

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

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Synopsis: Section 203 of the Federal Power Act (FPA) requires parties engaging in certain transactions involving public utilities and holding companies to obtain prior authorization from the Federal Energy Regulatory Commission (FERC).¹ This requirement generally applies to transfers of public utility assets, such as electric transmission lines, as well as “paper facilities,” such as tariffs and contracts for sale of electric energy at wholesale or for interstate electric transmission service, and to certain acquisitions of electric generating facilities by public utilities. It also applies to many change-in-control transactions and acquisitions of securities in public utilities and by holding companies. This article updates an article from ten years ago that examined the scope of FERC jurisdiction under FPA section 203.² During this ten-year period, transaction structures have evolved, FERC has clarified some issues regarding its jurisdiction, and Congress amended FPA section 203 to narrow the scope of FERC jurisdiction for one category of transactions. This article discusses these changes and examines both old and new issues about the breadth of FERC’s jurisdiction. The purposes of the article are twofold: (1) to help practitioners navigate the current FPA section 203 landscape in the context of modern transactions, and (2) make recommendations that would reduce the industry burden and streamline FERC’s workload by culling out FPA section 203 applications where there arguably is little or no public interest in review of the underlying transactions.

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

2. Hugh E. Hilliard, *FERC May I? When is FERC Authorization Needed for Transfers of Public Utility Assets and Equity Interests in Public Utilities?*, 34 ENERGY L.J. 151, 151 (2013) [hereinafter *FERC May I?*]. Some passages in this article are drawn from the original version. For ease of reading, they are not individually noted.

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I. INTRODUCTION

Parties to transactions involving the transfer of ownership or control of energy industry assets or entities should always ask an important question: do they need advance authorization from FERC under section 203 of the Federal Power

Act?³ The answer can affect the timing and validity of a transaction. FERC authorization requires preparing and filing a comprehensive application that describes affiliates and assets in detail.⁴ The application must be accompanied by a copy of the agreement documenting the transaction (or at least a draft agreement or term sheet that accurately reflects the material provisions), which means the parties must be in advanced negotiations before the application may be submitted.⁵ FERC then has up to 180 days to process the application and issue an order, and FERC may re-start the clock by requesting additional information.⁶ There is also

3. Unless otherwise indicated, “FPA section 203” refers to section 203 of the Federal Power Act, codified at 16 U.S.C. § 824b (2012).

4. For example, the applicant must include “[a] description of jurisdictional facilities owned, operated, or controlled by the applicant or its parent companies, subsidiaries, affiliates, and associate companies” and (with limited exceptions) include an organizational chart “indicating all parent companies, energy subsidiaries and energy affiliates.” 18 C.F.R. § 33.2(c)-(d) (2022). In the authors’ experience, obtaining all the necessary information may require several discussions with upstream owners and affiliates unfamiliar with FERC who may be reluctant to cooperate because they feel it is an unnecessary governmental intrusion into confidential business affairs.

5. 18 C.F.R. § 33.2(f) (stating the application must include “[a]ll contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction.”); *see also* Order No. 642, a Final Rule revising the filing requirements in Part 33 of the Commission’s regulations for applications, including public utility mergers, under section 203 of the Federal Power Act. *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, 65 Fed. Reg. 70,984 (2000) (“[W]e take this opportunity to clarify that all section 203 filings must include a copy of all contracts pertaining to the proposed disposition and/or such other agreements (in final or, if not available, in draft form) and must identify: (1) all relevant parties to the transaction and their roles in the transaction (e.g., as seller, purchaser, lessor, lessee, operator); (2) the jurisdictional facilities that are being disposed of and/or acquired, directly or indirectly; and (3) all terms and conditions of the proposed disposition that pertain to the ownership, leasing, control of, or operation of jurisdictional facilities. If contracts pertaining to the section 203 disposition have not been finalized at the time of filing, or, in the case of intra-corporate transactions, if applicants claim there will be no contracts associated with the disposition, applicants may submit a draft contract, a term sheet, a letter of intent or a memorandum of understanding to satisfy the § 33.2(f) filing requirement. However, in such instances, we will require that in the transmittal letter accompanying the application, counsel for applicants certify that, to the best of their knowledge, the final agreements will reflect the terms and conditions contained in the draft agreements in all material respects.”); *see also* note 301 for further discussion about the practicality of finalizing commercial terms before filing for FPA section 203 status.

6. 16 U.S.C. § 824b(a)(5); 18 C.F.R. § 33.11 (FERC staff will typically try to expedite review upon request when the application is uncontested, does not involve a merger, and is consistent with precedent. FERC’s regulations list the following examples: “(1) A disposition of only transmission facilities, including, but not limited to, those that both before and after the transaction remain under the functional control of a Commission-approved regional transmission organization or independent system operator; (2) Transactions that do not require an Appendix A analysis; and (3) Internal corporate reorganizations that result in the reorganization of a traditional public utility that has captive customers or owns or provides transmission service over jurisdictional transmission facilities, but do not present cross-subsidization issues.”); *see, e.g., Horus West Virginia I, LLC*, 184 FERC ¶ 62,130 (2023) (delegated order issued Sept. 7, 2023) (granting authorization in 57 days from the date the application was filed where no Appendix A analysis was required). FERC can also toll the deadline to extend the review period when – in rare circumstances – it determines it needs more time to fully review an application. *See, e.g., Energy Harbor Corp., et al.*, 185 FERC ¶ 61,024 (issued Oct. 13, 2023) (Order tolling the time for action on an FPA section 203 application filed April 17, 2023, as supplemented May 15, 2023 and Sept. 18, 2023).

always a possibility that FERC may not grant an application for section 203 approval (or may grant it with unacceptable conditions), which increases transaction risks.⁷

FERC has provided guidance in its orders, regulations, and policy statements, but questions remain about whether authorization is (or was!) required in many circumstances.⁸ When faced with uncertainty about FPA section 203 obligations, parties and practitioners either (1) proceed without obtaining authorization if they are sufficiently convinced that authorization is not required or (2) seek FERC approval to ensure their transaction is compliant, despite knowing it might not be required. One factor that weighs on the side of filing is that parties typically will not proceed with a transaction that potentially implicates FPA section 203 without a clean opinion of counsel that all necessary regulatory authorizations have been obtained. The fact-specific nature of FPA section 203 precedent means there frequently is not anything directly on point in precedent or prior guidance to enable a clean opinion, and the parties may not accept—or counsel may be unable to provide—a reasoned opinion. Parties therefore often file an application with FERC “out of an abundance of caution” when there is any uncertainty.⁹

Unnecessary FPA section 203 applications increase transactional costs and delays for public utilities, their owners, and investors. They also increase FERC’s workload, consuming valuable government resources. The practice is self-perpetuating: if parties previously filed an application “out of an abundance of caution” when faced with a particular set of circumstances, then other parties facing similar

7. See, e.g., *GridLiance High Plains LLC*, 166 FERC ¶ 61,171 (2019) (denying GridLiance’s application to acquire jurisdictional facilities from an electric cooperative because it failed to show the transaction would result in sufficient benefits to offset rate increases that the transaction would cause). FERC does not frequently deny FPA section 203 applications; instead, in cases where FERC has concerns it is generally more likely to approve a transaction with conditions to mitigate these concerns. See, e.g., *Duke Energy Corp.*, 137 FERC ¶ 61,210 at PP 91-92 (2011) (rejecting divestiture and directing mitigation measures); *Ohio Power Co.*, 143 FERC ¶ 61,075 at P 61 (2013) (requiring divestiture of certain debt from one party to the other as a condition of sale); *Entegra Power Group LLC*, 125 FERC ¶ 61,143 (2008) (authorizing an investment conditioned on several measures to ensure the investor would not have control); *Exelon Corporation, et al.*, 138 FERC ¶ 61,167 (2012) (conditionally authorizing merger between Exelon Corporation and Constellation Energy Group, Inc.).

8. In addition to considering whether FPA section 203 approval is required for a proposed transaction, occasionally in conducting diligence for a new transaction it turns out FPA section 203 should have been obtained for prior transactions. See, e.g., *Phoenix Energy Group, LLC*, Docket No. EC23-51-000 (Jan. 9, 2023) (requesting prospective approval of a prior transaction and requesting expedited treatment due to a new, pending transaction). The consequence of not obtaining FPA section 203 approval when required is discussed further in Section VII.

9. See, e.g., *Wapsipinicon Wind Project, LLC*, 143 FERC ¶ 62,196 (2023) (explaining that the applicant sought authorization for a transfer of upstream Class A and Class B ownership interests out of an abundance of caution without a determination of jurisdiction); see also, *Imperial Valley Solar, LLC*, FERC Docket No. EC19-65-000 (March 4, 2019); *Tropico, LLC, et al.*, FERC Docket No. EC20-36-000 (Feb. 11, 2020); *Energy Harbor Corp.*, Docket No. EC23-83-000 (Apr. 28, 2023). A search by the authors in FERC’s online records information system indicates that more than 900 FPA section 203 applications filed over the past ten years since *FERC, May I?* was published were filed (at least partially) out of an abundance of caution in the face of uncertainty regarding the scope of FERC’s jurisdiction. This is only a rough estimate; a more definitive number would require an examination of each of the FPA section 203 applications filed during this period. *eLibrary*, FERC, <http://elibrary.ferc.gov/idmws/search/fercsearch.asp> (last visited Oct. 29, 2023).

circumstances in the future are more likely to also file an application.¹⁰ When asked to approve a transaction under FPA section 203, FERC reviews the transaction without addressing whether it has jurisdiction.¹¹ It rarely independently disclaims jurisdiction.¹² A request for FERC to disclaim jurisdiction falls under the requirements for a request for declaratory order.¹³ Declaratory order requests require a filing fee, and there is no deadline by which FERC must rule.¹⁴ The path of least resistance is therefore to file a request under FPA section 203 out of “an abundance of caution.”¹⁵ No filing fee is required for an FPA section 203 application, and as mentioned above, FERC often issues an order approving the transaction well before the end of the statutory 180-day deadline.

Filing in the face of uncertainty is understandable, because deciding *not* to file a FPA section 203 application creates regulatory and commercial risk. First, it may not be possible to close a deal over such uncertainty. To even get to closing, the parties will likely require relevant legal opinions and – under current popular practice – potentially representation and warranty insurance, both of which require high confidence that no FPA section 203 is required to forego filing. Second, FERC has asserted that, if a transaction proceeds without approval, any interested party may challenge the transaction in court as invalid (although the authors are not aware of any precedent for this).¹⁶ Third, the parties could face significant problems if FERC later learns of the transaction and determines that FPA section

10. See, e.g., *BigBeau Solar, LLC*, FERC Docket No. EC22-121-000 (Sept. 16, 2022) (citing *Southern Company et al.*, 92 FERC ¶ 62,260 (2000); *Solar Star Colorado III, LLC*, 154 FERC ¶ 62,057 at P 1 (2016)) (stating FPA section 203 authorization may not be required but requesting approval out of an abundance of caution) (explaining the applicant sought authorization out of an abundance of caution without making a determination as to FERC’s jurisdiction to facilitate tax equity financing); *Breckinridge Wind Project, LLC*, 153 FERC ¶ 62,012 at P 1 (2015) (explaining applicant sought approval for the disposition of 100% of “passive, non-managing Class B Membership Interests” out of an abundance of caution).

11. See, e.g., 92 FERC ¶ 62,260, at 64,380 n.2; *National Electric Associates*, 80 FERC ¶ 62,116, at p. 64,191 n.2 (1997) (citing *Ocean State Power*, 47 FERC ¶ 61,321 (1989)) (Order assuming jurisdiction without making a jurisdictional interpretation for expediency).

12. One notable exception is *Boston Edison Company, et al.*, 109 FERC ¶ 61,309 at P 8 (2004) (disclaiming jurisdiction over the assignment of a power purchase agreement from one power purchaser to another, explaining: “because a right to purchase power under a contract is not a facility used for the transmission of electric energy or for the sale of electric energy at wholesale, the transfer (disposition) of such a purchase right is not subject to section 203 authorization.” (citing *New England Power Company et al.*, 83 FERC ¶ 61,275, at p. 62,147 (1998)). This order was a categorical clarification rather than a fact-specific analysis of an individual transaction.

13. A request for a declaratory order falls under Rule 207 of FERC’s Rules of Practice and Procedure. 18 C.F.R. § 385.207. As of publication, the filing fee for a Request for Declaratory Order (other than pursuant to Part I of the FPA) is \$33,690, but it is subject to annual adjustment. 18 C.F.R. § 381.302; see, e.g., *Conowingo Power Company, et al.*, FERC Docket Nos. EC95-7-000, EL95-14-000 (Dec. 6, 1994) (converting a request for disclaimer of jurisdiction to a petition for Declaratory Order “as instructed by the filing office” and paying the filing fee).

14. 18 C.F.R. § 381.302.

15. See generally, FERC Docket No. EC22-121-000.

16. *PDI Stoneman, Inc.*, 104 FERC ¶ 61,270 at P 25 (2003).

203 approval should have been obtained.¹⁷ If that occurs, FERC has the authority to assess civil penalties for violating the FPA for each day approval was not obtained.¹⁸ Moreover, FPA section 203 only contemplates *prior* approval, and FERC only grants late applications under FPA section 203 on a prospective basis from the date of filing.¹⁹ This creates a panoply of commercial issues. At a minimum, a late-filed application means there was likely a breach of customary representations and warranties in the underlying transaction documents that all necessary governmental approvals for the transaction were obtained.²⁰ If the closing was conditioned on compliance with law, then it arguably means the closing was void and calls into question the validity of all corporate actions since closing.²¹ It could also jeopardize a subsequent transaction if it is unclear whether the transferee ac-

17. See, e.g., *American Transmission Company, LLC*, 160 FERC ¶ 61,030 (2017) (Order Approving Stipulation and Consent Agreement stemming from enforcement action triggered by a failure to obtain required approvals under FPA section 203); *International Transmission Company*, 139 FERC ¶ 61,003 at n.18 (2012) (stating the matter was referred to the Office of Enforcement due to “the lateness and the volume of late filings.”).

18. See, e.g., *id.* (historically, however, FERC has only rarely assessed civil penalties for an inadvertent failure to timely file for authorization under FPA section 203 – FERC is much more likely to approve the transaction on a prospective basis and admonish the applicants for filing late); 160 FERC ¶ 61,030, at PP 5-6 (*American Transmission Company, LLC* is one of the few cases in which FERC assessed civil penalties, but the circumstances were unique because the case involved 21 violations of FPA section 203 and various other violations of the FPA); *Mesquite Investors LLC, et al.*, 111 FERC ¶ 61,162 at P 3 (2005) (admonishing applicants for failing to timely obtain prior approval under FPA section 203 for a transaction and stating “we take such violations seriously, and we expect public utilities that are planning transmissions that may be jurisdictional to come to the Commission for guidance before consummating the transaction.”). Note that guidance of the Commission’s staff is not binding, so if there is sufficient uncertainty to seek guidance, it may be just as expedient and prudent to file an application. See, e.g., 18 C.F.R. § 388.104(a) (“Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission’s functions.”).

19. See, e.g., *Phoenix Energy Group, LLC*, 182 FERC ¶ 62,137 (2023); *TransAlta Energy Marketing (U.S.) Inc., et al.*, 181 FERC ¶ 61,055 (2022); *Powervine Energy, LLC*, 175 FERC ¶ 62,033 (2021); *Cleveland-Cliffs Inc. & AK Electric Supply, LLC*, 174 FERC ¶ 62,115 (2021); *HIKO Energy, LLC*, 163 FERC ¶ 62,127 (2018); 139 FERC ¶ 61,003; see also 16 U.S.C. § 824b(a)(4) (FPA section 203 states “the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.” Arguably, this does not leave any room for FERC to deny an application for such transaction for the period of time before the filing, but some readers may more heavily weight the term “proposed” in the statute and claim that a transaction is not proposed if already consummated).

20. For example, following are example representations and warranties from closed Membership Interest Purchase Agreements (MIPA): “all necessary Governmental Approvals for the Transaction have been obtained;” “[a]ll Seller Entities have materially complied and are in material compliance with all applicable Laws;” and “[n]o consent or approval of, permit, license, authorization, or waiver from, registration, declaration, or application with, or notice to any Governmental Authority is required to be obtained or made by the Seller Companies in connection with the execution, delivery and performance of this Agreement or the other Transaction Documents by Seller Companies.”

21. In the authors’ experience, under current practice it is more likely that each party will represent that the transaction is in compliance with all laws applicable to that party – thereby leaving room open to go after one another for breaches of reps and warranties – than to include a provision that would have the effect of invalidating the closing if contrary to applicable law.

tually has sufficient interest in the jurisdictional entity or asset to permit the transfer. Or it could potentially result in a need to unwind the prior transaction (although the authors are not aware of any cases where this has occurred). The more guidance that the Commission can provide regarding the extent of its FPA section 203 jurisdiction, the more certainty the industry will have regarding whether approval is required in particular circumstances, and the fewer unnecessary filings will be made to avoid this array of risks.

In the ten years since *FERC May I?* was published, Congress and FERC have acted to resolve some of the issues with FPA section 203 that were discussed in that article. FERC has also applied its FPA section 203 regulations to new types of transaction structures that have emerged as the market continues to evolve.²² This updated article discusses the current state of the law on FERC's jurisdiction to review public utility transactions under FPA section 203 and examines some of the remaining sources of uncertainty. It also discusses areas in which FERC could resolve questions about its jurisdiction, or disclaim jurisdiction, thereby reducing the burden of unnecessary filings on both FERC staff and stakeholders.²³

II. OVERVIEW OF FPA SECTION 203

FERC jurisdiction under FPA section 203 has two separate bases—one for transactions by public utilities (FPA section 203(a)(1), or “Part 1”)²⁴ and one for transactions by holding companies (FPA section 203(a)(2), or “Part 2”).²⁵ FERC asks applicants to expressly state in their application the section(s) of FPA section 203 for which approval is requested.²⁶ FERC generally limits approval to the scope of the request; so getting the request right is important to ensuring appropriate authorization.²⁷ The sections are briefly covered in this section for convenience. They are discussed in more depth in the sections below.

22. *Id.*

23. The standards applied by FERC to approve or deny applications under FPA section 203 are beyond the scope of this article. For a discussion of the substantive standards applied by FERC in considering merger applications, see, e.g., Scott Hempling, *Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation*, 39 ENERGY L. J. 233 (2018); Mark J. Niefer, *Explaining the Divide Between DOJ and FERC on Electric Power Merger Policy*, 32 ENERGY L. J. 505 (2012) (discussing the substantive standards applied by FERC in considering merger applications); see also notes 107-108 (Notably, FERC still applies standards for assessing effects on competition set forth in the 1992 Department of Justice (DOJ) and Federal Trade Commission (FTC) Horizontal Merger Policy Guidelines, even though those guidelines were subsequently amended in 2010).

24. 16 U.S.C. § 824b(a)(1).

25. 16 U.S.C. § 824b(a)(2).

26. *But see Alloy Power LLC*, 117 FERC ¶ 62,008 at P 3 n.4 (2006) (granting authorization under FPA section 203(a)(1)(D) “[a]lthough not requested in the application” for approval of a disposition of a hydroelectric generating facility).

27. It is also common practice to explain why part of a transaction is not subject to FPA section 203, if applicable. For example, if a public utility requires approval to dispose of jurisdictional assets under FPA section 203(a)(1), but the entity acquiring the jurisdictional assets does not require prior approval, the applicant will typically explain why the acquiring entity is not an applicant. See, e.g., *SR Millington, LLC*, FERC Docket No. EC23-129-000, at P 1 n.3 (Sept. 1, 2023); 184 FERC ¶ 62,130, at P 1 n.3; *Carroll County Energy LLC*, FERC

A. *Public Utility Transactions (Part 1 of FPA section 203)*

FPA section 203(a)(1) requires prior authorization from FERC before a *public utility*²⁸ may:

(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000;

(B) merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of \$10,000,000, by any means whatsoever;

(C) purchase, acquire, or take any security with a value in excess of \$10,000,000 of any other public utility;

(D) purchase, lease, or otherwise acquire an existing generation facility — (i) that has a value in excess of \$10,000,000; and (ii) that is used for interstate wholesale sales over which the Commission has jurisdiction for ratemaking purposes.²⁹

B. *Holding Company Transactions (Part 2 of FPA section 203)*

FPA section 203(a)(2) requires prior authorization from FERC before a *holding company*³⁰ in a holding company system that includes a transmitting utility or an electric utility³¹ may:

purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with,

Docket No. EC23-123-000, at P 3 n.3 (Aug. 25, 2023); 153 FERC ¶ 62,012, at P 1 n.2 (stating the application said investors were eligible for a blanket authorization to the extent FPA section 203(a)(2) applied).

28. A “public utility” is any person who owns or operates facilities used for the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce but does not include the United States, a state or any agency, authority, or instrumentality of, or any corporation that is wholly owned by, the United States or any state. 16 U.S.C. § 824(e). *See also* Jersey Cent. Power & Light Co. v. Fed. Power Comm’n, 319 U.S. 61, 81-82 (1943); Hartford Elec. Light Co. v. Fed. Power Comm’n, 131 F.2d 953, 955 (1942). Transactions are sometimes strategically timed to close before an entity becomes a public utility.

29. 16 U.S.C. § 824b(a)(1)(A)-(D).

30. A “holding company” generally is “any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company” that owns or operates facilities used for (a) “the generation, transmission, or distribution of electric energy for sale” (i.e., an “electric utility company”) or (b) “the distribution at retail . . . of natural gas for heat, light, or power” (i.e., a “gas utility company”). 16 U.S.C. § 824b(a)(6); 42 U.S.C. § 16451(5), (7), (8), (14) (2012); *see also* 18 C.F.R. § 33.1(b)(4); Order No. 669, *Transactions Subject to FPA Section 203*, FERC Stats. & Regs. ¶ 31,200 at PP 69-73 (2005) (codified at 18 C.F.R. pts. 2 and 33), *order on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh’g*, Order No. 669-B, *Transactions Subject to FPA Section 203*, 71 Fed. Reg. 42,579 (2006) (to be codified at 18 C.F.R. pts. 2, 33). “Holding company” does not include financial institutions that own securities for certain banking purposes, 42 U.S.C. § 16451(8)(B), nor does it include a state (or a political subdivision, agency, authority, or instrumentality of a state) or an electric power cooperative. 18 C.F.R. § 33.1(b)(4).

