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

18 CFR Part 33

[Docket No. RM07-21-000; Order No. 708]

Blanket Authorization Under FPA Section 203

(Issued February 21, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations pursuant to section 203 of the Federal Power Act (FPA) to provide for additional blanket authorizations under FPA section 203(a)(1). These blanket authorizations will facilitate investment in the electric utility industry and, at the same time, ensure that public utility customers are adequately protected from any adverse effects of such transactions.

EFFECTIVE DATE: This Final Rule will become effective [Insert_Date days after publication in the **FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Blanket Authorization Under FPA Section 203 Docket No. RM07-21-000

ORDER NO. 708

FINAL RULE

(Issued February 21, 2008)

1. On July 20, 2007, the Commission issued a Notice of Proposed Rulemaking[1] to provide for an additional blanket authorization under section 203(a)(1) of the Federal Power Act (FPA).[2] After receiving comments in response to the Blanket Authorization NOPR, the Commission amends Part 33 of the Commission's regulations to add five blanket authorizations under section 203(a)(1). In addition, this Final Rule provides certain clarifications regarding the existing blanket authorizations under section 203. Further, this Final Rule clarifies the definitions of the terms "affiliate" and "captive customers." These blanket authorizations and clarifications will facilitate investment in

[1] Blanket Authorization Under FPA Section 203, Notice of Proposed Rulemaking, 72 FR 41640 (July 31, 2007), FERC Stats. & Regs. ¶ 32,619 (2007) (Blanket Authorization NOPR).

[2] 16 U.S.C. 824b.

the electric utility industry and, at the same time, ensure that public utility customers are adequately protected from any adverse effects of such transactions.

I. Background

2. The Energy Policy Act of 2005[3] expanded the scope of the corporate transactions subject to the Commission's review under section 203 of the FPA. Among other things, amended section 203: (1) expands the Commission's review authority to include authority over certain holding company mergers and acquisitions, as well as certain public utility acquisitions of generating facilities; (2) requires that, prior to approving a disposition under section 203, the Commission must determine that the transaction would not result in inappropriate cross-subsidization of non-utility affiliates or the pledge or encumbrance of utility assets;[4] and (3) imposes statutory deadlines for acting on mergers and other jurisdictional transactions.

3. Through the Order No. 669 rulemaking proceeding, the Commission promulgated regulations adopting certain modifications to 18 CFR § 2.26 and Part 33 to implement

[3] Energy Policy Act of 2005, Pub. L. No 109-58, 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005).

[4] Section 203(a)(4) is not an absolute prohibition on the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. If the Commission determines that the cross-subsidization, pledge or encumbrance will be consistent with the public interest, the action may be permitted.

amended section 203.[5] The Commission also provided blanket authorizations for certain transactions subject to section 203. These blanket authorizations were crafted to ensure that there is no harm to captive customers of franchised public utilities, but sought to accommodate investments in the electric utility industry and market liquidity. Some commenters in the rulemaking proceeding argued that the Commission should have granted additional blanket authorizations that would benefit the marketplace and not harm customers. Other commenters argued that the Commission should adopt additional generic rules to guard against inappropriate cross-subsidization associated with the mergers. Yet other commenters argued that the Commission should modify its competitive analysis for mergers, which has been in place for 10 years. The Commission stated that it would reevaluate these and other issues at a technical conference on the Commission's section 203 regulations as well as certain issues raised in the Order No. 667 rulemaking proceeding implementing the Public Utility Holding Company Act of 2005 (PUHCA 2005).[6]

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[5] Transactions Subject to FPA Section 203, Order No. 669, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), order on reh'g, Order No. 669-A, 71 FR 28422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214 (2006), order on reh'g, Order No. 669-B, 71 FR 42579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

[6] EPAct 2005, Pub. L. No. 109-58, 1261, et seq., 119 Stat. 594, 972-78 (2005) (PUHCA 2005). See also Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667, 70 FR 75592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005), order on reh'g, Order No. 667-A, 71 FR 28446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213, order on (continued)

4. On December 7, 2006, the Commission held a technical conference (December 7 Technical Conference) to discuss several of the issues that arose in the Order No. 667 and Order No. 669 rulemaking proceedings. The December 7 Technical Conference discussed a range of topics. The first panel discussed whether there are additional actions, under the FPA or the NGA, that the Commission should take to supplement the protections against cross-subsidization that were implemented in the Order No. 667 and Order No. 669 rulemaking proceedings. The second panel discussed whether, and if so how, the Commission should modify its Cash Management Rule[7] in light of PUHCA 2005 and whether the Commission should codify specific safeguards that must be adopted for cash management programs and money pool agreements and transactions. The third panel discussed whether modifications to the specific exemptions, waivers and blanket authorizations set forth in the Order No. 667 and Order No. 669 rulemaking proceedings are warranted. Post-technical conference comments were accepted.

