the transaction stating the names of the parties, the parties' pre- and post-transaction voting security holdings, the date of the transaction, the identities of any public utility holding company affiliates of the parties, and that the transaction will not result in certain types of cross-subsidization or pledges or encumbrances of utility assets. *Id.*

78. These compliance reports are required to be filed in FERC Docket No. HC09-8-000 (for fiscal year 2009). Order No. 708-B, *supra* note, 45, at P 13. As of March 15, 2013, according to records available on the FERC's eLibrary electronic docket record system, only three entities have filed compliance reports under Docket Nos. HC09-8-000, HC10-8-000, HC11-8-000, HC12-8-000, and HC13-8-000.

79. 18 C.F.R. § 33.1(c)(6).

80. Order No. 708-A, *supra* note 45, at PP 34-37 (clarifying the statement in the *Supplemental Policy Statement* under which this blanket authorization does not apply to asset transfers (122 F.E.R.C. ¶ 61,157, at P 38)); *see also* Order No. 669-A, *supra* note 10, at P 73; *Mesquite Investors L.L.C.*, 111 F.E.R.C. ¶ 61,162 at PP 8, 12 (2005) (holding that authorization was required under section 203(a)(1) where an intermediate owner of a public utility was eliminated, resulting in no change in the ultimate upstream ownership, and where the public utility's jurisdictional facilities were transferred to a wholly-owned subsidiary of the same ultimate upstream

One FERC order that predates this blanket authorization—but may help in interpreting it—provides that FERC authorization is not required for transfers of ownership interests in public utilities where the transaction simply involves inserting or compressing one or more layers in a corporate structure without changing the overall upstream ownership.[81] A nontraditional utility, such as an exempt wholesale generator (EWG)[82] that owns and operates an electric-generating facility, may qualify for this blanket authorization even if it owns some jurisdictional interconnection facilities, as long as it does not have captive customers served under cost-based rates.[83] The FERC further clarified that "captive customers" are "any wholesale or retail electric energy customers served *by a franchised public utility* under cost-based regulation."[84] Accordingly, a nontraditional electric-generating company that shares its interconnection or radial transmission facilities with another such company at cost under a shared facilities agreement would appear to benefit from this blanket authorization.

- Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. §§ 33.1(c)(8), 33.1(c)(9), or 33.1(c)(10).[85] As discussed in Section VII below, these blanket authorizations cover acquisitions by holding companies that are holding companies solely with respect to EWGs, qualifying facilities (QF),[86] and foreign utility companies (FUCO);[87] are regulated financial institutions engaging in certain specified transactions;[88] or are acquiring securities for certain underwriting or hedging activities. However, with respect to the blanket authorization for a holding company acquisition of securities of EWGs, QFs, or FUCOs,

owner that previously had held an intermediate ownership interest in the prior owner of the facilities); *Delmarva Power & Light Co.*, 71 F.E.R.C. ¶ 61,160, at p. 61,609 (1995) (jurisdiction over transfer of electric transmission line to the parent company of the prior owner of the line); *Kentucky Utils. Co.*, 56 F.E.R.C. ¶ 61,184, at p. 61,655 (1991).

81. *Commonwealth Atl. Ltd.*, 57 F.E.R.C. ¶ 61,193, at pp. 61,666-67 (1991).

82. EWGs are companies engaged exclusively in the generation and sale of electric energy at wholesale and certain incidental activities; they benefit from certain exemptions under PUHCA. *See generally* 18 C.F.R. § 366.1 (2012).

83. Order No. 708, *supra* note 45, at PP 60-61.

84. *Id.* at P 62 (codified at 18 C.F.R. § 33.1(b)(5)).

85. 18 C.F.R. § 33.1(c)(13)-(15).

86. QFs are generally facilities used for electric generation, either small facilities used to generate electric energy from renewable resources or cogeneration facilities of any size (using industrial or other waste heat to generate electric energy or using waste heat from electric-generating activities for other beneficial purposes); they qualify for certain exemptions under PUHCA, the FPA, and certain state utility regulations. *See generally* 18 C.F.R. pt. 292.

87. FUCOs are companies engaged in certain utility activities outside the United States; they benefit from certain exemptions under PUHCA. 18 C.F.R. § 366.1 (2012).

88. The authorization under 18 C.F.R. § 33.1(c)(14) is for public utilities to transfer securities to certain types of holding companies that are financial institutions, whereas the corresponding authorization under 18 C.F.R. § 33.1(c)(9) is for such holding companies to acquire securities in other holding companies, so the two authorizations do not precisely match. However, the public utilities are presumably granted authorization for change-in-control transactions involving transfers of securities by their upstream holding companies and not just transfers of their own securities. 18 C.F.R. § 33.1(c)(9), (14).

the FERC imposed a limitation in 18 C.F.R. § 33.1(c)(13) such that it applies only if, "after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10[%] of the outstanding voting [securities] of such public utility."[89] Accordingly, FERC authorization may nevertheless be required under FPA section 203(a)(1) for a disposition of interests in an EWG (or a QF that is not exempt from section 203) to the extent that there is a change of control with respect to such entity.[90] This limitation makes sense given that one of the principal factors addressed by the FERC under section 203 is whether a proposed acquisition of additional generating capacity may have an adverse effect on competition.[91] Since many electric generating companies that compete against one another in wholesale markets are EWGs or QFs, the FERC would forgo its ability in many cases to examine the effects on competition resulting from such acquisitions if it were to grant a blanket authorization for EWGs and QFs to transfer their securities to an entity that is a holding company solely with respect to EWGs, QFs, and FUCOs.

E. Exemptions for Qualifying Facilities

In addition to the blanket authorizations discussed above, FERC regulations also exempt from section 203 the two types of QFs: qualifying small power production facilities (subject to certain size limitations) and qualifying cogeneration facilities.[92] It is not clear, however, to what extent this exemption applies in cases in which the company that owns and operates a QF that is exempt from section 203 becomes subject to section 203 as a result of that company filing with FERC a market-based rate tariff for sales of electric energy at wholesale.[93] Arguably, the exemption from section 203 under the FERC's regulations trumps any independent basis for jurisdiction, because the regulation is not qualified by any reference to other activities in which the QF's owner may be engaged. But the QF exemption has the peculiar characteristic of applying to the facility itself and not specifically to the owner or operator of the facility.[94] Accordingly, a public utility that owns and operates a QF that is exempt from jurisdiction under section 203 could argue that it does not need authorization for a transfer of such facility (or for a transaction involving a change in control solely with respect to that facility), but that it does need authorization under section 203 if it transfers its market-based rate tariff or other non-QF jurisdictional facility (or for a transaction involving a change in control with respect to its market-based rate tariff or other non-QF jurisdictional facility). As

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89. 18 C.F.R. § 33.1(c)(13).

90. *See, e.g.*, Order No. 669-B, *supra* note 10, at P 44; *see also LS Power Dev., LLC*, 125 F.E.R.C. ¶ 61,267 at P 24 (2008).

91. *Mesquite Investors L.L.C.*, 111 F.E.R.C. ¶ 61,162 at P 14 (2005).

92. 18 C.F.R. §§ 292.601-.602 (2012). FERC authorization is required for dispositions of QFs that do not benefit from the exemption. *Baltimore Refuse Energy Sys. Co.*, 40 F.E.R.C. ¶ 61,366, at p. 62,118 (1987).

93. Some QFs are also exempt from the FERC's jurisdiction under section 205 with respect to their sales of electric energy at wholesale, 18 C.F.R. § 292.601(c), but those QFs that do not benefit from this exemption generally need to file a market-based rate tariff at the FERC if they engage in wholesale electric sales.

94. 18 C.F.R. § 292.601(a).

is so often the case under section 203, public utilities that own and operate QFs and that also have market-based rate or other tariffs on file with the FERC have been known to obtain prior FERC authorization for change-in-control transactions out of an abundance of caution to avoid any issue about whether FERC authorization is required.[95] This is an area where the FERC potentially could grant a blanket authorization or otherwise clarify its jurisdiction so as to eliminate the need for such filings.

IV. Application of Section 203(a)(1)(B) to Mergers and Consolidations

Compared to the large number of applications under section 203(a)(1)(A), there are relatively few applications for authorization under section 203(a)(1)(B), which grants the FERC jurisdiction over any transaction in which a public utility would "merge or consolidate, directly or indirectly, *such facilities* or any part thereof with *those* of any other person, by any means whatsoever."[96] The meanings of "such facilities" and "those" are discussed below in Section IV.A. These cases typically arise in connection with the transfer of electric interconnection or other transmission facilities to a public utility with the result that the transferred facilities are merged or consolidated with the acquiring public utility's other transmission facilities.[97] It is possible that section 203(a)(1)(B) may take on increasing importance, however, given the FERC's interpretation that, in contrast to section 203(a)(1)(A), there is no $10 million jurisdictional threshold under section 203(a)(1)(B).[98] Notably, this provision has for many years been interpreted to cover mergers in which a FERC-jurisdictional public utility acquires electric transmission assets from an entity that is not subject to FERC jurisdiction (i.e., that is exempt from jurisdiction under section 203(a)(1)(A)).[99]

A. Application of $10 Million Threshold

Vague terms "such facilities" and "those" in section 203(a)(1)(B) have led to questions of interpretation, including whether the $10 million jurisdictional threshold used in section 203(a)(1)(A) also applies under section 203(a)(1)(B). One possible interpretation is that the phrase "such facilities" refers back to "facilities subject to the jurisdiction of the Commission" in section 203(a)(1)(A)

95. *See, e.g.*, *Morgan Stanley Dean Witter Capital Partners IV, L.P.*, 107 F.E.R.C. ¶ 62,165, at p. 64,331 (2004). In some cases, entities in a similar situation have canceled their market-based rate tariffs before a change-in-control transaction as a more expedient approach to eliminating uncertainty regarding section 203 jurisdiction. *See, e.g.*, Notice of Cancellation of Market-Based Rate Schedule and Request for Expedited Action, *Geneva Energy LLC*, FERC Docket No. ER08-1143-000 (June 19, 2008).

