# REPORT OF THE FINANCE AND TRANSACTIONS COMMITTEE

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## I. INTERSTATE NATURAL GAS PIPELINE CAPACITY RELEASE

### *A. Waivers of FERC Capacity Release Regulations and Tariff Provisions Facilitating Asset Transfers*

Shippers seeking to transfer interstate pipeline capacity must adhere to the Federal Energy Regulatory Commission's (FERC's) capacity release policies and regulations, along with related pipeline tariff provisions (collectively, the

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"capacity release rules").[1] This section reports on the waivers of capacity release rules that were granted by the FERC in 2015.

1. Background

The FERC created the capacity release program as part of its restructuring of the interstate natural gas pipeline industry in Order No. 636.[2] Capacity release is the process by which interstate pipeline shippers transfer or "release" unused or unwanted firm natural gas transportation capacity to replacement shippers.[3] The FERC's position is that firm capacity must be released "in a non-discriminatory manner to those who [place] the highest value on the capacity up to the maximum rate."[4] Thus the FERC prescribes regulations[5] and rules for transfers of interstate pipeline capacity.[6]

In 2015, the FERC issued nineteen capacity release waivers. As shown below, these waivers covered seven types of transactions: (1) sales of production assets and pipeline capacity; (2) corporate restructurings; (3) sales of gas-fired power plants and pipeline capacity; (4) permanent release of pipeline capacity connected to an LNG terminal; (5) sales of marketing businesses; (6) a credit-related assignment; and (7) a transfer of natural gas processing facilities and pipeline capacity.[7]

a. Transfers of production assets

The FERC granted five waivers allowing sales of natural gas production assets 'bundled' with transportation capacity.[8] The parties in these proceedings

1. 18 C.F.R. § 284.8 (2015); *Tariff List*, FED. ENERGY REGULATORY COMM'N, http://etariff.ferc.gov/TariffList.aspx (last visited Apr. 1, 2011) (FERC eTariff database for current gas pipeline tariffs).

2. Order No. 712, *Promotion of a More Efficient Capacity Release Market*, 123 F.E.R.C. ¶ 61,286 at P 2 & n.2 (2008) (to be codified at 18 C.F.R. pt. 284) [hereinafter Order No. 712] (citing Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation*; and *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 30,939 (1992), 57 Fed. Reg. 13,267 (1992), *order on reh'g*, Order No. 636-A., [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 30,950 (1992), 57 Fed. Reg. 36,128 (1992), *order on reh'g*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), 57 Fed. Reg. 57,911 (1992), *notice of reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993); *aff'd in part*, *vacated in part*, *remanded in part*, United Dist. Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 F.E.R.C. ¶ 61,186 (1997)).

3. Order No. 712, *supra* note 2, at P 3.

4. *Id.* at P 5.

5. 18 C.F.R. § 284.8.

6. Intrastate pipelines doing interstate commerce pursuant to section 311 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, and "Hinshaw" pipelines providing interstate commerce under a blanket certificate issued per 18 C.F.R. 284.224 are not required to provide capacity release. *See, e.g.*, *N. Illinois Gas Co.*, 95 F.E.R.C. ¶ 61,452, at 62,646 (2000).

7. *Anadarko Energy Services Co.*, 153 F.E.R.C. ¶ 61,124 (2015); *World Fuel Services, Inc.*, 151 F.E.R.C. ¶ 61,082 (2015); *Union Power Partners, L.P.*, 151 F.E.R.C. ¶ 61,061 (2015); *ExxonMobil LNG Supply LLC*, 151 F.E.R.C. ¶ 61,002 (2015); *Barclays Bank PLC*, 152 F.E.R.C. ¶ 61,069 (2015); *Exelon Generation Company, LLC*, 153 F.E.R.C. ¶ 61,282 (2015); *Apache Corp.*, 153 F.E.R.C. ¶ 61,262 (2015).

8. *WPX Energy Appalachia, LLC*, 150 F.E.R.C. ¶ 61,013 (2015); *Chesapeake Energy Marketing, L.L.C.*, 150 F.E.R.C. ¶ 61,015 (2015); *Washington Gas Light Co.*, 152 F.E.R.C. ¶ 61,159 (2015); *Eni Petroleum US LLC*, 152 F.E.R.C. ¶ 61,174 (2015); 153 F.E.R.C. ¶ 61,124 (2015). This was the most common reason for capacity release waiver requests.

justified the requests by asserting that transportation capacity "is a necessary component of the transaction, and that without the [c]apacity, [the buyer] cannot directly market the gas it produces from the production assets."[9] The transactions were located in major producing regions including Texas and Louisiana,[10] Pennsylvania,[11] Wyoming,[12] the Gulf of Mexico,[13] and Pennsylvania and New York.[14]

b. Corporate Restructurings

In 2015, the FERC granted four capacity release waivers related to corporate restructurings.[15] The FERC has granted such waivers "when the [capacity] transfers are a result of various types of corporate restructurings, including corporate mergers and spinoffs of entire business units."[16] Specifically, waivers were granted for four reasons: (1) to "terminate substantially all affiliate resale and marketing transactions";[17] (2) to facilitate a merger of two affiliated energy marketing businesses;[18] (3) to allow an acquiring company to merge an acquired company's natural gas transportation capacity into its portfolio;[19] and (4) "in order to enhance operational efficiency" by consolidating two affiliate's marketing businesses into one.[20]

9. 153 F.E.R.C. ¶ 61,124 at P 4.

