

156 FERC ¶ 61,214
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. RM16-21-000]

Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act

(September 22, 2016)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Inquiry.

SUMMARY: In this Notice of Inquiry, the Federal Energy Regulatory Commission (Commission) seeks to explore whether, and if so, how, the Commission should revise its current approach to identifying and assessing market power in the context of transactions under section 203 of the Federal Power Act (FPA) and applications under section 205 of the FPA for market-based rate authority for wholesale sales of electric energy, capacity and ancillary services by public utilities. In addition, the Commission seeks comment related to its scope of review under section 203 of the FPA, including revisions to blanket authorizations.

DATES: Comments are due **[INSERT DATE 60 days after publication in the FEDERAL REGISTER]**

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through <http://www.ferc.gov>. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- Mail/Hand Delivery: Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document

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SUPPLEMENTARY INFORMATION:

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NOTICE OF INQUIRY

(September 22, 2016)

1. In this Notice of Inquiry (NOI), the Commission seeks to explore whether, and if so, how, the Commission should revise its current approach to identifying and assessing market power in the context of transactions under section 203 of the Federal Power Act (FPA)¹ and applications under section 205 of the FPA² for market-based rate authority for wholesale sales of electric energy, capacity and ancillary services by public utilities. In addition, the Commission seeks comment related to its scope of review under section 203 of the FPA, including revisions to blanket authorizations. Of particular interest is whether the Commission should: (1) establish a simplified analysis for certain section 203 transactions that are unlikely to raise market power concerns; (2) add a supply curve analysis to section 203 evaluations; (3) improve the Commission's single pivotal supplier analysis in reviewing market-based rate applications, and add a similar pivotal supplier analysis to section 203 evaluations; (4) add a market share analysis to review of

¹ 16 U.S.C. 824b.

² 16 U.S.C. 824d.

section 203 transactions; (5) modify how capacity associated with long-term power purchase agreements (PPAs) should be attributed in section 203 transactions; and (6) require submission of applicant merger-related documents. In addition, the Commission seeks comment related to its scope of review under section 203, including whether there are existing blanket authorizations that may be overly broad or otherwise no longer appropriate, and whether there are classes of transactions for which further blanket authorizations or form of expedited review would be appropriate.

I. Background

A. Section 203

2. Section 203(a)(4) of the FPA requires the Commission to approve a proposed disposition, consolidation, acquisition, or change in control if it finds that the proposed transaction will be consistent with the public interest.³ The Commission's analysis of whether a proposed transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁴ The Energy Policy Act of 2005 added the requirement that the Commission find that the proposed transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the

³ 16 U.S.C. 824b(a)(4).

⁴ Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: *Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (1996 Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008).

benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”⁵

3. To analyze whether a proposed transaction will have an adverse effect on competition, the Commission adopted the 1992 Department of Justice (DOJ) and Federal Trade Commission (FTC) Horizontal Merger Guidelines (1992 Guidelines)⁶ and its five-step framework,⁷ as well as an analytic screen (Competitive Analysis Screen), based on the 1992 Guidelines, to identify transactions that would not harm competition.⁸ The

⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, 1289, 119 Stat. 594, 982-83 (2005) (EPAAct 2005).

⁶ *1992 Horizontal Merger Guidelines*, 57 FR 41552 (Apr. 2, 1992) (1992 Guidelines).

⁷ 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118. The five steps are: (1) defining the markets; (2) evaluating whether the extent of concentration of the market raise concerns about potential adverse competitive effects; (3) assessing whether entry could counteract such concerns; (4) assessing any efficiency gains that cannot otherwise be gauged; and (5) assessing whether either party to the merger would fail without the merger, causing its assets to exit the market.

⁸ We note that in 2010, the DOJ and FTC again issued Horizontal Merger Guidelines (2010 Guidelines), which replaced the 1992 Guidelines and explained several changes to the analysis set forth in the 1992 Guidelines. Specifically, among other things, the 2010 Guidelines (1) raise the HHI thresholds used to classify a market as unconcentrated, moderately concentrated, or highly concentrated; and (2) place less emphasis on market definition and the use of a prescribed formula for considering the effects of a merger. The Commission sought comment on whether the Commission should revise its approach for examining horizontal market power when analyzing proposed mergers or other transactions under section 203 of the FPA and when analyzing market-based rate filings under section 205 of the FPA to reflect the 2010 Guidelines. However, the Commission ultimately decided to retain its existing approaches to analyzing horizontal market power under section 203 of the FPA and in its analysis of electric market-based rates under section 205 of the FPA. *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012).

components of the Competitive Analysis Screen are as follows: (1) identify the relevant products; (2) for the purpose of determining the size of the geographic market, identify customers who may be affected by the merger; (3) for the purpose of determining the size of the geographic market, identify potential suppliers to each identified customer (which includes a delivered price test analysis, consideration of transmission capability, and a check against actual trade data); and (4) analyze market concentration using the Herfindahl-Hirschman Index (HHI) thresholds from the 1992 Guidelines.⁹