96. 16 U.S.C. § 824b(a)(1)(B) (emphasis added). Similarly, for periods before EPAct 2005, there are relatively few cases in which authorization is sought specifically under the "merge or consolidate" clause of the former section 203(a) or the corresponding regulation at 18 C.F.R. § 33.1(a)(2). *See, e.g.*, *International Transmission Co.*, 139 F.E.R.C. ¶ 61,003 at P 10 & n.17 (2012) (applying in part to transactions occurring before the effective date of EPAct 2005); *Interstate Power Co.*, 26 F.E.R.C. ¶ 61,328, at p. 61,703 (1984); *Duke Power Co.*, Opinion No. 503, 36 F.P.C. ¶ 399 (1966); *reh'g denied* 36 F.P.C. 702 (1966); *rev'd* Duke Power Co. v. FPC, 401 F.2d 930, 951 n.162 (D.C. Cir. 1968) (collecting FPC cases under the "merge or consolidate" clause).

97. *See, e.g.*, 139 F.E.R.C. ¶ 61,003, at P 3; 26 F.E.R.C. ¶ 61,328, at pp. 61,702-03; *Duke Power*, 401 F.2d at 931.

98. Order No. 669, *supra* note 10, at P 32.

99. *See, e.g.*, 26 F.E.R.C. ¶ 61,328, at pp. 61,702-03 & n.3; *Duke Power*, 401 F.2d at 931.

held by the acquiring utility, and that the word "those" refers back to the same language as "such facilities" with respect to the facilities being acquired.[100] Under this reading, section 203(a)(1)(B) would apply to a direct or indirect merger or consolidation of the whole of a public utility's FERC-jurisdictional assets or any part thereof with the facilities of another person that are (or would be) subject to FERC jurisdiction, and there would be no $10 million threshold.[101] Another possible interpretation is that "such facilities" refers back to "the whole of [a public utility's] facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000" (of the acquiring entity) from section 203(a)(1)(A), and "those" refers back to "such facilities" as so defined (of the person from whom the facilities are being acquired).[102]

Under the FERC's regulations implementing the pre-EPAct 2005 version of section 203—which, for all purposes relevant to this analysis, is identical to the version of section 203 included in EPAct 2005[103]—the FERC applied the dollar threshold (at that time $50,000) to the facilities being acquired (but not to the facilities of the acquiring public utility) for purposes of the portion of section 203 that now is codified in section 203(a)(1)(B).[104] Notwithstanding its prior

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100. "Those" has been interpreted to include facilities that are owned by non-jurisdictional entities but that otherwise would be FERC-jurisdictional. *See, e.g.*, *Duke Power*, 401 F.2d at 940; *see also* 18 C.F.R. § 33.1(a)(2) (2005) (pre-EPAct 2005). The court in *Duke Power* addressed the definitions of "such facilities" and "those" with respect to whether "those" covers facilities being acquired that are not subject to FERC jurisdiction, but it did not address the application of the dollar jurisdictional threshold (then $50,000). *Duke Power*, 401 F.2d at 940.

101. *See, e.g*., *id.* at 934, 940.

102. Had this been the intent, however, there would have been no need to include "or any part thereof" after "such facilities" in section 203(a)(1)(B). Moreover, this interpretation would apply the dollar threshold to the facilities of the acquiring public utility as well as to the facilities being acquired from the other person. Other interpretations also may be possible.

103. The relevant portion of section 203(a) previously read as follows:

> No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, *or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person*, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.

16 U.S.C.§ 824b(a) (1935) (emphasis added). The revised version of the statute merely moved this clause to a separately enumerated subparagraph (1)(B) of section 203(a), moved "merge or consolidate" from the middle to the beginning of the clause, and moved "by any means whatsoever" from the beginning to the end of the clause. 16 U.S.C. § 824b(a)(1)(B) (2012).

104. 18 C.F.R. § 33.1(a)(2) (2005) (stating that the FERC's regulations promulgated pursuant to section 203 "will apply to any public utility seeking authority under [s]ection 203 of the Federal Power Act to: (1) Dispose by sale, lease or otherwise of the whole of its facilities subject to Commission jurisdiction or any part thereof of a value in excess of $50,000; (2) *Merge or consolidate, directly or indirectly, facilities subject to Commission jurisdiction with those of any other person, if such facilities are of a value in excess of $50,000*, including the acquisition of electric facilities used for the transmission or sale at wholesale of electric energy in interstate commerce which, except for ownership, would be subject to the Commission's jurisdiction." (emphasis added)). The $50,000 threshold was first included in the FPC's regulations governing the "merge or consolidate" clause in 1963 without explanation. 28 Fed. Reg. 2900 (Mar. 20, 1963) (codified at 18 C.F.R. § 33.1(a)(2)) (changing the regulations to conform to the FPC's order in *Southern Cal. Edison Co.*, 28 F.P.C. 787, at 789 (1962), which held that a public utility requires authorization under the "merge or consolidate" clause of section 203 to acquire electric facilities irrespective of the jurisdictional status of the seller); *see also* Order No. 397, *Application for Sale, Lease, or other Disposition, Merger or Consolidation of Facilities, or For Purchase or Acquisition of Securities of Public Utility*, 35 Fed. Reg. 5321 (Mar. 31, 1970) (codified at 18 C.F.R. § 33.1(a)(2)) (similarly using the $50,000 threshold for purposes of defining the applicability of the

regulatory interpretation, the FERC did not find any room for multiple interpretations when it promulgated revised regulations to implement the amendments to section 203 contained in EPAct 2005.[105] Instead, the FERC held that "the plain language of amended [s]ection 203(a)(1)(B) *does not permit*" an interpretation under which the $10 million jurisdictional threshold applies.[106] The FERC reasoned that, unlike sections 201(a)(1)(A), (C), and (D) and section 203(a)(2), "Congress clearly did not adopt a monetary threshold for mergers and consolidations in amended [s]ubsection 203(a)(1)(B)."[107] Accordingly, the FERC indicated that whereas its prior practice had been to apply a dollar threshold to mergers and consolidations, it considered such an approach "no longer tenable."[108]

One commentator pointed out that "Congress did not intend to change [the] statutory and regulatory structure" under which the $50,000 threshold applied to mergers and consolidations, and that "for decades the Commission, by regulation, limited the necessity to file applications pursuant to [s]ection 203 with respect to mergers, consolidations and acquisitions only to those that met the then-effective $50,000 threshold."[109] The FERC rejected this comment, relying on the "*unambiguous* statutory language."[110] The current version of the FERC's regulations therefore omit the dollar threshold in the "merge or consolidate" provision now set forth in section 33.1(a)(1)(ii).[111]

Contrary to the FERC's pronouncement in Order No. 669, the statutory language is ambiguous.[112] Given this ambiguity, the long history before 2006 of including the dollar threshold in the "merge or consolidate" provision in the Commission's regulations (of which Congress presumably was aware when it enacted EPAct 2005), the minimal changes made to the language of the statute in EPAct 2005, and the lack of any other expression of congressional intent to eliminate the dollar amount threshold in connection with enacting EPAct 2005, the Commission would have a strong basis for further amending its regulations to restore the dollar amount threshold (at a revised level of $10 million). Whereas the pre-2006 regulation did not limit the application of the dollar threshold only to acquisitions of a part of the FERC-jurisdictional facilities of

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"merger or consolidation" clause). The corresponding current regulations use language that is identical to the statutory language from EPAct 2005. 18 C.F.R. § 33.1(a)(1)(ii) ("The requirements of this part will apply to any public utility seeking authorization under Section 203 of the Federal Power Act to: (i) Sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10 million; (ii) *Merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever*. . . .") (emphasis added).

105. Order No. 669, *supra* note 10, at P 32.

106. *Id*. (emphasis added).

107. *Id*.

108. *Id.*

109. Comments of the Electric Power Supply Association, Proposed Rulemaking on Transactions Subject to FPA Section 203 at Section III, FERC Docket No. RM05-34-000 (filed Nov. 7, 2005) (citing 18 C.F.R. § 33.1(a)(2) and Duke Power Co. v. FPC, 401 F.2d 930 (D.C. Cir. 1968)).

110. Order No. 669, *supra* note 10, at P 32 (emphasis added).

111. 18 C.F.R. § 33.1(a)(1)(ii).

112. *Duke Power*, 401 F.2d at 934 ("we face a constructional problem of which the bare statutory words admit confidently of no single solution").

the person from whom they are being acquired, the FERC could consider imposing this limitation as being more consistent with the statutory language.[113]

Faced with the lack of a dollar threshold for purposes of section 203(a)(1)(B), some public utilities have filed for authorization under this section for transactions involving transfers of transmission facilities valued at considerably less than $10 million between two public utilities (or from a non-jurisdictional owner of transmission facilities to a jurisdictional public utility).[114] The lack of a dollar threshold under section 203(a)(1)(B) means that in the event of a transfer of a jurisdictional facility worth less than $10 million from one public utility to another, the acquiring utility requires prior authorization from the FERC even though the disposing utility does not need authorization under section 203(a)(1)(A). This result can occur, for example, when a public utility acquires interconnection facilities constructed by another public utility (or even a non-jurisdictional entity) under the "option to build" provision of the FERC's pro forma interconnection agreement.[115] These transactions seem to be no more worthy of review than other types of transactions to which the FERC applies the $10 million threshold, so there is no clear policy reason militating against the FERC interpreting the statute, as discussed above, to make the threshold applicable in these circumstances.

B. Transfers Involving Non-Jurisdictional Entities

Another interpretational issue with respect to section 203(a)(1)(B) is whether it applies to mergers involving transmission facilities owned by entities not subject to FERC jurisdiction, such as municipal and other government-owned utilities and cooperatives financed by the Rural Utilities Administration. The pre-EPAct 2005 version of section 203 was interpreted for many years to require FERC authorization under the "merge or consolidate" provision for any merger or consolidation of either facilities subject to the FERC's jurisdiction *or* facilities that, "except for ownership, would be subject to the Commission's jurisdiction."[116] In *Duke Power*, the Commission reasoned that the inclusion of the word "person," which has a broader meaning than "public utility" in the phrase "those of any other person," suggests that the facilities to be acquired in

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113. Section 203(a)(1)(A), to which section 203(a)(1)(B) appears to refer back in some manner, applies the dollar threshold only with respect to dispositions of a part of a public utility's jurisdictional assets. Order No. 669, *supra* note 10, at P 32.