10. 150 F.E.R.C. ¶ 61,015 at P 2 (transferring 184,000 net acres and capacity on Enable Gas Transmission, LLC).

11. 152 F.E.R.C. ¶ 61,159 at P 3 (transferring production interests and transportation capacity on Columbia Gas Transmission, LLC, & Dominion Transmission, Inc.).

12. 153 F.E.R.C. ¶ 61,124 at P 3 (transferring Wyoming Interstate Company, L.L.C. transportation capacity and (i) numerous oil and natural gas leases and the lands covered by those leases; (ii) agreements relating to the leases and land; (iii) coalbed methane wells; (iv) equipment and machinery; (v) related electrical equipment; (vi) a natural gas pipeline gathering system; and (vii) other miscellaneous assets).

13. 152 F.E.R.C. ¶ 61,174 at P 1 (transferring transportation capacity on Destin Pipeline Company, L.L.C., along with wells, gathering lines, and processing facilities).

14. 150 F.E.R.C. ¶ 61,013 at P 1 (transferring capacity on National Fuel and Millennium Pipeline).

15. *Rice Drilling B LLC*, 150 F.E.R.C. ¶ 61,014 (2015); *World Fuel Services, Inc.*, 151 F.E.R.C. ¶ 61,082; *Twin Eagle Resource Management, LLC*, 151 F.E.R.C. ¶ 61,217 (2015); *QEP Marketing Co., Inc.*, 153 F.E.R.C. ¶ 61,280 (2015).

16. 151 F.E.R.C. ¶ 61,082 at P 6.

17. 153 F.E.R.C. ¶ 61,280 at P 4 (transferring capacity on Kern River Gas Transmission Company, Questar Pipeline Company, Rendezvous Pipeline Company, Southern Star Central Gas Pipeline, Inc., & Wyoming Interstate Company, Ltd.).

18. 151 F.E.R.C. ¶ 61,217 at P 1 (transferring capacity on Colorado Interstate Gas Company, Cheyenne Plains Gas Pipeline Company, L.L.C., El Paso Natural Gas Company, Wyoming Interstate Company, Ltd., Tallgrass Interstate Gas Transmission, LLC, Trailblazer Pipeline Company, WBI Energy Transmission, Inc., Northwest Pipeline, LLC, Kern River Gas Transmission Company, Questar Pipeline Company, & Southern Star Central Gas Pipeline, Inc.).

19. 151 F.E.R.C. ¶ 61,082 at PP 1-2 (transferring capacity on Northern Natural Gas Company, Tallgrass Interstate Gas Transmission LLC, & Viking Gas Transmission Company).

20. 150 F.E.R.C. ¶ 61,014 at P 2 (transferring capacity on ANR Pipeline Company, Columbia Gas Transmission, LLC, Columbia Gulf Transmission, LLC, Dominion Transmission, Inc., Equitrans, L.P., National Fuel Gas Supply Corporation, Rockies Express Pipeline LLC, & Texas Eastern Transmission, L.P.).

c. Sales of Natural Gas-fired Generators

There were four waivers granted to allow sales of natural gas-fired generators.[21] The sales included: (1) a 660 MW combined-cycle generator near Lebanon, Pennsylvania;[22] (2) a 620-MW generator near Pleasant Hill, Missouri;[23] and (3) four power blocks, each of which has generating capacity of 495 MW or 505 MW.[24] With respect to two of these waivers, the FERC stated that the waivers were "adequately supported and consistent with previous waivers that the Commission has granted to permit the release of capacity under similar circumstances, such as the sale of a major natural gas electric generating facility."[25] The Commission also found granting such a waiver "will help ensure uninterrupted access to natural gas [for the generator] as intended by the asset transaction."[26]

There were two orders issued with respect to Union Power Partners, L.P. ("Union Power").[27] In the second order, the FERC allowed an affiliate of one of the original purchasers to be substituted for an original FERC-approved purchaser.[28] Also, the FERC allowed Union Power Partner, L.P. to transfer only a "share" of its Trans-Union Interstate Pipeline, L.P. capacity.[29]

d. LNG Terminal Connecting Pipeline

The FERC granted waiver of its prohibition on tying to allow ExxonMobil LNG Supply LLC and ConocoPhillips Company release their Golden Pass Pipeline capacity meant to transport imported liquefied natural gas ("LNG") from the Golden Pass LNG Terminal.[30] The release relieved the shippers of reservation and LNG terminal fees for import capacity that is not being used.[31] The shippers retained the right to recall the released capacity over the seven-year term. The FERC granted the waiver because: (1) it would not harm open access competition; (2) there were no protests; (3) the capacity was unwanted and had been posted for four years; (4) the agreement was voluntary; and (5) the release did not impose any restrictions on use of the capacity.[32]

21. *Union Power Partners, L.P.*, 151 F.E.R.C. ¶ 61,061 (2015); *Dogwood Energy LLC*, 152 F.E.R.C. ¶ 61,083; *Union Power Partners, L.P.*, 153 F.E.R.C. ¶ 61,070 (2015); *Talen Energy Marketing, LLC*, 153 F.E.R.C. ¶ 61,319 (2015).

22. 153 F.E.R.C. ¶ 61,319 at P 2 (transferring capacity on Texas Eastern Transmission, LP).

23. 152 F.E.R.C. ¶ 61,083 at P 2 (transferring capacity on Southern Star Central Gas Pipeline, Inc.).

24. Joint Petition for Limited Waiver at 1 n.5, Union Power Partners, L.P., FERC Docket No. RP15-655-000 (filed March 17, 2015); *Union Power Partners, L.P.*, 151 F.E.R.C. ¶ 61,061 at P 2; *Union Power Partners, L.P.*, 153 F.E.R.C. ¶ 61,070 at P 2.