31. A “holding company system” is “a holding company, together with its subsidiary companies.”; 42 U.S.C. § 16451(9) (A “transmitting utility” is “an entity (including an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy – (A) in interstate commerce; (B) for the sale of electric energy at wholesale.”). *Id.* at n.11; 16 U.S.C. § 796(23) (2012). An “electric utility” is “a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy” and “includes the Tennessee Valley Authority and each Federal power marketing administration.”; 16 U.S.C. § 796(22) (Notably, section 203(a)(2) does not apply to a “holding company” if the only public-utility company it owns or operates is a “gas utility company.”). *Id.*

a transmitting utility, an electric utility company,³² or a holding company in a holding company system that includes a transmitting utility, or an electric utility company.³³

C. Exemptions for Qualifying Facilities

Three categories of “qualifying facilities” (QFs) are exempt from FPA section 203: (i) qualifying small power production facilities that have a capacity of 30 MW or less, (ii) geothermal QFs, (regardless of size), and (iii) all qualifying cogeneration facilities.³⁴ QF status attaches to facilities, but the public utility that owns or operates the QF benefits from the FPA section 203 exemption. The exemption applies even if the public utility has a market-based rate tariff for sales of electric energy at wholesale.³⁵ This largely affects owners of qualifying small power production facilities with a capacity between 20 MW and 30 MW, since in most cases these entities are subject to FERC’s market-based rate jurisdiction under FPA section 205.³⁶

32. An “electric utility company” is a company that “owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale.”; 42 U.S.C. § 16451(5); *see also* Order No. 669, *supra* note 30, at P 51; Order No. 669-A, *supra* note 30, at PP 41-54, 59-60; *id.* at n.12. Note that this definition includes exempt wholesale generators, qualifying facilities, and foreign utility companies, as well as utilities operating in Hawaii, Alaska, and areas of Texas that are not engaged in interstate commerce, but it does not include power marketers that do not own or operate any facilities used for generation, transmission, or distribution of electric energy for sale. Order No. 669, *supra* note 30, at PP 51, 71; Order No. 669-A, *supra* note 30, at PP 29, 54.

33. 16 U.S.C. § 824b(a)(2).

34. 18 C.F.R. §§ 292.601 (Qualifying small power production facilities generally are renewable energy facilities with a capacity of 80 MW or less that file for QF status (unless exempt); qualifying cogeneration facilities generally are facilities that sequentially use thermal energy for generation of electric energy and for industrial, commercial, heating, or cooling purposes and file for QF status); 18 C.F.R. §§ 292.202(c), 292.203 (QFs that meet the requirements of FPA section 3(17)(E), 16 U.S.C. 796(17)(E)—covering small power production facilities that filed for QF status earlier than 1995 and commenced construction before 2000 or met certain diligence requirements—also are exempt); 18 C.F.R. § 292.601(a). FERC authorization is required for dispositions of QFs that do not benefit from the exemption. *See, e.g., Baltimore Refuse Energy Systems Co.*, 40 FERC ¶ 61,366, at p. 62,118 (1987).

35. *Chevron U.S.A., Inc.*, 153 FERC ¶ 61,192 (2015). The order also clarifies that ownership of generator interconnection facilities and FERC-jurisdictional books and records does not nullify the exemption from FPA section 203 otherwise provided under FERC’s regulations.

36. Public utilities that own or control QFs with a capacity of 20 MW or less (or that make sales under a contract executed on or before March 17, 2006, or pursuant to state regulations requiring utilities to purchase energy from QFs) are exempt from FERC’s jurisdiction under FPA section 205 with respect to their sales of electric energy at wholesale. 18 C.F.R. § 292.601(c)(1). But those QFs that do not benefit from this exemption need to file a market-based rate tariff at FERC if they engage in wholesale electric sales in interstate commerce. There was a long-standing debate in the industry about whether the mere fact a public utility had market-based rate authority eviscerated the QF exemption from FPA section 203. FERC resolved the issue in its 2015 *Chevron* declaratory order. 153 FERC ¶ 61,192, at P 13. The order also clarifies that ownership of generator interconnection facilities and FERC-jurisdictional books and records does not nullify the exemption from FPA section 203 otherwise provided under FERC’s regulations. This order helped to reduce the number of FPA section 203 applications filed with FERC “out of an abundance of caution” by QF owners. FERC emphasized that owners of QFs undergoing such transactions still are subject to applicable requirements to file a new “Form 556” to notify FERC of changes in the ownership of the QF and that QFs with market-based rate authority may be required to file a notice under FPA section 205 to notify FERC of any changes in status from the characteristics relied upon by FERC in granting market-based rate authority. *Id.*

An important issue in assessing whether a QF exemption applies under FPA section 203 is the size of the QF. For a single facility, the relevant size is the “send-out” capacity, which is the amount of capacity that the facility can actually deliver to the point of interconnection.³⁷ Calculating the size of affiliated QFs became a bigger issue in 2020 thanks to Order No. 872.³⁸ The order eliminated a “bright-line” established over 40 years of FERC precedent that a “qualifying small power production facility would be deemed separate from an affiliated generating facility located more than one mile away.”³⁹ Instead, the capacity of any affiliated QFs using the same resource (with exceptions for certain hydroelectric and geothermal resources) with electrical generation equipment located within ten miles of each other may be aggregated to determine whether the 30 MW exemption from FPA section 203(a)(1) applies.⁴⁰ Order No. 872 and its progeny provides fodder for a whole separate article, but it is notable here because of its impact on determining whether a particular QF qualifies for the exemption from FPA section 203 for QFs that are below the 30 MW threshold.⁴¹

III. APPLICATION OF FPA SECTION 203(A)(1)(A) TO DISPOSITIONS OF PUBLIC UTILITY ASSETS AND CHANGES IN PUBLIC UTILITY OWNERSHIP/CONTROL

The majority of applications filed at FERC for authorization under FPA section 203 are for dispositions of facilities by public utilities pursuant to FPA section 203(a)(1)(A).⁴² This is likely due to the broad interpretation of the meaning of the statutory term “dispose.” Jurisdictional dispositions include transfers of physical assets and paper facilities, as well as upstream changes in control of public utilities that indirectly result in such dispositions. It is also likely in part because it is fairly simple to structure transactions to avoid section 203(a)(1)(B) and the availability of a myriad of “blanket authorizations” that apply to holding companies, as discussed in Section V, below.

37. *Broadview Solar, LLC*, 174 FERC ¶ 61,199 at P 26 (2021); *aff'd*, *Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287 (DC Cir., 2023) (confirming that a 160 MW direct current (dc) solar facility combined with a 50 MWdc battery storage system qualified for QF status because the inverters used to convert the facility's power to grid-usable alternating current (ac) limited the maximum send-out capacity to 80 MWac).

38. Order No. 872, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 85 Fed. Reg. 54,638 (2020), 172 FERC ¶ 61,041 (2020); *aff'd* Order No. 872-A, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 173 FERC ¶ 61,158 (2020).

39. *See, e.g., Northern Laramie Range Alliance, et al.*, 138 FERC ¶ 61,171 at PP 14, 15 n.25 (2012) (finding two affiliated wind facilities located 2.5 miles apart are QFs and stating “[c]ontrary to Petitioner's characterization of our regulations, the Commission does not consider the one-mile rule to be a rebuttable presumption.”).

40. *Id.*

41. *See generally* 172 FERC ¶ 61,041.

42. 16 U.S.C. § 824b(a)(1)(A).

A. Dispositions of Physical Assets

The most straightforward application of FPA section 203 occurs when a public utility sells (or otherwise transfers) a physical asset subject to FERC's jurisdiction under Part II of the FPA,⁴³ such as electric transmission facilities used in interstate commerce.⁴⁴ Generator interconnection facilities are transmission facilities,⁴⁵ and they often provide FERC a jurisdictional hook over dispositions of otherwise non-jurisdictional electric-generating plants.⁴⁶ Even if FERC-jurisdictional assets account for only a small portion of the total assets being transferred – as in the case of modest interconnection facilities interconnecting an expensive generating plant – FERC evaluates the overall effects of a transaction.⁴⁷

Dispositions of interests in shared interconnection facilities may also be implicated.⁴⁸ Often one electric generation project constructs and energizes interconnection facilities well before a subsequent, co-located project is ready to use the line. If the parties did not enter into a co-tenancy and shared facilities agreement (or similar agreement) that grants joint ownership before the line is energized, then transferring interests in the facilities is a disposition of jurisdictional assets that may trigger FPA section 203(a)(1)(A).⁴⁹ For this reason, many co-tenancy and shared facility agreements for shared interconnection facilities are exe-

43. FERC's jurisdiction over such physical facilities commences once they are used for wholesale sales or transmission of electric energy in interstate commerce. *See, e.g., Resources Recovery (Dade County), Inc.*, 20 FERC ¶ 61,138 at p. 61,303 n.11 (1982). This typically occurs when the facilities are first connected to the transmission grid and energized, including for testing purposes. Note that such facilities typically become jurisdictional before the "commercial operation date" as defined in relevant revenue and interconnection contracts.

44. *See, e.g., Public Service Company of New Mexico*, 29 FERC ¶ 61,282, at p. 61,576 (1984) (holding that FPA section 203 applies only to facilities that are jurisdictional under Part II of the FPA and not to other facilities that are subject to FERC's jurisdiction, such as facilities that are jurisdictional under the Natural Gas Act).

45. *See Standardization of Generator Interconnection Agreements and Procedures*, 106 FERC ¶ 61,220 at P 804 (2003) (stating that discrete interconnection facilities are transmission facilities).

46. Section 201 of the FPA provides that FERC "shall not have jurisdiction, except as specifically provided in [Parts II and III of the FPA], over facilities used for the generation of electric energy." 16 U.S.C. § 824 (2012). A sale of electric generating facilities without interconnection facilities is not subject to section 203(a)(1)(A). *See, e.g., Perryville Energy Partners, LLC*, 109 FERC ¶ 61,019 at P 14 (2004); *Western Kentucky Energy Corp.*, 83 FERC ¶ 61,336, at p. 62,361 (1998); *Green Mountain Power Corp.*, 53 FERC ¶ 61,035, at p. 61,138 n.15 (1990); *KGen Enter. LLC & Navasota Wharton Energy Partners, LP*, 115 ¶ FERC 62,055 at p. 64,407 (2006). Note that a public utility's acquisition of a generating facilities may be subject to FERC's prior approval under FPA section 203(a)(1)(D), discussed further below.

47. *Ameren Energy Generating Co.*, 108 FERC ¶ 61,081 at P 25 n.19 (2004).

48. FERC recently ordered transmission providers to allow multiple generating facilities to share a single point of interconnection. *See Improvements to Generator Interconnection Procedures and Agreements*, 184 FERC ¶ 61,054 at P 7 (2023); *Reform of Generator Interconnection Procedures and Agreements*, 163 FERC ¶ 61,043 at P 275 (2018), *order on reh'g*, Order No. 845-A, 166 FERC ¶ 61,137 (2019), *order on reh'g*, Order No. 845-B, 168 FERC ¶ 61,092 (2019) (modifying the definition of "Generating Facility" in the pro forma LGIP and pro forma LGIA to include "and/or storage for later injection."). This was already common practice in many regions, but Order No. 2023 may increase use of the shared facilities arrangement in regions that previously did not have a clear policy on shared interconnection.

49. *PSI Energy, Inc.*, 63 FERC ¶ 61,107, at p. 8 (1993).

cuted well before a project is scheduled to commence testing, with each “co-tenant” having an undivided interest in the facilities, but later projects have no use rights until they are ready to energize.⁵⁰

An increasingly common transfer of jurisdictional assets occurs when a public utility transfers interconnection facilities constructed under the “option-to-build” provisions of standard generator interconnection agreements.⁵¹ Transmission owners typically require that the facilities the interconnection customer elected to build be energized to demonstrate they work before the transmission owner will accept ownership. Once the facilities are energized, FPA section 203 is implicated.⁵² The facilities may be exempt from filing an application under FPA section 203 for other reasons (e.g., the value of the facilities is less than \$10 million), but the transaction requires analysis.⁵³ Given that the interconnection customer usually has zero intention (or ability) to ever provide transmission service over such transmission facilities, it would make a lot of sense for FERC to create

50. *Id.* In *PSI Energy*, PSI Energy unsuccessfully argued that various agreements associated with shared transmission infrastructure did not provide for jurisdictional service. *See id.* The agreements provided for jurisdictional service because the use of the system by some owners exceeded their ownership rights, and thus they had to be filed under Section 205 of the FPA. *See id.* at 13; *see also Int'l Transmission Co.*, 152 FERC ¶ 61,043 at P 26 (2015) (“if an owner’s utilization of the joint transmission system exceeds its ownership, thereby resulting in the use of another owner’s share of the system, any charge for such use must be filed under section 205.”). *PSI Energy* raises a related relevant issue regarding when the shared interconnection owners become public utilities subject to FPA section 203. If, as in *PSI Energy*, a joint owner must file the shared facilities agreement pursuant to FPA section 205 because it is providing transmission service, then arguably the co-owners are mere customers of the transmission service and are not public utilities based on the receipt of service alone. It is common practice (often required by project finance lenders’ counsel) for a shared facilities agreement to be filed with FERC even if each party’s use of the shared facilities is limited to its ownership and there is no jurisdictional service. One party will file, and the co-owners file notices of concurrence. If the first co-owner to have a project come online files the shared facilities agreement, then it begs the question of whether all the co-tenants become public utilities because they have a “rate” on file with the Commission. A better interpretation – and one that is consistent with the Filed Rate Doctrine (discussed below) – is that a co-tenant will not be deemed to have a rate on file with FERC as a result of entering into a shared facilities agreement until it files a Certificate of Concurrence. This uncertainty is a good reason not to file the shared facilities agreement too early (or possibly at all if the joint owners are sufficiently comfortable that they are not providing one another jurisdictional service). *Id.*

51. Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶ 61,103 at P 353 (2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *order on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d sub nom.*, National Ass’n of Regul. Util. Comm’rs v. FERC, 475 F.3d 1277, 1279-81 (D.C. Cir. 2007). The “option to build” has become more common in recent years in an effort to overcome prevalent transmission owner construction delays and following FERC Order No. 845, which expanded an interconnection customer’s right to opt to build certain interconnection facilities. 163 FERC ¶ 61,043.

52. Final Rule, *Transactions Subject to FPA Section 203*, 71 Fed. Reg. 1348, 1356 (2006) (to be codified at 18 C.F.R. pts. 2, 33).

53. *See, e.g., Oxbow Solar Farm 1*, 184 FERC ¶ 61,005 at PP 9, 19 (2023) (order granting requested open access waivers, and stating that the applicant asserted that FPA section 203 approval was not required because the facilities were less than \$10 million). Several other forms of build-transfer arrangements exist for the construction of generating and transmission facilities that sometimes raise similar jurisdictional issues when the builder is a public utility.

a blanket authorization under FPA section 203 for transfers of facilities from interconnection customers to transmission owners pursuant to the election of an option-to-build under interconnection agreements.⁵⁴

B. Dispositions of “Paper Facilities”

Section 203(a)(1)(A) requires FERC authorization for dispositions by public utilities of paper facilities, such as tariffs, contracts, and other books and records.⁵⁵ A power marketer that has no physical facilities may nonetheless require prior FERC authorization for the transfer of its FERC tariff, its contracts for sale of power at wholesale, and its related books and records (or any part of these with a value in excess of \$10 million). Under FPA section 205, a public utility must have a rate schedule or tariff on file with FERC before it is authorized to engage in sales of electric energy at wholesale in interstate commerce or transmission of electric energy in interstate commerce.⁵⁶ Such a tariff or rate schedule becomes a paper facility subject to the requirements of FPA section 203 upon FERC’s acceptance of the tariff or rate “schedule for filing.”⁵⁷

54. In 2016 FERC issued a Notice of Inquiry in which it sought comments on whether blanket authorization would be appropriate for transfers of transmission assets that will be integrated into a public utility’s existing transmission network, but the proceeding has not resulted in rulemaking. See Notice of Inquiry, *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*, 156 FERC ¶ 61,214 at P 3 (2016) [hereinafter 2016 NOI]. While beyond the scope of this article, it would also save the industry a lot of headaches if FERC would grant a blanket waiver of any transmission owner/operator requirements to interconnection customers electing the option-to-build.

55. *Citizens Energy Corp.*, 35 FERC ¶ 61,198, at p. 61,457 (1986) (holding that a wholesale power marketer with no physical facilities is subject to jurisdiction under section 203 but that revenues derived from wholesale power sales are not subject to jurisdiction under section 203); *Hartford Elec. Light Co. v. Fed. Power Comm’n*, 131 F.2d 953, 961 (2d Cir. 1942); see also *Enova Corp.*, 79 FERC ¶ 61,107, at p. 61,488-89, nn.17-20 (1997).

56. 16 U.S.C. § 824(d).

57. See, e.g., *Long Lake Energy Corp.*, 51 FERC ¶ 61,262, at p. 7 (1990) (stating the petitioner will be a “public utility” under the FPA “when the Commission accepts [petitioner’s] rates for filing.”) (citing *Ocean State Power*, 38 FERC ¶ 61,140, at p. 61,378 n.4 (1987)); see also *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000) (“[i]t is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine”) (citing *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 417 (1986); *Miss. Power Light Co. v. Mississippi*, 487 U.S. 354, 374 (1988)). It would make sense that jurisdiction should attach upon the effective date of the tariff or rate schedule, which could be earlier or later than the date of FERC’s acceptance. See *BP Wind Energy N. Am. Inc.*, 134 FERC ¶ 62,223 at P 64,399 (2011) (FERC staff order issued under delegated authority stating that an applicant will become subject to FERC jurisdiction upon the effective date of its tariff filed with FERC); see also 104 FERC ¶ 61,270, at P 15 (stating a tariff became jurisdictional on the effective date that FERC granted in its order conditionally accepting the tariff). Notably, the earlier precedent suggesting FERC’s acceptance of a tariff for filing triggers public utility status came before FERC’s adoption of mandatory electronic filing through the eTariff system. FERC’s eTariff systems makes FERC’s acceptance of tariffs or filing more automatic. See Order No. 714, *Electronic Tariff Filings*, 124 FERC ¶ 61,270 P 115 (2008) (requiring electronic filing of all tariffs, tariff revisions, and rate changes, and stating electronic filing will “provide[] automatic e-mail notification to an applicant of receipt of the filing and whether or not it has been accepted.”). It would be helpful if FERC clarified the moment a market-based rate tariff becomes a “jurisdictional facility” so the industry understands the precise point at which the applicant becomes a public utility for FPA section 203 (and other FPA) purposes. This should include further guidance of the meaning of “accept” in this context – whether it really does mean the moment when an applicant receives the

FERC's treatment of paper facilities such as tariffs is inconsistent with its treatment of physical facilities.⁵⁸ FERC has found that it lacks jurisdiction for purposes of FPA section 203 when transmission facilities are not in use, even if they once were energized – as in the case of spare transmission parts.⁵⁹ In contrast, entities that have paper facilities such as a market-based rate tariff on file with FERC are generally considered to be subject to FPA section 203, even if no sales have been made (or are even possible given the state of project construction) pursuant to such tariff. In fact, it is often ill-advised to overzealously apply for market-based rate authority too far in advance of making jurisdictional sales pursuant to the tariff because it triggers FERC's regulation – and possibly results in the need for an FPA section 203 application for the transfer of early stage development assets that would normally be exempt.⁶⁰

In addition to tariffs, public utilities typically have contracts, such as power purchase agreements or transmission service agreements, setting out the terms and conditions of specific sales of electric energy⁶¹ and transmission services.⁶² Both

“Notification of Acceptance for Filing” email from FERC (which typically arrives within hours or at most a day after submitting a tariff), or the issuance of an order by FERC accepting the tariff for filing (or acceptance by operation of law under section 205 of the FPA). The FERC Notification of Acceptance for Filing emails state: “This is to notify that the FERC Office of the Secretary has accepted the following electronic submission for filing (Acceptance for filing does not constitute approval of any application or self-certifying notice).” This seems to mean that the tariff filing has been “accepted” for purposes of electronic docketing but has not been “accepted” in the sense that the tariff may be used for jurisdictional electric sales or transmission. Order No. 714 explains, “Once passed validation, the standard eFiling e-mail will be sent to indicate whether the Secretary of the Commission has accepted and docketed the filing or rejected it. As occurs with all filings, the docketing e-mail does not guarantee that other filing deficiencies will not result in rejection or other action pertaining to the filing later in the review processes within the Commission. After this step, the filing is passed on to eLibrary, the tariff database and other Commission systems.” Order No. 714, *supra* note 57, at P 21. It would be helpful if FERC would provide further clarification of the use of the term “accept” in this context or consider using a different term for approving the docketing of an electronic tariff filing versus accepting the tariff to be used for jurisdictional electric sales or transmission. While the difference between the date a tariff is accepted for filing and the eventual effective date may be mere days, the difference between whether an entity is a public utility or not within those few days could be determinative of whether FPA section 203 approval is required for closing.

58. 79 FERC ¶ 61,107, at 61,489.

59. See e.g., *Grid Assurance*, 152 FERC ¶ 61,116 at P 19 (2015) (Declaratory Order stating “[t]he Commission has found that transmission facilities that are not in service at the time of the transfer are not subject to its jurisdiction under section 203 of the FPA” (citing *N.Y. Transco*, 151 FERC ¶ 61,005 at P 16 (2015) (dismissing application under FPA section 203 where transmission facilities were not in service or energized)); *PacifiCorp*, 132 FERC ¶ 61,018 at P 20 (2010) (citing *Gamma Mariah, Inc. et al.*, 44 FERC ¶ 61,442, at p. 62,399 (1988)); *Idaho Power Co.*, 132 FERC ¶ 61,019 at P 20 (2010).