114. *See, e.g.*, *ITC Great Plains, LLC*, 137 F.E.R.C. ¶ 62,037 (2011) (filing made after the transaction was completed, referring to a "mistaken interpretation of [FPA] [s]ection 203(a)(1)(B)"); *PECO Energy Co. and Exelon Generation Co.*, 137 F.E.R.C. ¶ 62,120 (2011) (filed "out of an abundance of caution" despite low value of the facility (Joint Application for Transaction Approval Pursuant to Federal Power Act Section 203, at 3-4, *PECO Energy Corp. and Exelon Generation Co.*, FERC Docket No. EC11-120-000 (filed Sept. 26, 2011))). In both of these cases, the orders were issued by the FERC staff acting under authority delegated by the Commission. 18 C.F.R. § 375.307 (2012).

115. Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, F.E.R.C. STATS. & REGS. ¶ 31,146 at P 353 (2003), *order on reh'g*, Order No. 2003-A, F.E.R.C. STATS. & REGS. ¶ 31,160, *order on reh'g*, Order No. 2003-B, F.E.R.C. STATS. & REGS. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, F.E.R.C. STATS. & REGS. ¶ 31,190 (2005), *aff'd sub nom.*, National Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277, 1279-81 (D.C. Cir. 2007).

116. 18 C.F.R. § 33.1(a)(2) (2005).

the merger could include facilities owned by non-jurisdictional entities.[117] This interpretation, as upheld by the U.S. Court of Appeals for the D.C. Circuit, was codified in the FERC's pre-EPAct 2005 regulations, which included the above-quoted language referring to facilities that, "except for ownership, would be subject to [FERC] jurisdiction."[118]

In its post-EPAct 2005 regulations, however, the FERC omitted this language, substituting instead the same language that is included now in section 203 (which is in all relevant respects identical to the pre-EPAct 2005 version of section 203). There was no discussion of this change in the FERC's orders promulgating the revised regulations, but presumably the holding from *Duke Power* still applies. Based on a 2011 application in *ITC Great Plains*, which likely was made after discussions with FERC staff, it appears that FERC staff continues to hold the view that the "merge or consolidate" clause in section 203 applies to transfers of transmission facilities from non-jurisdictional entities to FERC-jurisdictional public utilities.[119] In addition, the FERC has indicated in other recent cases that transfer of transmission facilities from a non-public utility to a FERC-jurisdictional public utility *may* require FERC authorization, citing *Duke Power* for authority.[120] This is an area in which the FERC might want to revisit its interpretation, however, and consider whether there is a strong policy reason for exercising jurisdiction over these types of transactions.

C. Blanket Authorizations

The FERC's regulations make the blanket authorizations discussed above and in the Appendix for purposes of section 203(a)(1)(A) applicable to all portions of 203(a)(1). In theory, these blanket authorizations would also cover transactions under section 203(a)(1)(B), but the types of transactions addressed by section 203(a)(1)(B) rarely would meet the requirements of these authorizations (which generally do not apply to asset transfers).[121]

V. APPLICATION OF SECTION 203(a)(1)(C) AND (D) TO ACQUISITIONS BY

117. Duke Power Co. v. FPC, 401 F.2d 930, 931-32, 940 (D.C. Cir. 1968). *Duke Power* involved the transfer of electric distribution facilities from a non-jurisdictional entity (Clemson University, which was owned by the State of South Carolina and therefore exempt from FERC-jurisdiction pursuant to section 201(f)) to a FERC-jurisdictional public utility. *Id.* at 931 (citing 16 U.S.C. § 824(f)). On review, the U.S. Court of Appeals for the D.C. Circuit reversed the FPC on the grounds that the "merge or consolidate" provision of section 203 did not cover acquisitions of distribution facilities, but the court did not reverse the FPC's holding that the provision covered acquisitions from non-jurisdictional entities of facilities that otherwise would be subject to Commission jurisdiction (such as transmission facilities). *Id.* at 933, 399-401; *see also Enova Corp.*, 79 F.E.R.C. ¶ 61,107, at p. 61,491 (1997); *Kandiyohi Power Coop.*, 107 F.E.R.C. ¶ 61,285 at PP 2, 6 (2004).

118. Order No. 397, *Application for Sale, Lease, or Other Disposition, Merger, or Consolidation of Facilities, or for Purchase or Acquisition of Securities of Public Utility*, 35 Fed. Reg. 5321 (Mar. 31, 1970) (codified at 18 C.F.R. § 33.1(a)(2)).

119. *ITC Great Plains, LLC*, 137 F.E.R.C. ¶ 62,037 (2011).

120. *Southern Cross Transmission LLC*, 137 F.E.R.C. ¶ 61,206 at P 37 (2011); *Brazos Elec. Power Coop., Inc.*, 118 F.E.R.C. ¶ 61,199 at P 46 (2007).

121. One exception would be certain asset transfers subject to section 203(a)(1)(B), which could be covered by the blanket authorization for internal corporate reorganizations (18 C.F.R. § 33.1(c)(6)) to the extent that the asset transfer is between two nontraditional utility subsidiaries and only one of them survives the transaction. Order No. 708-A, *supra* note 45, at P 38.

PUBLIC UTILITIES OF PUBLIC UTILITY SECURITIES OR EXISTING GENERATING FACILITIES

While most section 203 cases involve transactions in which a person is acquiring facilities from, or interests in, public utilities, section 203 can apply to some transactions in which a public utility is the acquiring entity.[122] Under section 203(a)(1)(C), a public utility requires FERC authorization before it may acquire any security with a value in excess of $10 million of any other public utility.[123] In addition, under section 203(a)(1)(D), a public utility requires FERC authorization before it may "purchase, lease, or otherwise acquire an existing generating facility . . . that has a value in excess of $10 [million]" and that is used for sales of electric energy at wholesale subject to FERC ratemaking jurisdiction.[124]

A. Acquisitions by Public Utilities of Public Utility Securities

The FERC's jurisdiction over the acquisition by a public utility of securities of another public utility, pursuant to the portion of section 203 now set forth in section 203(a)(1)(C), was upheld by the U.S. Supreme Court in an early decision interpreting section 203.[125] Today, the principal question that arises with respect to the extent of the FERC's jurisdiction under this section involves the application of the $10 million threshold, as discussed in Section VII below.

Among the blanket authorizations discussed above for purposes of section 203(a)(1)(A), only two of them would apply to the types of transactions covered by section 203(a)(1)(C). First, the blanket authorization for internal corporate reorganizations, pursuant to section 33.1(c)(6) of the FERC's regulations, authorizes the acquisition by a public utility of securities of another public utility under section 203(a)(1)(C), provided that such acquisition is part of an internal corporate reorganization.[126] Another blanket authorization that would apply precisely to the type of transactions covered by section 203(a)(1)(C) is the blanket authorization under section 33.1(c)(7) of the FERC's regulations for "[a]ny public utility in a holding company system that includes a transmitting utility or an electric utility" to acquire "securit[ies] of a public utility in connection with an intra-system cash management program, subject to safeguards to prevent cross-subsidization."[127]

In some cases, a public utility subject to section 201(a)(1)(C) also is a holding company and therefore also is subject to FERC jurisdiction under section 203(a)(2) with respect to acquisitions of securities of transmitting utilities or electric utility companies (which often are public utilities, as well).[128] While the FERC has added to its regulations blanket authorizations under section 203(a)(2) for holding companies to acquire public utility securities in certain circumstances, as discussed below,[129] it has not done the same for public utilities

122. *See, e.g.*, Jersey Cent. Power & Light Co. v. Fed. Power Comm'n, 319 U.S. 61 (1943).

123. 16 U.S.C. § 824b(a)(1)(C).

124. *Id.* § 824b(a)(1)(D).

125. *Jersey Cent. Power & Light Co.*, 319 U.S. at 62, 77-78.

126. 18 C.F.R. § 33.1(c)(6).

127. *Id.* § 33.1(c)(7); *see also* Order No. 669-A, *supra* note 10, at PP 89-91.

128. 16 U.S.C. § 824b(a)(2).

129. *See generally* 18 C.F.R. § 33.1(c)(2), (8)-(10).

seeking to acquire similar securities. Accordingly, a holding company that is also a public utility may have to seek authorization from the FERC under section 203(a)(1)(C) to acquire securities of public utilities even if its acquisition is covered by a blanket authorization under the FERC's regulations for purposes of section 203(a)(2).[130]

B. Acquisitions by Public Utilities of Existing Generating Facilities

Section 203(a)(1)(D) requires FERC authorization before a public utility (including an entity with market-based rate authorization) may "purchase, lease, or otherwise acquire an existing generation facility" with a value of $10 million or more "that is used for interstate wholesale sales over which the [FERC] has jurisdiction for ratemaking purposes."[131] In most cases, authorization for such transactions also is required under section 203(a)(1), since the transferor typically is a public utility subject to section 203, and typically there are some transmission facilities being transferred in addition to generating facilities.[132] In certain situations, however, section 203(a)(1)(A) will not apply while section 203(a)(1)(D) will. Examples include when the transferred facility is a QF exempt from regulation under section 203, or when the transfer includes only generation facilities and not any transmission facilities or "paper facilities" otherwise subject to the FERC's jurisdiction.

The FERC has defined "existing generation facility" as "a generation facility that is operational at or before the time the section 203 transaction is consummated"; "operational" means that the facility is capable of producing power; and "the time the transaction is consummated" means the time "when the transaction actually closes and control of the facility changes hands."[133] The FERC makes the rebuttable presumption that this requirement applies to any acquisition of an existing generation facility unless the purchaser can demonstrate with substantial evidence that the facility is used only for retail sales.[134] The requirement applies to acquisitions of mothballed facilities that previously were operational as well as to acquisitions of QFs that themselves may be exempt from section 203 requirements.[135] It also applies to acquisitions of new electric-generating facilities in cases in which the acquisition will close

130. A holding company that also is a public utility can seek an order from the FERC granting such a blanket authorization under conditions similar to those provided by the regulatory blanket authorization. *See, e.g.*, *UBS AG*, 125 F.E.R.C. ¶ 61,282 at P 1 (2008) (granting a blanket authorization for acquisitions of public utility securities under section 203(a)(1)(C) subject to the same restrictions applicable under the regulatory blanket authorizations under section 203(a)(2)).