4. There are two ways that an applicant may demonstrate that the proposed transaction will not have an adverse effect on competition. First, the applicant may explain how the transaction does not result in any increase in the amount of generation capacity owned or controlled collectively by it and its affiliates in the relevant geographic markets.¹⁰ Second, an applicant may explain how the transaction results in a *de minimis* change in its market power.¹¹ An applicant that is not able to rely on either of the above

⁹ *Id.* at 30,119-20, 30,128-37. Specifically, the 1992 Guidelines address three ranges of market concentration: (1) an unconcentrated post-merger market – if the post-merger HHI is below 1000, regardless of the change in HHI the merger is unlikely to have adverse competitive effects; (2) a moderately concentrated post-merger market – if the post-merger HHI ranges from 1000 to 1800 and the change in HHI is greater than 100, the merger potentially raises significant competitive concerns; and (3) a highly concentrated post-merger market – if the post-merger HHI exceeds 1800 and the change in the HHI exceeds 50, the merger potentially raises significant competitive concerns; if the change in HHI exceeds 100, it is presumed that the merger is likely to create or enhance market power.

¹⁰ 18 CFR 33.3(a)(2).

¹¹ *Id.*

is required to submit a Competitive Analysis Screen, which includes a delivered price test.¹²

5. Although the Commission's regulations require applicants to "[i]dentify and define all wholesale electricity products sold by the merging entities during the two years prior to the date of the application, including, but not limited to, non-firm energy, short-term capacity (or firm energy), long-term capacity (a contractual commitment of more than one year), and ancillary services (specifically spinning reserves, non-spinning reserves, and imbalance energy, identified and defined separately)," ¹³ the delivered price tests analyses filed with the Commission often focus on only the short-term energy market, with far less detail and attention given to the other relevant products.

6. The delivered price test primarily determines the scope, or size, of the relevant geographic market by identifying potential suppliers, incorporating transmission availability and prices, and determining the effects of a transaction on concentration.¹⁴ The Commission first adopted the delivered price test in 1996 for section 203 filings as part of its response to "dramatic and continuing changes in the electric power industry" to "ensure that future mergers are consistent with the competitive goals of the Energy

¹² 18 CFR 33.3(a)(1).

¹³ 18 CFR 33.3(c)(1).

¹⁴ See 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118-19.

Policy Act of 1992 (EPAAct).”¹⁵ Subsequent case law and policy statements have provided further guidance but have not materially modified the delivered price test.

B. Section 205

7. Section 205 of the FPA requires that all rates charged by public utilities for the interstate transmission or sale of electric energy be just and reasonable and not unduly discriminatory or preferential.¹⁶ The Commission allows sales of electric energy, capacity, and ancillary services at market-based rates if the applicant and its affiliates show that they do not have, or have adequately mitigated, horizontal and vertical market power.¹⁷ The Commission adopted two indicative screens, the wholesale market share screen and the pivotal supplier screen, for purposes of determining whether a seller may be granted market-based rate authority.

8. The wholesale market share screen measures whether a seller has a dominant position in the market by analyzing the number of megawatts (MW) of uncommitted

¹⁵ *Id.* at 30,110-11.

¹⁶ 16 U.S.C. 824d(a).

¹⁷ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 1, 4, *clarified*, 121 FERC ¶ 61,260 (2007), order on reh’g, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, order on reh’g, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), order on reh’g, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), order on reh’g, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff’d sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

capacity it owns or controls, relative to the uncommitted capacity of the entire market.¹⁸

A seller whose share of the relevant market is less than 20 percent during all seasons passes the market share screen.¹⁹ The Commission stated that the use of such a conservative threshold at the indicative screen stage of a proceeding is warranted because the indicative screens are meant to identify those sellers that raise no horizontal market power concerns, as well as those that require further examination.²⁰ The Commission reasoned that a 20 percent threshold for the wholesale market share screen achieved the proper balance between identifying sellers that may present market power concerns, while avoiding the risk of “false positives” and imposing undue regulatory burdens on sellers.²¹

9. The pivotal supplier screen evaluates the seller’s potential to exercise market power based on the seller’s uncommitted capacity at the time of annual peak demand in the relevant market.²² Sellers are required to identify the wholesale load, which is calculated by taking the difference between the annual peak load and the average of the

¹⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 43.

¹⁹ *Id.* PP 43-44, 80, 89.

²⁰ *Id.* PP 13, 62. Sellers are allowed to use simplifying assumptions in preparing their indicative screens, such as not considering competing imports into the relevant market. Additionally, sellers may be excused from filing screens if, for instance, they represent that the full output of all of the capacity they and their affiliates own in the relevant market and all first-tier markets is fully committed under long-term contracts to unaffiliated entities.

²¹ *Id.* P 91.