60. See also 18 C.F.R. § 35.3(a)(1) (stating “[a]ll rate schedules or tariffs or any part thereof shall be tendered for filing with the Commission and posted not less than sixty days nor more than one hundred-twenty days prior to the date on which the electric service is to commence and become effective under an initial rate schedule. . . .”). Some entities (and investors) nonetheless prematurely file (or require filing) in order to ensure market-based rate authority is secure prior to closing a transaction.

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

62. Some contracts now are not really *paper* facilities, because they may be entered into using electronic platforms, such as online systems used in organized electric markets in various parts of the country for sales of

wholesale energy sellers and purchasers under power purchase agreements often assign their interests in these contracts to other parties.⁶³ Under section 201 of the FPA it is the sales of electric energy—not the purchases—that fall under FERC’s jurisdiction.⁶⁴ This is true even if the contract conveys control over all of the capacity of an electric generating facility, effectively resulting in a change in control over the facility.⁶⁵

Bilateral contracts, such as contracts for the sale of electricity at wholesale in interstate commerce (commonly called a power purchase agreement, or “PPA”), do not become jurisdictional paper facilities until the earliest of (i) the date they are filed with FERC (which typically only occurs if the seller has not filed a tariff with FERC for making such sales), (ii) a tariff (such as a market-based rate tariff) pursuant to which PPA sales are made is filed, or (iii) they are actually used to sell energy at wholesale (which should not occur before (i) or (ii) occurs).⁶⁶ This comports with the “filed rate doctrine” because the PPA is not a filed rate until it is either filed and accepted by FERC or is subject to a tariff that has been filed and accepted by FERC.⁶⁷

It is also consistent with the need for commercial flexibility in the early stages of project development. Entities will often enter into a PPA at a very early stage of project development in order to secure financing for construction of a project

FERC-jurisdictional services. The electronic records established on these systems should be considered jurisdictional to the extent that they establish the terms and conditions of a public utility’s jurisdictional sales. *See, e.g., Potomac Elec. Power Co.*, 124 FERC ¶ 62,093 at P 64,245 n.3 (2008) (authorizing the transfer of a public utility’s rights and obligations to sell capacity in the PJM Interconnection L.L.C. Reliability Pricing Model program, under which rights and obligations are auctioned and transferred on an online platform).

63. *See e.g., id.*

64. 16 U.S.C. § 824 (limiting the FPA to the transmission and sale of electric energy (not the purchase)); *compare* 109 FERC ¶ 61,309, at P 8 (disclaiming jurisdiction over the transfer of the contractual right to purchase power under a power purchase agreement), *with Entergy Nuclear Indian Point 2*, 115 FERC ¶ 62,056 at P 2 (2006) (authorizing assignment of the right to sell power under power purchase agreements pursuant to FPA section 203).

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

66. “Filed” in this context means that the PPA or tariff has been filed under FPA section 205 and has been accepted for filing by FERC.

67. *See, e.g., Res. Recovery (Dade Cnty.), Inc.*, 20 FERC ¶ 61,138, at p. 61,303 (1982); *Long Lake Energy Corp.*, 51 FERC ¶ 61,262 at n.14 (1990) (“In Ocean State Power, the Commission found that an entity owned ‘facilities subject to the Commission’s jurisdiction’ within the meaning of FPA section 201 as soon as the Commission accepted its rates for filing. Accordingly, Commonwealth will be a public utility when the Commission accepts its rates for filing.”); *Ocean State Power*, 43 FERC ¶ 61,466, at p. 62,139 (1988) (citing *Alamito Co. Shareholder v. Alamito Co.*, 38 FERC ¶ 61,241, at p. 61,779 (1987)); *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000) (“It is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine.”) (internal citations omitted).

based on the contracted revenues.⁶⁸ The project company will normally not apply for market-based rate authority until a later stage of development, after funding is secured and shortly before the project is completed and placed in service.⁶⁹ Ownership of the project company may change one or more times during the intervening period.⁷⁰ If the transfer occurs before the project company has legal authority to make energy sales (such as market-based rate authority from FERC under FPA section 205), then the direct or indirect transfer of the PPA is similar to a transfer involving physical facilities that will be jurisdictional, but that are not yet jurisdictional.⁷¹

Recommendation: While the authors believe that the discussion above regarding FPA section 203 jurisdiction over PPAs is consistent with FERC precedent and standard industry practice, the authors are not aware of any clear supporting precedent or FERC guidance. Given the importance of PPAs to project development, it would be useful if FERC would confirm that a PPA is not a jurisdictional paper facility triggering FPA section 203(a)(1) prior to the earliest of time that the owner or operator of the facility has (i) filed the PPA with FERC, (ii) filed a tariff allowing for sales at wholesale from the facility or (iii) any such sales have been made.⁷² It would be even more helpful if FERC would change its current policy by stating that the mere fact an entity has market-based rate authority does not make it a jurisdictional public utility for purposes of FPA section 203

68. 43 FERC ¶ 61,466, at 62,139-40.

69. In Order 2001, FERC amended the filing requirements for public utilities under the FPA to eliminate the requirement that public utilities file individual market-based power sales agreements that conform to an effective market-based rate tariff (instead, requiring such transactions be reported in Electric Quarterly Reports). See Order No. 2001, *Revised Pub. Util. Filing Requirements*, 99 FERC ¶ 61,107, at P 9 (2002), *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074 (2002), *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342 (2002), *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003), *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270 (2007), *order on reh'g & clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008).

70. See Order No. 2001, *supra* note 69, at P 19.

71. *N.Y. Transco*, 153 FERC ¶ 61,259 at PP 19-22 (2015) (Order denying rehearing, confirming unenergized transmission facilities are not jurisdictional facilities, stating “[t]o find, as New York Public Power advocates, that the Commission had jurisdiction based on Applicants’ intended use of the Transmission Projects for jurisdictional service or as jurisdictional facilities at some point in the future would expand the scope of the Commission’s jurisdiction under FPA section 203 beyond the limits imposed by the statute, and could encompass facilities that Congress never intended for the Commission to have authority over.”); see also 79 FERC ¶ 61,107, at 61,491 (“one of the fundamental prerequisites of FPA section 203 jurisdiction is the presence of jurisdictional facilities.” (citing *Duke Power Co. v. FPC*, 401 F.2d 930 (D.C. Cir. 1968))).

72. FERC has clarified that “proposed transmission rates are contingent on, among other things, approval and closing of the proposed transaction, approval of the proposed transmission rates, and the transmission facilities actually being placed into service. Thus, there is no inconsistency in disclaiming jurisdiction under FPA section 203 while proceeding with review of proposed FPA section 205 transmission rates and incentives, which necessarily take effect only after the facilities are placed into service.” See 153 FERC ¶ 61,259, at P 23. This same conclusion should apply to a PPA for sales from a generating facility that has not been constructed by a seller that does not have legal authority to sell energy. See *id.* (referencing *Desert Sw. Power*, 135 FERC ¶ 61,143 (2011)).

until the tariff or rate schedule is actually used to sell energy.⁷³ This would streamline transactions involving late-stage development projects and facilitate earlier in-service dates. Applications for market-based rate authority are often delayed until after a developer transfers ownership to the long-term equity investors near completion of the project specifically to avoid being a public utility (and the time, resources, and extra closing conditions) necessary to obtain FPA section 203 approval.⁷⁴

C. Change-in-Control Transactions

In addition to a public utility's direct transfer of jurisdictional assets, FPA section 203(a)(1)(A) applies to change-in-control transactions resulting from direct or indirect transfers of proprietary ownership interests, such as stock or partnership or membership interests, in public utilities or their upstream owners.⁷⁵ FERC has interpreted this jurisdiction over "change-in-control" transactions to derive from the "or otherwise dispose" language of FPA section 203(a)(1).⁷⁶ FERC clarified in the Supplemental Policy Statement "that transactions that do not transfer control of a public utility do not fall within the 'or otherwise dispose' language of section 203(a)(1)(A) and thus do not require approval" under that section.⁷⁷

The obligation to obtain prior approval for upstream transfers of indirect interests in public utilities tends to result in a disproportionate amount of debate and angst among all of the FPA section 203 requirements in current transactional practice. This is due in part to the evolving nature of transactions, but also to often narrow and sometimes confusing precedent, discussed below. Timing is ripe for another FERC guidance order on FPA section 203 to clarify how precedent should be applied to future transactions involving indirect changes in interests of public utilities.

One major obstacle is the lack of a definition of "control." Historically, FERC presumed that a transfer of less than 10% of the voting securities of a public utility did not constitute a transfer of control.⁷⁸ FERC has emphasized, however, that the determination of whether a transaction results in a change of control is a fact-based inquiry and that no "bright-line standard will encompass all relevant factors and

73. FERC would still have the opportunity to address changes in ownership through FPA section 205 change-in-status filings to the extent that there is a change in ultimate upstream ownership or a new affiliation (subject to regulatory thresholds) created as a result of the transfer. *See* 18 C.F.R. § 35.42.

74. As discussed in section 2(D) below, FERC's regulations provide for a blanket authorization for certain transfers of jurisdictional contracts (including PPAs) in certain circumstances. *See* 18 C.F.R. 33.1(c)(16).

75. *See, e.g., Cent. Vt. Pub. Serv. Corp.*, 39 FERC ¶ 61,295, at p. 61,960 (1987); *Cent. Ill. Pub. Serv. Co.*, 42 FERC ¶ 61,073, at p. 61,328 (1998); 79 FERC ¶ 61,107, at 61,493-94; *PG&E Corp.*, 80 FERC ¶ 61,041, at p. 61,129 (1997).

76. *FPA Section 203, Supplemental Policy Statement*, FERC Stats & Regs. ¶ 31,253 (2007), 120 FERC ¶ 61,060 at P 37 (2007), 72 Fed. Reg. 42,277, *clarified*, 122 FERC ¶ 61,157, at P 4 (2008) [hereinafter *Supplemental Policy Statement*].

77. *Id.* at P 37 (stating the finding assumes "there is no sale or lease of the facilities").

78. *Id.* at P 57; *see also* 181 FERC ¶ 61,055, at P 25 ("The Commission has established that an ownership share under 10% creates a rebuttable presumption of no control." (citing Order No. 669-A, *supra* note 30, at 101 (2006))).

possibilities.”⁷⁹ FERC has warned entities involved in proposed transactions that they have the burden to decide whether they need to obtain FERC authorization for the transaction.⁸⁰

An example where a change of control may occur even absent a 10% or greater change in interests is when the general partner of a limited partnership changes. It is common for the general partner to only hold *de minimus* ownership interests, such as 1%, yet hold nearly all actual control over the entity.⁸¹ In this case, depending on the rights set forth in the partnership agreement, a general partner with a very small economic interest may hold all—or at least 10% or more—of the voting securities.

Entities also need to consider upstream aggregation of interests.⁸² If multiple companies under common control each acquire less than 10% of a public utility’s voting securities, they might collectively hold more than 10%.⁸³ In that case, FERC stated it would view the transaction as potentially subject to authorization under sections 203(a)(1)(A) and (B).⁸⁴

Certain precedent seems to focus on whether an entity has the ability to direct day-to-day activities and actual operational control of a public utility.⁸⁵ In *Entegra*, however, FERC stated applicant’s “focus on day-to-day power sale activities and operational controls is [] an overly narrow reading of the Commission’s authority.”⁸⁶ Instead, “the determination of control is appropriately based on a review of the totality of the circumstances on a fact-specific basis. No single factor or factors necessarily results in control. The electric industry remains a dynamic, developing industry, and no bright-line standard will encompass all relevant factors and possibilities that may occur now or in the future.”⁸⁷ This leaves the industry with scant grounds to independently assert whether an investor has control in any given transaction.

Arguably, once FERC has approved a change-in-control transaction, there is no further change in control as a result of the acquisition of *additional* ownership interests by the same acquirer, so that no further authorization should be required

79. *Supplemental Policy Statement*, *supra* note 76, at P 43.

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

81. *See generally*, DEL. CODE ANN. tit. 6 §§ 17-401 – 407 (2022).

82. 16 C.F.R. § 801.13(a) (2005).

83. Order No. 669-B, *supra* note 30, at 42,582-83.

84. *Id.* at 42,583 (citing *Goldman Sachs Group*, 114 FERC ¶ 61,118 at P 15 (2006), *order on reh’g*, 115 FERC ¶ 61,303 (2006)).

85. *See, e.g., Tenaska Lotus Holdings, LLC, et al.*, 173 FERC ¶ 61,199 at P 10 (2020) (finding a FPA section 203 application was timely filed by a passive tax equity investor because it was filed “prior to assuming operational management activities.”); *Supplemental Policy Statement*, *supra* note 76, at P 54 (stating circumstances that indicate an investment is passive include “the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity.”).

86. *Entegra Power Group LLC, et al.*, 129 FERC ¶ 61,156 at P 19 (2009). Applicants in *Entegra* complained that FERC was not clear whether “control” should be interpreted as “day-to-day control over facility operations and sales of power” or “actions that any shareholder is normally entitled to take that are unrelated to the operation or control of jurisdictional facilities.” *Id.* at P 10.

87. *Id.* (citing Order No. 697, *supra* note 61, at P 174).

(unless FERC placed limits on its earlier approval of a change-in-control).⁸⁸ FERC has not, however, provided clear guidance on this point. For example, FERC has found that, in a case involving a series of transactions in which a company ultimately acquired 100% of the voting interests in a public utility, that FPA section 203 authorization was required for at least one prior transaction in which that same company acquired additional interests in the public utility.⁸⁹ FERC has also asserted jurisdiction over a transaction where a public utility transferred an additional 20% voting interests to an investor already holding 20% voting interests under a prior blanket authorization.⁹⁰

Entities have attempted to use contractual arrangements to limit control to varying degrees of success.⁹¹ In *Cascade*, FERC determined that an acquisition of greater than 10% of the common stock in a public utility did not require authorization under FPA section 203(a)(1), subject to the conditions offered by the relevant investor in a Standstill Agreement to prevent the investor from exercising control over the public utility.⁹² These conditions included that: the investment did not have the purpose and would not have the effect of changing or influencing the control of the public utility; the investor would not seek or hold a seat on the board of directors; the investor would not seek to set or influence the price, timing, or manner in which power would be sold from the public utility's generating facilities; the investor would provide FERC with copies of any Schedule 13D or 13G filed with the Securities and Exchange Commission; the investor would limit its investment to not more than 20%; the investor would not terminate a Standstill Agreement under certain of its provisions; and certain debt securities held by the investor did not provide any equity-related voting rights.⁹³

In *Hartree*, FERC agreed that investor shares placed into a "Voting Trust" established pursuant to Delaware General Corporation Law did not constitute voting securities.⁹⁴ The Voting Trust had an independent trustee who could only be

88. *Supplemental Policy Statement*, *supra* note 76, at P 35.

89. *See, e.g., id.* at P 55 (citing 104 FERC ¶ 61,270, at PP 15-17 (discussing that a transfer resulting in the increase of PDI Stoneman's ownership share in a public utility from one-fourth to one-third may have constituted a change in control despite the existence of a supermajority voting provision and that "the material change in the proportion of membership interests [in a subsequent transaction increasing PDI Stoneman's ownership share from one-third to two-thirds] resulted in a change in control"); the parties had not sought or obtained prior FERC authorization for either of these two transactions, and the target company had not been a jurisdictional public utility at the time of PDI Stoneman's acquisition of the initial one-fourth ownership interest).

90. *LS Power Dev., LLC*, 125 FERC ¶ 61,267 at PP 24, 28 (2008) (asserting jurisdiction over an increase in ownership of common stock in a public utility holding company to 40% where FERC previously had granted a blanket authorization for the acquisition by the same acquirers of up to 20% of such common stock). It is not clear why the applicants in this and other similar proceedings only sought approval up to a certain percentage interest, such as 20%. FERC has not suggested that any percentage ownership limits over 10% matters for change-of-control analysis.

91. *See, e.g., Cascade Inv.*, 129 FERC ¶ 61,011 at PP 9-10 (2009); 181 FERC ¶ 61,055, at PP 18-19.

92. 129 FERC ¶ 61,011, at PP 8-11.

93. *Id.* at P 20. FERC also imposed certain monitoring requirements, including quarterly filings certifying compliance with these conditions. *Id.* at P 21.

94. *Hartree Partners, LP, et al.*, 168 FERC ¶ 61,212 at P 10 (2019).

removed for cause and the investor only retained veto rights regarding “(1) issuances of stock; (2) liquidation of [the public utility]; (3) bankruptcy; (4) changes to [the public utility’s] corporate form or tax treatment; (5) changes to certain investor rights under [the public utility’s] corporate charter; and (6) merger or consolidation.”⁹⁵ FERC conditioned approval on investors not having more than one representative on the public utility’s Board in the future without FERC approval.⁹⁶ FERC also took the opportunity to provide the following guidance: “In the future, applicants asserting that a voting trust breaks an affiliate relationship should provide the Commission with information regarding their combined representation on relevant boards of directors (or similar governing bodies) and any other facts and circumstances that would indicate a lack of common control.”⁹⁷

Conversely, in *TransAlta*, FERC held that the parties should have sought authorization under FPA section 203 for a transaction that had certain similarities with the transactions in *Hartree* and *Cascade*.⁹⁸ Investors in *TransAlta* also employed a Standstill Agreement, but unlike *Cascade*, FERC determined the Standstill Agreement at issue was insufficient evidence of no control where the agreement did not explicitly prevent the investor from influencing day-to-day activities of a public utility holding company and its public utility subsidiary.⁹⁹

Another factor differentiating *TransAlta* from *Hartree* and *Cascade* was that the investor in *TransAlta* and its affiliate also had the right to appoint two out of twelve members of the board of directors of the holding company with respect to several public utilities and had exercised this right to place two executives from the investor’s affiliate on the board.¹⁰⁰ Relying on its holdings in two other recent decisions (involving determinations of affiliation under sections 205 and 206 of the FPA), FERC determined that the appointment of these board members “that are not independent from” the investor or its affiliates constitutes a change in control and announced that “[going forward], appointment of an investor’s own officers or directors, or other appointee accountable to the investor, to the board of a public utility or holding company that owns public utilities will require prior Commission approval under section 203(a)(1)(A).”¹⁰¹ It is not relevant to FERC whether the nature or number of appointees actually have the power to determine how the board will act.¹⁰² FERC’s rationale is that “board membership confers rights, privileges, and access to non-public information, including information on

95. *Id.* at P 11.

96. *Id.* at P 25.

97. *Id.* at P 27.

98. 181 FERC ¶ 61,055, at P 33 (approving a transaction under section 203(a)(1) and 203(a)(2) and holding that authorization also was required under both FPA sections 203(a)(1)(A) and 203(a)(2)—but not sought or obtained—for an earlier transaction and distinguishing the finding in *Cascade*. FERC did not take any enforcement action for the parties’ failure to timely apply for authorization of the earlier transaction).

99. *Id.* at PP 30-31.

100. *Id.* at PP 27-28.

101. *Id.* at P 29 (citing *Pub. Citizen, Inc. v. CenterPoint Energy, Inc.*, 174 FERC ¶ 61,101 at P 33 (2021); *Every Kan. Central, Inc.*, 181 FERC ¶ 61,044 (2022); *order addressing arguments on r’hg*, 184 FERC ¶ 61,003 (2023)).

102. 181 FERC ¶ 61,055, at P 29.

commercial strategy and operations.”¹⁰³ The Commission’s order in *TransAlta* establishes that appointment of non-independent board members constitutes affiliation and leads to a requirement for prior FERC authorization under FPA section 203(a)(1). This relatively clear guidance will nonetheless likely lead to additional questions about how to determine whether a board member is independent.¹⁰⁴ There will likely be many cases with facts that do not align exactly with the facts in *TransAlta* that will require public utilities and their investors to determine whether they need to file for prior approval from FERC. Uncertainty about this may lead to additional applications filed “in an abundance of caution.”

Although it is beyond the scope of this article, it is important to consider antitrust implications of transactions, regardless of whether approval is required under FPA section 203. FERC relies in part on Horizontal Merger Policy Guidelines established in 1992 by the DOJ and FTC to determine whether a proposed transaction will have an adverse effect on competition.¹⁰⁵ The DOJ and FTC modified these guidelines in 1997 and in 2010, but to date FERC continues to apply the 1992 guidelines.¹⁰⁶ The DOJ/FTC standards were further amended in 2020, but this amendment was later withdrawn, and the DOJ and FTC released updated draft Merger Guidelines on July 19, 2023, subject to a 60-day comment period.¹⁰⁷ Entities such as the American Antitrust Institute, the DOJ and the FTC have engaged in FERC Section 203 rulemaking proceedings. For example, the DOJ and FTC submitted comments to FERC in response to the 2016 NOI, urging FERC to

103. *Id.* (citing 181 FERC ¶ 61,044, at P 45). For cases further addressing whether the circumstances under which appointment by an otherwise non-controlling investor (i.e., holding less than 10% of the voting equity) of a member of a public utility (or its holding company) constitutes affiliation for purposes of FPA sections 205 and 206, see *id.*; *Mankato Energy Center*, 184 FERC ¶ 61,170 at P 62 (2023) (*Mankato*) (applying FERC’s regulations at 18 C.F.R. § 35.36(a)(9)(iii) (providing for a Commission determination that there is liable to be an absence of arms-length bargaining making it necessary or appropriate that a person be treated as an affiliate, regardless of the amount, if any, of voting interests held) and finding affiliation between an investment advisor and certain public utilities based on review of the totality of the circumstances, where FERC found, among other factors, that an employee of the investment advisor sits on the board of directors of a holding company over the public utilities as the representative of the holding company advised by the investment advisor). Based on the Commission’s decision in *TransAlta*, it is likely that FERC will apply the same test to determine affiliation under FPA section 203 as it does under FPA sections 205 and 206, except that, as discussed in Section III.D. below, blanket authorizations may apply in cases where the investor will hold less than 10% of the public utility’s voting securities. The regulation applied by FERC to determine affiliation in *Mankato* does not necessarily involve a transfer of securities and likely would be made after any such transfer occurred, so situations similar to the one in *Mankato* likely would not invoke FPA section 203 jurisdiction.