25. *See, e.g.*, *Union Power Partners, L.P.*, 151 F.E.R.C. ¶ 61,061 at P 6; 153 F.E.R.C. ¶ 61,319 at P 6.

26. 152 F.E.R.C. ¶ 61,083 at P 8.

27. 151 F.E.R.C. ¶ 61,061; *Union Power Partners, L.P.*, 153 F.E.R.C. ¶ 61,070 (2015).

28. 153 F.E.R.C. ¶ 61,070 at P 3.

29. *Id.* at P 2.

30. *ExxonMobil LNG Supply LLC*, 151 F.E.R.C. ¶ 61,002 (2015). The LNG terminal capacity was constructed under section 3 of the Natural Gas Act and the Commission's "*Hackberry*" policy, which allows the terminal to charge market-based rates; *Hackberry* capacity may be transferred without the typical open access policies that ensure transparency and non-discrimination. *Id.* at PP 2, 14.

31. *Id.* at PP 4-5.

32. *Id.* at PP 13-18.

e. Transfers of Marketing Business

The FERC granted three waivers of capacity release rules to allow marketing companies to transfer their jurisdictional transportation and storage agreements and related commodity purchase and sales agreements.[33] In one case the FERC re-confirmed its prior approval of a non-conforming transportation service agreement being transferred.[34] In another order the FERC granted waivers prospectively allowing a seller to seek buyers to facilitate seller's exit from its trading business.[35]

f. Credit Support

The FERC granted a waiver to allow a local distribution company ("LDC") to release a precedent agreement for transportation capacity because the LDC was not creditworthy.[36] The LDC would release its capacity to a creditworthy replacement shipper, who would then sell the LDC an equivalent amount of natural gas at its city-gate.[37] Once the LDC meets the pipeline's creditworthiness standards, the replacement shipper will permanently release the capacity back to the LDC, and the LDC will re-release the capacity back to the replacement shipper in the FERC Order No. 712 asset management arrangement ("AMA").[38] The order also granted a clarification of the FERC's AMA policy.[39]

g. Natural Gas Processing Facilities

The FERC granted a capacity release waiver to allow transfer of the Crane Plant (a natural gas processing facility), a gathering system, and associated interstate pipeline capacity.[40] The FERC granted its waiver stating that it was consistent with other orders approving transfers that "are a result of various types of corporate restructurings, including corporate mergers, and sales of entire business units."[41]

*B. Rice Energy Petition for Declaratory Order*

1. Background of AMAs

AMAs allow shippers to release firm interstate natural gas pipeline capacity to asset managers who then manage the capacity on behalf of the releasing shipper

33. *MidAmerican Energy Co.*, 152 F.E.R.C. ¶ 61,196 (2015); *Barclays Bank PLC*, 152 F.E.R.C. ¶ 61,069 (2015); *WPX Energy Marketing, LLC*, 151 F.E.R.C. ¶ 61,164 (2015).

34. 151 F.E.R.C. ¶ 61,164 at P 9.

35. 152 F.E.R.C. ¶ 61,069 at PP 2, 7.

36. *Exelon Generation Company, LLC*, 153 F.E.R.C. ¶ 61,282 (2015) (releasing capacity on Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C.).

37. 153 F.E.R.C. ¶ 61,282 at P 4.

38. *Id.*

39. The order also granted clarification about Order No. 712 AMAs that at any time prior to the beginning of a given month, the releasing shipper may relieve the asset manager of its delivery obligation under a long-term asset management agreement for all or part of the month – as long as the asset manager is not relieved of its full delivery obligation for more than seven months (or 210 days) in any 12-month period. *Id.* at P 13.

40. *Apache Corp.*, 153 F.E.R.C. ¶ 61,262 (2015) (transferring 6,000 Dth/d capacity on El Paso Natural Gas Company).

41. *Id.* at P 6.

and who may re-market or utilize the capacity when not used by the releasing shipper (usually sharing revenues from such activities with the releasing shipper).[42] If a capacity release qualifies as an AMA, the release is not required to comply with several of the capacity release rules, including the competitive bidding requirement, the buy/sell prohibition, and the prohibition on tying.[43] AMAs were created by the FERC's Order No. 712 series of orders[44] and the requirements to qualify as the FERC Order No. 712 AMA are set forth in section 284.8(h)(3) of FERC's regulations.[45]

2. *Rice Energy* FERC Proceeding

In June 2015, Rice Energy Marketing LLC petitioned the FERC for a declaratory order clarifying that the exemption from the buy/sell prohibition set forth in Order No. 712 applies to supply-side AMAs on the same basis as delivery-side AMAs.[46] In Order No. 712, the FERC permitted shippers to hire asset managers to manage their interstate pipeline capacity while continuing to purchase gas supplies from a different marketer under separate contracts that are not assigned to the asset manager. The Commission exempted AMAs from the buy/sell prohibition, specifically stating that the exemption applied to volumes of gas *delivered to* the releasing shipper.[47] Rice sought to have the Commission clarify that the same exemption applies to volumes of gas *purchased from* the releasing shipper so as to eliminate uncertainty in the industry, promote a uniform AMA policy among supply-side and delivery-side shippers alike, and further the goal of Order No. 712 to encourage use of pipeline capacity in the secondary market as a way to increase efficiencies and lower costs to end users.[48]

The FERC issued its order on October 15, 2015, granting Rice's petition by way of clarifying the scope of the buy/sell prohibition itself rather than expanding the scope of the Order No. 712 exemption.[49] The Commission confirmed that Order No. 712 only granted an exemption from the buy/sell prohibition with respect to delivery AMAs.[50] It went on to clarify that the Order No. 636 buy/sell prohibition itself does not apply to volumes of natural gas which the asset manager in a supply AMA purchases from its releasing shipper and resells to that shipper.[51] In reaching this conclusion, the Commission reviewed historical discussions about the scope of the buy/sell exemption set forth in Order No. 712. Citing that Order,

42. Order No. 712, *supra* note 2, at P 21.

43. *Id.* at PP 132-37, 167, 171. AMAs must still be posted on pipeline's websites even though they are exempt from the competitive bidding requirement.