²² *Id.* P 35.

daily native load peaks during the month in which the annual peak occurs. The pivotal supplier analysis deducts the wholesale load from the total uncommitted supply in the market to calculate the net uncommitted supply available to compete at wholesale. A seller satisfies the pivotal supplier screen if wholesale load is less than uncommitted capacity from the seller's competing suppliers in the relevant market (wholesale load can be served without any of the seller's capacity participating in the market).

10. With respect to sales of energy, capacity, energy imbalance service, generation imbalance service, and primary frequency response service, the Commission has established rebuttable presumptions that a seller lacks market power if the screens above are passed. In addition, there is a rebuttable presumption that a seller lacks market power in the provision of operating reserve services if the seller passes the above screens and makes an additional showing that the scheduling practices in its region supports the delivery of operating reserve resources from one balancing authority area to another. For each of these products, a seller is rebuttably presumed to have market power if it does not pass one of the screens.²³

II. Request for Comments

11. As part of ensuring that the Commission meets its statutory obligations, the Commission, on occasion, engages in public inquiry to gauge whether there is a need to add, modify or eliminate certain requirements. Here, the Commission is interested in obtaining comment on harmonizing its analysis of transactions under section 203 and its

²³ 18 CFR 35.37.

market-based rate analysis under section 205, streamlining the process for certain applicants that submit section 203 filings, and obtaining additional information from applicants that may help better inform the Commission's analyses. Specifically, the Commission is undertaking a review of its approach to identifying and assessing market power in the context of both its review of transactions under section 203 and applications under section 205 for market-based rate authority and whether the Commission's analyses of market power under section 203 and of market-based rate applications are effective at identifying the potential for the exercise of market power, and if not, what improvements can be made. The Commission has identified several potential improvements in how it analyzes section 203 and market-based rate applications on which it seeks comment, which include harmonizing the Commission's analysis of transactions under section 203 and its market-based rate analysis under section 205, considering additional information in the Commission's market power analysis (such as a supply curve analysis, pivotal supplier analysis, market share analysis, and applicant merger-related documents), and potentially clarifying what would qualify as a *de minimus* transaction in section 203 filings. The Commission notes there are a number of areas where the Commission's section 203 and market-based rate market power analyses differ.²⁴ Some of these differences are appropriate, but others may not be. Thus, in

²⁴ For example, the Commission recently addressed the question of the appropriate analysis for ancillary services in the section 205 market-based rate context, but did not make any corresponding finding in the section 203 context. Nonetheless, we seek comment broadly in this NOI. *See Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for Electric Storage Technologies*, Order No. 784,

(continued ...)

considering whether and how to implement any changes to the market power analyses in the Commission's review of section 203 transactions and market-based rate applications, the Commission is interested in whether increased harmonization of the two analyses is warranted and feasible. The Commission also seeks comment on whether several additional types of analyses that have not been required previously could aid the Commission's review of a proposed transaction.

12. As described below, the Commission seeks comment on whether, and if so, how, the Commission should revise its approach for examining horizontal market power in transactions under sections 203 and 205 for wholesale sales of electric energy, capacity and ancillary services by public utilities in six specific areas: (1) whether, and if so, how, to more precisely define *de minimis* in the context of the section 203 effect on competition prong and whether to develop a specific test for determining when a proposed transaction meets that definition such that a full Competitive Analysis Screen is unnecessary; (2) whether to add a requirement that applicants provide a supply curve analysis for their effect on competition demonstration under section 203; (3) whether there is a need for modifications to the Commission's existing pivotal supplier analysis in reviewing a market-based rate application and whether adding a pivotal supplier analysis to an applicant's effect on competition demonstration under section 203 would help detect market power issues; (4) whether adding a market share analysis to an applicant's

FERC Stats. & Regs. ¶ 31,349 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

effect on competition demonstration under section 203 would help detect market power issues; (5) whether to specify how capacity covered by a long-term firm PPA should be attributed in the section 203 Competitive Analysis Screen; and (6) whether to adopt a requirement for section 203 applicants to submit certain merger-related documents. In addition, the Commission seeks comment on several additional questions regarding the section 203 analysis beyond market power issues related to its scope of review, including whether there are existing blanket authorizations under section 203 that may be overly-broad or otherwise no longer appropriate, and whether there are classes of transactions for which further blanket authorizations or form of expedited review would be appropriate.

A. Simplified *De Minimis* Analysis

13. The Commission seeks comment on whether, and if so, how, to more precisely define *de minimis* in the context of reviewing a section 203 application. The Commission seeks comment on whether a threshold is appropriate to determine whether a transaction's impact can be determined to be *de minimis*, and if so, how that threshold should be calculated.