131. 16 U.S.C. § 824b(a)(1)(D).

132. This section was added in EPAct 2005 apparently to address concerns over the ability of a large, integrated public utility to acquire an electric-generating facility without needing to obtain FERC authorization by structuring the transaction such that no FERC-jurisdictional interconnection facilities would be included. *See, e.g.*, *Perryville Energy Partners, L.L.C.*, 109 F.E.R.C. ¶ 61,019 at PP 14, 17 (2004) (disclaiming jurisdiction over transfer of generation-only assets under pre-EPAct section 203, which included the provision now in section 203(a)(1)(A) but not the provision now in section 203(a)(1)(D), notwithstanding protests filed by a number of competing electric generators and wholesale electric purchasers).

133. 18 C.F.R. § 33.1(b)(1); Order No. 669, *supra* note 10, at PP 84-85.

134. 18 C.F.R. § 33.1(b)(1).

135. Order No. 669, *supra* note 10, at PP 85, 87.

shortly after the facility begins commercial operation.[136] The FERC also has interpreted this requirement to apply where the entity acquiring the facility was a public utility with authority to sell electric energy at market-based rates, even if the electric generation facilities being acquired were not being used for wholesale sales before the transaction.[137] In cases where one public utility is acquiring electric-generation assets from another public utility, the seller may need authorization under section 203(a)(1)(A) for the disposition of interconnection facilities and any jurisdictional paper facilities, and the purchaser may need authorization under section 203(a)(1)(D) to acquire the generation facilities.[138] Section 203(a)(1)(B) may apply as well if there is a consolidation of jurisdictional interconnection facilities previously held by separate entities.[139] The fact that there are multiple bases for jurisdiction makes little substantive difference: the standard for FERC approval is the same for each.[140] But the applicants should ensure that their request for approval covers all the required authorizations.

FERC staff, by delegated order, has disclaimed jurisdiction under section 203(a)(1)(D) where the acquiring entity was not a public utility under section 201 of the FPA.[141] On the other hand, FERC staff has authorized under section 203(a)(1)(D) the transfer of undivided ownership interests in a radial electric transmission line used to connect electric-generating facilities to the electric grid,[142] although it is not clear that such authorization was required in this case. The FERC also has approved transactions under this section in the context of lease transactions, including a transaction involving an extension of a lease of an existing electric-generating facility.[143] Conversely, the FERC has approved an acquisition of electric-generating turbines by a public utility that previously had leased the turbines and exercised its option under the lease to purchase them from the lessor.[144] This provision also has been applied in the context of transfers between affiliated entities (reflecting the fact that the blanket authorization for intra-corporate transfers generally does not apply to asset transfers).[145]

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136. *See, e.g.*, Order Authorizing Acquisition of Generating Facilities, *NorthWestern Corp.*, FERC Docket No. EC11-88-000 (July 29, 2011).

137. *See, e.g.*, *Alloy Power L.L.C.*, 117 F.E.R.C. ¶ 62,008, at p. 64,014 & n.4 (2006).

138. 16 U.S.C. § 824b(a)(1)(A), (D).

139. *See, e.g.*, *E.I. du Pont de Nemours & Co.*, 132 F.E.R.C. ¶ 62,138 (2010).

140. The FERC's general standards for section 203 applications include review of whether the transaction is consistent with the public interest (including evaluation of effects on competition, rates, and regulation) as well as whether it will result in cross-subsidization. 16 U.S.C. § 824b(4)-(5); Order No. 669, *supra* note 10, at PP 7-10 (discussing the Merger Policy Statement (codified at 18 C.F.R. § 2.26)) and P 19.

141. *KGen Enter. LLC*, 115 F.E.R.C. ¶ 62,055 (2006).

142. *Milford Wind Corridor Phase I, LLC*, 129 F.E.R.C. ¶ 62,237 (2009).

143. *See, e.g.*, *Covanta Union, Inc.*, 137 F.E.R.C. ¶ 62,122 (2011) (where the lessee was a public utility with market-based rate authority and the lessor was a non-jurisdictional governmental entity, the initial lease had been entered into before enactment of section 203(a)(1)(D) and had not been previously approved); *see also PacifiCorp*, 139 F.E.R.C. ¶ 62,259 (2012); *Calpine Fox LLC*, 116 F.E.R.C. ¶ 61,261 (2006) (termination of lease in the context of a bankruptcy).

144. *Hardee Power Partners Ltd.*, 140 F.E.R.C. ¶ 62,121 (2012).

145. *See, e.g.*, *El Dorado Energy, LLC*, 136 F.E.R.C. ¶ 62,219 (2011).

Section 203(a)(1)(D) by its terms applies only to acquisitions of generation facilities with a value in excess of $10 million.[146] Section VII below provides an analysis of the FERC's precedent regarding calculation of the $10 million threshold.

The FERC has not included in its regulations any blanket authorizations that apply to the types of transactions subject to section 203(a)(1)(D).

VI. APPLICATION OF SECTION 203(a)(2) TO HOLDING COMPANY TRANSACTIONS

As noted above, Congress added section 203(a)(2) to the FPA as part of EPAct 2005.[147] This section requires prior authorization from the FERC before any:

> holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000.[148]

A. Differences from Prior Regulation Under Public Utility Holding Company Act of 1935

This provision generally serves the purpose of replacing in part the former section 9(a)(2) of PUHCA 1935,[149] which was repealed by EPAct 2005.[150] Section 9(a)(2) of PUHCA 1935 (otherwise known as the "two-bite rule")[151] generally required prior authorization for any person to acquire, directly or indirectly, 5% or more of the voting securities of any "public-utility company" if the person also owned or controlled 5% or more of the voting securities of any other public-utility company (or for the simultaneous, direct or indirect acquisition of 5% or more of the voting securities of two public-utility companies).[152] Although section 203(a)(2) applies in many of the same

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146. 16 U.S.C. § 824b(a)(1)(D).

147. Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982.

148. 16 U.S.C. § 824b(a)(2). The FERC clarified that the terms "associate company," "electric utility company," "foreign utility company," "holding company," and "holding company system" have the same meanings as under PUHCA 2005. Order No. 669, *supra* note 10, at PP 49, 51; 18 C.F.R. § 33.1(b)(4). The terms "transmitting utility" and "electric utility" are defined in sections 3(22) and (23), respectively, of the FPA. 16 U.S.C. § 796(22)-(23) (2012).

149. Previously codified at 15 U.S.C. § 79i(a)(2) (2005).

150. EPAct 2005 §§ 1261-1277. EPAct 2005 also enacted the Public Utility Holding Company Act of 2005, which regulates holding companies less strictly than its predecessor, PUHCA 1935, and vests the regulation in the FERC rather than the SEC, which was responsible for implementing PUHCA 1935. 42 U.S.C. §§ 16451-16463. For a discussion of the repeal of PUHCA 1935 and its replacement by PUHCA 2005, see Markian M.W. Melnyk & William S. Lamb, *PUHCA's Gone: What's Next for Holding Companies?*, 27 ENERGY L.J. 1 (2006).

151. DOUGLAS W. HAWES, UTILITY HOLDING COMPANIES § 3.06, 3-23 (1984).

152. 15 U.S.C. § 79i(a)(2) (2005). The PUHCA 1935 definition of "public-utility company" was similar to the definition in PUHCA 2005, which includes companies engaged in "generation, transmission, or distribution of electric energy for sale" ("electric utility companies") as well as companies engaged in retail distribution of natural gas ("gas utility companies"). Previously codified at 15 U.S.C. § 79b(3)-(5) (2005). However, EWGs, many QFs, and FUCOs were exempt from regulation as public-utility companies under PUHCA 1935. Exemptions previously codified at 15 U.S.C. § 79z-5a(e) (2005) (EWGs); 15 U.S.C. § 79z-

circumstances as section 9(a)(2), there are several notable differences. In particular, section 203(a)(2) is administered by the FERC, rather than the SEC, which administered PUHCA, and the standards for authorization are much different.[153] The public interest standard applied by the FERC for applications under section 203(a)(2) is the same as the standard the FERC applies to applications under section 203(a)(1), focusing on the effects of the transaction on competition, rates, and regulation, and on preventing cross-subsidization between entities with captive customers subject to cost-based rate regulation and affiliated companies that are not subject to cost-based regulation.[154]

Another notable difference under EPAct 2005 is that holding companies now include companies whose only interests in public-utility companies are in EWGs, QFs, and FUCOs.[155] While it would appear that such companies are subject to increased regulation as a result of their holding company status compared to their situation under PUHCA 1935, in reality the scope of additional regulation is minimal, because, as discussed below, the FERC has granted a blanket authorization for such holding companies to acquire voting interests in additional EWGs, QFs, and FUCOs.[156]

B. Jurisdictional Interpretations by the FERC

Section 203(a)(2) has been applied most often in the context of acquisitions of securities of a transmitting utility, electric utility, or a holding company with respect to a transmitting utility or electric utility. The FERC has defined the terms "purchase, acquire, or take" broadly to include situations in which the holding company acquires the right to vote securities even if the holding company does not have a proprietary interest in the securities.[157] This contrasts with section 203(a)(1), where under *Atlantic City* a proprietary interest is

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5b(a)(1) (2005) (FUCOs); *and* 18 C.F.R. § 292.602(b) (2005) (QFs); *see also* Order No. 669-A, *supra* note 10, at PP 27-31.

153. Notice of Proposed Rulemaking, *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, FERC Docket No. RM-05-32-000 at P 2 n.6 (Sept. 16, 2005) (codified at 18 C.F.R. pts. 365, 366). In addition, section 203(a)(2) applies only to holding companies with respect to transmitting utilities and electric utilities, 16 U.S.C. § 824b(a)(2); it does not apply to holding companies and other persons with respect to companies engaged in retail distribution of natural gas, as did section 9(a)(2) of PUHCA 1935, *see supra* note 152.