44. Order No. 712, *supra* note 2, *order on reh'g*, Order No. 712-A, 125 F.E.R.C. ¶ 61,216 (2008), *order on reh'g*, Order No. 712-B, 127 F.E.R.C. ¶ 61,051 (2009).

45. 18 C.F.R. § 284.8(h)(3) (2015). To qualify as an AMA the asset manager must either buy natural gas from the releasing shipper or sell natural gas to the releasing shipper for a minimum portion of time of the release. *Id.*

46. Petition for Declaratory Order of Rice Energy Marketing LLC, FERC Docket No. RP15-1089-000 (June 29, 2015) [hereinafter Petition for Declaratory Order]; Order on Petition for Declaratory Order, *Rice Energy Marketing LLC*, 153 F.E.R.C. ¶ 61,048 at P 1 (2015).

47. Order No. 712, *supra* note 2, at P 165.

48. Petition for Declaratory Order, *supra* note 46, at 9-10; 153 F.E.R.C. ¶ 61,048 at P 18.

49. *See generally* 153 F.E.R.C. ¶ 61,048.

50. *Id.* at P 26.

51. *Id.*

the Commission explained that the purpose of the buy/sell transactions exempted from the prohibition is to permit the releasing shipper to negotiate gas purchase arrangements with a third party while having its asset manager transport the gas by way of the released capacity, enabling the releasing shipper to meet its own gas requirements, which is a condition of the capacity release.[52] This scenario is distinct from the buy/sell transactions prohibited by Order No. 636, where the purpose of the transaction was to meet gas requirements of a third party and there was no capacity release to the transaction participants.[53] However, the Commission explained, this scenario does not occur in supply AMA transactions.[54] Rather, in a capacity release to an asset manager in a supply AMA, the releasing shipper is not releasing unneeded capacity, but capacity that will be used for the purpose of transporting the releasing shipper's own natural gas.[55] This type of arrangement is in accordance with the Commission's capacity release regulations, is not prohibited by Order No. 636, and thus does not require an exemption to perform.[56]

## II. UPDATE ON FEDERAL POWER ACT SECTIONS 203 AND 205

### *A. FERC Policy Statement on Hold Harmless Commitments*

On January 22, 2015, the FERC issued a proposed policy statement ("Proposed Policy Statement")[57] to provide clarifications regarding hold harmless commitments offered by applicants as ratepayer protection mechanisms to mitigate adverse effects on rates that may result from transactions subject to section 203 of the Federal Power Act ("FPA").[58] Comments on the Proposed Policy Statement were due on March 30, 2015.[59] However, as of December 31, 2015, the Commission has yet to issue a final policy statement on the matter.

In short, the Commission proposes:

- to clarify the scope and definition of the costs that should be subject to hold harmless commitments;
- to clarify that applicants offering hold harmless commitments must implement controls and procedures to track the costs from which customers will be held harmless, and to clarify the types of controls and procedures that applicants offering must implement;
- to no longer accept hold harmless commitments that are limited in duration; and
- to clarify that applicants may demonstrate that, under certain circumstances, transactions will not have an adverse effect on rates without

52. *Id.* at P 29.

53. *Id.*

54. 153 F.E.R.C. ¶ 61,048 at P 32.

55. *Id.*

56. *Id.*

57. Proposed Policy Statement, *Policy Statement on Hold Harmless Commitments*, 150 F.E.R.C. ¶ 61,031 (2015).

58. 16 U.S.C. § 824b (2012).

59. Proposed Policy Statement, *Policy Statements on Hold Harmless Commitments*, 80 Fed. Reg. 4231, 4238 (Jan. 27, 2015) (to be codified at 18 C.F.R. pt. 33).

> relying on hold harmless commitments or other ratepayer protection mechanisms.[60]

The Commission stated that because hold harmless commitments are a frequently proposed ratepayer protection mechanism in FPA section 203 applications, it would be beneficial to applicants, customers, and interested persons to clarify its policy regarding hold harmless commitments.[61] The Commission explained that its rationale for clarifying the costs to which hold harmless commitments will apply is that it has only provided broad guidance on the issue in the past, which has led to inconsistency in terms of which costs have been covered by hold harmless commitments.[62] Further, the Commission reasoned that the implementation of controls and procedures to track the applicable costs will ensure the proper identification, accounting, and rate treatment of all transaction-related costs incurred prior to and subsequent to the announcement of a proposed transaction, which will also improve the Commission's ability to prevent those costs from being recovered in rates prior to an approval under an FPA section 205 filing.[63] The Commission further believes that for a hold harmless commitment to provide adequate ratepayer protection, it should not be limited in duration because that raises the risk that transaction-related costs could be included in future formula rate billings without applicants making the requisite showing of offsetting savings.[64] The Commission stated that eliminating the time limit will ensure that transaction-related costs cannot be recovered from ratepayers at any time, unless applicants can demonstrate that there are offsetting transaction-related savings.[65] Finally, the Commission also stated that, under certain circumstances, hold harmless commitments may not be necessary in section 203 transactions because such transactions may not have an adverse effect on rates (although they may have an effect on rates), in which case an applicant may demonstrate as much without having to rely on a hold harmless commitment.[66]