14. Commission regulations require a Competitive Analysis Screen, which includes a delivered price test, for section 203 applications that involve an impact on horizontal competition. A Competitive Analysis Screen is not needed if the applicant affirmatively demonstrates that the merging entities do not currently conduct business in the same geographic market or that the extent of business transactions among the merging entities in the same geographic market is *de minimis*, and no intervenor has alleged that one of

the merging entities is a perceived potential competitor in the same geographic market as the other.²⁵

15. The Commission has not defined *de minimis* nor identified a threshold that it would consider sufficient to meet this requirement, but has accepted various representations made by applicants regarding the issue. Applicants often make representations that their transaction's effect on horizontal competition is *de minimis* because their combined share of post-transaction installed capacity in the relevant geographic market will be relatively small. In other cases, applicants have claimed that their transaction's effect on horizontal competition is *de minimis* even where an applicant's post-transaction market share is large but the increase in an applicant's post-transaction installed capacity is relatively small. Additionally, some applicants have provided a simplistic calculation to demonstrate the change in HHI, based on the installed capacity of the parties to the transaction compared to the market size, referred to as a "2ab analysis." The "2ab analysis" is used to demonstrate that the overlap is *de minimis* and thus a delivered price test is not needed.

16. In light of the various representations made by applicants regarding whether a proposed transaction's effect on horizontal competition is *de minimis*, the Commission seeks comment on whether it should establish a specific threshold to determine whether a transaction's impact can be determined to be *de minimis* and, if so, how that threshold should be calculated. The following are possible preliminary steps that a *de minimis*

²⁵ 18 CFR 33.3(a).

analysis could include to arrive at a market share: (1) identify the default relevant geographic market as the balancing authority area (BAA) or regional transmission organization/independent system operator (RTO/ISO) market (or submarket, if known or appropriate); (2) identify the default product market as installed capacity, or identify the actual transactions in the relevant geographic market; and (3) calculate the existing (i.e., pre-transaction) market shares of the two transacting parties in the default relevant geographic market, where the results of that calculation would be measured against a specific threshold, such that if the product of the pre-transaction market shares is less than the threshold, the Commission would not require a full Competitive Analysis Screen. The Commission seeks comment both on this method as well as on alternative methods for determining whether a proposed transaction's effect on horizontal competition is *de minimis*, and on what an appropriate specific threshold may be.

17. Further, as explained above, while some applicants have contended that their section 203 transaction would only have a *de minimis* effect on horizontal competition, applicants have also argued that they either do not need to provide a market power study or, alternatively, that the “2ab analysis” sufficiently demonstrates the transaction does not impact horizontal market power. The Commission seeks comments regarding whether the “2ab analysis” may lead to false results in situations where the proposed transaction is a partial acquisition of a competitor in the same market. The majority of section 203 applications where the applicants' market presence overlaps are for partial acquisitions. In instances where both entities will continue to exist post-merger—albeit with different portfolios of assets—relying on the algebraically simple “2ab analysis” may be

inappropriate because the resulting market shares of the post-transaction competitors have changed and therefore the squared market shares caused by the transaction do not produce the same mathematical result as when two firms merge.

18. Thus, the Commission seeks comment on whether it should continue to accept the use of the current “2ab analysis,” whether the “2ab analysis” is useful for some types of transactions but not others, or whether the Commission should develop an alternative abbreviated test to assess whether a transaction would result in an adverse effect on horizontal competition.

B. Serial *De Minimis* Mergers

19. Serial acquisitions have the potential to result in an applicant with a larger market share incrementally acquiring additional capacity such that each proposed transaction individually would not require a full Competitive Analysis Screen, but taken as a whole would require a more in depth examination. That is, a particular entity could be a serial acquirer and amass market power from a number of small incremental transactions. As such, the Commission requests comment on whether it should incorporate consideration of incremental acquisitions into its competition analysis as well as into its analysis of whether a proposed transaction is *de minimis*. The Commission also seeks comment on alternative methods for determining how to address incremental acquisitions.²⁶

²⁶ Below, the Commission asks questions about whether it should be concerned about incremental acquisitions of generating capacity that cumulatively over time could lead to market power, but where no individual transaction raised a competitive concern. This concern is sometimes referred to as the “serial merger theory.”

C. Supply Curve Analysis

20. The Commission also seeks comment on whether the existing section 203 horizontal market power analysis could be strengthened by incorporating a supply curve analysis. A supply curve analysis overlays a demand curve and a supply curve in order to assess whether a merged company has the ability and incentive to exercise market power by withholding output from marginal units (i.e., ability units) to raise prices in order to benefit its baseload units (i.e., incentive units) and increase its total profits.²⁷ The supply curve is constructed using generation dispatch costs from the market.²⁸ The ability to withhold output depends on the amount of marginal capacity that would be controlled by the merged firm, and the incentive to withhold output depends on the amount of inframarginal capacity that could benefit from higher prices. In contrast, the delivered price test examines aggregate MW of capacity in the relevant geographic area(s), not the structure of capacity (i.e., not the number of units in the baseload, intermediate, and peaking segments by ownership). A supply curve analysis can be used to calculate the responsiveness of prices to a reduction in supply for the market price calculated for each season/load, and establish a threshold that indicates the market may be subject to price movement through unilateral action. The results of this analysis could indicate that an

²⁷ A supply curve analysis considers the relevant portion of the market supply curve elasticity for most hours of the year which provides information regarding applicants' incentive to withhold output. *See, e.g., Commonwealth Edison Co.*, 91 FERC ¶ 61,036, at 61,133 n.42 (2000).