104. 181 FERC ¶ 61,055, at PP 33-34.

105. See Notice of Inquiry, *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*, 156 FERC ¶ 61,214 at P 3 (2016) (citing the DOJ and FTC’s 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992)).

106. *Foxhound Solar, LLC*, 184 FERC ¶ 62,004 at n.2 (2023) (citing *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,129 (1996); *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012)).

107. *Merger Guidelines*, US DEPT. JUSTICE & FED. TRADE COMM’N (Draft, for public comment, July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

“reduce its reliance on market structures to assess market power in electricity markets.”¹⁰⁸ Instead, the DOJ and FTC suggested that “[s]tructural measures, such as market shares and market concentration, should be the starting point of an analysis of market power” and that FERC should supplement its analyses “with other types of evidence, such as a supply curve analysis.”¹⁰⁹ It would be interesting to hear the views of the FTC and other parties on the extent to which, if any, equity interests with limited rights with respect to management of the public utility or holding company raise concerns about possible anti-competitive effects, and screens and analytical tools that could be used to separate out such interests that do raise concerns about competition from those that do not. These views would be particularly valuable once the DOJ and FTC have completed action on the recently proposed revisions to their Horizontal Merger Guidelines. It would be even more helpful to the industry if the FTC and FERC could establish joint criteria or guidelines that would allow parties to certain transactions to rely on the authority of one agency or the other for authorization rather than have to consider both agency’s jurisdiction over the same transaction. Increased coordination between FERC and the FTC in cases where they have concurrent jurisdiction could increase efficiency for the regulated public and the Federal government.

1. Uncertainty About Whether Interests Are “Voting Securities”

FERC has disclaimed jurisdiction under FPA section 203(a)(1)(A) over transfers by public utilities of “non-voting” equity securities that do not convey control.¹¹⁰ The analysis does not depend on the percentage of equity securities.¹¹¹ Nor does the analysis depend on labels – jurisdiction may attach if there is a change in actual control, even if a transaction involves equity securities that are labeled “non-

108. 156 FERC ¶ 61,214, at P 2 (filed November 28, 2016). FERC previously proposed changes in 2010 to its regulations regarding electric sector mergers, but ultimately terminated the rulemaking proceeding without further action. Notice of Proposed Rulemaking, *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, FERC Stats. & Regs. ¶ 32,650, 75 Fed. Reg. 4498 (2010); Notice of Proposed Rulemaking, *Withdrawal Notice of Proposed Rulemaking and Termination of Rulemaking Proceeding*, 81 Fed. Reg. 78,756, 78,756 (2016).

109. Comment of the U.S. Department of Justice and the Federal Trade Commission, FERC Docket No. RM16-21, p. 2 (filed November 28, 2016).

110. Order No. 708, *Blanket Authorization Under FPA Section 203*, FERC Stats. & Regs. ¶ 31,265 at P 55, 73 Fed. Reg. 11,003 (2008) (citing the *Supplemental Policy Statement*, *supra* note 76, at P 37; *Legg Mason, Inc.*, 121 FERC ¶ 61,061 at P 18 (2007)), *order on reh’g*, Order No. 708-A, FERC Stats. & Regs. ¶ 31,273, 73 Fed. Reg. 43,066 (2008), *order on reh’g*, Order No. 708-B, FERC Stats. & Regs. ¶ 31,290, 74 Fed. Reg. 25,410 (2009). But FERC has not clearly defined the term “voting security” for purposes of section 203, even though it has provided clearer guidance for purposes of section 205 of the FPA. *See, e.g., AES Creative Res., LP*, 129 FERC ¶ 61,239 at PP 21-28 (2009). In *Hartree*, FERC cited to the definition of voting security in the Public Utility Holding Company Act of 2005, stating it is “any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.” *Hartree Partners, LP, et al.*, 168 FERC ¶ 61,212 at n.41 (citing 42 U.S.C. § 16451(17) (2012)).

111. In many cases it is difficult to calculate the percentage of equity securities held, because the passive investor often will hold an entirely different class of securities than the active investor. For example, a passive investor may hold 100% of the “Class A” membership interests, whereas the managing member holds 100% of the “Class B” membership interests.

voting” but nevertheless grant to the holder control over the entity, for example, through veto rights.¹¹² It is often difficult to determine with certainty whether public utilities that issue “non-voting” equity securities with limited consent or veto rights benefit from this disclaimer of jurisdiction. There is no bright line for establishing when such securities convey control. In *D.E. Shaw Plasma Power*, FERC disclaimed jurisdiction under FPA section 203 over certain transfers of passive interests in a public utility, where the investors had only limited consent rights with respect to actions of the public utility in which they held interests.¹¹³ FERC explained that the passive equity investors “will not have authority to manage, direct or control the activities of [the public utility] in its day-to-day operations, as it engages in wholesale power transactions” and that the consent rights “do not impart control of jurisdictional facilities to the [p]assive [i]nvestors and will not affect the ability of [the public utility] to conduct jurisdictional activities.”¹¹⁴ As discussed in more detail in *FERC May I?*,¹¹⁵ FERC subsequently provided general guidance in Order No. 669,¹¹⁶ the *Supplemental Policy Statement*,¹¹⁷ and other orders on this topic.¹¹⁸ This guidance provided some color, but has been insufficient for determining whether each of the veto and consent rights—sometimes

112. See generally, Order No. 708, *supra* note 110.

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

114. 102 FERC ¶ 61,265, at P 19.

115. *FERC May I?*, *supra* note 2, at 161-63.

116. Order No. 669, *supra* note 30, at P 141 n.101.

117. *Supplemental Policy Statement*, *supra* note 76, at 54 (footnotes omitted) (stating that an investment in a public utility that does not convey control will be considered to be a passive investment not subject to section 203(a)(1)(A) if, among other things: “(1) the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity; and (2) the acquired interest gives the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities); and (3) the acquiring entity has a principal business other than that of producing, selling, or transmitting electric power.”).

118. In *AES Creative Resources*, FERC “confirm[ed] that the term ‘voting securities,’ as used in our market-based rate regulations, was intended to have the same meaning as the definition of ‘voting securities’ adapted from the PUHCA 1935 and set forth in PUHCA 2005,” which defines voting securities as “any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.” 129 FERC ¶ 61,239, at PP 21-28 (citing 42 U.S.C. § 16451(17) (2006)). *Ad Hoc Renewable Energy Fin. Grp.*, 161 FERC ¶ 61,010 (2017). In the Ad Hoc Order, FERC stated that it “see[s] no reason to not to” apply the same findings that the tax equity interests constituted non-voting securities that did not transfer control “for purposes of FPA section 203.” *Id.* at P 16.

numbering two dozen or more—in many equity investment documents are consistent with a finding that the investment is passive. FERC diluted the value of its guidance in the *Supplemental Policy Statement* by adding that “the circumstances that convey control in section 203 analysis vary depending on a variety of factors” and that “the burden remains upon the entities involved in a proposed transaction to decide whether they need to obtain Commission authorization under section 203 to undertake a proposed transaction.”¹¹⁹

Given uncertainty about the scope of FERC’s jurisdiction, parties to passive equity investment transactions often file FPA section 203 applications “out of abundance of caution” requesting FERC authorization without seeking a ruling on jurisdiction.¹²⁰ Parties’ willingness to submit to FERC jurisdiction in these cases stems in part from the reluctance of their counsel to issue clean opinions that no FERC authorization is required on transfers of non-controlling equity interests, given the lack of clear FERC guidance applying to the specific situation. These filings are designed to obtain prompt approval—whether required or not—rather than risk delay while FERC considers whether the transaction is subject to FERC jurisdiction.¹²¹

In 2017, FERC provided guidance on one type of transaction that was the subject of many of these “abundance of caution” filings—namely, whether FPA section 203 authorization was needed for transfers of passive interests in renewable energy generating companies when financial institutions and other non-utility parties acquire “tax equity” interests in such companies.¹²² Previous FERC guidance established that the types of equity interests typically acquired in these transactions were not “voting securities” for purposes of section 205 and 206 of the FPA (regarding the rates charged by public utilities).¹²³ The order in *AES Creative Resources* was important for these renewable energy generating companies with market-based rate authorization, since it relieved them of the burden of considering their passive investors (and other public utilities in which such investors also hold equity interests) as affiliates for purposes of conducting the competition analysis required to qualify for market-based rates.¹²⁴ In the 2017 *Ad Hoc Group* order,

119. *Supplemental Policy Statement*, *supra* note 76, at PP 55-56.

120. *See, e.g.*, FERC Docket No. EC22-121-000, at n.4 (requesting approval out of an abundance of caution for the transfer of passive membership interests that do not confer rights to control the applicant). FERC typically acts on these applications without making any determination on whether it has jurisdiction, based on the precedent established in 43 FERC ¶ 61,466.

121. FERC has 180 days to rule on an application under FPA section 203, but as discussed above, often grants applications for such authorization within about 60 days of filing upon a request for expedited action. 16 U.S.C. § 824b(a)(5); 18 C.F.R. § 33.11. The alternative – a request for declaratory order – is not subject to a deadline by which FERC must act.

122. 161 FERC ¶ 61,010. Investors in these transactions normally seek equity treatment under the tax laws due to requirements related to tax incentives offered to those projects; they do not seek an active role in management but rather seek consent rights with certain major actions, such as issuing new equity securities, taking on new debt or other obligations, changing the organizational documents, changing the tax treatment, or entering into, amending, or terminating certain material contracts (which often includes power purchase agreements). They typically can remove the managing member of the public utility only for cause. *Id.* at P 5.

123. 129 FERC ¶ 61,239, at PP 21-28.

124. *Id.*

FERC expanded this guidance to FPA section 203, holding that “the tax equity interests in public utilities or public utility holding companies identified in *AES Creative Resources* do not constitute voting securities for purposes of FPA section 203” and therefore that “the issuance or transfer of them do not constitute a transfer of control” and do not require authorization under FPA section 203.¹²⁵ FERC cautioned, however, that the guidance is limited to securities having the characteristics of the securities at issue in *AES Creative Resources* and that “it remains the investor’s responsibility to make a determination as to whether prior Commission approval” is necessary for securities with characteristics that vary from those at issue in *AES Creative Resources*.¹²⁶

In fact, the securities in tax equity transactions rarely—if ever—are exactly the same as those at issue in *AES Creative Resources*. Key aspects to consider in reviewing voting or consent rights granted to tax equity investors include the extent of any rights with respect to the sales by the public utility of electric energy at wholesale or rights to remove the manager of the public utility for reasons other than cause. The public utility or its holding company issuing or transferring direct or indirect tax equity interests to investors often is able to provide a representation and warranty, as well as an opinion of counsel, that no FPA section 203 authorization is required. But in cases where the investor has interests that differ from those in *AES Creative Resources* in a way that raises questions about coverage under the *Ad Hoc Group* guidance (for example, where rights involving management of the day-to-day activities of the public utility or its sales of electric energy at wholesale are materially different from those in *AES Creative Resources*), the parties typically will agree that the public utility will obtain FPA section 203 authorization before the securities are issued.¹²⁷ Note that public utilities that are the target of tax equity transactions may have obligations to make filings with FERC under section 205 of the FPA with respect to such transactions, regardless of whether they sought FERC approval for the transaction under FPA Section 203.¹²⁸

125. 161 FERC ¶ 61,010, at P 17. Similarly, the acquisition of such interests by a holding company does not require specific authorization from FERC because it qualifies for a blanket authorization under section 33.(c)(2)(ii) of FERC’s regulations (as discussed further below). *Id.*

126. *Id.* at P 17, n.30. Interestingly, although FERC stated it is the investor’s burden to determine passivity, it is typically the public utility that has the compliance obligation. *Id.* at P 14. Investors often take a position that their investment is passive, but nonetheless require the seller/public utility to represent that no FPA section 203 application is required (and may even require regulatory compliance indemnities). See 161 FERC ¶ 61,010, at P 3.

127. In some cases, the public utility or its counsel may prefer to file an application “out of an abundance of caution” rather than make the requisite representation—or provide the requested opinion—to the investor, even where the securities are substantially similar to those in *AES Creative Resources*. FERC typically acts on these applications without making any determination on whether it has jurisdiction, based on the precedent established in 43 FERC ¶ 61,466.

128. When *FERC May I?* was published, FERC guidance provided that public utilities with market-based rates that obtain FPA section 203 authorization for passive investments were required to file with FERC a change-in-status notice under section 205 of the FPA, even though it otherwise would not be required because no affiliation was created as a result of the transaction under *AES Creative Resources*. See *FERC May I?*, *supra* note 2, at 163. Since then, FERC has issued new guidance and changed its regulations to require a uniform reporting regime under section 205 for these types of transactions, so that obtaining authorization under section 203 does not affect the reporting under section 205. Order No. 860, *Data Collection for Analytics & Surveillance and*

The *Ad Hoc Group* order did not address transactions other than tax equity transactions. One major unanswered question is whether it is appropriate to rely on this precedent for other types of transactions given that key elements of the transaction – the purpose of the investment and type of investor – is different. This is becoming more salient since the passage of the Inflation Reduction Act in 2022, because entities may now transfer individual tax credits.¹²⁹ The traditional tax equity finance arrangement that requires a transfer of actual ownership in an entity to the investor may become less prevalent, which may open doors for other types of investors, many of whom may want to be classified as passive.

FERC has determined interests are not voting securities in the context of certain other types of investments, but these orders are normally in response to requests for declaratory orders.¹³⁰ FERC's findings are therefore generally limited to the specific facts described in the application and may only be relied upon by the applicants.

FERC has only issued limited broadly-applicable guidance regarding passive investments. The guidance is generally too narrow to account for the nuanced rights that investors negotiate. Arguably, every right an investor has in its public utility borrower is “necessary to protect their . . . investments.”¹³¹ The value of the investment is directly tied to the success of the public utility.¹³² In fact, the jurisdictional activity the public utility is engaged in (i.e., wholesale sales of energy or transmission in interstate commerce) is likely the primary revenue-generator of their borrower and thus the source of funds to repay loans or pay returns

Market-Based Rate Purposes, 168 FERC ¶ 61,039 (2019). Under current regulations and guidance, a market-based rate seller in which any investor has acquired passive securities—regardless of whether section 203 authorization was obtained—is required to file a notice of change-in-status identifying the passive investor (if the investors has not been previously identified in a market-based rate proceeding) and must include an affirmation that the relevant “ownership interests consist solely of passive rights that are necessary to protect passive investors’ or owners’ investments and do not confer control” (i.e., that in accordance with *AES Creative Resources*, the interests held by the passive owners are not voting securities, do not confer more than limited consent/veto rights, and do not provide the investor with the power to remove the manager without cause). 18 C.F.R. § 35.37(a)(2).

129. Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. (1st Sess. 2022).

130. See, e.g., *Starwood Energy Group Global, LLC, et al.*, 153 FERC ¶ 61,332 at n.6 (2015) (granting declaratory order regarding the “passive” status of investors comprised of “a mix of sovereign wealth funds, insurance companies, pension funds, superannuation funds, fund[s] of funds, charitable endowments, family offices, high net worth individuals and banking institutions.”); *NextEra Energy Partners, LP*, 150 FERC ¶ 61,071 at PP 29-30 (2015) (disclaiming jurisdiction over future transactions of certain specified investment interests [same]); *Solios Power LLC*, 114 FERC ¶ 61,161 at PP 5, 10 (2006) (holding that there would be no change in control, and thus no need to obtain section 203 authorization, resulting from transfers of equity interests in a company that held passive shares in a public utility where the holder of such shares “ha[d] the right to vote only at class meetings where matters concerning any proposed changes to its share rights [were] to be determined” and otherwise “no right to receive notice of, attend, or vote at general [shareholder] meetings.”); cf. *Entegra Power Group LLC*, 125 FERC ¶ 61,143 (2008), *clarif. granted and reh’g denied*, 129 FERC ¶ 61,156 (2009) (holding that certain restrictions on the exercise of voting rights were necessary in order for a company to be granted a blanket authorization to hold up to 20% of the voting interests in two public utilities where the transaction otherwise raised concerns regarding effects on competition).

131. 129 FERC ¶ 61,239, at P 25 (citing *Solios Power LLC*, 114 FERC ¶ 61,161 at PP 9-10 (2006)).

132. 129 FERC ¶ 61,239, at P 26.

on the investment.¹³³ An investor is therefore keenly interested in ensuring the success of the jurisdictional activity.

Besides being fact-specific based on the totality of facts presented in each case, the precedential cases also seem contradictory in certain respects to the limited criteria FERC has provided. For example, FERC has stated an element of passivity is that “the acquired interest gives the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities).”¹³⁴ It is normal, however, for a passive equity investor (or even a lender) to have veto or consent rights over any modification to a public utility’s material contracts. Material contracts typically include jurisdictional paper facilities such as wholesale power purchase agreements and transmission capacity agreements.¹³⁵ In some circumstances, investors also pre-negotiate limits on the public utility’s merchant trading activities that the public utility cannot veer from without “passive investor” consent.¹³⁶ These restrictions typically are designed to protect the investor from losses that might be incurred from the public utility engaging in speculative activities instead of the core activity of selling the electric energy generated by the public utility’s facilities. The line between controlling jurisdictional activities and protecting an investment can be difficult to navigate. *Recommendation:* As discussed above, FERC has provided further guidance over the past ten years regarding whether certain types of transactions constitute a change of control for purposes of triggering review under FPA section 203 (or create affiliation for purposes of FPA section 205). However, there are other situations that arise on a regular basis where parties are not clear about whether a transaction invokes FERC jurisdiction and therefore file for authorization out of an “abundance of caution.” One simple example is a transaction where an investor obtains nearly identical veto or consent rights as the investor in *AES Creative Resources*, but the investor is not a tax equity investor and is investing

133. 114 FERC ¶ 61,161, at PP 9-10.

134. 161 FERC ¶ 61,010, at P 13 (citing *Supplemental Policy Statement*, *supra* note 76, at P 54).

135. For example, the rights considered by FERC in the *Ad Hoc Group* proceeding (as previously addressed in *AES Creative Resources*) included the rights to “[c]ancel, suspend, renew, amend, terminate or replace a principal project document, including power purchase agreements, under certain circumstances (this does not give the non-managing equity investors the right to select the offtaker or to negotiate the price or other terms and conditions of the power purchase agreement, but it may provide such investors a consent right, similar to what a lender would have, with respect to what typically is the most important revenue contract for the project company”). FERC Docket No. EL17-26-000, at 22 (Dec. 9, 2016); *see also* 161 FERC ¶ 61,010 (finding limited consent/veto rights listed in petition do not confer control).

136. *See, e.g.*, Notice of Non-Material Change in Status, *Enel Green Power Diamond Vista Wind Project, LLC*, Docket No. ER18-2312-000 (Dec. 31, 2018) (stating the Managing Member requires the investor’s consent before “[e]ngaging in any speculative financial activities, excluding forward sales of renewable energy credits or market or contracted energy sales, in each case to the extent permitted under the LLCA, including, for the avoidance of doubt, sales pursuant to the day-ahead trading plan set forth in Exhibit G thereto.”) (accepted by delegated letter order, issued Oct. 30, 2018); *see also* Notification of Changes in Status, *Haystack Wind Project, LLC*, Docket No. ER21-2140-000 (Mar. 3, 2022) (stating the Managing Member requires consent to “Cause the Company or the Project Company (i) to sell any electric energy generated by the Project other than in a manner consistent with (A) each Offtake Agreement, (B) the Interconnection Agreement, (C) applicable Law (including FERC requirements), (D) the Energy Sales and Trading Strategy set forth as Exhibit E to the Haystack Holdings LLCA.”).

for reasons other than to receive tax benefits. In the authors' experience, there is a wide spectrum of opinions among FERC practitioners on this very issue.

Rather than relegating the industry to cull examples from the limited available precedent and try to conform transaction documents to identically match investors' veto and consent rights in the limited precedent, it would be very helpful if FERC were to more specifically identify the factors it considers to constitute control and disclaim jurisdiction over interests that do not possess that type of control. For example, it appears based on FERC's limited guidance that it interprets its jurisdiction to cover any investor that can actually affect jurisdictional activities. Accordingly, the Commission could categorically explain that FPA section 203 jurisdiction will not attach to a transfer of equity interests to any investor that cannot direct a public utility's actions concerning sales of wholesale energy or transmission in interstate commerce, through the ability to appoint the people who make such decisions or otherwise. The industry would also benefit from a bright line test of whether the energy-related activities (if any) of an investor – passive or active – matters for purposes of determining whether an FPA section 203 application is required. If it is irrelevant, then a blanket authorization should apply, such that no specific application would be required. For example, independent wholesale power generators (i.e., registered “power generation companies”) located in Texas are only required to seek prior approval from the Public Utility Commission of Texas for mergers if the newly merged companies will offer for sale more than 10% of the total electricity for sale in Texas.¹³⁷ It would often be easier to determine whether investors will control a certain percentage of interests in energy assets within a region than it is to try to classify each such interest as active or passive.

2. Secondary Market Transactions

Recognizing that a public utility may not have any control over, or even knowledge about, transfers of its direct or indirect upstream equity interests, FERC established in its *Supplemental Policy Statement* that public utilities do not require prior authorization under FPA section 203(a)(1) for “secondary market transactions.”¹³⁸ FERC defined these as “purchases or sales of the securities of a public utility or its upstream holding company by a third-party investor.”¹³⁹ Notwithstanding FERC's broad definition of secondary market transactions, FERC clarified that this exemption does not apply in all cases of purchases or sales of public utility or holding company securities by a third-party investor.¹⁴⁰ FERC initially granted this exemption in the context of the following circumstances:

- (1) [the public utility or holding company's] common stock is publicly traded;
- (2) huge volumes may change ownership every day between third-party investors in arm's-length transactions;
- (3) neither the holding company nor its public utility subsidiaries are parties to the transactions;
- (4) neither the holding company nor its public

137. Tex. Util. Code Ann. § 39.158 (West 2023).

138. *Supplemental Policy Statement*, *supra* note 76, at P 36.