154. *See supra* note 140. The standards applied by the SEC under section 9(a)(2) of PUHCA 1935 generally included preventing certain types of interlocking relationships or concentrations of control, ensuring the reasonableness of the purchase price, and promoting geographically and operationally integrated systems with simplified capital structures. Consolidated Edison, Inc., Application/Declaration on Form U-1, SEC File No. 070-09615, at Item 3.B. (Jan. 24, 2000), *available at* http://www.sec.gov/Archives/edgar/data/72741/0000072741-00-000019.txt.

155. Order No. 669, *supra* note 10, at PP 60, 70; Order No. 669-A, *supra* note 10, at PP 50-51.

156. Order No. 669, *supra* note 10, at P 60 (noting that blanket authorizations address concerns regarding including of EWGs, FUCOs, and QFs as electric utility companies). Another difference is that section 9(a)(2) of PUHCA applied to direct or indirect acquisitions of securities, but section 203(a)(2) omitted "direct or indirect" for purposes of acquisitions of securities.

157. *Horizon Asset Mgmt., Inc.*, 125 F.E.R.C. ¶ 61,209 (2008) (holding that an investment adviser that has been delegated the responsibility to vote the shares of its account holders constituting 10% or more of the voting interests in a public-utility company (or a holding company with respect to a public-utility company) is a holding company and that it requires authorization under section 203(a)(2) to acquire rights to vote with respect to additional such securities (but granting the investment adviser a blanket authorization, subject to certain conditions, to engage in such activities for a three-year period)).

required to establish jurisdiction for a change-in-control transaction, as discussed above.[158]

In a rare case of the FERC interpreting section 203 in a manner that limits the FERC's jurisdiction, the FERC held in an order issued shortly after enactment of EPAct 2005 that a company that is a subsidiary of a holding company but is not itself a holding company under PUHCA 2005 does not require authorization to acquire securities of a transmitting utility, electric utility company, or other holding company.[159] The FERC later clarified, however, that its ruling in *Goldman Sachs* does not apply where a holding company is, in fact, the acquiring company but the securities ultimately are owned by a non-holding company subsidiary of the acquiring holding company.[160] Therefore, to benefit from the *Goldman Sachs* finding of non-jurisdiction, it is important that any holding company parent of the acquiring non-holding company not be a party to or directly involved in the acquisition transaction.

Section 203(a)(2) applies to acquisitions of securities of some entities that are not themselves subject to FERC jurisdiction under section 203(a)(1), and it does not apply to some entities that are subject to FERC jurisdiction under section 203(a)(1). For example, section 203(a)(2) applies to acquisitions of interests in the owners of QFs, which may be exempt under section 203(a)(1), and FUCOs, which typically are exempt from section 203(a)(1); however, in both of these instances, blanket authorizations may apply,[161] as discussed below. Similarly, section 203(a)(2) can apply to acquisitions of interests in utilities operating in Hawaii, Alaska, and areas of Texas that are not engaged in interstate commerce and accordingly are exempt from section 203(a)(1).[162] Because the term "electric utility company" does not specifically exclude government-owned entities (although the term "holding company" does), the FERC has interpreted section 203(a)(2) to require a holding company to obtain FERC authorization before acquiring any government-owned entity that owns interstate transmission facilities, or facilities used for wholesale sales in interstate commerce, even though such entities themselves may be exempt from section 203(a)(1).[163] On the other hand, section 203(a)(2) does not apply to acquisitions of interests in power marketers that do not own or operate any facilities used for generation, transmission, or distribution of electric energy for sale, even though such power marketers with authorization from the FERC to sell electric energy at wholesale would be subject to section 203(a)(1).[164]

With respect to holding company acquisitions of securities, section 203(a)(2) applies only to acquisitions of any security with a value in excess of

158. Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 11-13 (D.C. Cir. 2002).

159. *Goldman Sachs Group, Inc.*, 114 F.E.R.C. ¶ 61,118 at PP 13-15 (2006) (relying in part on the omission of the word "indirect" from the statutory language), *order on reh'g*, 115 F.E.R.C. ¶ 61,303 (2006); *see also Supplemental Policy Statement*, *supra* note 28, at P 58 n.48; *Horizon Asset Mgmt., Inc.*, 125 F.E.R.C. ¶ 61,209 at P 33 (2008).

160. *BlackRock, Inc.*, 131 F.E.R.C. ¶ 61,063 at PP 13-14 (2010).

161. *See supra* notes 85-88 and accompanying text; Order No. 669, *supra* note 10, at PP 60, 70.

162. Order No. 669, *supra* note 10, at PP 54-57.

163. *Id.* at P 58 (stating that this requirement applies if the holding company would turn the acquired company into a private company subsidiary).

164. *See supra* note 12 (discussing definition of "electric utility company"); Order No. 669-A, *supra* note 10, at P 54.

$10 million.[165] Section VII below discusses how the FERC determines whether a security has a value in excess of $10 million.

C. Application to Mergers and Consolidations

In addition to covering acquisitions of securities, section 203(a)(2) applies to an action by a holding company to "by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000."[166] The FERC suggested in one case that jurisdiction may attach pursuant to this provision where a holding company increased its ownership interest in certain public utility holding companies from just over 10% to 100% "'to achieve a consolidation of financial management firms.'"[167] The FERC's precedent regarding the determination of whether the $10 million threshold has been crossed is discussed in Section VII below.

D. Blanket Authorizations

The FERC has established in its regulations a number of blanket authorizations for transactions subject to section 203(a)(2), which are summarized in the Appendix. The following blanket authorizations under Section 203(a)(2) overlap with authorizations described in Section III.D. above with respect to section 203(a)(1), and accordingly raise some of the same questions regarding their application:

- Acquisition by a holding company of "any voting security in a transmitting utility or an electric utility company or a holding company" (with respect to either of them) "if, after the transaction, the holding company and its associate and affiliate companies will own less than 10% of the voting securities of the public utility."[168] (Discussed in Section III.D). Whereas the corresponding section 203(a)(1) blanket authorization pursuant to 18 C.F.R. § 33.1(c)(12)(i) appears unnecessary given the FERC's general presumption that transfers in which the transferee and its affiliates will hold less than 10% of the voting interests are not jurisdictional,[169] the section 203(a)(2) blanket authorization is required, since no such presumption applies in that context. This authorization is subject to the restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).[170]

- Internal corporate reorganizations for nontraditional public utilities that do not have captive customers or own or provide transmission service

165. 16 U.S.C. § 824b(a)(2); *see also* 18 C.F.R. § 33.1(a)(1)(iii).

166. 16 U.S.C. § 824b(a)(2).

167. *BlackRock, Inc.*, 131 F.E.R.C. ¶ 61,063 at P 13 & n.9 (2010) (citation omitted).

168. 18 C.F.R. § 33.1(c)(2)(ii).

169. *See supra* notes 34-37 and accompanying text (discussing the FERC's presumption).

170. 18 C.F.R. § 33.1(c)(3)-(4); *see also Cascade Inv., L.L.C.*, 129 F.E.R.C. ¶ 61,011 at P 20 n.22 (2009) (emphasizing the FERC's expectation that holding companies relying on a blanket authorization subject to these obligations comply with the requirement to file with the FERC copies of certain filings with the SEC with respect to their holdings of securities in a target company).

over jurisdictional transmission facilities and that present no cross-subsidization issues.[171]

- Acquisition by a person that is a holding company solely with respect to EWGs, QFs, and FUCOs of the securities of additional EWGs, QFs, or FUCOs.[172] (Discussed in Section III.D above with respect to the blanket authorization in 18 C.F.R. § 33.1(c)(13)).[173] This authorization applies also to the acquisition of securities of holding companies that are holding companies solely as a result of ownership of interests in EWGs, QFs, or FUCOs.[174]

- Acquisition by a holding company, or its subsidiary, that is regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency under the Bank Holding Act of securities of holding companies that include a transmitting utility or electric utility company if the acquisition is for certain banking purposes.[175] This covers such acquisitions that are in the normal course of business and the securities are held as a fiduciary, as principal for derivatives hedging purposes (subject to not voting more than 10% of the voting securities), as collateral for a loan or solely for purposes of liquidation and in connection with a prior loan and beneficially owned for not more than two years (subject to certain conditions).[176] (Discussed in Section III.D above with respect to the blanket authorization in 18 C.F.R. § 33.1(c)(14)).[177] The FERC has granted more expansive blanket authorizations to financial institutions in response to specific requests where the applicants have provided assurances that regulation by the SEC and securities exchanges, contractual obligations, and internal policies will prevent the applicants from exercising control over the public utility in which they acquire securities, but has imposed a 20% limitation on the voting securities that may be held in certain circumstances.[178]

171. 18 C.F.R. § 33.1(c)(6).

172. *Id.* § 33.1(c)(8).

173. *See supra* notes 85-91 and accompanying text.

174. Order No. 669-B, *supra* note 10, at P 44.

175. 18 C.F.R. § 33.1(c)(9).

176. *Id*.

177. *See supra* notes 85-91 and accompanying text. Note that the definition of "holding company" excludes banks and certain other financial institutions and their subsidiaries that own, control, or have the power to vote public utility or holding company securities, "as long as the securities are (i) held as collateral for a loan, (ii) held in the ordinary course of business as a fiduciary, or (iii) acquired solely for purposes of liquidation in connection with" a prior loan (if owned beneficially for a period of two years or less); or, as a broker dealer if the securities are "(i) not beneficially owned by the broker or dealer and are subject to any voting instructions . . . given by customers . . . or (ii) acquired within [twelve] months in the ordinary course of business . . . with the bona fide intention of effecting [further] distribution." 42 U.S.C. § 16451(8)(B). The blanket authorization in 18 C.F.R. § 33.1(c)(9) covers situations that do not benefit from the exclusion from the holding company definition. Order No. 669-A, *supra* note 10, at P 122.