As its first proposed category of transaction-related costs that should be subject to any hold harmless commitment, the Commission proposed to include, without limitation, the following costs incurred to explore, agree to, and consummate a transaction:

- the costs of securing an appraisal, formal written evaluation, or fairness opinions related to the transaction;
- the costs of structuring the transaction, negotiating the structure of the transaction, and obtaining tax advice on the structure of the transaction;
- the costs of preparing and reviewing the documents effectuating the transaction (e.g., the costs to transfer legal title of an asset, building permits, valuation fees, the merger agreement or purchase agreement and any related financing documents);

60. 150 F.E.R.C. ¶ 61,031 at P 1.
61. *Id.* at P 15.
62. *Id.* at P 16.
63. *Id.* at P 17.
64. *Id.* at P 18.
65. 150 F.E.R.C. ¶ 61,031 at P 18.
66. *Id.* at P 19.

- the internal labor costs of employees and the costs of external, third-party, consultants and advisors to evaluate potential merger transactions, and once a merger candidate has been identified, to negotiate merger terms, to execute financing and legal contracts, and to secure regulatory approvals;
- the costs of obtaining shareholder approval (e.g., costs of proxy solicitation and special meeting of shareholders);
- professional service fees incurred in the transaction (e.g., fees for accountants, surveyors, engineers, and legal consultants); and
- installation, integration, testing, and set up costs related to ensuring the operability of facilities subject to the transaction.[67]

The second category of costs the Commission proposed to include in hold harmless commitments refer to "transition" costs, i.e., both internal and external, capital and operating, costs incurred after the transaction is completed to integrate individuals and assets to achieve merger synergies.[68] These include, but are not limited to:

- engineering studies needed both prior to and after closing the merger;
- severance payments;
- operational integration costs;
- accounting and operating systems integration costs;
- costs to terminate any duplicative leases, contracts, and operations; and
- financing costs to refinance existing obligations in order to achieve operational and financial synergies.[69]

In addition, the Commission reiterated its previous policy that ratepayers should continue to be protected from adverse effects on rates stemming from accounting entries recording goodwill and fair value adjustments on a public utility's books and reported in FERC Form Nos. 1 or 1-F, occurring as a result of both asset purchases and holding company mergers.[70] The Commission stated that it does not consider acquisition premiums to be part of transaction-related costs, and that the recovery of acquisition premiums must be pursued through a separate FPA section 205 filing, whether or not a hold harmless commitment has been made.[71]

The Commission's proposal also provides the following additional guidance on the implementation of certain controls and procedures to track the costs from which customers will be held harmless. In addition to proposing to clarify that all applicants offering hold harmless commitments should implement appropriate internal controls and procedures, the Commission proposed that applicants offering hold harmless commitments "should include, as part of their FPA section 203 applications and any separate FPA section 205 filings, a detailed description of how they define, designate, accrue, and allocate transaction-related costs, and explain the criteria used to determine which costs are transaction-related."[72] The Commission further stated that applicants "should specifically identify and

67. *Id.* at P 22.
68. *Id.* at P 24.
69. *Id.*
70. 150 F.E.R.C. ¶ 61,031 at PP 26-27.
71. *Id.* at P 27.
72. *Id.* at P 31.

describe their direct and indirect cost classifications, and the processes they use to functionalize, classify, and allocate transaction-related costs."[73] The Commission also stated that applicants "should explain the types of transaction-related costs that will be recorded on their public utilities' books; how they determined the portion of these costs assigned to their public utilities; and how they classify these costs as non-operating, transmission, distribution, production, and other."[74] According to the Commission, these explanations should be accompanied by descriptions of the procedures used to maintain the underlying accounting data in order to facilitate the verification of transaction-related costs that are allocated among the operating and non-operating accounts of applicants' public utilities.[75] Finally, the Commission provided that applicants should submit all transaction-related cost accounting entries stemming from these controls and procedures, as well as a narrative explanation of the entries as part of the filing that details the final accounting entries associated with section 203 transactions and that is required within six months of the date that a transaction is consummated.[76]

As a result of Commission concern over the potential creation of incentives for accounting modifications and rate recovery of transaction-related costs due to hold harmless commitment timing issues, the Commission further stated that there should be "no time limit on hold harmless commitments and that costs subject to hold harmless commitments cannot be recovered from ratepayers at any time (regardless of when such costs are incurred), absent a showing of offsetting savings in order to demonstrate no adverse effect on rates."[77] The Commission explained that the focus of a hold harmless commitment should be on whether a cost is transaction-related, and not on when the cost is incurred.[78]

Finally, the Commission clarified that "applicants undertaking certain transactions to fulfill documented utility service needs need not propose ratepayer protection mechanisms such as a hold harmless commitment in an application under FPA section 203 in order to show that the transaction will not have an adverse effect on rates."[79] Examples of such transactions are the purchase of an existing generating plant or transmission facility that is needed to serve the acquiring company's customers or forecasted load within a public utility's existing footprint; to comply with a resource planning process; or to meet specified North American Electric Reliability Corporation ("NERC") standards.[80] The Commission stated that these examples are not an exclusive list, but that an applicant would still need to show that the transaction would not have an adverse effect on rates in order for it to be approved in the absence of a ratepayer protection mechanism like a hold harmless commitment.[81]

73. *Id.*
74. *Id.*
75. 150 F.E.R.C. ¶ 61,031 at P 31.
76. *Id.* at P 32.
77. *Id.* at P 34.
78. *Id.* at P 36.
79. *Id.* at P 40.
80. 150 F.E.R.C. ¶ 61,031 at P 41.
81. *Id.* at P 42.