139. *Id.*

140. *Id.*

utility subsidiaries have any control over transfers of the common stock; and (5) neither the holding company nor its public utility subsidiaries are required to be given prior notice of these transactions.¹⁴¹

The use of “and” in FERC’s list of circumstances suggests all five criteria must apply. To the extent that any one of these circumstances does not apply, it is not clear whether FERC would find that a transfer of the securities of a public utility or holding company is exempt from the requirements of FPA section 203(a)(1).¹⁴² The factors set forth in the *Supplemental Policy Statement* are not particularly clear. In particular, the language in factor (2) is vague (“huge volumes may change ownership”), and the “every day” requirement in that factor seems too extreme.¹⁴³ It is not clear why it is necessary to exclude transactions where the holding company or its public utility subsidiary has prior notice, as set forth in factor (5). FERC denied a request to clarify that secondary market transactions include:

circumstances where: (1) the securities are regularly traded but are not necessarily traded at a volume of thousands of shares per day on a public exchange and (2) the public utility or its holding company may review proposed transactions in advance and play a ministerial role in approving the transactions but is not a party to them.¹⁴⁴

FERC stated the request for clarification was “unsupported” in part because the request was not accompanied by an assertion “that, without the requested clarification, a public utility would be put in an impossible position of having to seek authorization for transactions it knew nothing about.”¹⁴⁵ This indicates a key element of a secondary market transaction is the public utility must not have prior notice of the transaction.

Recommendation: It would be useful for FERC to provide further guidance on its policy on secondary market transactions and to expand the scope to transactions over which a public utility has no direct involvement.

141. *Id.* at P 4.

142. In FERC’s order on reconsideration and clarification of the *Supplemental Policy Statement*, *supra* note 76. FERC declined to adopt a broad interpretation of the scope of this policy and, in particular, rejected an interpretation under which it would apply to “what may be an indirect disposition of control of jurisdictional facilities in circumstances in which the public utility knows of and has a role in such transactions.” *Id.* at 6. In at least one case, however, FERC did not object to application of the secondary market transaction policy to an acquisition of certain trusts and investment funds that indirectly held the voting securities of several public utilities where it appears that some of the circumstances described in Order No. 697, *supra* note 64 (for example, publicly traded shares and large volumes of transactions) were not met. *BlackRock, Inc.*, 131 FERC ¶ 61,063 at P 13 (2010) (holding that the transaction otherwise required authorization under section 203(a)(2), however). In another case, FERC declined an opportunity to clarify further the application of its policy regarding secondary market transactions. 129 FERC ¶ 61,011, at P 18 n.20.

143. *Supplemental Policy Statement*, *supra* note 76, at P 4.

144. *Id.* at P 3.

145. *Id.*

D. FPA Section 203(a)(1)(A) Transactions That Are Preapproved Under Blanket Authorizations

FERC has established in its regulations a number of “blanket authorizations” that apply to transactions for which specific approval under FPA section 203 otherwise would be required.¹⁴⁶ A transaction covered by a blanket authorization is automatically approved pursuant to the regulation itself rather than pursuant to an order resulting from an application and adjudicatory proceeding at FERC.¹⁴⁷ The discussion below addresses issues arising with respect to some of the blanket authorizations under FPA section 203(a)(1)(A) for dispositions of jurisdictional facilities by public utilities. Blanket authorizations under FPA section 203(a)(2) for acquisitions by holding companies are discussed in Section V.B., below.

- Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. section 33.1(c)(2)(ii) for acquisition of any voting security in a transmitting utility or an electric utility company (or a holding company with respect to either of them) if, after the transaction, the holding company and its associate and affiliate companies in aggregate will own less than 10% of the voting securities of the public utility.¹⁴⁸

Recommendation: As discussed in Section V.B., this blanket authorization is confusing. The 10% cap is incongruous with the corresponding blanket authorization for holding companies. At a minimum, it should be consolidated with the blanket authorization for transfers to “[a]ny person other than a holding company,” as discussed immediately below.

- Transfer by a public utility of its outstanding voting securities to “[a]ny person other than a holding company if, after the transfer, such person and any of its associate or affiliate companies in aggregate will own less than 10[0%] of the outstanding voting interests of such public utility.”¹⁴⁹ This blanket authorization is subject to certain reporting requirements.¹⁵⁰

Note that there is some overlap between this blanket authorization and FERC’s guidance in the *Supplemental Policy Statement* that it has made a rebuttable presumption that transfers of less than 10% of a public utility’s voting securities do not constitute a change in control and accordingly do not invoke

146. Order No. 669-A, *supra* note 30, at P 2.

147. In the 2016 *NOI*, FERC requested comments on, among other things, whether its current blanket authorizations were appropriate and whether further blanket authorizations were appropriate, but FERC did not take any further action in the proceeding. 156 FERC ¶ 61,214, at PP 1, 12, 35-38.

148. 18 C.F.R. § 33.1(c)(12)(i).

149. 18 C.F.R. § 33.1(c)(12)(ii).

150. 18 C.F.R. § 33.1(c)(17). A public utility engaging in a transfer pursuant to this blanket authorization is required to file a report with FERC within thirty days after the transaction stating the names of the parties, the parties’ pre- and post-transaction voting security holdings, the date of the transaction, the identities of any public utility holding company affiliates of the parties, and that the transaction will not result in certain types of cross-subsidization or pledges or encumbrances of utility assets. *Id.*

FERC jurisdiction under FPA section 203(a)(1).¹⁵¹ FERC has explained that this blanket authorization helps eliminate uncertainty due to the fact that the *Supplemental Policy Statement* guidance was only a rebuttable presumption and that in some cases a transfer of less than 10% of a public utility's voting stock may be jurisdictional.¹⁵² FERC's finding in *TransAlta* that FPA section 203 jurisdiction is triggered by an acquisition by an investor of securities providing certain "control" rights over the public utility involved a situation where the investor had acquired more than 10% of the subject securities.¹⁵³ FERC arguably would reach a different result (finding that the transaction benefits from this blanket authorization, or the blanket authorization under 18 C.F.R. section 33.1(c)(2)(ii), as discussed above) in a situation where the investor acquires less than 10% of the voting securities of the public utility.¹⁵⁴

For investments involving less than 10% of a public utility's securities, parties need to determine whether these transactions are simply non-jurisdictional under the *Supplemental Policy Statement* guidance or instead are jurisdictional but preapproved by FERC under this blanket authorization. The distinction matters because of the reporting requirements attached to the blanket authorization.¹⁵⁵ Based on the very small number of entities that have ever filed reports in connection with this blanket authorization, it appears that public utilities have not found this blanket authorization useful.¹⁵⁶

Recommendation: It is unclear why a distinction is made between transfers to holding companies that benefit from their own blanket authorization and transfers to any other person. Why not instead consolidate paragraphs (i) and (ii) of this blanket authorization and simply state that a public utility has blanket authorization under FPA section 203(a)(1) to transfer less than 10% of its outstanding voting securities to any person, unless the transfer will cause that person and its associate or affiliate companies to hold an aggregate of 10% or more of the public utility's outstanding voting securities? This would streamline the regulations and reduce confusion.

- Internal corporate reorganizations of nontraditional public utilities that do not have captive customers or own or provide transmission service over jurisdictional transmission facilities and that present no cross-subsidization issues.¹⁵⁷

151. Order No. 708, *supra* note 110, at PP 23, 25-26.

152. *Id.* at 26.

153. See discussion *supra* at Section III.C; see also 181 FERC ¶ 61,055, at PP 27, 31.

154. 18 C.F.R. § 33.1(c)(12)(i).

155. 18 C.F.R. § 33.1(c)(17).

156. These compliance reports are required to be filed in FERC Docket No. HC09-8-000 (for fiscal year 2009). Order No. 708-B, *supra* note 110, at P 13. As of March 15, 2013, according to records available on FERC's eLibrary electronic docket record system, only three entities have filed compliance reports under Docket Nos. HC09-8-000, HC10-8-000, HC11-8-000, HC12-8-000, and HC13-8-000.

157. 18 C.F.R. § 33.1(c)(6) ("Any public utility or any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under sections 203(a)(1) or 203(a)(2) of the Federal Power Act, as relevant, for internal corporate reorganizations that do not result in the

FERC has not defined “internal corporate reorganizations,” making it difficult in some cases for parties contemplating a proposed transaction to determine whether this authorization applies to their specific circumstances. Based on the limited available precedent on this issue, it appears that it is not sufficient that ultimate ownership and control of the public utility remains the same.¹⁵⁸ This authorization does not cover transfers of assets, unless the transfer is between two nontraditional utility subsidiaries and only one survives the transaction.¹⁵⁹

One FERC order that predates this blanket authorization—but may help in interpreting it—provides that FERC authorization is not required for transfers of ownership interests in public utilities where the transaction simply involves inserting or compressing one or more layers in a corporate structure without changing the overall upstream ownership.¹⁶⁰ A nontraditional utility, such as an exempt wholesale generator (EWG)¹⁶¹ that owns and operates an electric-generating facility, may qualify for this blanket authorization even if it owns some jurisdictional interconnection facilities, as long as it does not have captive customers served under cost-based rates.¹⁶² FERC further clarified that “captive customers” are “any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.”¹⁶³

Recommendation: We are not aware of any policy reason for the distinction between equity and asset transfers as long as no traditional public utility with captive customers is involved. We suggest that FERC provide further guidance on the definition of internal corporate reorganizations and apply the blanket authorization to asset transfers (as long as no utility with captive customers is involved).

- A public utility has blanket authorization “to transfer a wholesale market-based rate contract to any other public utility affiliate that has the same ultimate upstream ownership, provided that neither affiliate is affiliated with a traditional public utility with captive customers.”¹⁶⁴

reorganization of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and that do not present cross-subsidization issues.”).

158. 111 FERC ¶ 61,162, at P 11.

159. Order No. 708-A, *supra* note 110, at PP 51, 55 nn.41-43 (clarifying the statement in the *Supplemental Policy Statement* under which this blanket authorization does not apply to asset transfers). *Supplemental Policy Statement*, *supra* note 76, at PP 51, 55; *see also* Order No. 669-A, *supra* note 30, at P 73; 111 FERC ¶ 61,162, at P 19 (holding that authorization was required under section 203(a)(1) where an intermediate owner of a public utility was eliminated, resulting in no change in the ultimate upstream ownership, and where the public utility’s jurisdictional facilities were transferred to a wholly-owned subsidiary of the same ultimate upstream owner that previously had held an intermediate ownership interest in the prior owner of the facilities); *Delmarva Power & Light Co.*, 71 FERC ¶ 61,160, at p. 61,610 (1995) (jurisdiction over transfer of electric transmission line to the parent company of the prior owner of the line); *Kentucky Utilities Co.*, 56 FERC ¶ 61,184, at p. 61,653 (1991).

160. *Commonwealth Atl. Ltd.*, 57 FERC ¶ 61,193, at pp. 61,666-67 (1991).

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

162. Order No. 708, *supra* note 110, at PP 60-61.

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

164. 18 C.F.R. § 33.1(c)(11).

- Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. §§ 33.1(c)(8), 33.1(c)(9), or 33.1(c)(10).¹⁶⁵

As discussed in Section V. below, these blanket authorizations cover acquisitions by holding companies that are holding companies solely with respect to EWGs, qualifying facilities (QF),¹⁶⁶ and foreign utility companies (FUCO);¹⁶⁷ are regulated financial institutions engaging in certain specified transactions;¹⁶⁸ or are acquiring securities for certain underwriting or hedging activities.¹⁶⁹ However, with respect to the blanket authorization for a holding company acquisition of securities of EWGs, QFs, or FUCOs, FERC imposed a limitation in 18 C.F.R. § 33.1(c)(13) such that it applies only if, “after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10[%] of the outstanding voting [securities] of such public utility.”¹⁷⁰ Accordingly, FERC authorization may nevertheless be required under FPA section 203(a)(1) for a disposition of interests in an EWG (or a QF that is not exempt from section 203) to the extent that there is a change of control with respect to such entity.¹⁷¹

IV. APPLICATION OF FPA SECTIONS 203(A)(1)(B)-(D) TO MERGERS AND ACQUISITIONS BY PUBLIC UTILITIES

Compared to the large number of applications under FPA section 203(a)(1)(A), there are relatively few applications for authorization under FPA Sections 203(a)(1)(B) – (D).¹⁷² Whereas FPA Section 203(a)(1)(A) pertains to public utility dispositions, the remaining sections of FPA section 203(a)(1) concern mergers and certain acquisitions by public utilities.¹⁷³ If an application is required for an acquisition under FPA sections 203(a)(1)(B)-(D), however, then it

165. *Id.* §§ 33.1(c)(8)-(10).

166. QFs are generally facilities used for electric generation, either small facilities used to generate electric energy from renewable resources or cogeneration facilities of any size (using industrial or other waste heat to generate electric energy or using waste heat from electric-generating activities for other beneficial purposes); they qualify for certain exemptions under PUHCA, the FPA, and certain state utility regulations. *See generally* 18 C.F.R. § 33.1(c)(8).

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

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

169. 18 C.F.R. § 33.1(c)(10).

170. *Id.* § 33.1(c)(13).

171. *See, e.g.*, Order No. 669-B, *supra* note 30, at 44; *see also* 125 FERC ¶ 61,267, at P 24.

172. 18 C.F.R. §§ 33.1(a)(1)(i)-(iv).

173. *Id.*; *see FERC May I?*, *supra* note 2, at 168 nn.95-96.

is likely FPA section 203(a)(1)(A) also applies to any public utility on the “disposing” side of the transaction.¹⁷⁴

A. Public Utility Mergers & Consolidations under FPA Section 203(a)(1)(B)

FPA section 203(a)(1)(B) grants FERC jurisdiction over any transaction in which a public utility would:

[M]erge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of \$10,000,000, by any means whatsoever.¹⁷⁵

The FPA does not define “merge or consolidate” as used in FPA section 203(a)(1)(B). FERC interprets the terms broadly, beyond customary corporate vernacular.¹⁷⁶ It has said: “we do not believe Congress intended a narrow interpretation of ‘merge’ or ‘consolidate.’ Section 203(a) ‘clearly was not written to describe the strict legal concepts of corporate mergers and consolidations. This language speaks of merger or consolidation of *facilities*, not of corporate entities.’”¹⁷⁷ It may be useful to think of a merger generally as a public utility acquisition.¹⁷⁸

Applications under FPA section 203(a)(1)(B) typically arise in connection with the acquisition by a public utility of electric interconnection or other transmission facilities of another public utility.¹⁷⁹ The result is that the transferred facilities are merged or consolidated with the acquiring public utility’s other transmission and jurisdictional facilities.¹⁸⁰

174. 18 C.F.R. §§ 33.1(a)(1)(i)-(iv).

175. 16 USC § 824b(a)(1)(B).

176. *Id.*

177. *Enova Corp. & Pacific Enter.*, 79 FERC ¶ 61,607, at p. 61,489 n.22 (1997) (citing *Pennsylvania Electric Co. (Pennsylvania Electric)*, 9 FPC 91, 95 (1950) (emphasis in original; footnote omitted); see also *Duke Power Co.* *supra* note 71, at 933).

178. See, e.g., H.R. Rep. No. 115-253, at 5 (2018) [hereinafter Rep. No. 115-253] (stating “Section 1 amends section 203(a)(1)(B) of the FPA to ensure that the threshold is for facilities *to be acquired* having a value in excess of \$10 million.”) (emphasis added); *Testimony of James Danley, General Counsel, Federal Energy Regulatory Commission, Before the United States Senate Committee on Energy and Natural Resources, Subcommittee on Energy*, FERC 2 (Oct. 3, 2017), <https://www.ferc.gov/media/9204> [hereinafter *S. 1860 Testimony*] (stating a merger is an “acquisition”).

179. 18 C.F.R. § 33.1(a)(1)(ii).

180. See, e.g., 139 FERC ¶ 61,003, at 3; *Interstate Power Company*, 26 FERC ¶ 61,328, at pp. 61,702-03 (1984); *Duke Power Co.*, *supra* note 71, at 931. Filings under this section were more frequent prior to 2018 when Congress established a \$10 million minimum value threshold for these transfers. Order No. 669, *supra* note 30, at P 32. This eliminated an issue, as discussed in *FERC May I?*, that was caused by the ambiguity in the 2005 version of the statute and FERC’s regulations interpreting that version of the statute to mean that no dollar threshold applied. Prior to this clarification, applications were filed for the transfer of facilities with a value much less than \$10 million. See, e.g., *ITC Great Plains, LLC*, 137 FERC ¶ 62,037 at P 64,083 (2011) (filing made after the transaction was completed, referring to a “mistaken interpretation of [FPA] [s]ection 203(a)(1)(B)”); *PECO Energy Co. & Exelon Generation Co.*, 137 FERC ¶ 62,120 at P 4 (2011); *PECO Energy Co. & Exelon Generation Co.*, FERC Docket No. EC11-120-000 (Sept. 26, 2011) (filed “out of an abundance of caution” despite low value of the facility). In both of these cases, the orders were issued by FERC staff acting under authority delegated by the Commission. 18 C.F.R. § 375.307 (2012).

Jurisdictional mergers and consolidations are not, however, limited to acquiring facilities from another public utility. Rather, FPA section 203(a)(1)(B) covers mergers in which a FERC-jurisdictional public utility acquires electric transmission assets from an entity that is not subject to FERC jurisdiction (i.e., that is exempt from jurisdiction under FPA section 203(a)(1)(A)), such as municipal and other government-owned utilities and cooperatives financed by the Rural Utilities Administration.¹⁸¹ It only applies, however, when such facilities would be FERC-jurisdictional *but for* the fact they are owned by an entity that is exempt from FERC jurisdiction.¹⁸² In contrast, FERC has found a public utility does not require authorization to acquire assets that would not have been subject to FERC's jurisdiction at the time acquired, even if the acquiring entity intends to use the facility for jurisdictional purposes (e.g., converting a local distribution facility into an interstate transmission asset).¹⁸³

In its regulations implementing the 2018 amendment to FPA section 203(a)(1)(B), FERC implemented a new reporting requirement established by Congress for transactions that do not exceed the \$10 million threshold but otherwise would be covered by the statutory provision and have a value in excess of \$1 million.¹⁸⁴ This has the potential to significantly increase the reporting burden on entities transferring certain transmission facilities pursuant to an option to build provision. The new requirement is discussed in more detail in Section VI, below.

The language of FPA section 203(a)(1)(B) is broader than the other FPA section 203(a)(1) provisions, because it states the merger or consolidation may occur “directly or indirectly” and “by any means whatsoever.”¹⁸⁵ It is commonplace for affiliates of public utilities to acquire other public utilities and associated or separate jurisdictional facilities.¹⁸⁶ Even though FPA section 203(a)(1)(B) applies only

181. See, e.g., *Duke Power*, *supra* note 71, at 932; Final Rulemaking, *Mergers or Consolidations by a Public Utility*, 166 FERC ¶ 61,120, 84 Fed. Reg. 6,069, 6,069-70, 6,073 (codified at 18 C.F.R. § 33) (2019) [hereinafter Order No. 855].

182. See, e.g., 26 FERC ¶ 61,328, at 61,702-03 n.3. There were several years of uncertainty regarding whether FPA section 203(a)(1)(B) applied to facilities owned by non-jurisdictional entities. It was an open question at the time *FERC May I?* was published, as discussed in Section IV.B. *FERC May I?*, *supra* note 2, at 171-72. FERC fixed this issue (as recommended in *FERC May I?*) in its order implementing the 2018 amendment to section 203(a)(1)(B). Order No. 855, *supra* note 181, at 6,073. In response to comments received during the rulemaking process, FERC explained how the revised statutory language supports the interpretation in *Duke Power* and noted that the legislative history of the 2018 amendment does not indicate any Congressional intent to “reverse the Commission’s longstanding reliance on *Duke Power Co.* to assert jurisdiction over a public utility’s acquisition of transmission facilities from a non-public utility.” *Id.* (citations omitted). This result can occur, for example, when a public utility acquires interconnection facilities constructed by another public utility (or even a non-jurisdictional entity) under the “option-to-build” provision of FERC’s *pro forma* interconnection agreement. See Order No. 2003, *supra* note 51, at P 353; Order No. 2003-A, *supra* note 51; Order No. 2003-B, *supra* note 51; Order No. 2003-C *supra* note 51. As noted above, the “option to build” has become more popular in recent years given commonplace transmission owner construction delays and following FERC Order No. 845, which revised FERC’s *pro forma* large generator interconnection procedures to expand the customer’s right to opt to build certain of the transmission provider’s interconnection facilities. 163 FERC ¶ 61,043, at PP 1-2.

183. Order No. 855, *supra* note 181, at P 30.

184. 18 C.F.R. § 33.12; 16 USC § 824b(a)(7).

185. *Id.* § 33.1(a)(1)(ii).

186. Order No. 855, *supra* note 181, at P 20.

to public utilities, and not to public utility holding companies, FERC has used the provisions in FPA section 203(a)(1)(B) to exercise jurisdiction over mergers between, and changes of control with respect to, holding companies that result in an indirect merger of public utilities.¹⁸⁷ FERC has found that a merger of public utility holding companies is also a merger of their respective public utility subsidiaries.¹⁸⁸ This can get complicated quickly. A project company public utility might not know about the acquisitions of its remote partial upstream equity holders.

1. Blanket Authorizations Applicable to Public Utility Mergers & Consolidations

FERC's regulations make the blanket authorizations discussed above for purposes of FPA section 203(a)(1)(A) applicable to all portions of 203(a)(1).¹⁸⁹ The types of transactions addressed by section 203(a)(1)(B), however, often do not meet the requirements of these authorizations.

B. Acquisitions by Public Utilities of Public Utility Securities Under FPA Section 203(a)(1)(C)

Under FPA section 203(a)(1)(C), a public utility requires FERC authorization before it may acquire any security "with a value in excess of \$10 million of any other public utility."¹⁹⁰ The U.S. Supreme Court has expressly upheld FERC's jurisdiction over the acquisition by a public utility of securities of another public utility, pursuant to the portion of FPA section 203 now set forth in FPA section 203(a)(1)(C).¹⁹¹ Today, the principal question that arises with respect to the extent of FERC's jurisdiction under this section involves the application of the \$10 million threshold, as discussed in Section VI below.