²⁸ A properly constructed delivered price test incorporates the dispatch costs for the available generation in the market.

entity may have both the ability and incentive to raise the market price. In addition, a supply curve analysis would enable the Commission to identify situations that typical HHI analyses do not capture, including situations where mergers that result in changes in market concentration below the thresholds that merit further scrutiny from an HHI perspective may still have the ability and incentive to raise prices above competitive levels.

21. Currently, a supply curve analysis is not explicitly required by the Commission's regulations although it can be submitted by some applicants as alternative evidence.²⁹

The Commission requests comment on whether requiring a supply curve analysis for each section 203 application that must submit a Competitive Analysis Screen, in addition to current components of the Competitive Analysis Screen, would strengthen the horizontal market power analysis. If so, the Commission seeks comment as to what information it should require and what metrics it should evaluate, as part of such supply curve analysis.

D. Pivotal Supplier Analysis

22. The Commission uses a pivotal supplier analysis as an indicative screen and for the delivered price test aspect of its assessment of whether an applicant seeking market-

²⁹ In Order No. 642, the Commission clarified that applicants with screen failures could address market conditions beyond the change in HHI "such as [with an analysis of] demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved." *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,897 (2000), order on reh'g, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

based rate authority under FPA section 205 has market power. The Commission is interested in receiving comment on its current use of the pivotal supplier test in the context of market-based rates, whether adding a pivotal supplier test in the Commission's FPA section 203 analysis would provide valuable information to assess whether a party to the transaction is pivotal prior to the transaction, whether the transaction would render the party pivotal, and whether the degree to which a party to the transaction is pivotal is enhanced by the transaction.

23. Specifically, the Commission requests comment on whether the current pivotal supplier analysis applied in market-based rate cases works effectively for purposes of analyzing market power and whether any improvements may be made to the current analysis. In particular, the Commission seeks comment on whether the wholesale load proxy is an effective metric in examining whether a supplier is pivotal in the study area. The wholesale load proxy used in the current pivotal supplier analysis uses the study area's annual peak load (i.e., needle peak) less the proxy for native load obligation (i.e., the average of the daily peak native load during the month in which the annual peak load day occurs).

24. The Commission notes that, in practice, market-based rate sellers rarely fail the pivotal supplier screen. In many cases, the results of the pivotal supplier analysis indicate that the study area's wholesale load can be met solely by remote suppliers, a result that is unlikely in practice. Moreover, the Commission intended that the indicative screens

would serve as a conservative threshold.³⁰ However, with experience this does not seem to be the case. Thus, the Commission requests comment on whether modifying the existing pivotal supplier analysis by replacing the current wholesale load proxy with the study area's annual peak load (i.e., peak load not reduced by the proxy for native load obligation) would improve the accuracy and usefulness of the indicative screen and whether such a modification would result in a more realistic analysis of whether a supplier is pivotal. The Commission welcomes additional comments on the use of and modifications to pivotal supplier screens in the context of the Commissions' review of an applicant's request for market-based rate authorizations.

25. The Commission also notes that using a more conservative screen such as the study area's peak load may trigger "false positives" that put additional burdens on sellers to rebut the presumption of market power and require additional analysis. As a result, the Commission seeks comment on the magnitude of the additional burden and whether that burden is outweighed by the benefits of adopting a modified pivotal supplier screen to provide a more accurate analysis.

26. As noted above, the Commission is interested in the use of an appropriately constructed pivotal supplier screen in the context of its review of applications under FPA section 203. The Commission seeks comment on whether adding a pivotal supplier analysis to its review of a section 203 application would enhance the Commission's analysis of section 203 transactions. Because the Commission's review of a section 203

³⁰ See generally Order No. 697, FERC Stats. & Regs. ¶ 31,252.

application focuses on whether a proposed transaction will have an adverse effect on competition rather than whether there is a dominant market participant, the Commission also requests comment on whether a pivotal supplier analysis for a section 203 application should be different from that used for the Commission's review of a market-based rate application, and if so, how it should be adjusted. While pivotal supplier tests are usually applied to analysis of energy-only markets, the Commission notes that these analyses could be applied to capacity and ancillary service markets in both the sections 203 and 205 contexts. Adding a pivotal supplier test to the Commission's review of a section 203 application could make the Commission's analysis more effective because it would take into account the ability to meet demand, in addition to supply conditions, in screening for potential market power. While the available economic capacity measure³¹ in the delivered price test deducts for native load obligations, market conditions may be such that the residual supply is many times greater than any market demand outside of native load obligations. Conversely, in more concentrated markets, a pivotal supplier analysis provides important information about the ability to exercise market power because small changes in supply could lead to large changes in price. For example, adjustments could include a determination of whether a transaction would create a pivotal supplier where there was none or whether an existing pivotal supplier is pivotal in a greater number of hours. This information may help to answer questions from a slightly different perspective than pure market concentration analysis as measured by the

³¹ 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,132.

delivered price test, such as how a transaction would result in an increase of market power or whether market demand is low enough as compared to existing supply such that a large HHI change does not necessarily create the ability to withhold output and competing supply can serve the peak load.