## III. MASTER LIMITED PARTNERSHIP PARITY ACT

On June 24, 2015, a group of bipartisan members of Congress reintroduced the Master Limited Partnership Parity Act ("MLP Parity Act").[82] Sponsored by Senators Christopher Coons (D-Del.) and Jerry Moran (R-Kan.) and Congressmen Ted Poe (R-Texas) and Mike Thompson (D-Cal.), the law seeks to "level the energy playing field"[83] by amending the definition of master limited partnerships ("MLPs") to include renewable and alternative sources of energy. Under current law MLPs, which can be publicly traded but are treated as pass-through entities for federal income tax purposes, are limited to entities that generate at least ninety percent of their income from "qualified" resources such as crude oil, natural gas, petroleum products, coal, timber, and other minerals.[84] The Master Limited Partnership Association estimates that, as of August 2015, there were around 150 MLPs traded on major exchanges, with an estimated $481 billion in MLP-invested capital in the market.[85] Approximately $393 billion (over eighty-two percent) has gone into qualifying energy and natural resources projects, of which seventy percent has gone into midstream oil and gas pipeline projects.[86]

The MLP Parity Act expands the definition of "qualified" resources to include clean energy resources and infrastructure.[87] The expanded definition specifically includes:

- Electric power generated "exclusively utilizing" any resource or property described in sections 45 (production tax credit) and 48 (investment tax credit) of the Internal Revenue Code ("Code");[88]
- Energy storage technologies that serve a variety of functions on the electric grid including providing electricity, capacity and ancillary services;[89]
- Combined heat and power facilities as defined in section 48(c)(3) of the Code;[90]
- Generation, storage and distribution of renewable thermal energy from resources described in sections 45(c) and 48(a)(3) of the Code, including

82. *Coons, Moran, Poe, Thompson Bill will Level the Playing Field for Renewable Energy*, POE.HOUSE.GOV (June 24, 2015), http://poe.house.gov/2015/6/coons-moran-poe-thompson-bill-will-level-the-playing-field-for-renewable-energy.

83. *Id.*

84. Annabelle Gibson, *An Introduction to Energy Tax Developments in 2015*, BLOOMBERG BNA (Aug. 21, 2015), http://www.bna.com/introduction-energy-tax-n17179935112/.

85. *Master Limited Partnerships 101*, MASTER LIMITED PARTNER ASS'N 28 (Aug. 28, 2015), http://www.mlpassociation.org/wp-content/uploads/2015/08/MLP-101-MLPA.pdf.

86. *Id.*

87. John Lorentzen et al., *Renewable Energy Investment: REITs and MLPs,* LAW360 (Aug. 23, 2012), http://www.law360.com/articles/372623/renewable-energy-investment-reits-and-mlps.

88. Master Limited Partnerships Parity Act, H.R. 2883, 114th Cong. § 2(a)(4)(ii) (2015) (This provision applies to electric power generated by wind, biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production or marine and hydrokinetic renewable energy. It also includes electric power produced exclusively utilizing certain "energy property" such as equipment that uses solar energy, energy derived from a geothermal deposit, fuel cells, micro turbines or certain wind energy property, as well as leasing of certain personal property used by certain renewable energy business models such as solar leasing.)

89. *Id.* § 2(a)(4)(iii).

90. *Id.* § 2(a)(4)(iv).

closed-loop biomass, open-loop biomass, geothermal energy and municipal solid waste;[91]

- Generation of electricity from waste to heat power without combustion and without emissions and the capture of waste heat for onsite thermal use;[92]
- Infrastructure for the storage and transportation of renewable fuels, including renewable fuels pipelines, as described in section 6426 of the Code;[93]
- Production, storage or transportation of renewable fuels as defined in section 211 of the Clean Air Act;[94]
- Production, storage or transportation of "qualified renewable chemicals;"[95]
- Capital improvement projects for buildings that lower energy usage and consumption. Improvements can include building lighting, envelopes, heating and cooling and hot water systems with the savings in energy costs meeting or exceeding the projects' costs;[96]
- Gasification projects with carbon capture and storage ("CCS") that capture at least seventy-five percent of their carbon dioxide emissions as part of the gasification process; and [97]
- Power plants that capture at least five hundred thousand tons of carbon dioxide annually for the purposes of CCS.[98]

The MLP Parity Act was first introduced in September 2012 as H.R. 6437[99] and then reintroduced in April 2013 as H.R. 1696.[100] The current legislation, which has seven cosponsors, was referred to the House Ways and Means Committee[101] but no additional action has been taken as of December 31, 2015.[102]

The following legislation that was passed in December 2015 extended tax credits applicable to wind, solar and other renewable energy sources. The "Consolidated Appropriations Act, 2016" (the "Appropriations Act"), paired with the "Protecting Americans from Tax Hikes Act of 2015" (or "PATH"), included these provisions:

91. *Id.* § 2(a)(4)(v) (Qualified renewable thermal energy may be distributed from a district energy system supplying steam, hot water or chilled water to a university, industrial plant, hospital complex, downtown area or other groups of buildings.).