1. Blanket Authorizations Applicable to Acquisitions by Public Utilities of Public Utility Securities

Among the blanket authorizations discussed above for purposes of FPA section 203(a)(1)(A), only two of them would apply to the types of transactions covered by section 203(a)(1)(C). First, the blanket authorization for internal corporate reorganizations, pursuant to section 33.1(c)(6) of FERC's regulations, authorizes the acquisition by a public utility of securities of another public utility under FPA section 203(a)(1)(C), provided that such acquisition is part of an internal corporate

187. See, e.g., *Illinois Power Co.*, 67 FERC ¶ 61,136, at p. 61,351, 61,353 (1994) ("approval under section 203 is required for the indirect merger of the public utilities."). In *Illinois Power*, FERC "clarified" its order in *Missouri Basin Municipal Power Agency v. Midwest Energy Co.*, 55 FERC ¶ 61,464 (1991) in which FERC previously had disclaimed such jurisdiction. FERC later rejected arguments relying on *Missouri Basin*. See 79 FERC ¶ 61,107, at p. 61,494; see *Morgan Stanley Capital Group Inc.*, 79 FERC ¶ 61,109, at p. 61,504 (1997). See also *NorAm Energy Servs., Inc.*, 79 FERC ¶ 61,108, at p. 61,500 (1997); *Phelps Dodge Corp. et al.*, 121 FERC ¶ 61,251 at PP 15-18 (2007) (affirming FERC's interpretation after enactment of EPAct 2005).

188. 67 FERC ¶ 61,136, at pp. 61,352-53 ("[M]ost mergers of public utility holding companies will simultaneously involve an indirect merger of the public utility subsidiaries of such holding companies.")

189. Order No. 708-A, *supra* note 110.

190. 16 U.S.C. § 824b(a)(1)(C), (2).

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

reorganization.¹⁹² Another blanket authorization that would apply precisely to the type of transactions covered by FPA section 203(a)(1)(C) is the blanket authorization under section 33.1(c)(7) of FERC's regulations for "[a]ny public utility in a holding company system that includes a transmitting utility or an electric utility" to acquire "securit[ies] of a public utility in connection with an intra-system cash management program, subject to safeguards to prevent cross-subsidization."¹⁹³

In some cases, a public utility subject to FPA section 203(a)(1)(C) also is a holding company and therefore also is subject to FERC jurisdiction under FPA section 203(a)(2) with respect to acquisitions of securities of transmitting utilities or electric utility companies (which often are public utilities, as well).¹⁹⁴ While FERC has added to its regulations blanket authorizations under FPA section 203(a)(2) for holding companies to acquire public utility securities in certain circumstances, as discussed below,¹⁹⁵ it has not done the same for public utilities seeking to acquire similar securities.¹⁹⁶ Accordingly, a holding company that is also a public utility may have to seek authorization from FERC under section 203(a)(1)(C) to acquire securities of public utilities even if its acquisition is covered by a blanket authorization under FERC's regulations for purposes of section 203(a)(2).¹⁹⁷

C. Acquisitions by Public Utilities of Existing Generating Facilities Under FPA Section 203(a)(1)(D)

Section 203(a)(1)(D) requires FERC authorization before a public utility may "purchase, lease, or otherwise acquire an existing generation facility" with "a value in excess of" \$10 million "that is used for interstate wholesale sales over which the [FERC] has jurisdiction for ratemaking purposes."¹⁹⁸ In most cases, authorization for such transactions also is required under section 203(a)(1)(A), since the transferor is often a public utility subject to FPA section 203, and typically there are some transmission facilities being transferred in addition to generating facilities.¹⁹⁹ In certain situations, however, FPA section 203(a)(1)(A) will

192. 18 C.F.R. § 33.1(c)(6).

193. *Id.* § 33.1(c)(7); *see also* Order No. 669-A, *supra* note 30, at PP 89-91.

194. 16 U.S.C. § 824b(a)(2).

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

196. *Id.*

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

198. 16 U.S.C. § 824b(a)(1)(D).

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

not apply while FPA section 203(a)(1)(D) will.²⁰⁰ Examples include when the transferred facility is a QF exempt from regulation under FPA section 203 (see discussion above in Section II.C.), or when the transfer includes only generation facilities and not any transmission facilities or “paper facilities” otherwise subject to FERC’s jurisdiction.²⁰¹

FERC has defined “existing generation facility” as “a generation facility that is operational at or before the time the section 203 transaction is consummated”; “operational” means that the facility “is capable of producing power;” and “the time the transaction is consummated” means the time when the transaction actually closes and control of the facility changes hands.”²⁰² FERC makes the rebuttable presumption that this requirement applies to any acquisition of an existing generation facility unless the purchaser can demonstrate with substantial evidence that the facility is used only for retail sales.²⁰³ The requirement applies to acquisitions of mothballed facilities that previously were operational as well as to acquisitions of QFs that themselves may be exempt from section 203 requirements.²⁰⁴ It also applies to acquisitions of new electric-generating facilities in cases in which the acquisition will close shortly after the facility begins commercial operation.²⁰⁵ In cases where one public utility is acquiring electric-generation assets from another public utility, the seller may need authorization under FPA section 203(a)(1)(A) for the disposition of interconnection facilities and any jurisdictional paper facilities, and the purchaser may need authorization under FPA section 203(a)(1)(D) to acquire the generation facilities.²⁰⁶ Section 203(a)(1)(B) may apply as well if there is a consolidation of jurisdictional interconnection facilities previously held by separate entities.²⁰⁷ The fact that there are multiple bases for jurisdiction makes little substantive difference: the standard for FERC approval is the same for each.²⁰⁸ Applicants should nonetheless ensure that their request for approval lists all the required authorizations.

FERC staff, by delegated order, has disclaimed jurisdiction under FPA section 203(a)(1)(D) where the acquiring entity was not a public utility under section

200. Order No. 669, *supra* note 30, at P 87.

201. *Id.*

202. 18 C.F.R. § 33.1(b)(1); Order No. 669, *supra* note 30, at PP 84-85.

203. 18 C.F.R. § 33.1(b)(1).

204. Order No. 669, *supra* note 30, at PP 85, 87.

205. See, e.g., *Order Authorizing Acquisition of Generating Facilities, NorthWestern Corp.*, 136 FERC ¶ 62,088 at P 2 (2011). This may become increasingly relevant given the recent rise in utility interest in build-transfer agreements (or similar agreements that call for a project sponsor to construct a generating facility and then transfer ownership to a utility). As long as the seller does not obtain market-based rate authority and does not sell any energy from the project (including test energy), then it would not be a public utility subject to FPA 203(a)(1)(A) for the disposition.

206. 16 U.S.C. §§ 824b(a)(1)(A), (D).

207. See, e.g., *E.I. du Pont de Nemours and Co.*, 132 FERC ¶ 62,138, at p. 64,426 (2010).

208. FERC’s general standards for FPA section 203 applications include review of whether the transaction is consistent with the public interest (including evaluation of effects on competition, rates, and regulation) as well as whether it will result in cross-subsidization. 16 U.S.C. §§ 824b(4)-(5); Order No. 669, *supra* note 30, at PP 7-10, 19 (discussing the Merger Policy Statement (codified at 18 C.F.R. § 2.26)).

201 of the FPA.²⁰⁹ On the other hand, FERC staff has authorized under FPA section 203(a)(1)(D) the transfer of undivided ownership interests in a radial electric transmission line used to connect electric-generating facilities to the electric grid,²¹⁰ although it is not clear that such authorization was required. FERC also has approved transactions under this section in the context of lease transactions, including a transaction involving an extension of a lease of an existing electric-generating facility.²¹¹ Conversely, FERC has approved an acquisition of electric-generating turbines by a public utility that previously had leased the turbines and exercised its option under the lease to purchase them from the lessor.²¹² FPA section 203(a)(1)(D) also has been applied in the context of transfers between affiliated entities (reflecting the fact that the blanket authorization for intra-corporate transfers generally does not apply to asset transfers).²¹³

FPA section 203(a)(1)(D) by its terms applies only to acquisitions of generation facilities with a value in excess of \$10 million.²¹⁴ Section VI below provides an analysis of FERC's precedent regarding calculation of the \$10 million threshold.

1. Blanket Authorizations Applicable to Public Utility Acquisitions of Generating Facilities

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

V. APPLICATION OF FPA SECTION 203(A)(2) TO HOLDING COMPANY TRANSACTIONS

Congress added section 203(a)(2) to the FPA as part of the Energy Policy Act of 2005 ("EPAAct 2005").²¹⁵ This section requires prior authorization from FERC before any:

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

209. *KGen Enterprise LLC*, 115 FERC ¶ 62,055 at P 64,407 (2006).

210. *Milford Wind Corridor Phase I, LLC et al.*, 129 FERC ¶ 62,237, at p. 64,752 (2009).

211. *See, e.g., Covanta Union, Inc.*, 137 FERC ¶ 62,122 at P 64 (2011) (where the lessee was a public utility with market-based rate authority and the lessor was a non-jurisdictional governmental entity, the initial lease had been entered into before enactment of section 203(a)(1)(D) and had not been previously approved); *see also PacifiCorp*, 139 FERC ¶ 62,259 (2012); *Calpine Fox LLC*, 116 FERC ¶ 61,261 at PP 5, 38 (2006) (termination of lease in the context of a bankruptcy).

212. *Hardee Power Partners Ltd.*, 140 FERC ¶ 62,121 at PP 1, 4 (2012).

213. *See, e.g., El Dorado Energy, LLC*, 136 FERC ¶ 62,219 at P 1 (2011).

214. 16 U.S.C. § 824b(a)(1)(D).

215. Energy Policy Act of 2005, H.R. 6, 109th Cong. §§ 15801-16524 (2005). For a discussion of the changes made to PUHCA in 2005 versus the original 1935 version of PUHCA, please *see FERC May I? supra* note 2, at 176-77.

that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000.²¹⁶

A. *In Practice - Remaining Relevance of "Part 2" of FPA Section 203*

FPA section 203(a)(2) is largely obsolete today because most acquisitions occur through a newly formed entity (a special purpose vehicle, a joint venture, or other new entity established for the express purpose of acquiring the target interests).²¹⁷ FERC held that a company that is not *itself* a holding company under PUHCA 2005 does not require authorization to acquire securities of a transmitting utility, electric utility company, or other holding company irrespective of whether it is a direct or indirect subsidiary of a holding company.²¹⁸

FERC later clarified, however, that its ruling in *Goldman Sachs* does not apply where a holding company is, in fact, the acquiring company but the securities ultimately are owned by a non-holding company subsidiary of the acquiring holding company.²¹⁹ Therefore, to benefit from the *Goldman Sachs* finding of non-jurisdiction, it is important that any holding company parent of the acquiring non-holding company not be a party to, or directly involved in, the acquisition transaction.²²⁰

1. Holding Company Acquisitions of Securities

FPA section 203(a)(2) has been applied most often in the context of acquisitions of securities of a transmitting utility, electric utility, or a holding company with respect to a transmitting utility or electric utility. FERC has defined the terms "purchase, acquire, or take" broadly to include situations in which the holding company acquires the right to vote securities even if the holding company does not have a proprietary interest in the securities.²²¹ This contrasts with section 203(a)(1), where under *Atlantic City* a proprietary interest is required to establish jurisdiction for a change-in-control transaction, as discussed above.²²²

216. 16 U.S.C. § 824b(a)(2). FERC clarified that the terms "associate company," "electric utility company," "foreign utility company," "holding company," and "holding company system" have the same meanings as under PUHCA 2005. Order No. 669, *supra* note 30, at 49, 51; 18 C.F.R. § 33.1(b)(4). The terms "transmitting utility" and "electric utility" are defined in sections 3(22) and (23), respectively, of the FPA. 16 U.S.C. §§ 796(22)-(23).

217. *FERC May I?*, *supra* note 2, at 182-83.

218. 114 FERC ¶ 61,118, at PP 13-15 (relying in part on the omission of the word "indirect" from the statutory language), *order on reh'g*, 115 FERC ¶ 61,303; *see also Supplemental Policy Statement*, *supra* note 76, at P 58 n.48; *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209 at P 33 (2008).

219. 131 FERC ¶ 61,063, at PP 13-14.

220. FERC also stated in dictum that the transaction could be an indirect consolidation of public utility company assets, which could trigger FPA section 201(a)(1)(B). 114 FERC ¶ 61,118, at P 15.

221. 125 FERC ¶ 61,209, at 62,092 (holding that an investment adviser that has been delegated the responsibility to vote the shares of its account holders constituting 10% or more of the voting interests in a public-utility company (or a holding company with respect to a public-utility company) is a holding company and that it requires authorization under section 203(a)(2) to acquire rights to vote with respect to additional such securities (but granting the investment adviser a blanket authorization, subject to certain conditions, to engage in such activities for a three-year period)).

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

FPA section 203(a)(2) applies to acquisitions by holding companies of securities of some entities that are not themselves subject to FERC jurisdiction under FPA section 203(a)(1), and it does not apply to similar acquisitions of securities in some entities that are subject to FERC jurisdiction under FPA section 203(a)(1). For example, FPA section 203(a)(2) applies to holding company acquisitions of interests in the owners of QFs, which may be exempt under FPA section 203(a)(1), and FUCOs, which typically are exempt from section 203(a)(1); however, in both of these instances, blanket authorizations may apply,²²³ as discussed below. Similarly, FPA section 203(a)(2) can apply to holding company acquisitions of interests in utilities operating in Hawaii, Alaska, and areas of Texas that are not engaged in interstate commerce and accordingly are exempt from FPA section 203(a)(1).²²⁴ Because the term “electric utility company” does not specifically exclude government-owned entities (although the term “holding company” does), FERC has interpreted FPA section 203(a)(2) to require a holding company to obtain FERC authorization before acquiring any government-owned entity that owns interstate transmission facilities, or facilities used for wholesale sales in interstate commerce, even though such entities themselves may be exempt from section 203(a)(1).²²⁵ On the other hand, FPA section 203(a)(2) does not apply to holding company acquisitions of interests in power marketers that do not own or operate any facilities used for generation, transmission, or distribution of electric energy for sale, even though such power marketers with authorization from FERC to sell electric energy at wholesale would be subject to section 203(a)(1).²²⁶ It is difficult to understand how this level of complexity is justified.

With respect to holding company acquisitions of securities, FPA section 203(a)(2) applies only to acquisitions of any security with a value in excess of \$10 million.²²⁷ Note that, in contrast to FPA section 203(a)(1), jurisdiction is not determined by whether the holding company acquiring securities in a public utility or holding company also acquires control. If the holding company acquires securities with a value in excess of \$10 million in the public utility, then FERC jurisdiction attaches under FPA section 203(a)(2), regardless of whether any control is acquired.²²⁸ However, as discussed below, a blanket authorization applies to certain transactions, including acquisitions of voting securities in an aggregate amount of less than 10%.²²⁹ Section VI below discusses how FERC determines whether a security has a value in excess of \$10 million.

223. Order No. 669, *supra* note 30, at PP 60, 70.

224. *Id.* at PP 54-57.

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

226. See *FERC May I?*, *supra* note 2, at P 154 n.10 (discussing definition of “electric utility company”); Order No. 669-A, *supra* note 30, at P 54.

227. 16 U.S.C. § 824b(a)(2); see also 18 C.F.R. § 33.1(a)(1)(iii).

228. See 181 FERC ¶ 61,055, at P 32.

229. *Id.* at P 27 n.31 (citing the blanket authorization at 18 C.F.R. § 33.1(c)(2)).

2. Holding Company Mergers and Consolidations

In addition to covering acquisitions of securities, FPA section 203(a)(2) applies to an action by a holding company to “by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000.”²³⁰ FERC suggested in one case that jurisdiction may attach pursuant to this provision where a holding company increased its ownership interest in certain public utility holding companies from just over 10% to 100% “to achieve a consolidation of financial management firms.”²³¹ FERC’s precedent regarding the determination of whether the \$10 million threshold has been crossed is discussed in Section VI below.

3. Potential Integration of Multiple Transactions

FPA section 203(a)(2) applies only to purchases by a holding company of securities of a transmitting utility, an electric utility company, or a holding company with respect to a transmitting utility or an electric utility company (or consolidations among such entities).²³² Accordingly, if the entity engaging in the acquisition or consolidation does not hold 10% or more of the voting securities of any transmitting utility or electric utility company immediately prior to the transaction (and therefore is not a holding company covered by FPA section 203(a)(2)), then the purchaser could, in a single transaction, acquire any amount of the securities of an electric utility company or transmitting utility, or the holding company of a transmitting utility or an electric utility company, without being subject to the requirement under FPA section 203(a)(2) to obtain authorization from FERC prior to the acquisition.²³³ But issues could arise if an acquisition were made in such a way that it was not clearly a single transaction, such as sequential purchases from the market or separate purchases from multiple holders.²³⁴ It is also very possible that other parts of FPA section 203 may be implicated, such as a merger under FPA section 203(a)(1)(B) if the acquiring entity is affiliated with a public utility, or a disposition under FPA section 203(a)(1)(A) if the transaction results in a change in control with respect to the public utility.²³⁵ FERC has also made clear

230. 16 U.S.C. § 824b(a)(2).

231. 131 FERC ¶ 61,063, at P 13, n.9 (citation omitted).

232. 18 C.F.R. § 33.1(a)(2).

233. *Id.* §§ 33.1(c)(2)(ii)-(iii).

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

235. *See FERC May I?*, *supra* note 2. *See* § III.B. for a detailed discussion of change-in-control transactions.

“that entities may not evade Commission jurisdiction by separating an otherwise jurisdictional transfer into separate transactions.”²³⁶

B. Blanket Authorizations Under FPA Section 203(a)(2)

FERC has established in its regulations a number of blanket authorizations for transactions subject to FPA section 203(a)(2).²³⁷ The following blanket authorizations under FPA section 203(a)(2) overlap with authorizations described in Section III.D. above with respect to FPA section 203(a)(1), and accordingly raise some of the same questions regarding their application:

- Acquisition by a holding company of “any voting security in a transmitting utility or an electric utility company or a holding company” (with respect to either of them) “if, after the transaction, the holding company and its associate and affiliate companies will own less than 10% of the voting securities” of the public utility.²³⁸ As discussed in Section III.D, FERC’s regulations also include a corresponding blanket authorization under FPA section 203(a)(1) for transfers by a public utility of voting securities to a holding company that benefits from the blanket authorization “described above if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10% of the outstanding voting interests of such public utility.”²³⁹ As discussed in Section III.C. above, there is an overlap between this blanket authorization and FERC’s traditional presumption that transfers in which the transferee and its affiliates will hold less than 10% of the voting interests are not jurisdictional. And, for the same reasons discussed in Section III.D., FERC arguably would find that a transaction involving transfer of less than 10% of a public utility’s securities to a holding company benefits from this blanket authorization even if FERC finds that for purposes of FPA sections 205 and 206 that the investor is considered to be an affiliate of the public utility due to rights to appoint a member to the board of directors or other indicia of control. In contrast, the section 203(a)(2) blanket authorization is required, since no such presumption applies in that context. This authorization is subject to the restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).²⁴⁰

236. *Tenaska Lotus Holdings, LLC*, 173 FERC ¶ 61,199 at P 10 (2020) (citing 79 FERC ¶ 61,107, at p. 61,495 (“the Commission would be remiss in upholding its statutory mandate if it allowed control over jurisdictional facilities to be removed from its oversight merely by how the transaction is structured.”)).

237. FERC has found that it lacks the statutory authority to waive FPA section 203 obligations, so it relies on blanket authorizations to exempt certain transactions. *See, e.g.*, 20 FERC ¶ 61,138, at p. 61,303.

238. 18 C.F.R. § 33.1(c)(2)(ii).

239. 18 C.F.R. § 33.1(c)(12)(i).

240. 18 C.F.R. §§ 33.1(c)(3)-(4); *see also* 129 FERC ¶ 61,011, at P 20 n.22 (emphasizing FERC’s expectation that holding companies relying on a blanket authorization subject to these obligations comply with the

Recommendation: We recommend that FERC simplify this blanket authorization, as discussed in Section VIII. In addition, as discussed in Section III.D, the notification requirement in paragraph (ii) of this blanket authorization appears to be rarely used (and unnecessary). Accordingly, we recommend elimination of this reporting requirement.

- Internal corporate reorganizations for nontraditional public utilities that do not have captive customers or own or provide “transmission service over jurisdictional transmission facilities” and that present no cross-subsidization issues.²⁴¹
- Acquisition by a person that is a holding company solely with respect to EWGs, QFs, and FUCOs of the securities of additional EWGs, QFs, or FUCOs.²⁴² (See discussion in Section III.D above with respect to the blanket authorization in 18 C.F.R. § 33.1(c)(13)).²⁴³ This authorization applies also to the acquisition of securities of holding companies that are holding companies solely as a result of ownership of interests in EWGs, QFs, or FUCOs.²⁴⁴
- Acquisition by a holding company, or its subsidiary, that is regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency under the Bank Holding Act of securities of holding companies that include a transmitting utility or electric utility company if the acquisition is for certain banking purposes.²⁴⁵

This blanket authorization covers such acquisitions that are in the normal course of business and the securities are held as a fiduciary, as principal for derivatives hedging purposes (subject to not voting more than 10% of the voting securities), as collateral for a loan or solely for purposes of liquidation and in connection with a prior loan and beneficially owned for not more than two years (subject to certain conditions).²⁴⁶ (See discussion in Section III.D above with respect to the blanket authorization in 18 C.F.R. § 33.1(c)(14)).²⁴⁷ FERC has granted more

requirement to file with FERC copies of certain filings with the SEC with respect to their holdings of securities in a target company).

241. 18 C.F.R. § 33.1(c)(6).

242. *Id.* § 33.1(c)(8).

243. *See supra* notes 170-171 and accompanying text.

244. Order No. 669, *supra* note 30, at 44; 18 C.F.R. § 33.1.

245. 18 C.F.R. § 33.1(c)(9).