27. Finally, the Commission seeks comments on how to interpret the results if it incorporates a pivotal supplier analysis into its section 203 analysis. In particular, should the Commission factor into its determination whether a proposed transaction causes an applicant to become pivotal? If the applicant is already pivotal, should the Commission require mitigation to alleviate any enhancement in an applicant's status as a pivotal supplier that results from the transaction?

E. Market Share Analysis

28. The Commission's section 203 analysis focuses primarily on changes in market concentration arising from a proposed transaction.³² The Commission's section 203 analysis is a forward-looking analysis of the effect of the proposed transaction, and it focuses largely on concentration of the market and not an examination of market share changes or accumulation of market share over time. As a consequence, the section 203 analysis may not include complete information about an applicant's overall presence in a market. Therefore, the Commission seeks comment on the potential benefits of expanding its section 203 analysis to include an examination of market share.

³² *Tucson Elec. Power Co.*, 149 FERC ¶ 61,056, at P 30 (2014) (the Commission will consider evidence of anticompetitive effects other than increases in HHI).

29. Unlike the pivotal supplier analysis, discussed above, that focuses on the size of the applicant relative to the maximum capacity needed to serve load, a market share analysis focuses on the size of the applicant relative to all other suppliers in the market.³³ An overall market share screen in the section 203 context would enable the Commission to determine if a seller has obtained a significant share in a specific market either through a series of transactions or a combination of transactions and construction, allowing for the accumulation of market power without one particular transaction triggering concerns. The Commission seeks comment on whether there is a specific market share above which market power concerns would arise in a section 203 review. For example, in evaluating applications for market-based rate authority, the Commission applies a 20 percent market share threshold in determining whether an application raises market power concerns.³⁴ The Commission seeks comment on whether a market share threshold is appropriate in its review of section 203 applications and, if so, what that threshold should be. The Commission seeks further comment on whether market share analyses should be applied to capacity and ancillary service markets, in addition to energy markets.

30. The Commission also seeks comment on whether the market share threshold, or an alternative analysis, would adequately address concerns that an entity has accumulated a

³³ The Commission's existing delivered price test analysis requirement in the implementing regulations of the FPA section 203 program incorporate individual market shares; therefore, we believe market share information is readily available for most applicants to be able to complete a market share analysis.

³⁴ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 89-93.

dominant position in a market over time through a series of acquisitions, i.e., the serial merger theory. Such an alternative analysis could consider changes in market concentration resulting from an entity's past mergers and acquisitions over a certain time period. For example, the Commission could establish a threshold where, if an entity proposes to acquire another entity (or its generation assets) and that acquiring entity has made other acquisitions that have cumulatively increased its market share by 10 percent or more over the previous five years, the newest acquisition would not be considered *de minimis* and would require a complete horizontal competitive analysis.

F. Capacity Associated with Power Purchase Agreements

31. The Commission is interested in whether it should alter the way in which it accounts for capacity associated with long-term firm PPAs³⁵ in the Commission's review of a section 203 application. Currently, if a purchasing utility entered into a long-term firm PPA for the output of a generating facility before filing a section 203 application to acquire that same facility, the Commission has generally considered the generation capacity of that facility to be attributed to the purchasing utility's pre-acquisition market share. Because the capacity of the facility is already attributed to the purchaser, the acquisition of the facility will not increase the purchaser's market share under the

³⁵ The Commission has defined a long-term PPA to be one that has a contract term of one year or longer. *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, 80 FR 67056 (Oct. 30, 2015), FERC Stats. & Regs. ¶ 31,374, at P 143 (2015), order on reh'g and clarification, Order No. 816-A, FERC Stats. & Regs. ¶ 31,382 (2016).