92. *Id.* § 2(a)(4)(vi).

93. H.R. 2883 § 2(a)(4)(vii).

94. *Id.* § 2(a)(4)(viii).

95. *Id.* §§ 2(a)(4)(ix), 2(b). (Qualified renewable chemicals must be produced in the U.S., be a product of biological and/or thermal conversion, have a biobased content of at least ninety-five percent, and must be included on the list of approved chemicals in section 2(b) of the bill.).

96. *Id.* § 2(a)(4)(x).

97. *Id.* § 2(a)(4)(xi).

98. H.R. 2883 § 2(a)(4)(xii) (New power plants must capture at least fifty percent of their carbon dioxide while existing power plants must capture at least thirty percent of their carbon dioxide.).

99. Master Limited Partnerships Parity Act, H.R. 6437, 112th Cong. § 102 (2012).

100. Master Limited Partnerships Parity Act, H.R. 1696, 113th Cong. § 101 (2013).

101. Master Limited Partnerships Parity Act, H.R. 2883, 114th Cong. (2015), *available at* https://www.congress.gov/bill/114th-congress/house-bill/2883/all-actions (latest action).

102. *Id.*

- Full Production Tax Credit ("PTC") for wind extended to year-end 2016, with stipulated ramp-down through 2019;[103] and
- Full Investment Tax Credit ("ITC") for solar extended to year-end 2019, with stipulated ramp-down through 2021.[104]

Additionally, the 2015 legislation also provided for a reinstatement of the ITC in lieu of the PTC for wind and select technologies, as well as bonus depreciation, both of which would tend to concentrate the realization of tax benefits early in project lives.[105]

## IV. YEILDCO WAREHOUSE FACILITIES

### *A. SunEdison Warehouse Facilities*

SunEdison has been the most active sponsor of yieldco warehouse facilities during 2015, with two such facilities currently in place and a third announced in August of 2015.[106]

#### 1. First Reserve Warehouse

In May 2015, a wholly-owned subsidiary of SunEdison and an indirect subsidiary of First Reserve, a private equity and infrastructure investment firm, formed a warehouse facility for the purpose of acquiring and constructing renewable energy projects developed by SunEdison and other parties and selling such projects to Terraform Power or other parties upon completion.[107] The facility is capitalized with a $500 million equity commitment from First Reserve, as well as a $466 million term loan facility and a $550 million senior secured revolving credit facility.[108] The facility provides First Reserve with preferential distributions as well as payment of fees in the event First Reserve's equity commitment is not fully invested in projects having the desired return during the investment period.[109] The term loan facility has a five-year maturity and is priced at LIBOR plus 4.25%, while the revolving facility has a four-year maturity and is priced at LIBOR plus 4%.[110] The obligation to pay yield maintenance fees to First Reserve, as well as the debt service reserve under the senior credit facility, are supported by a letter

103. Jennifer Runyon, *Making Sense of the Tax Credit Extensions from Wind, Solar (And Bioenergy, Too),* RENEWABLE ENERGY WORLD (Dec. 16, 2015), http://www.renewableenergyworld.com/articles/2015/12/making-sense-of-the-itc-extension-for-wind-solar-and-bioenergy-too.html.

104. *Id.*; Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. (2015).

105. Paul A. Gordon & Casey S. August, *New Legislation Extends and Modifies Renewable Energy Industry Tax Incentives*, MORGAN LEWIS (Dec. 23, 2015), https://www.morganlewis.com/pubs/new-legislation-extends-and-modifies-renewable-energy-industry-tax-incentives.

106. *See generally* SUNEDISON, INC., FORM 10-Q QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT (filed Nov. 9, 2015) [hereinafter SUNEDISON 10-Q REPORT], *available at* http://www.getfilings.com/sec-filings/151109/SUNEDISON-INC_10-Q/.

107. *Id.* at 29-30.

108. *Id.*

109. *Id.* at 29.

110. *Id.* at 30.

of credit.[111] The First Reserve warehouse is currently being used to finance the construction of the 120MW Comanche solar project in Colorado.[112]

2. Terraform Private Warehouse

In June 2015, a wholly-owned subsidiary of SunEdison established TerraForm Private, LLC as a warehouse facility to hold five operating wind power facilities acquired from Atlantic Power.[113] In addition to SunEdison, equity for the acquisitions was provided by Macquarie Capital and John Hancock Life Insurance Company on a preferred basis.[114] The preferred equity is entitled to receive a cash dividend of 4.50% per annum and a pay-in-kind dividend of 5.00% per annum. TerraForm Private also secured a $280 million senior credit facility with a 7 year maturity at a rate of LIBOR plus 3.5%.[115] The TerraForm yieldco itself has rights to acquire the assets from the TerraForm Private warehouse, subject to consent from the requisite percentage of the preferred equity holders, among other conditions.[116]

3. West Street Infrastructure Partners Warehouse

On August 17, 2015, SunEdison entered into equity commitment letters with various West Street Global Infrastructure Partners funds managed by Goldman Sachs and debt commitment letters with a syndicate of banks providing for an aggregate equity and debt commitment of $1 billion.[117] As with SunEdison's other warehouse facilities, the West Street Infrastructure Partners warehouse would be available to purchase and hold for subsequent sale to TerraForm solar and wind energy projects developed or acquired by SunEdison.[118]

*B. Abengoa Warehouse Facility*

In March of 2015, Abengoa established Abengoa Projects Warehouse 1 in partnership with EIG Global Energy Partners LLC ("EIG").[119] The warehouse facility is intended to gradually acquire a portfolio of renewable and conventional energy projects and power transmission assets under construction by Abengoa in South America.[120] EIG holds an initial 55% stake in Abengoa Projects Warehouse 1, with Abengoa holding the remaining 45% stake.[121] Abengoa retains a right of first refusal to acquire the assets held by the warehouse.[122] However, some

111. SUNEDISON 10-Q REPORT, *supra* note 106, at 30.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. SUNEDISON 10-Q REPORT, *supra* note 106, at 30.