246. *Id.*

247. *See supra* note 168 and accompanying text. Note that the definition of “holding company” excludes banks and certain other financial institutions and their subsidiaries that own, control, or have the power to vote public utility or holding company securities, “as long as the securities are (i) held as collateral for a loan, (ii) held in the ordinary course of business as a fiduciary, or (iii) acquired solely for purposes of liquidation in connection with” a prior loan (if owned beneficially for a period of two years or less); or, as a broker dealer if the securities are “(i) not beneficially owned by the broker or dealer and are subject to any voting instructions . . . given by customers . . . or (ii) acquired within [twelve] months in the ordinary course of business . . . with the bona fide intention of effecting [further] distribution.” 42 U.S.C. § 16451(8)(B). The blanket authorization in 18 C.F.R.

expansive blanket authorizations to financial institutions in response to specific requests where the applicants have provided assurances that regulation by the SEC and securities exchanges, contractual obligations, and internal policies will prevent the applicants from exercising control over the public utility in which they acquire securities, but has imposed a 20% limitation on the voting securities that may be held in certain circumstances.²⁴⁸

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

- Acquisition by a holding company of any security of certain smaller or intrastate utilities, including: (a) “a transmitting utility or company that owns, operates, or controls only facilities used solely for” (i) electric transmission or sales in intrastate commerce or (ii) local distribution and/or retail sales subject to state commission regulation (in each case subject to reporting requirements in certain circumstances); or (b) “an electric utility company that owns generating facilities that total 100 MW or less” and are used fundamentally for individual load or affiliated end-users (e.g., industrial self-generators).²⁴⁹ FERC granted these blanket authorizations based on its recognition that the definition of “electric utility company” encompasses companies that own or operate facilities used for the generation, transmission, or distribution of electric energy, which is broader than the definition of “public utility” (which is limited to entities engaged in interstate sales at wholesale or interstate transmission of electric energy), and that it did not consider its review of such transactions necessary to protect consumers.²⁵⁰

§ 33.1(c)(9) covers situations that do not benefit from the exclusion from the holding company definition. Order No. 669-A, *supra* note 30, at P 122.

248. See, e.g., *The Vanguard Group, Inc. et al.*, 180 FERC ¶ 62,065 at P 5 (2022) (2022 Delegated Order); *Morgan Stanley*, 134 FERC ¶ 61,234 at PP 14-15 (2011); *Franklin Res., Inc. et al.*, 126 FERC ¶ 61,250 at PP 38-40 (2009); *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,029 at PP 45-50 (2008); *Legg Mason, Inc.*, 121 FERC ¶ 61,061 at PP 26-32 (2007); *Goldman Sachs Group, Inc.*, 121 FERC ¶ 61,059 at P 30 (2007); *Morgan Stanley*, 121 FERC ¶ 61,060 at PP 36-51 (2007); *Capital Research & Management Co. et al.*, 116 FERC ¶ 61,267 at P 28 (2006). See also *The Vanguard Group, Inc. et al.*, FERC Docket No. EC19-57-002, at P 4 (May 9, 2023) (stating an extension of a blanket authorization under a prior Commission order pursuant to FPA section 203(a)(2) was granted by operation of law rather than Commission decision). It is uncommon for the Commission to allow the statutory timeline to review a FPA section 203 application to expire. The FERC Chair has authority to set the Commission’s agenda and it may be that this application was skipped due to a likely deadlock if it went to vote. Two of the four seated Commissioners, Commissioners Danley and Christie, subsequently issued a Joint Statement claiming that the “Application raises a number of issues that demand Commission scrutiny because Vanguard may be able to exercise profound control over the Utilities whose securities it holds, including the potential to influence decisions of the Utility management that could have serious effects on the reliability of power service and rates for customers.” *Id.* This may indicate a political divide at the Commission regarding the level of scrutiny and standards for granting blanket authorizations; the standstill could also incentivize more requests for blanket authorizations. It would be interesting to see whether an application for FPA section 203 approval of an acquisition of control by this investor group would be found contrary to public interest as opposed to debating whether blanket authorizations based on assertions of no control should be extended.

249. 18 C.F.R. § 33.1(c)(1); see also *Goldman Sachs Group, Inc.*, 115 FERC ¶ 61,303 at P 4 (2006).

250. Order No. 669, *supra* note 30, at PP 12-17, 56-57; Order No. 669-A, *supra* note 30, at PP 62-63.

- Acquisition by a holding company of any security of a “subsidiary company” in the same holding company system (the “Subsidiary Securities Authorization”).²⁵¹ This authorization is subject to the restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).²⁵² The scope of this authorization is ambiguous, however. The term “subsidiary company” is not defined for purposes of FPA section 203 or in FERC’s regulations implementing section 203.²⁵³ Although FERC specified in its regulations implementing FPA section 203 that the terms “holding company,” “holding company system,” and several others are to have the meanings given them in PUHCA 2005,²⁵⁴ FERC did not include the term “subsidiary company” in this provision.²⁵⁵ FERC’s order establishing this blanket authorization suggests that it may have been intended to allow for the use of “cash management programs, money pools and other intra-holding company financing arrangements,” but the text of the order does not specifically link the blanket authorization in section 33.1(b)(2)(iii) to FERC’s interest in facilitating such programs.²⁵⁶ FERC’s orders citing this regulation have involved acquisitions by holding companies of securities of their wholly owned public utility subsidiaries in the context of money pool and other intra-system financing arrangements, but it

251. 18 C.F.R. § 33.1(c)(2)(iii).

252. *Id.* § 33.1(c)(3-4).

253. “Subsidiary company” is defined in FERC’s regulations in parts 101 (the Uniform System of Accounts) and 366 (implementing PUHCA 2005). 18 C.F.R. pts. 101 and 366 (2012). In each case the definition is specific to that respective part of FERC’s regulations and does not have any general applicability under the FPA or FERC’s regulations implementing the FPA. In part 101, “Subsidiary Company”: in the case of Major utilities means a company which is controlled by the utility through ownership of voting stock. (See Definitions item 5B, Control). A corporate joint venture in which a corporation is owned by a small group of businesses as a separate and specific business or project for the mutual benefit of the members of the group is a subsidiary company for the purposes of this system of accounts. 18 C.F.R. pt. 101 (39). In part 366, “subsidiary company” is defined with respect to a holding company as “[a]ny company, 10[%] or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company” (as well as an additional definition not applicable here). 18 C.F.R. pt. 366.1. Subsection 201(g)(5) of the FPA defines “subsidiary company” as having the same meaning as in PUHCA 2005 (which is the same definition in part 366 of FERC’s regulations), but this definition applies only for purposes of such subsection (dealing with access by state commissions to books and records of certain electric utility companies and holding companies). 16 U.S.C. § 824(g)(5) (referring to PUHCA 2005, 42 U.S.C. § 16451).

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

255. 18 C.F.R. § 33.1(b)(4).

256. Order No. 669, *supra* note 30, at P 142.

is not clear from the language of these orders that the blanket authorization necessarily is limited to those types of situations.²⁵⁷

If “subsidiary company” is defined in the same manner as in PUHCA 2005, then any company that acquired 10% or more of the voting securities of an electric utility company (which by definition is a public-utility company), and thereby became a “holding company,” could acquire additional securities of such electric utility company without obtaining further authorization from FERC pursuant to section 203(a)(2) of the FPA because such electric utility would be a “subsidiary company” of such holding company and therefore the transaction would be covered by the Subsidiary Securities Authorization.²⁵⁸ FERC, however, might take the view that this blanket authorization was not intended to apply in such circumstances, given the fact that the rule apparently was developed in the context of money pool scenarios where the holding company wholly owned the subsidiary company, and given a natural proclivity of regulatory agencies to interpret their jurisdiction broadly.²⁵⁹ Moreover, a court may find that, due to the ambiguity in the regulation, any interpretation by FERC should be afforded deference.²⁶⁰ Therefore, it is not clear whether the interpretation suggested above would be upheld in any proceeding at FERC or upon review by the U.S. Court of Appeals. Regardless of whether this blanket authorization applies for purposes of FPA section 203(a)(2), it is possible that authorization may be required by the public utility in which the holding company is acquiring a direct or indirect interest pursuant to section 203(a)(1)(A) of the FPA if there is a direct or indirect acquisition of 10% or more of the voting securities of a public utility.²⁶¹

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

257. See, e.g., *Ameren Servs. Co. et al.*, 114 FERC ¶ 62,290 at pp. 1-2 n.3 (2006); *Ky. Utilities Co.*, 114 FERC ¶ 62,050 at p. 1 n.3 (2006); *Louisville Gas & Electric Co.*, 114 FERC ¶ 62,051 at pp. 1-2 n.3 (2006); *S.C. Electric & Gas Co.*, 114 FERC ¶ 62,262 at p. 2-3 (2006); *Exelon Corp.*, 114 FERC ¶ 61,116 at PP 9-10 (2006); *Entergy Servs., Inc.*, 114 FERC ¶ 61,120 at P 9 (2006).

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

259. This would be similar to the narrow interpretation by FERC of its rule regarding secondary market transactions, as discussed above, notwithstanding the broad interpretation supported by the plain language of the regulation. See *supra* notes 138-145, and accompanying text.

260. See generally *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984). The long-standing “Chevron Deference” to federal agencies established in this case may no longer be as reliable, however, because the US Supreme Court announced on May 1, 2023, that it will reconsider the case. The reconsideration remained pending at the time this article was finalized.

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

Recommendation: We recommend that FERC align the blanket authorizations among affiliates for public utilities and holding companies. It is not clear why a holding company has blanket authorization to acquire any amount of securities of a subsidiary company,²⁶² but that same subsidiary company only has blanket authorization in the same transaction for a transfer of securities to the holding company if the holding company will own less than 10% of the public utility's outstanding voting interests.²⁶³ It means that a public utility does not have blanket authorization to transfer as little as 1% of its outstanding voting interests to an entity that already owns 10% or more of the public utility's outstanding voting interests.

Perhaps the reason for this difference is that there arguably is *no* requirement for FERC authorization for a public utility to transfer additional securities to an entity where the public utility already has transferred—with FERC approval—10% or more of its securities to that entity (as discussed in Section III.C. above). This is because FERC already presumes control once the holding company acquires 10% of the voting interests of the public utility, so there is no additional change in control for subsequent transfers to the same holding company. But, as discussed above, it would be helpful for FERC to provide clarification on this point, and at the same time FERC could clarify the intent of this discrepancy between the relevant blanket authorizations. Although not included in a specific blanket authorization, FERC has clarified that authorization is not required under FPA section 203(a)(2) for a holding company to repurchase its own stock.²⁶⁴

VI. CALCULATION OF \$10 MILLION THRESHOLD

FERC's jurisdiction under FPA section 203 is limited in many instances to transactions where the value of the transferred assets or securities is in excess of \$10 million. Until 2005, FERC's jurisdiction under FPA section 203 was limited solely to the types of transactions addressed in what now are FPA sections 203(a)(1)(A)–(C), with a lower dollar threshold of \$50,000 instead of the current \$10 million threshold, where applicable.²⁶⁵ EPAct 2005 increased the jurisdictional dollar threshold to \$10 million, added a new section, 203(a)(1)(D), which governs acquisitions by public utilities of certain existing generating facilities, and added FPA section 203(a)(2), which governs certain transactions by holding companies.²⁶⁶

Since the publication of *FERC, May I?*, Congress further amended FPA section 203 in 2018 to extend the \$10 million threshold to merger transactions under

262. 18 C.F.R. § 33.1(c)(2)(ii).

263. *Id.* § 33.1 (c)(12)(i).

264. Order No. 669-A, *supra* note 30, at P 13 (citing National Grid plc, 114 FERC ¶ 61,115 at P 11 (2006)).

265. Order No. 669-A, *supra* note 30, at P 1.

266. 16 U.S.C. § 824b(a)(1)-(2). (It is generally understood that the increase in value was a result of inflation); see *FERC, May I?*, *supra* note 2, at 155 (for further discussion of the reasons for certain amendments to Section 203 included in EPA 2005).

section 203(a)(1)(B).²⁶⁷ This has doubtlessly resulted in fewer FPA section 203 applications.²⁶⁸ At the same time, however, Congress created a new requirement for submitting a notification filing within 30 days following a merger or consolidation that falls under this jurisdictional threshold if “the facilities, or any part thereof, to be acquired are of a value in excess of \$1,000,000.”²⁶⁹ This will likely disproportionately impact transmission owners that take ownership of additional transmission facilities, including via interconnection customers’ election of an option-to-build.²⁷⁰

The \$10 million dollar threshold does not apply consistently to all transactions. It applies to a public utility for mergers, consolidations, and acquisitions under FPA section 203(a)(1)(B)–(D) and to holding companies for acquisitions under FPA section 203(a)(2).²⁷¹ It also applies to transfers of *less than* all of the voting securities in a public utility under FPA section 203(a)(1)(A).²⁷² There is no threshold, however, under FPA section 203(a)(1)(A) if a public utility disposes of “the whole” of its jurisdictional facilities.²⁷³ There are no clear policy grounds for

267. An Act to Amend Section 203 of the Federal Power Act, H.R. 1109, 115th Cong. § 3152 (2018) [hereinafter H.R. 1109].

268. *Id.*; 16 U.S.C. § 824b(a)(7).

269. *Id.*; see also Order No. 855, *supra* note 181 at P 5 (adding a new section 33.12 to FERC’s regulations, 18 C.F.R. § 33.12 (“[M]erge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of \$10 million, by any means whatsoever. . . .”). The “purpose” of the act was “to correct the misinterpretation” by FERC regarding whether the \$10 million threshold applied to FPA section 203(a)(1)(B). Rep. No. 115-253, *supra* note 178. The report provides a comprehensive history of this subsection and detailed explanation of why FERC should have interpreted the \$10 million threshold to apply to FPA section 203(a)(1)(B). The \$1 million notice filing appears to be an afterthought, and the report does not explain its purpose. *Id.*

270. See discussion above, *supra* Section III.A. In the authors’ experience, it is rare that the value of transmission facilities constructed pursuant to an option-to-build is less than \$1 million. The option-to-build context does raise another interesting issue, however, because the project company building these facilities typically transfers them to the transmission owner at no cost. FERC’s regulations state that the value of transmission facilities “means the market value of the facilities . . . for transactions between non-affiliated companies” and “the Commission will rebuttably presume that the market value is the transaction price.” 18 C.F.R. § 33.1(b)(3). A rational conclusion would be that none of the option-to-build transmission facility transfers trigger FPA section 203(a)(1) because the “value” of the transmission facilities is \$0 as defined by FERC’s regulations. Practitioners appear to generally take a more conservative route, however, and base the value of the asset on other mechanisms. See, e.g., 184 FERC ¶ 61,005, at P 9 (order granting requested open access waivers, and indicating that the applicant stated FPA section 203 approval was not required for the transfer of interconnection facilities pursuant to an option to build because the facilities were less than \$10 million).

271. 16 U.S.C. § 824(b)(a)(1).

272. Order No. 708, *supra* note 110, at PP 21, 22; see also *PPL Electric Utilities Corporation*, 168 FERC ¶ 61,046 at P 2 (2019) (dismissed application because the \$10 million threshold was not met).

273. Order No. 669-B, *supra* note 30, at P 28 n.41 (“Because of the placement of the comma in [section 203(a)(1)(A)], we do not interpret the \$10,000,000 threshold as applying to dispositions of the whole of a utility’s jurisdictional facilities.”). FERC stated in its notice of proposed rulemaking that this same interpretation applied for the pre-EPAAct 2005 section 203. Notice of Proposed Rulemaking, *Transactions Subject to FPA Section 203*, FERC Stats. & Regs. ¶ 32,589 at P 27 n.21, 70 Fed. Reg. 58,636 (2005); but see, *S. 1860 Testimony*, *supra* note 178; Parity Across Reviews (PARs) Act, H.R. 115th Cong. Amending § 203 (1st Sess. 2017); H.R. 1109, *supra* note 267 (stating “[t]he bills would align [Section 203(a)(1)(B)] of the FPA with the other three subsections of Section 203(a)(1). Subsections (A), (C), and (D) only require Commission approval if the transaction at issue

this distinction; particularly given that a public utility typically has reporting requirements under FPA section 205 that would alert FERC to changes in affiliation and control.²⁷⁴ The recommendation below in this section suggests that FERC grant a blanket authorization for transfers of “the whole” of a public utility’s jurisdictional facilities if the value is less than \$10 million.

In Order No. 669,²⁷⁵ FERC added a definition of “value” to its regulations as follows:

(i) For jurisdictional facilities and companies, value is the market value for transactions between non-affiliated companies, which is rebuttably presumed to be the transaction price. For transactions between affiliated companies, value is the original undepreciated cost, as defined in FERC’s Uniform System of Accounts (18 C.F.R. pt. 101), or original book cost, as applicable.²⁷⁶

(ii) For wholesale contracts, value is the market value for transactions between non-affiliated companies, which is rebuttably presumed to be the transaction price. For transactions between affiliated companies, value is the total expected “revenues over the remaining life of the contract.”²⁷⁷

(iii) For securities, value is the “market value for transactions between non-affiliated companies,” which is rebuttably presumed to be the transaction price. For transactions between affiliated companies, value is the market value for widely-traded securities (determined by the market price at the time of the transaction) or, if the securities are not widely traded, it is determined by multiplying the value of the issuing company’s total undepreciated book value by the ratio of the number of equity securities involved in the transaction to the total number of outstanding equity securities of the issuer.²⁷⁸

The method in (i) above would apply to physical, jurisdictional facilities, and existing generation facilities addressed by sections 203(a)(1)(A) and (D).²⁷⁹ This section also would apply for purposes of a merger or consolidation (addressed by sections 203(a)(1)(B) and (D)).²⁸⁰ For “paper jurisdictional facilities,” however,

exceeds \$10 million in value. Subsection 203(a)(1)(A) requires Commission approval before a public utility sells, leases, or otherwise disposes of facilities worth more than \$10 million.”). Then-General Counsel Danley’s statement (which is not precedential) reflects common confusion in the industry regarding the proper application of the \$10 million threshold in section 203(a)(1)(A) given the manner in which the sentence structure differs from the remaining subsections of 203(a)(1). *S. 1860 Testimony, supra* note 178.

274. *See, e.g.*, 18 C.F.R. § 35.42 (stating a condition of retaining market-based rate authority is reporting, among other things, changes in ownership of electric generating capacity in excess of 100 MW, inputs to electric generation, or electric transmission facilities).

275. *See* Order No. 669, *supra* note 30, at PP 113, 116, 120-21.

276. 18 C.F.R. § 33.1(b)(3)(i).

277. *Id.* § 33.1(b)(3)(ii).

278. *Id.* § 33.1(b)(3)(iii).

279. Order No. 669, *supra* note 30, at P 27; Entergy Gulf States, Inc., 121 FERC ¶ 61,182 at P 16 n.11 (2007) (market value, rebuttably presumed to be transaction price, used for purposes of section 203(a)(1)(D)(1)).

280. Order No. 669, *supra* note 30, at P 96.

the method in (ii) above would apply.²⁸¹ Finally, for securities, as addressed by section 203(a)(1)(C) and 203(a)(2), the method in (iii) above would apply.²⁸²

FERC clarified that for non-affiliate transactions including transfers of both jurisdictional facilities (including “paper facilities”) and non-jurisdictional facilities, any valuation performed by the acquiring entity of the constituent parts of the transaction may be used to determine whether FPA section 203 authorization is required.²⁸³ If such a valuation is not available, then original cost undepreciated should be used.²⁸⁴

FERC also clarified that in cases involving non-affiliate security acquisitions under FPA section 203 or mergers or consolidations under section 203(a)(2), the appropriate measure is the entire transaction price and not some value prorated to reflect only the portions of the underlying assets that are subject to FERC jurisdiction.²⁸⁵ This could capture portfolio transactions that involve the purchase and sale of multiple entities and assets where the individual assets would not have triggered the filing requirement. For similar cases involving affiliates, the original book cost of all of the acquired company’s assets should be used.²⁸⁶

Recommendation - Revise Dollar Thresholds for FPA Section 203 Transactions: One straightforward way to reduce the number of unnecessary FPA section 203 applications would be for Congress to amend Section 203(a)(1)(A) to make the \$10 million threshold apply to acquisitions of “the whole” of a public utility’s jurisdictional assets, as discussed above. This would serve a similar function to the 2018 revision to FPA section 203(a)(1)(B), including to promote consistency throughout FPA Section 203 and “ease the regulatory burden on industry.”²⁸⁷ There is no apparent policy reason for distinguishing between transfers of the whole of a public utility’s assets with a value of \$10 million or less and transfers of a portion of a public utility’s assets with a similar value. If amending the statute is considered to be too difficult to achieve, then FERC could amend its regulations to add a blanket authorization for transfers of “the whole” of a public utility’s jurisdictional assets if the value is less than \$10 million.

281. *Id.* at P 97 (Rather than transfer a market-based rate tariff and trigger an application under Section 203 (with a potential 180-day approval period), it is often easier for the would-be acquiring entity simply to file for its own original market-based rate authority (which it should be able to get within 60 days under FPA section 205)).

282. *Id.* at P 98 (Note that even if the securities represent 10% or more of the target company’s voting securities, no section 203(a)(1)(C) authorization is required if the securities have a value of less than \$10 million). Order No. 669-B, *supra* note 30, at P 28.

283. Order No. 669, *supra* note 30, at PP 116, 120. (Such valuation should be consistent with the value placed by the acquiring company for purposes of its audited financial statements and in keeping with generally accepted accounting principles); Order No. 669-A, *supra* note 30, at P 90.

284. Order No. 669-A, *supra* note 30, at 117.

285. *Id.* at Appendix B, pt. 33(5)(b)(3)(iii).

286. *Id.* at P 126.

287. Rep. No. 115-253, *supra* note 178, at 8 (“In my view, the proposal to add a \$10 million threshold to Subsection 203(a)(1)(B) of the FPA would ease the regulatory burden on industry without impeding the Commission’s regulatory responsibilities. Transactions below the proposed threshold are unlikely to impose a significant negative impact on competition or the rates of utility customers.”).