Commission's screens. Therefore, the transaction would be considered to have no adverse effect on competition.³⁶

32. While the current approach of attributing the capacity of the facility to the purchaser is appropriate in the context of the market-based rate market power analysis, in the section 203 context the change in market concentration may extend beyond the terms of the PPA. For example, if a transaction conveys ownership over a generation facility where a PPA is expiring in two years, the transaction may prevent competitive supply from reentering the market. In the Commission's review of a section 203 application, the impact of a proposed transaction on horizontal competition is assessed when the section 203 filing is made seeking authorization of the acquisition. However, a market power analysis is not conducted upon the expiration of the contract. The Commission seeks comment on whether it should use alternative methodologies in its review of a section 203 application to account for the capacity associated with long-term firm PPAs to increase the accuracy of its market power analyses with respect to such PPAs. For example, where a section 203 applicant seeks approval to purchase a generating facility from which it already purchases the output under a long-term firm PPA, that applicant could be asked to provide a delivered price test analysis showing the HHI impacts under two different scenarios: (1) with the capacity attributed solely to the current facility owner; and (2) with the capacity attributed solely to the applicant proposing to acquire

³⁶ The Commission recently clarified that market-based rate applications must attribute a long-term firm PPA to the purchaser when the PPA has an associated long-term transmission reservation. Order No. 816, FERC Stats. & Regs. ¶ 31,374 at P 138.

the facility. Alternatively, the Commission could attribute a facility's capacity to the facility owner only under certain circumstances, including: (1) if the term of the PPA began one year or less prior to the filing of the section 203 application; (2) if the PPA expires prior to the end of the study period used in the applicant's delivered price test analysis;³⁷ or (3) if the facility is external to the purchaser's BAA but does not have firm transmission service to the purchaser's BAA. Applicants with long-term firm PPAs could also be required to justify in a detailed manner why the capacity in question should be attributed to the facility purchaser. The Commission seeks comments on these proposals.

G. Applicant Merger-Related Documents

33. As part of the Commission's assessment regarding whether we should revise aspects of our review of section 203 applications, the Commission requests comment on whether, for transactions that require a full Competitive Analysis Screen, it should require the submission of additional documentation that may assist the Commission's review of certain proposed transactions. Specifically, the Commission understands that applicants submit to DOJ and/or FTC consultant reports and other internal reports that assess the competitive effects of the merger. The Commission seeks comment regarding whether the Commission should require applicants to submit as part of their section 203

³⁷ Merger analysis should be as forward looking as practicable, typically a delivered price test will study projected market conditions on a forward-looking basis after the proposed transaction is expected to close. *See* Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,887.

application these consultant reports and internal reports (merger-related documents) required by DOJ and/or FTC. The Commission would continue to rely on the Competitive Analysis Screen to make its determination, but we believe these merger-related documents could be useful in the Commission's understanding of an applicant's Competitive Analysis Screen by providing additional information regarding, for example, the relevant geographic market definition or anticipated unit retirements.

34. We recognize that imposing a new requirement regarding the submission of such merger-related documents could impose a burden on applicants or raise other concerns. However, we do not anticipate that the burden of requiring submission of these merger-related documents would be significant because applicants already are required to submit such documents to other federal governmental agencies reviewing the competitive effects of the proposed transaction. In addition, we recognize that there could be concerns regarding the commercially sensitive nature of these merger-related documents, and how such documents would be protected once submitted to the Commission. The Commission seeks comments on this proposal, including the likely costs and benefits of including the merger-related documents in its processing of section 203 applications and the confidentiality concerns that this proposal may raise.

H. Blanket Authorizations

35. EPLA 2005³⁸ revised the scope of transactions subject to the Commission's review under section 203. Among other things, the amended section 203 codified the Commission's review authority to include authority over certain holding company mergers and acquisitions,³⁹ as well as certain public utility acquisitions of generating facilities.⁴⁰ In Order No. 669,⁴¹ the Commission promulgated regulations adopting certain modifications to 18 CFR part 33 and section 2.26 to implement the amended section 203 and, in so doing, granted blanket authorizations for certain types of transactions, including foreign utility acquisitions by holding companies, intra-holding company system financing and cash management arrangements, certain internal corporate reorganizations, and certain investments in transmitting utilities and electric utility companies. Under these blanket authorizations, even though the transaction may be jurisdictional under section 203, no application or prior Commission authorization is needed prior to completing the transaction although some have reporting requirements and other conditions.⁴²

³⁸ EPLA 2005, Pub. L. No 109-58, 1289, 119 Stat. 594, 982-83.

³⁹ 16 U.S.C. 824b(a)(2).

⁴⁰ 16 U.S.C. 824b(a)(1)(D).

⁴¹ *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁴² *See* 18 CFR 33.1(c)(1)(i)-(ii), (c)(2), (c)(5), (c)(10), (c)(12).