178. *See, e.g.*, *Morgan Stanley*, 134 F.E.R.C. ¶ 61,234 at PP 14-15 (2011); *Franklin Res., Inc*., 126 F.E.R.C. ¶ 61,250 at PP 38-40 (2009); *Horizon Asset Mgmt., Inc*., 125 F.E.R.C. ¶ 61,029 at PP 45-50 (2008); *Legg Mason, Inc*., 121 F.E.R.C. ¶ 61,061 at PP 26-32 (2007); *Goldman Sachs Group, Inc*., 121 F.E.R.C.

The following blanket authorizations that apply only in the context of section 203(a)(2) also raise issues meriting discussion:

- Acquisition by a holding company of any security of certain smaller or intrastate utilities, including: (a) "a transmitting utility or company that owns, operates, or controls only facilities used solely for" (i) electric transmission or sales in intrastate commerce or (ii) local distribution and/or retail sales subject to state commission regulation (in each case subject to reporting requirements in certain circumstances); or (b) "an electric utility company that owns generating facilities that total 100 MW or less" and are used fundamentally for individual load or affiliated end-users (e.g., industrial self-generators).[179] The FERC granted these blanket authorizations based on its recognition that the definition of "electric utility company" encompasses companies that own or operate facilities used for the generation, transmission, or distribution of electric energy, which is broader than the definition of "public utility" (which is limited to entities engaged in interstate sales at wholesale or interstate transmission of electric energy), and that it did not consider its review of such transactions necessary to protect consumers.[180]

- Acquisition by a holding company of any security of a "subsidiary company" in the same holding company system (the "Subsidiary Securities Authorization").[181] This authorization is subject to the restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).[182] The scope of this authorization is ambiguous, however. The term "subsidiary company" is not defined for purposes of section 203 of the FPA or in the FERC's regulations implementing section 203.[183] Although the FERC specified in its regulations

¶ 61,059 (2007); *Morgan Stanley*, 121 F.E.R.C. ¶ 61,060 at PP 36-51 (2007); *Capital Research & Mgmt. Co*., 116 F.E.R.C. ¶ 61,267 at P 28 (2006).

179. 18 C.F.R. § 33.1(c)(1); *see also Goldman Sachs Group, Inc.*, 115 F.E.R.C. ¶ 61,303 (2006).

180. Order No. 669-B, *supra* note 10, at PP 12-17; Order No. 669-A, *supra* note 10, at PP 62-63; Order No. 669, *supra* note 10, at PP 56-57.

181. 18 C.F.R. § 33.1(c)(2)(iii).

182. *Id.* § 33.1(c)(3)-(4).

183. "Subsidiary company" is defined in the FERC's regulations in parts 101 (the Uniform System of Accounts) and 366 (implementing PUHCA 2005). 18 C.F.R. pts. 101 and 366 (2012). In each case the definition is specific to that respective part of the FERC's regulations and does not have any general applicability under the FPA or the FERC's regulations implementing the FPA. In part 101, "Subsidiary Company":

> in the case of Major utilities means a company which is controlled by the utility through ownership of voting stock. (*See* Definitions item 5B, Control.) A corporate joint venture in which a corporation is owned by a small group of businesses as a separate and specific business or project for the mutual benefit of the members of the group is a subsidiary company for the purposes of this system of accounts.

18 C.F.R. pt. 101 (39) (2012). In part 366, "subsidiary company" is defined with respect to a holding company as "[a]ny company, 10[%] or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company" (as well as an additional definition not applicable here). 18 C.F.R. pt. 366.1 (2012). Subsection 201(g)(5) of the FPA defines "subsidiary company" as having the same meaning as in PUHCA 2005 (which is the same definition in part 366 of the

implementing section 203 that the terms "holding company," "holding company system," and several others are to have the meanings given them in PUHCA 2005,[184] the FERC did not include the term "subsidiary company" in this provision.[185] The FERC's order establishing this blanket authorization suggests that it may have been intended to allow for the use of "cash management programs, money pools and other intra-holding company financing arrangements," but the text of the order does not specifically link the blanket authorization in section 33.1(b)(2)(iii) to the FERC's interest in facilitating such programs.[186] The FERC's orders citing this regulation have involved acquisitions by holding companies of securities of their wholly owned public utility subsidiaries in the context of money pool and other intra-system financing arrangements, but it is not clear from the language of these orders that the blanket authorization necessarily is limited to those types of situations.[187]

If "subsidiary company" is defined in the same manner as in PUHCA 2005, then any company that acquired 10% or more of the voting securities of an electric utility company (which by definition is a public-utility company), and thereby became a "holding company," could acquire additional securities of such electric utility company without obtaining further authorization from the FERC pursuant to section 203(a)(2) of the FPA because such electric utility would be a "subsidiary company" of such holding company and therefore the transaction would be covered by the Subsidiary Securities Authorization.[188] The FERC, however, might take the view that this blanket authorization was not intended to apply in such circumstances, given the fact that the rule apparently was developed in the context of money pool scenarios where the holding company wholly owned the subsidiary company, and given a natural proclivity of regulatory agencies to interpret their jurisdiction

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FERC's regulations), but this definition applies only for purposes of such subsection (dealing with access by state commissions to books and records of certain electric utility companies and holding companies). 16 U.S.C. § 824(g)(5) (2012) (referring to PUHCA 2005, 42 U.S.C. § 16451).

184. "Holding company" is defined in PUHCA 2005 as "any company that directly or indirectly owns, controls, or holds with power to vote, 10[%] or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company" (as well as an additional definition not applicable here). 42 U.S.C. § 16451(8). "Holding company system" is defined in PUHCA 2005 as "a holding company, together with its subsidiary companies." *Id*. § 16451(9).

185. 18 C.F.R. § 33.1(b)(4).

186. Order No. 669, *supra* note 10, at P 142.

187. *See, e.g.*, *Ameren Servs. Co.*, 114 F.E.R.C. ¶ 62,290, at pp. 64,785-86 & n.3 (2006); *Kentucky Utils. Co*., 114 F.E.R.C. ¶ 62,050, at p. 64,184 n.3 (2006); *Louisville Gas & Elec. Co.*, 114 F.E.R.C. ¶ 62,051, at pp. 64,185-86 & n.3 (2006); *South Carolina Elec. & Gas Co.*, 114 F.E.R.C. ¶ 62,262, at p. 64,690 (2006); *Exelon Corp*., 114 F.E.R.C. ¶ 61,116 at PP 9-10 (2006); *Entergy Servs., Inc.*, 114 F.E.R.C. ¶ 61,120 at P 9 (2006).

188. The FERC has held that under the blanket authorization in 18 C.F.R. § 33.1(c)(8) a holding company may increase its ownership interests in EWGs, FUCOs, or QFs in which it has already acquired interests without obtaining further authorization under section 203(a)(2) (subject to the possible requirement for the EWG, FUCO, or QF to obtain any needed authorization under section 203(a)(1)). *Harbinger Capital Partners Master Fund I, Ltd.*, 125 F.E.R.C. ¶ 61,144 at PP 23-24 (2008).

broadly.[189] Moreover, a court may find that, due to the ambiguity in the regulation, any interpretation by the FERC should be afforded deference.[190] Therefore, it is not clear whether the interpretation suggested above would be upheld in any proceeding at the FERC or upon review by the U.S. Court of Appeals. Regardless of whether this blanket authorization applies for purposes of section 203(a)(2), it is possible that authorization may be required by the public utility in which the holding company is acquiring a direct or indirect interest pursuant to section 203(a)(1)(A) of the FPA if there is a direct or indirect acquisition of 10% or more of the voting securities of a public utility.[191]

Similarly, regardless of whether the Subsidiary Securities Authorization applies for purposes of section 203(a)(2), it is possible that authorization may be required pursuant to section 203(a)(1) of the FPA if there is an acquisition of 10% or more of the voting securities of a public utility.

- Although not included in a specific blanket authorization, the FERC has clarified that authorization is not required under section 203(a)(2) for a holding company to repurchase its own stock.[192]

E. Potential Integration of Multiple Transactions

Section 203(a)(2) of the FPA applies only to purchases by a holding company of securities of a transmitting utility, an electric utility company, or a holding company with respect to a transmitting utility or an electric utility company (or consolidations among such entities).[193] Accordingly, if the entity engaging in the acquisition or consolidation does not hold 10% or more of the voting securities of any transmitting utility or electric utility company immediately prior to the transaction (and therefore is not a holding company covered by section 203(a)(2)), then the purchaser could, in a single transaction, acquire any amount of the securities of an electric utility company or transmitting utility, or the holding company of a transmitting utility or an electric utility company, without being subject to the requirement under section 203(a)(2) to obtain authorization from the FERC prior to the acquisition. But issues could arise if an acquisition were made in such a way that it was not clearly a single transaction, such as sequential purchases from the market or

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189. This would be similar to the narrow interpretation by the FERC of its rule regarding secondary market transactions, as discussed above, notwithstanding the broad interpretation supported by the plain language of the regulation. *See supra* notes 64-68 and accompanying text.

190. *See generally* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984).

191. To the extent that the holding company is a holding company solely with respect to EWGs, QFs, and FUCOs, and is acquiring additional interests in such entities, the FERC's regulations at 18 C.F.R. § 33.11(c)(8), as discussed below, provide a blanket authorization for such acquisition under section 203(a)(2). *LS Power Dev., Inc.*, 125 F.E.R.C. ¶ 61,267 at P 23 (2008).