117. *Id.* at 31.

118. *Id.*

119. *Abengoa Announces Final Agreement with EIG for Investment in Abengoa Projects Warehouse 1*, ABENGOA 1-2 (Mar. 27, 2015), http://www.abengoa.com/export/sites/abengoa_corp/resources/gestion_noticias/pdf/20150326-NP-Cierre-Operacion-EIG-eng.pdf.

120. *Id.*

121. *Id.*

122. *Id.*

industry observers expect Abengoa's recent decision to seek creditor protection may impact Abengoa Yield, and therefore the ability of Abengoa Yield to acquire assets held by the warehouse, due to the existence of cross-default clauses on Abengoa Yield's project finance debt tying the yieldco to Abengoa.[123]

## V. RESTRICTIONS OF END-USER TERMINATION RIGHTS WITH FINANCIAL COMPANIES

The International Swaps and Derivatives Association ("ISDA") released the ISDA 2015 Universal Resolution Stay Protocol ("2015 Protocol") on November 12, 2015.[124] The 2015 Protocol applies to all ISDA Master Agreements, any related credit support arrangements and certain master agreements published by the International Capital Market Association, International Securities Lending Association and Securities Industry and Financial Markets Association.[125] The 2015 Protocol applies retroactively to contracts between two adhering counterparties.[126]

Section I of the 2015 Protocol addresses the jurisdictional issue relating to cross-border agreements.[127] Section I generally results in adhering parties "opting in" to certain special resolution regimes applicable to their counterparty.[128] The result is that the party's ability to exercise early termination rights is subject to the special resolution regime applicable to its counterparty and thus, by contractual agreement, avoids a question of law regarding whether a foreign special resolution regime has jurisdiction over the non-defaulting counterparty's ability to exercise its contractual early termination rights.[129]

Section II of the 2015 Protocol subjects an adhering party to a stay on the exercise of contractual termination rights if an affiliate of the counterparty enters into U.S. insolvency proceedings, including the Bankruptcy Code.[130] ISDA made the contractual cross-border provisions of section I effective January 1, 2016, but contrary to the request of the regulators,[131] to request of regulators or delete preceding clause ISDA provided that section II would not become effective until the date applicable U.S. regulations become effective and compliance with such regulations is required.[132]

123. Robert Smith, *Abengoa Yield's Dividend in the Spotlight*, REUTERS (Dec. 17, 2015), http://www.reuters.com/article/abengoa-bonds-idUSL8N14640B20151217.

124. The 2015 Protocol was developed due to regulatory authorities from Germany, Japan, Switzerland, the U.K. and the U.S. requesting ISDA to expand the scope of its 2014 Resolution Stay Protocol and to more easily accommodate special resolution regimes developed in other jurisdictions. *ISDA 2015 Universal Resolution Stay Protocol FAQs*, INT'L SWAPS AND DERIVATIVES ASS'N (Nov. 12, 2015), http://www2.isda.org/functional-areas/protocol-management/faq/22.

125. *Id.* This article does not describe the terms of the 2014 Resolution and 2015 Resolution in detail.

126. *Id.*

127. *Id.*

128. *Id.*

129. INT'L SWAPS AND DERIVATIVES ASS'N, *supra* note 124.

130. *Id.*

131. *Id.*

132. *Id.*

As of February 2016, the 2015 Protocol had 210 adhering parties, including some of the world's largest dealers in over-the-counter derivatives.[133] End-users are not expected to adhere to the 2015 Protocol but to an as-yet unpublished Resolution Stay Jurisdictional Modular Protocol once the applicable regulations are issued by U.S. regulators.[134] The Resolution Stay Jurisdictional Modular Protocol is intended to achieve the same results as section 1 of the 2015 Protocol, which results in an adhering party "opting in" to certain special resolution regimes applicable to counterparty.[135]

U.S. and international regulators are seeking to impose stays on the termination rights of end users against defaulting financial companies for the purpose of facilitating transfer of the assets of these financial companies (including certain contracts with end-users) without obtaining any approval, assignment or consent for such transfer.[136] These efforts include requests to ISDA to implement a contractual approach, using their power to review and approve a bank holding company's living will to require them to amend their financial contracts "on an industry-wide and firm-specific basis" and seek regulations "that will require counterparties of certain banking groups to give up certain cross-default and direct default rights arising when an affiliate (including a parent) becomes subject to proceedings under 'ordinary' U.S. insolvency regimes."[137]

133. *Adhering Parties*, INT'L SWAPS AND DERIVATIVES ASS'N, http://www2.isda.org/functional-areas/protocol-management/protocol-adherence/22 (last updated Feb. 12, 2016).

134. INT'L SWAPS AND DERIVATIVES ASS'N, *supra* note 124.

135. *Id.*

136. *Id.*

137. *Id.*; *New ISDA Resolution Stays Protocol: Challenges for Buy-side and Sell-side Firms Alike*, SIDLEY (Nov. 19, 2015), http://www.sidley.com/news/11-19-2015-derivatives-update.

 



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