36. In Order No. 708,⁴³ the Commission established five additional blanket authorizations. Four of these blanket authorizations apply to transactions in which a public utility seeks to transfer its outstanding voting securities to another holding company that has already been granted blanket authorization under various provisions of section 33.1(c).⁴⁴ The fifth blanket authorization applies to the acquisition or disposition of a jurisdictional contract where: (1) neither the acquirer nor transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities; (2) the contract does not convey control over the operation of a generation or transmission facility; (3) the parties to the transaction are neither affiliates nor associate companies; and (4) the acquirer is a public utility.⁴⁵

37. As discussed above, since these blanket authorizations were granted, industry has undergone substantial change including continued market development and expansion of RTOs/ISOs, consolidation among utilities, such that the conditions that gave rise to the blanket authorizations currently in effect may no longer be appropriate. For example, it may no longer be appropriate to grant blanket authorizations to holding companies that only hold exempt wholesale generators, as is granted in 18 CFR 33.1(c)(8), as exempt wholesale generators now make up a significant portion of supply and any transaction

⁴³ *Blanket Authorization Under FPA Section 203*, Order No. 708, FERC Stats. & Regs. ¶ 31,265, order on reh'g, Order No. 708-A, FERC Stats. & Regs. ¶ 31,273 (2008), order on reh'g, Order No. 708-B, FERC Stats. & Regs. ¶ 31,290 (2009).

⁴⁴ 18 CFR 33.1(c)(12)-(15).

⁴⁵ 18 CFR 33.1(c)(16).

involving these generators could affect wholesale rates by impacting competition. In light of these changes and others, the Commission seeks comment on whether there are existing blanket authorizations under section 203 that are no longer appropriate.

38. Industry change has also led to an evolution in the types of transactions that are submitted to the Commission for section 203 approval but which may not give rise to the competitive concerns considered when analyzing whether a transaction is consistent with the public interest. Such transactions include the disposition of securities with limited rights to governance of the public utility, as well as transfers of pieces of the transmission system that are consolidated into the existing transmission network of a public utility. Many applications submitted under section 203 present no concerns and are found to be consistent with the public interest and are approved by the Commission without condition. The Commission seeks comment on whether there are classes of transactions that share characteristics for which further blanket authorizations would be appropriate, and whether specific reporting requirements would also be appropriate in certain cases.

I. Transactions Subject to Only Section 203(a)(1)(B)

39. As discussed above, in EPAAct 2005, Congress revised the scope of the Commission's jurisdiction under section 203. For certain types of transactions, Congress established a "minimum threshold" of \$10 million for requiring Commission approval.⁴⁶ In contrast, under section 203(a)(1)(B) a public utility requires Commission authorization before it "merge[s] or consolidate[s], directly or indirectly" its jurisdictional facilities

⁴⁶ 16 U.S.C. 824b(a)(1)(A), (C), (D).

with those of another person with no minimum dollar threshold. Based on the plain language of the statute, the Commission has not established a minimum threshold for transactions under section 203(a)(1)(B).⁴⁷ Accordingly, there are scenarios in which transfers of low-value equipment require Commission review. These transactions account for a large percentage of the section 203 filings submitted to the Commission,⁴⁸ and many of them do not raise concerns under the Commission's public interest analysis.

40. As noted above, the Commission has granted blanket authorizations for certain jurisdictional transactions. The Commission believes there may be certain other categories of transactions for which abbreviated filing requirements may be appropriate. Thus, the Commission seeks comment on whether there are categories of proposed transactions that are jurisdictional only under section 203(a)(1)(B) that, by their nature, do not require the same level of scrutiny by the Commission. One such category of proposed transactions could include those below a minimum dollar threshold. Such a

⁴⁷ In Order No. 669, the Commission stated:

While Congress included a \$10 million threshold for amended subsections 203(a)(1)(A), (C), (D), and 203(a)(2) (dispositions of jurisdictional facilities; acquisitions of securities of public utilities; purchase of existing generation facilities; holding company acquisitions), Congress clearly did not adopt a monetary threshold for mergers and consolidations in amended subsection 203(a)(1)(B).

Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 32.

⁴⁸ For example, in Fiscal Year 2015, the Commission received 216 applications for approval under section 203. Approximately 20 percent of those applications were filed only under section 203(a)(1)(B) and fell below the \$10 million threshold.

threshold would be distinct from the threshold for the Commission to review a section 203 transaction, and would establish a benchmark for identifying transactions under section 203(a)(1)(B) that are jurisdictional but that would not require the same level of scrutiny by the Commission.

41. If such categories can be identified, the Commission seeks comment on ideas for facilitating expeditious processing of those transactions, consistent with the Commission's obligations under the FPA. The Commission offers, as an example, the adoption of abbreviated filing requirements for those transactions under section 203(a)(1)(B) that fall within certain categories. These abbreviated filing requirements could include: (a) a request for partial waiver that sets forth the requirements for which waiver is sought; and (b) a certification by the applicants that the proposed transaction does not raise concerns under the Commission's analysis of whether a transaction is consistent with the public interest (i.e., the transaction will have no adverse effect on competition, rates, or regulation, and will not result in cross-subsidization). The Commission seeks comment on alternative methods as well.

III. Comment Procedures

42. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[INSERT DATE 60 days after publication in the FEDERAL REGISTER]**. Comments must refer to Docket No. RM16-21-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

43. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

44. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

45. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

IV. Document Availability

46. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

47. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and

Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

48. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

By direction of the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.