192. Order No. 669-A, *supra* note 10, at P 115 (citing *National Grid plc*, 114 F.E.R.C. ¶ 61,115 at P 11 (2006)).

193. 18 C.F.R. § 33.1(a).

separate purchases from multiple holders.[194] Of course, any public utility in which the purchaser would be acquiring an interest, directly or indirectly, may require authorization for the transaction under section 203(a)(1)(A) if the transaction results in a change in control with respect to the public utility.[195]

VII. CALCULATION OF $10 MILLION THRESHOLD

As discussed above, the FERC's jurisdiction under section 203 is limited in certain instances to transactions where the value is in excess of $10 million. In Order No. 669,[196] the FERC added a definition of "value" to its regulations as follows:

(i) For jurisdictional facilities and companies, value is the market value for transactions between non-affiliated companies, which is rebuttably presumed to be the transaction price. For transactions between non-affiliated companies, value is the original cost undepreciated, as defined in the FERC's Uniform System of Accounts (18 C.F.R. pt. 101), or original book cost, as applicable.[197]

(ii) For wholesale contracts, value is the market value for transactions between non-affiliated companies, which is rebuttably presumed to be the transaction price. For transactions between affiliated companies, value is the total expected "revenues over the remaining life of the contract."[198]

(iii) For securities, value is the "market value for transactions between non-affiliated companies," which is rebuttably presumed to be the transaction price. For transactions between non-affiliated companies, value is the market value for widely-traded securities (determined by the market price at the time of the transaction) or, if the securities are not widely traded, it is determined by multiplying the value of the issuing company's total undepreciated book value by the ratio of the number of equity securities involved in the transaction to the total number of outstanding equity securities of the issuer.[199]

The method in (i) above would apply to physical, jurisdictional facilities, and existing generation facilities addressed by sections 203(a)(1)(A) and (D).[200] This section also would apply for purposes of a merger or consolidation (addressed by sections 203(a)(1)(B) and (D)).[201] For "paper jurisdictional facilities," however, the method in (ii) above would apply.[202] Finally, for

194. The FERC has focused on "the overall economic substance of [a] transaction, rather than its component parts." *Turners Falls Ltd. P'ship*, 55 F.E.R.C. ¶ 61,487, at p. 62,668 (1991) (citing *San Diego Gas & Elec. Co. v. Alamito Co.*, 38 F.E.R.C. ¶ 61,241, at p. 61,778 (1987)). For example, the FERC has viewed a transaction with multiple steps as a single integrated transaction where adhering strictly to the form of the transaction might frustrate the FERC's statutory authorities. *See, e.g.*, *Alamito*, 38 F.E.R.C. ¶ 61,241, at p. 61,778. The FERC likely would be reluctant to consider multiple, related transactions to be a single integrated transaction if the result would be a finding that the FERC did not have jurisdiction over the transaction(s).

195. See *supra* Section III.B. for a detailed discussion of change-in-control transactions.

196. Order 669, *supra* note 10, at PP 113, 116, 120-21.

197. 18 C.F.R. § 33.1(b)(3)(i).

198. *Id.* § 33.1(b)(3)(ii).

199. *Id.* § 33.1(b)(3)(iii).

200. Order No. 669, *supra* note 10, at PP 95, 97; *Entergy Gulf States, Inc.*, 121 F.E.R.C. ¶ 61,182 at P 16 n.11 (2007) (market value, rebuttably presumed to be transaction price, used for purposes of section 203(a)(1)(D)(1)).

201. Order No. 669, *supra* note 10, at P 96.

202. *Id.* at P 97.

securities, as addressed by section 203(a)(1)(C) and 203(a)(2), the method in (iii) above would apply.[203]

The FERC clarified that for non-affiliate transactions including transfers of both jurisdictional facilities (including "paper facilities") and non-jurisdictional facilities, any valuation performed by the acquiring entity of the constituent parts of the transaction may be used to determine whether section 203 authorization is required.[204] If such a valuation is not available, then original cost undepreciated should be used.[205]

The FERC also clarified that in cases involving non-affiliate security acquisitions under section 203 or mergers or consolidations under section 203(a)(2), the appropriate measure is the entire transaction price and not some value prorated to reflect only the portions of the underlying assets that are subject to FERC jurisdiction.[206] For similar cases involving affiliates, the original book cost of all of the acquired company's assets should be used.[207]

VIII. Issues If Approval Not Obtained

A party's failure to obtain prior FERC approval can bring unfavorable consequences. The FERC has imposed civil penalties for failure to obtain needed authorization under section 203, it has required a company to disgorge revenues received under wholesale electric sales contracts transferred in violation of section 203, and it has threatened other consequences for unauthorized transactions. Before EPAct 2005 (which, in addition to the changes to section 203 discussed above, also expanded the FERC's civil penalty authority),[208] the FERC concluded that a particular set of merger transactions had been consummated without obtaining the required prior authorization, noted that "the parties to the merger transactions voluntarily assumed the risk of any consequences that may result" from the FERC's subsequent review of the transactions, and warned the parties that the FERC could pursue remedies including "initiat[ing] an action to undo a merger consummated in violation of the FPA and/or refer[ring] violations of the FPA to the Department of Justice."[209] In another pre-EPAct 2005 case, the FERC threatened to impose

203. *Id.* at P 98. Note that even if the securities represent 10% or more of the target company's voting securities, no section 203(a)(1)(C) authorization is required if the securities have a value of less than $10 million. Order No. 669-B, *supra* note 10, at P 28.

204. Order No. 669, *supra* note 10, at PP 116, 120. Such valuation should be consistent with the value placed by the acquiring company for purposes of its audited financial statements and in keeping with generally accepted accounting principles. *Id.*; Order No. 669-A, *supra* note 10, at PP 20-21.

205. Order No. 669, *supra* note 10, at P 117.

206. *Id.* at PP 123, 125.

207. *Id.* at P 126.

208. *Enforcement: Civil Penalties*, FERC.GOV, http://www.ferc.gov/enforcement/civil-penalties.asp (last updated Mar. 13, 2012).

209. *San Diego Gas & Elec. Co. v. Alamito Co.*, 38 F.E.R.C. ¶ 61,241, at p. 61,779 & n.16 (1987) (citing section 314 of the FPA, 16 U.S.C. § 825m(a), which provides: "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall

remedies as a term or condition of its subsequent approval of a transaction that had been implemented without obtaining prior FERC authorization and noted (without citing any authority) the "obvious risk to the public utility that a disposition implemented without *prior* authorization may be voidable in court by any affected party."[210] The author is not aware of any case in which a party to a transaction, or the FERC, has actually sought to void a transaction for failure to obtain section 203 authorization. In a case involving the unauthorized transfer of wholesale electric sales contracts from a franchised public utility to its power marketing affiliate without obtaining authorization under section 203, the FERC required the transferee to reimburse the transferor, or its counterparties under the contracts, approximately $5 million.[211] While the FERC has approved a number of transactions under section 203 after the transactions had already occurred, the FERC in many cases has refused to grant such authorizations retroactively.[212]

EPAct2005 provided the FERC with civil penalty authority for violations of Part II of the FPA (including section 203),[213] and the FERC has used this authority in at least one case involving a violation of section 203. In that case, a public utility agreed to a settlement including payment of a $500,000 civil penalty for its failure to obtain authorization under section 203(a)(1) of the FPA in connection with its merger with another company (among other violations).[214] The Commission also has referred to its Office of Enforcement another matter involving multiple applications by a public utility and its affiliates seeking authorization under section 203 for transactions that had already been implemented.[215]

be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter."). The FERC has never filed an action under section 314, however.

210. *PDI Stoneman*, 104 F.E.R.C. 61,270 at P 25 (2003); *see also Kandiyohi Power*, 102 F.E.R.C. ¶ 61,213 at P 17 (2003) (similar language); *Northern Iowa Windpower II LLC*, 110 F.E.R.C. ¶ 61,059 at P 13 (2005) (same).

211. *Idaho Power Co.*, 103 F.E.R.C. ¶ 61,182 (2003).

212. *See, e.g.*, *Int'l Trading Co.*, 139 F.E.R.C. ¶ 61,003 at P 10 & n.17; *BlackRock, Inc.*, 131 F.E.R.C. ¶ 61,063 at Ordering P (A) (2010); *Horizon Asset Mgmt., Inc.*, 125 F.E.R.C. ¶ 61,209 at PP 1-2 (2008); *Phelps Dodge Corp.*, 121 F.E.R.C. ¶ 61,251 at Ordering P (A) (2007); *Mesquite Investors L.L.C.*, 111 F.E.R.C. ¶ 61,162 at P 19, Ordering PP (A)-(B) (2005); *Northern Iowa Windpower II LLC*, 110 F.E.R.C. ¶ 61,059 at PP 7-8, 13 (2005); *Kandiyohi Power Coop.*, 107 F.E.R.C. ¶ 61,285 at PP 17, Ordering P (A) (2004) (authorizing transaction as of the date of the order); *but see JPMorgan Chase & Co.*, 123 F.E.R.C. ¶ 61,088 at PP 13, 31 (2008) (granting retroactive approval for transaction implemented with the purpose of stabilizing financial markets and where the public utility aspects were incidental to the transaction as a whole).

213. EPAct 2005, Pub. L. No. 109-58, § 1284(e), 119 Stat. 594 (2005) (amending FPA § 316A, 16 U.S.C. § 825*o*-1 (2012)).

214. *Gexa Energy, L.L.C.*, 120 F.E.R.C. ¶ 61,175 at P 11 (2007). The merger occurred before the FERC was granted civil penalty authority under EPAct 2005, but the public utility did not receive authorization until after the FERC received such authority, and the FERC considered the violation to be continuing after that time. *Id.* at P 13. The FERC noted that the penalty could have been much higher had the public utility's new owner not investigated and self-reported the violation and taken measures to prevent future occurrences. *Id.* at P 14. Counsel advising public utilities on merger transactions should note that the FERC stated in its order approving the settlement that the public utility had represented in its merger documents that no FERC authorization was required for the transaction and its regulatory counsel had provided an opinion to that effect. *Id.* at P 4.

215. *Int'l Trading Co.*, 139 F.E.R.C. ¶ 61,003, at P 10 n.18.