In addition, Congress could amend FPA section 203 to provide FERC with discretion to establish the value threshold for all transactions governed by FPA section 203. Rather than legislate transactional dollar thresholds, Congress should grant FERC the discretion to determine appropriate thresholds based on its specialized knowledge of the industry to exclude the types of minor transactions the dollar threshold was (presumably) originally designed to exclude.²⁸⁸ Alternatively, Congress could provide for the threshold to be adjusted annually for inflation, similar to the threshold for Hart-Scott-Rodino review of mergers and acquisitions.²⁸⁹ It would be fantastic if, as part of these amendments, Congress would eliminate the \$1 million threshold for providing notice of mergers, which was added as part of the 2018 amendment to FPA section 203. The threshold is met with even minor transactions in the current market. It merely creates paperwork and unnecessary risk of non-compliance.

VII. ISSUES IF FPA SECTION 203 APPROVAL IS REQUIRED, BUT NOT OBTAINED

Failure to obtain FPA section 203 approval when required can result in adverse regulatory and commercial consequences. FERC has imposed civil penalties for failure to obtain needed authorization under FPA section 203, it has required a company to disgorge revenues received under wholesale electric sales contracts transferred in violation of FPA section 203, and it has threatened other consequences for unauthorized transactions.²⁹⁰ Before EPAct 2005 (which, in addition to the changes to FPA section 203 discussed above, also expanded FERC's civil penalty authority), FERC remarked upon finding that a particular set of merger transactions had been consummated without obtaining the required prior authorization that "the parties to the merger transactions voluntarily assumed the risk of any consequences that may result" from FERC's subsequent review of the transactions, and warned the parties that FERC could pursue remedies including "initiat[ing] an action to undo a merger consummated in violation of the FPA and/or refer[ring] violations of the FPA to the Department of Justice."²⁹¹ In another pre-EPAct 2005 case, FERC threatened to impose remedies as a term or condition of

288. *Id.*

289. Clayton Act, H.R. 8532, 94th Cong. § 201(7a)(2)(a) (1976).

290. See, e.g., *American Transmission Company, LLC*, 160 FERC ¶61,030 at PP 10-11 (2017); *Idaho Power Co.*, 103 FERC ¶61,182 (2003).

291. *San Diego Gas & Elec. Co. v. Alamito Co.*, 38 FERC ¶61,241, at p. 61,779 n.16 (1987) (citing 16 U.S.C. § 825m(a) (1992), which provides: "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter."). FERC has never filed an action under section 314, however.

its subsequent approval of a transaction that had been implemented without obtaining prior FERC authorization, noting (without citing any authority) the “obvious risk to the public utility that a disposition implemented without *prior* authorization may be voidable in court by any affected party.”²⁹² The authors are not aware of any case in which an affected party, or FERC, has actually sought to void a transaction for failure to obtain FPA section 203 authorization. In a case involving the unauthorized transfer of wholesale electric sales contracts from a franchised public utility to its power marketing affiliate without obtaining authorization under FPA section 203, FERC required the transferee to reimburse the transferor, or its counterparties under the contracts, approximately \$5 million.²⁹³ While FERC has approved a number of transactions under FPA section 203 after the transactions had already occurred, FERC usually refuses to grant such authorizations retroactively.²⁹⁴

EPAAct 2005 provided FERC with civil penalty authority for violations of Part II of the FPA (including section 203).²⁹⁵ FERC has used this authority involving a violation of section 203 sparingly. In one case, a public utility agreed to a settlement including payment of a \$500,000 civil penalty for its failure to obtain authorization under section 203(a)(1) of the FPA in connection with its merger with another company (among other violations).²⁹⁶ In another, a public utility agreed to pay a civil penalty of \$205,000 for violations of both FPA section 203 and 205, in addition to implementing certain compliance requirements.²⁹⁷ The Commission also has authority to refer entities to its Office of Enforcement for violations. FERC exercised this jurisdiction in a matter involving multiple applications by a

292. 104 FERC ¶ 61,270, at P 25; see also *Kandiyohi Power*, 102 FERC ¶ 61,213 at P 17 (2003) (similar language); *Northern Iowa Windpower II LLC*, 110 FERC ¶ 61,059 at P 13 (2005) (same). Note that FERC does not have clear authority to condition approval of a FPA section 203 application given that the statute states FERC “shall approve” a transaction under FPA section 203 “if it finds it is consistent with the public interest and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.” 16 USC § 824b(4)(5).

293. 103 FERC ¶ 61,182, at P 17.

294. See, e.g., *Int’l Trading Co.*, 139 FERC ¶ 61,003 at P 10 n.17 (2012); *BlackRock, Inc.*, 131 FERC ¶ 61,063 at Ordering P (A) (2010); *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209 at PP 1-2 (2008); *Phelps Dodge Corp.*, 121 FERC ¶ 61,251 at Ordering P (A) (2007); *Mesquite Investors L.L.C.*, 111 FERC ¶ 61,162 at P 19, Ordering PP (A)(B) (2005); 110 FERC ¶ 61,059, at PP 7-8, 13; *Kandiyohi Power Corp.*, 107 FERC ¶ 61,285 at PP 17, Ordering P (A) (2004) (authorizing transaction as of the date of the order); see *JPMorgan Chase & Co.*, 123 FERC ¶ 61,088 at PP 13, 31 (2008) (granting rare retroactive approval for transaction implemented with the purpose of stabilizing financial markets and where the public utility aspects were incidental to the transaction as a whole).

295. Energy Policy Act of 2005, H.R.6, 109th Cong. § 1284(e) (1st Sess. 2005).

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

297. 160 FERC ¶ 61,030, at PP 1-2.

public utility and its affiliates seeking authorization under FPA section 203 for transactions that had already been implemented.²⁹⁸

FERC generally only approves transactions described by and based on the information as it is provided in the application. This gives parties a strong incentive to file an application based on accurate information to ensure that the associated authorization by FERC is valid. If material facts in the application are incorrect, then FERC's FPA section 203 authorization arguably does not apply and the transaction – if consummated – is subject to the consequences described in this section as if authorization had not been sought. Also, FERC has assigned civil penalties to a public utility for providing inaccurate information in an FPA section 203 application.²⁹⁹

VIII. PROPOSALS FOR IMPROVEMENT

The ability to promptly close a transaction can make or break the economics of a deal. The end of a calendar year is a stressful time for every transactional regulatory lawyer and presumably FERC staff. Government holiday schedules collide with numerous requests for expedited action to rule on FPA section 203 applications in time to close before the calendar year rolls over.

A project's eligibility for tax incentives may depend heavily on when financing transactions close and the project can be placed in service.³⁰⁰ There are often other corporate accounting and reporting requirements that incentivize closing before the end of a calendar or fiscal year. FERC has informally stated commercial considerations are not good cause to support expedited action, so if expedited action is required, it is prudent to file an application at least 180 days prior to December 31 (or other deadline) if possible. However, the reality is that deals often are not yet contemplated or are in very preliminary stages of negotiation six months in advance of closing. The facts that (i) FPA section 203 applications are public and (ii) the application must include a copy of the transaction document (or at least a Term Sheet that counsel must verify reflects the ultimate deal) further disincentivizes early filings.³⁰¹

298. 139 FERC ¶ 61,003, at P 10 n.18.

299. *Duke Energy Corp.*, 163 FERC ¶ 61,189 P 1 (2018) (Civil penalty for providing inaccurate information in 203 application).

300. The Inflation Reduction Act of 2022 has reduced this stress to some extent by making it possible to monetize and sell tax credits, but the placed-in-service date is still material in various ways, such as whether production tax credits will be created at the point of sale of energy or measurement. The placed-in-service date also may have implications for other accounting or tax reasons, including the timing of accelerated depreciation for tax purposes.

301. Publicizing possible change in ownership could result in unwanted interest. For example, Exelon Corporation filed an application with FERC in connection with its hostile takeover bid for NRG Energy, seeking authorization for, among other things, a change in control with respect to NRG Energy's subsidiaries that were public utilities under the FPA, even though NRG Energy and its public utility subsidiaries did not participate in that application. *Exelon Corp.*, 127 FERC ¶ 61,161 at PP 25-26 (2009); 130 FERC ¶ 61,095 (2010) (denying motion for rehearing as moot given that Exelon withdrew its tender offer, and denying motion for vacatur); see also *Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61,237, at p. 62,682 (1993); *Kansas City Power & Light Co.*, 53 FERC ¶ 61,097, at p. 61,273 (1990). While we are not focusing on the contents of FPA section 203 applications in this article, in the interest of making the whole process more efficient we recommend that FERC revisit the

If you have arrived at this point, you know that this article is peppered with various recommendations for improving specific provisions of FPA section 203 and FERC's implementing regulations. The authors offer a few broader proposals below. The government has an opportunity to significantly reduce the amount of inefficiency associated with FPA section 203 and facilitate investment and development in the industry.

A. *Expand the Scope of the "Blanket Authorizations"*

Of the thousands of FPA section 203 applications that the industry has dutifully presented to FERC, it appears that FERC has only found that a transaction was *not* in the public interest and denied approval three times.³⁰² In each case, FERC denied approval because the applicants "failed to demonstrate that the Proposed Transaction will not have an adverse effect on rates."³⁰³ This means the vast majority of proposed transactions are consistent with the public interest. It would save a lot of time and resources if the rules more effectively resulted in applications for transactions that actually have potential to raise public interest concerns. This will facilitate "greater industry investment and market liquidity," which FERC has agreed "are important goals."³⁰⁴

It will also modernize FPA section 203, which was initially enacted in a very different market that did not have ISOs/RTOs subject to market mitigation and that was dominated by vertically integrated utilities with captive customers and consolidated ownership of such utilities.³⁰⁵ Today, the electric generation market in most areas of the nation is saturated with independent power producers that are special purpose entities that each own a single generating facility (although they often are affiliated with other such entities).³⁰⁶ They typically sell all of the output

obligation to substantially complete negotiations before an application under FPA section 203 can be filed. Most of the information in the transaction documents is irrelevant to FPA section 203. If the parties can agree to the information that is relevant – i.e., the parties to the transaction, percentage interests and degree of control – it should be sufficient. This will allow applicants to start the approval process earlier while they finalize more of the irrelevant (to the FPA section 203 analysis) commercial terms. Even if the parties to the transaction decided to wait to make the proposed transaction public by filing an application, it would help gain necessary sign-off from private investors who find the idea of filing a proprietary commercial agreement with the government undesirable.

302. See *Liberty Utilities*, 181 FERC ¶ 61,212 at P 2 (2022); *Electric Energy Inc.*, 168 FERC ¶ 61,130 at P 2 (2019); *GridLiance High Plains LLC*, 166 FERC ¶ 61,171 at P 2 (2019). The Commission has also conditioned approval on compliance measures, including divestiture of generation (see, e.g., *Exelon Corporation & Public Service Enterprise Corp.*, 112 FERC ¶ 61,011 (2005), *order denying reh'g, Accepting Compliance Filing and Granting Clarification*, 113 FERC ¶ 61,299 (2005)), and adoption of ratepayer protection commitments (see, e.g., *IES Utilities*, 81 FERC ¶ 61,187, at p. Introduction (1997); *Colorado Interstate Gas Co.*, 83 FERC ¶ 61,089, at p. Summary (1998) (Order Denying Rehearing, Granting Clarification in Part and Denying Clarification in Part)).

303. 181 FERC ¶ 61,212, at P 2.

304. 120 FERC ¶ 61,060, at P 33.

305. *Energy Primer: A Handbook for Energy Market Basics*, FERC 35-71 (2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_Final.pdf.

306. *Id.*

of the generating facility pursuant to a long-term contract in order to obtain financing and build the project, or they sell their output into wholesale markets administered by ISOs/RTOs that are subject to FERC regulations that seek to ensure competition.³⁰⁷ Energy sales are made at negotiated rates within structured market rules and self-regulated by competitive forces, subject to FERC oversight.³⁰⁸

FERC is bound by Congress's directives, and ideally Congress would amend the statute to cull out unnecessary applications, but FERC is an independent agency and is often more nimble than Congress. FERC should therefore consider establishing a blanket authorization that covers all aspects of modern transactions other than the limited circumstances that may realistically be contrary to the public interest, such as transactions that may have an effect on captive customers (including as a result of cross subsidization by entities with captive customers of entities without such customers) or that create concerns for horizontal or vertical market power that are not mitigated by other market protections.

FERC has periodically updated its regulations in a manner that "streamlines filing requirements and reduces the information burden for mergers and other dispositions of jurisdictional facilities that raise no competitive concerns and eliminates certain filing requirements in part 33 that are outdated or no longer useful to the Commission in analyzing mergers and other dispositions of jurisdictional facilities"³⁰⁹ and we think the time is ripe for further revisions to achieve the same goal.³¹⁰

Based on the limited precedent denying or conditioning approval on mitigating measures, we recommend FERC add the following succinct and comprehensive blanket authorization to section 33.1(c) of its regulations:

A public utility is granted blanket authorization under FPA section 203(a)(1) if: (i) it is not, and is not affiliated with, a franchised public utility with captive customers, (ii) it does not provide transmission service over jurisdictional transmission facilities, (iii) it has market-based rate authority pursuant to Section 205 of the Federal Power Act and (iv) either (1) all of the electric generating capacity that it owns or controls is committed under one or more long-term contracts, or (2) if it has any such capacity not contracted under such a long-term contract, then it sells all of the energy output of such uncontracted capacity only into liquid wholesale energy markets that are subject to FERC-approved mitigation measures.³¹¹

307. *Id.*

308. *Id.*

309. Final Rule, Order No. 642, *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

310. In the 2016 NOI, FERC sought comments on whether blanket authorizations would be appropriate for certain transactions that do not give rise to competitive concerns, including dispositions of securities with limited governance rights and transfers of transmission assets that will be integrated into a public utility's existing transmission network. 156 FERC ¶ 61,214, at P 38. As noted above, FERC has taken no further action after receiving comments on this question.

311. 18 C.F.R. § 33.1(c).

This would cover a large portion of the types of transactions involving investments in independent power producers that are common today.

FERC must approve a transaction “if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.”³¹² FERC has stated that determining whether a transaction is in the “public interest” generally involves analyzing the transaction’s “effect on competition, effect on rates, and effect on regulation.”³¹³

Part (i) of this proposed Blanket Authorization ensures that the transaction will not affect retail energy rates of any captive customers and there will be no cross-subsidization of a non-utility associate company.³¹⁴

Part (ii) of this proposed Blanket Authorization ensures that the transaction will not affect rates for transmission service.³¹⁵

Part (iii), in conjunction with part (ii), means the transaction will not have an effect on regulation.³¹⁶ FERC will continue to regulate the public utility in the same manner under FPA section 205. The majority of independent power producers that are not exempt from FPA section 203 under the QF exemption have market-based rate authority and are required to provide FERC notice of material changes in status (including changes in upstream ownership and control).³¹⁷ FERC would receive notice of any transactions that otherwise would be subject to FPA section 203 but for the proposed Blanket Authorization.

Part (iv)(2) of the proposed Blanket Authorization reflects FERC’s findings that there is little cause for market power concerns when a public utility operates within FERC-regulated RTO/ISO markets. FERC streamlined FPA section 205 applications for entities seeking market-based rates when it dispensed with the obligation to provide market power screens for certain jurisdictional sales that occur within RTOs/ISOs.³¹⁸ The rationale was that “approved market monitoring and mitigation was sufficient to address market power concerns.”³¹⁹ If there are no market power concerns related to a public utility’s jurisdictional activities due

312. 16 U.S.C. § 824b(a)(4).

313. *Supplemental Policy Statement*, *supra* note 76, at P 4.

314. *Id.* at P 34 (FERC has also stated that “a blanket authorization can be granted only when the Commission can be assured that the statutory standards will be met, including ensuring that the interests of captive customers are safeguarded.”).

315. *Id.* at PP 13-16.

316. *Id.* at P 80.

317. See generally Order No. 652, *Reporting Requirement for Change in Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005); Order No. 816, *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electricity Energy, Capacity and Ancillary Services by Public Utilities*, 153 FERC ¶ 61,065 (2015); Order No. 697, *supra* note 61; Order No. 860, *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 FERC ¶ 61,039 (2019); 18 C.F.R. § 35.42.

318. *Refinements to Horizontal Mkt. Power Analysis for Sellers in Certain Reg’l Transmission Org. & Indep. Sys. Operator Mkts.*, 168 FERC ¶ 61,040 at P 6 (2019) (citing Order No. 697-A, 119 FERC ¶ 61,295 at P 62 (2007) “establishing the rebuttable presumption that Commission-approved market monitoring and mitigation was sufficient to address market power concerns.”).

319. *Id.* at P 26.

to the structure of the market the public utility operates within, then it makes little sense for such public utility to have to seek FPA section 203 approval for upstream changes in control. We therefore recommend granting a blanket authorization under FPA section 203 for public utilities to engage in transactions if they have no captive customers and do not provide electric transmission service, and if they solely operate within markets in which FERC has determined that there is adequate mitigation of market power concerns.

Similarly, FERC has found that there are no horizontal market power concerns for purposes of FPA section 203 when a public utility sells all of its capacity to one or more buyers pursuant to long-term contract.³²⁰ This justifies Part (iv)(1) of the proposed Blanket Authorization. If a public utility has no available capacity because it is fully committed via contract, it reasonably cannot do anything to harm the public interest and should thus be eligible for a blanket authorization under FPA section 203.

B. Provide Clarifications in Response to "Abundance of Caution" Filings

FERC should look for opportunities to clarify in its orders whether it has jurisdiction over transactions that are the subject of abundance of caution filings. We do not propose delaying an order on individual applications; rather, we suggest that FERC periodically issue guidance addressing issues raised in applications filed out of an abundance of caution. If there are fewer unnecessary applications filed, FERC staff should have more time to address open issues. FERC has precedent to follow in the form of its FPA section 203 policy statement and Supplemental Policy Statement.³²¹ Alternatively, applicants could file requests for declaratory order together with, or after, the initial applications seeking FERC authorization in an abundance of caution. Although the declaratory order proceeding arguably would be moot once FERC had approved the transaction,³²² FERC's rules with respect to requests for a declaratory order do not require that a petition involve a live controversy.³²³ Accordingly, it would appear that FERC would have the option to continue addressing the request for declaratory order, based on the actual facts set forth in the petition, if it chose to do so. To the extent that FERC is concerned about opening a loophole through which parties could evade FERC review in situations where such review is appropriate, a rulemaking process may help to avoid this result, because a wide variety of entities likely would participate

320. Order No. 816, *supra* note 317, at P 39 ("The Commission clarifies here that when all of a seller's generation capacity is sold on a long-term firm basis to one or more buyers, the seller has no uncommitted capacity and in such cases will not be required to file the indicative screens. Sellers may explain that their generation capacity is fully committed in lieu of including indicative screens in their filings in order to satisfy the Commission's market-based rate requirements regarding horizontal market power in instances where all generation owned or controlled by a seller and its affiliates in the relevant balancing authority areas or markets, including first-tier balancing authority areas or markets, is fully committed.")

321. Order No. 592, *Inquiry Concerning the Comm'n's Merger Policy Under the Fed. Power Act: Policy Statement*, FERC Stats. & Regs. ¶ 31,044, 61 Fed. Reg. 68,595 (1996); Order No. 592-A, *Inquiry Concerning the Comm'n's Merger Policy Under the Fed. Power Act: Order on Reconsideration*, 62 Fed. Reg. 33,341 (1997); *Supplemental Policy Statement*, *supra* note 76.

322. See, e.g., *Koch Hydrocarbon Co.*, 65 FERC ¶ 61,202, at p. 61,964 (1993).

323. 18 C.F.R. § 385.207(a)(2) (providing for filing of a petition for a declaratory order to "remove uncertainty").

and help identify such potential shortcomings. In any event, FERC could adjust its regulations, or issue clarifying adjudicative orders, at a later date if it becomes clear that transactions that should be reviewed under FPA section 203 are evading scrutiny. The point is that we expect the commercial world to continue to outpace regulations in creativity and complexity. We encourage FERC to seek ways to keep up and help facilitate responsible industry investment and growth. Keeping pace with evolving transaction structures by timely providing clear FPA section 203 rules is proverbial low hanging fruit.

Even if FERC does not take any of the actions discussed above, parties planning to engage in future transactions that are substantially similar to a transaction previously approved by the Commission in response to an abundance of caution filing (with no Commission ruling on jurisdiction) could file a request for declaratory order asking FERC to rule on whether it has jurisdiction over a transaction with identical facts. This is essentially the same approach used in obtaining the FERC order in the *Ad Hoc Group* order. This approach avoids the problem of asking FERC to provide guidance based on hypothetical facts while at the same time avoiding holding up FERC action on the initial approval application pending a FERC ruling on jurisdiction. The disadvantage of this approach is that it requires a filing fee, takes time and resources from both applicant and the Commission, and the ruling is limited to the specific facts.

IX. CONCLUSION

FERC could reduce regulatory costs and uncertainty, as well as its own workload, by issuing orders or regulations changing or clarifying its policies—or seeking legislative changes—with respect to some of the issues discussed above. Reducing the number of FPA section 203 filings through implementation of some or all of the proposals listed above would have multiple benefits. At a minimum, it would reduce the time, cost, and effort for the industry and FERC. In addition, it would reduce the risks faced by public utilities and holding companies in connection with financing and merger and acquisition transactions. These risks include the possibility that the parties to the transaction may erroneously decide that they do not need to seek FERC authorization, potentially leading to civil penalties and uncertainty whether a transaction may be void or voidable. Alternatively, if the parties decide that they do need to file a FPA section 203 application, they are exposed to the risk that during their wait for authorization some external event may occur that changes the value of the transaction to one or both parties. Clearer guidance on the scope of FERC's jurisdiction under FPA section 203 will facilitate market liquidity for public utility assets and public utility ownership interests, which in turn will support greater and more efficient investment in public utilities and FERC jurisdictional assets. If the measures to adopt the proposals discussed above are carefully crafted, then they would achieve these benefits without compromising the Commission's jurisdiction under the FPA to review transactions in situations where review is necessary to protect the public interest, including transactions that have the potential to have a material effect on consumers.