IX. PROPOSALS FOR IMPROVEMENT

The FERC could reduce regulatory costs and uncertainty, as well as its own workload, by issuing orders or regulations changing or clarifying its policies with respect to some of the issues discussed above. The FERC has a strong record of expeditiously processing section 203 applications made out of an abundance of caution with a request that the FERC not rule on whether it has jurisdiction, often issuing orders in as few as thirty days after filing of the application. This has helped minimize the cloud of uncertainty hanging over parties engaging in public utility transactions. But this approach also has an unwelcome downside: it postpones, or avoids altogether, tough decisions regarding the limits of the FERC's jurisdiction. The FERC should look for opportunities to clarify the extent of its section 203 jurisdiction and, where appropriate, change its prior jurisdictional determinations, without holding up the processing of section 203 applications. The FERC's inclusion of blanket authorizations in its regulations also has made an important contribution to reducing the number of section 203 applications, but opportunities remain to make some of the existing blanket authorizations clearer, delete any that are unnecessary, and add new blanket authorizations. Amendments to the FERC's section 203 regulations to make them less burdensome would be consistent with Executive Order 13579, which requests that independent agencies follow principles designed to promote improved regulation and prepare a plan for periodical review of their significant regulations.[216]

One significant way to reduce the number of unnecessary section 203 applications would be for the FERC to revert to something akin to its pre-EPAct 2005 interpretation, applying a dollar threshold (now $10 million) for purposes of mergers of utility assets under section 203(a)(1)(B). This would, for example, avoid requiring section 203 approvals for minor transfers of interconnection and similar facilities. Another important change would be to provide further clarification on "control" and "affiliation," as requested in 2008 and currently pending in the Control and Affiliation Rulemaking, including by providing more guidance on the meaning of "voting securities." More clarity on this issue could reduce significantly the number of "abundance of caution" filings for passive equity transactions under section 203(a)(1)(A). Similarly, the FERC could provide a major service to the regulated public by further clarifying the requirements for the internal corporate reorganization blanket authorization and by clarifying or expanding the scope of the secondary market transactions blanket authorization.

Other opportunities for reform include providing guidance on how section 203 applies to QFs that otherwise are exempt from section 203 but whose owners have market-based rate authority and on whether an equity holder that already owns 10% or more of the voting securities of a public utility and is deemed to exercise control requires authorization to increase its equity holdings. Other reforms could include adding new blanket authorizations under section 203(a)(1)(B) for acquisitions by public utilities of securities of other public utilities paralleling the blanket authorizations for holding companies to acquire

216. Exec. Order No. 13579, 76 Fed. Reg. 41,587 (July 14, 2011); *see also Retrospective Review Under Executive Order 13579*, F.E.R.C. STATS. & REGS. ¶ 29,663, 76 Fed. Reg. 70,913 (Nov. 16, 2011).

securities of electric utility companies, transmitting utilities, or other holding companies under section 203(a)(2).

To implement these reforms, the FERC could initiate a rulemaking, or build on the Control and Affiliation Rulemaking that is pending in Docket No. RM09-16-000.[217] Another approach would be to make specific rulings in response to "abundance of caution" filings by, for example, issuing an initial order approving the transaction (assuming it meets the standards for approval) based on an assumption of jurisdiction and a supplemental declaratory order addressing the jurisdictional issue. The FERC could informally work with applicants to choose appropriate cases and obtain the agreement of the selected applicants to participate in such proceedings. Some applicants likely would be willing to participate in such a proceeding, as long as it did not delay their proposed transaction, so that they could obtain clarity on what transactions require FERC authorization. Although the declaratory order proceeding arguably would be moot once the FERC had approved the transaction,[218] the FERC's rules with respect to requests for a declaratory order do not require that a petition involve a live controversy.[219] Accordingly, it would appear that the FERC would have the option to continue addressing the request for declaratory order, based on the actual facts set forth in the petition, if it chose to do so. To the extent that the FERC is concerned about opening a loophole through which parties could evade FERC review in situations where such review is appropriate, a rulemaking process may help to avoid this result, because a wide variety of entities likely would participate and help identify such potential shortcomings. In any event, the FERC could adjust its regulations, or issue clarifying adjudicative orders, at a later date if it becomes clear that transactions that should be reviewed under section 203 are evading scrutiny.

Reducing the number of section 203 filings would have multiple benefits. At a minimum, it would reduce the time, cost, and effort for applicants and the Commission alike. In addition, it would reduce the risks faced by public utilities and holding companies in connection with financing and M&A transactions. These risks include the possibility that the parties to the transaction may decide that they do not need to seek FERC authorization, only to discover later that they should have sought such authorization, potentially leading to civil penalties or arguments that the transaction may be voidable. Alternatively, if the parties decide that they do need to file a section 203 application, they are exposed to the risk that during their wait for authorization some external event may occur that changes the value of the transaction to one or both parties, so that a party may seek to withdraw. Clearer guidance on the scope of the FERC's jurisdiction under section 203 will facilitate market liquidity for public utility assets and public utility ownership interests, which in turn will support greater and more efficient investment in public utilities and public utility assets. But the FERC should not issue guidance clarifying or limiting its jurisdiction if the result would be to open up a gap in regulation that would allow transactions that would limit

217. *Control and Affiliation*, FERC Docket No. RM09-16-000; F.E.R.C. STATS. & REGS. ¶ 32,650, 75 Fed. Reg. 4498 (2010).

218. *See, e.g.*, *Koch Hydrocarbon Co.*, 65 F.E.R.C. ¶ 61,202 (1993).

219. 18 C.F.R. § 385.207(a)(2) (2012) (providing for filing of a petition for a declaratory order to "remove uncertainty").

competition and damage consumers to escape review by the FERC. This doesn't mean that the FERC should completely abstain from issuing clearer guidance on its section 203 jurisdiction, but rather that the FERC should proceed with caution.

APPENDIX

Summary of Section 203 Blanket Authorizations

Section 203(a)(1)

Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. section 33.1(c)(2)(ii) for acquisition of any voting security in a transmitting utility or an electric utility company (or a holding company with respect to either of them) if, after the transaction, the holding company and its associate and affiliate companies in aggregate will own less than 10% of the voting securities of the public utility.[220]

Transfer by a public utility of its outstanding securities to any person other than a holding company if, after the transaction, the person and its associate and affiliate companies will own less than 10% of the voting securities of the public utility.[221] This blanket authorization is subject to certain reporting requirements. A public utility engaging in a transfer pursuant to this blanket authorization is required to file a report with the FERC within thirty days after the transaction stating the names of the parties, the parties' pre-and post-transaction voting security holdings, the date of the transaction, the identities of any public utility holding company affiliates of the parties, and that the transaction will not result in certain types of cross-subsidization or pledges or encumbrances of utility assets.[222]

Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. section 33.1(c)(8), 33.1(c)(9) or 33.1(c)(10).[223]

Transfer by a public utility of a wholesale market-based rate contract to a public utility affiliate with the same upstream ownership, provided that neither affiliate is affiliated with a traditional public utility with captive customers.[224]

Acquisition or disposition by a public utility of a FERC-jurisdictional contract, provided that neither the acquirer nor transferor has captive customers or owns or provides FERC-jurisdictional transmission service over jurisdictional transmission facilities, the contract does not convey control over the operation of a generation or transmission facility, and the acquirer is a public utility.[225]

Section 203(a)(2)

Acquisition by a holding company of any security of certain smaller or intrastate utilities, including: (a) a transmitting utility or company that owns, operates, or controls only facilities used solely for (i) electric transmission or sales in intrastate commerce or (ii) local distribution and/or retail sales subject to state commission regulation (in each case subject to reporting requirements in certain circumstances) or (b) an electric utility company that owns generating

220. 18 C.F.R. § 33.1(c)(12)(i) (2012).

221. *Id.* § 33.1(c)(12)(ii).

222. *Id.* § 33.1(c)(17).

223. *Id.* § 33.1(c)(13)-(15).

224. *Id.* § 33.1(c)(11).

225. *Id.* § 33.1(c)(16).

facilities that total 100 MW or less and are used fundamentally for individual load or affiliated end-users (e.g., industrial self-generators).[226]

Acquisition by a holding company of any non-voting securities in a transmitting utility, an electric utility company, or a holding company of a transmitting utility or electric utility company.[227] This authorization is subject to certain restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4) to prevent cross-subsidization and to provide the FERC with certain forms provided to the SEC.

Acquisition by a holding company of any voting security in a transmitting utility or an electric utility company (or a holding company with respect to either of them) if, after the transaction, the holding company and its associate and affiliate companies will own less than 10% of the voting securities of the public utility.[228] This authorization also is subject to certain restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).

Acquisition by a holding company of any security of a "subsidiary company" in the same holding company system (the "Subsidiary Securities Authorization").[229] This authorization also is subject to the restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).

Acquisition by a holding company of a foreign utility company (subject to certain conditions if the holding company or its affiliates, subsidiaries, or associate companies have captive customers or own or provide transmission service over jurisdictional transmission facilities in the United States).[230]

Both Sections 203(a)(1) and 203(a)(2)

Internal corporate reorganizations for nontraditional public utilities that do not have captive customers or own or provide transmission service over jurisdictional transmission facilities and that present no cross-subsidization issues.[231]

Acquisition by any public utility in a holding company system that includes a transmitting utility or an electric utility to acquire securities of a public utility in connection with an intra-system cash management program, subject to safeguards to prevent cross-subsidization.[232] Acquisition by a person that is a holding company solely with respect to EWGs, QFs, and FUCOs of the securities of additional EWGs, QFs, or FUCOs.[233]

Acquisition by a holding company, or its subsidiary, that is regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency under the Bank Holding Act of securities of holding companies that include a transmitting utility or electric utility company if the acquisition is for certain banking purposes. This covers such acquisitions that are in the normal course of business and the securities are held as a fiduciary, as

226. *Id.* § 33.1(c)(1).
227. *Id.* § 33.1(c)(2)(i).
228. *Id.* § 33.1(c)(2)(ii).
229. *Id.* § 33.1(c)(2)(iii).
230. *Id.* § 33.1(c)(5).
231. *Id.* § 33.1(c)(6).
232. *Id.* § 33.1(c)(7).
233. *Id.* § 33.1(c)(8).

principal for derivatives hedging purposes (subject to not voting more than 10% of the voting securities), as collateral for a loan or solely for purposes of liquidation and in connection with a prior loan and beneficially owned for not more than two years (subject to certain conditions).[234]

Acquisition by a holding company, or its subsidiary, of any security of a public utility or a holding company that includes a public utility for purposes of certain underwriting or hedging activities (subject to certain conditions).[235]

234. *Id.* § 33.1(c)(9).

235. *Id.* § 33.1(c)(10).