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reh'g, Order No. 667-B, 71 FR 42750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006), order on reh'g, Order No. 667-C, 72 FR 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007). These issues included matters related to inappropriate cross-subsidization and pledges or encumbrance of utility assets, whether our current merger policy should be revised, and whether additional exemptions, different reporting requirements, or other regulatory action (under PUHCA 2005 or the FPA or Natural Gas Act (NGA)) needed to be considered.

[7] Regulation of Cash Management Practices, Order No. 634, 68 FR 40500 (July 8, 2003), FERC Stats. & Regs. ¶ 31,145, revised, Order No. 634-A, 68 FR 61993 (Oct. 31, 2003), FERC Stats. & Regs. ¶ 31,152 (2003) (Cash Management Rule).

5. On March 8, 2007, the Commission held a second technical conference (March 8 Technical Conference) to discuss whether the Commission's section 203 policy should be revised and, in particular, whether the Commission's Appendix A merger analysis is sufficient to identify market power concerns in today's electric industry market environment. The first panel discussed whether the Appendix A analysis is appropriate to analyze a merger's effect on competition, given the changes that have occurred in the industry (e.g., the development of Regional Transmission Organizations) and statutory changes (e.g., as a result of the repeal of the Public Utility Holding Company Act of 1935[8] and new authorities given to the Commission in EPAct 2005[9]). The second panel assessed the factors the Commission uses in reviewing mergers and the coordination between the Commission and other agencies (including state commissions) with merger review responsibility.

6. On July 20, 2007, the Commission took three actions based on the Commission's experience implementing amended FPA section 203 and PUHCA 2005, as well as the record from the Commission's December 7 and March 8 Technical Conferences regarding section 203 and PUCHA 2005. In this docket, the Commission issued the

[8] 16 U.S.C. 79a et seq. (PUHCA 1935). EPAct 2005 repealed PUHCA 1935. EPAct 2005, Pub L. No. 109-58, 1263.

[9] These include new authorities through amended FPA section 203 as well as PUHCA 2005.

Blanket Authorization NOPR, proposing an additional blanket authorization for certain dispositions of jurisdictional facilities under FPA section 203(a)(1) and seeking comment on additional blanket authorizations under section 203. In addition, in separate proceedings, the Commission issued a policy statement providing additional guidance regarding the Commission's section 203 authority[10] and a notice of proposed rulemaking proposing to codify restrictions on affiliate transactions between franchised public utilities with captive customers and their market-regulated power sales affiliates or non-utility affiliates.[11]

II. Blanket Authorization NOPR

7. In the Blanket Authorization NOPR, based on the record from the technical conferences (including both oral and written comments) and the Commission's experience under amended section 203 to date, the Commission proposed to provide for a limited blanket authorization to public utilities under section 203(a)(1). Under this limited blanket authorization, a public utility would be pre-authorized to dispose of less than 10 percent of its voting securities to a public utility holding company but only if,

[10] FPA Section 203 Supplemental Policy Statement, 72 FR 42277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), order on clarification and reconsideration, 122 FERC ¶ 61,157 (2008).

[11] Cross-Subsidization Restrictions on Affiliate Transactions, 72 FR 41644 (July 31, 2007), FERC Stats. & Regs. ¶ 32,618 (2007) (Affiliate Transactions NOPR); see Cross-Subsidization Restrictions on Affiliate Transactions, Order No. 707 122 FERC ¶ 61,155 (2008) (Affiliate Transactions Final Rule).

after the disposition, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of that public utility. The proposed limited blanket authorization would work in conjunction with the blanket authorization granted to holding companies under section 203(a)(2) in 18 CFR 33.1(c)(2)(ii).[12] The Commission noted that this proposed blanket authorization would not entirely parallel the section 203(a)(2) authorization since the section 203(a)(2) authorization does not contain the "in aggregate" limitation. However, the Commission stated that this limitation would provide better protection against possible transfer of control of a public utility. The Commission sought comment on this limitation.

8. The Commission stated that the disposition of such limited voting interests (less than 10 percent), with the proposed "in aggregate" restriction and the existing reporting requirements applicable to holding companies,[13] will not harm competition or captive

[12] The section 203(a)(2) blanket authorization states that any holding company in a holding company system that includes a transmitting utility or an electric utility may purchase, acquire, or take "[a]ny voting security in 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 if, after the acquisition, the holding company will own less than 10 percent of the outstanding voting securities." 18 CFR 33.1(c)(2)(ii). Because a "transmitting utility" or "electric utility company" may also be a "public utility" as defined in the FPA, the public utility may need to obtain separate authorization for the same transaction under FPA section 203(a)(1), which requires authorization for public utilities to dispose of jurisdictional facilities.

[13] See, e.g., 18 CFR 33.1(c)(4) (requiring the filing of Securities and Exchange Commission (SEC) Schedule 13D, Schedule 13G, and Form 13F, if applicable); 18 CFR 35.42(a) (effective September 18, 2007, the effective date of Market-Based Rates (continued)

customers. Moreover, the Commission stated this 10 percent threshold is consistent with the definition of "holding company" under section 1262(8)(A) of PUHCA 2005. Under that definition, any company that has the power to vote 10 percent or more of the securities of a public utility company (or a holding company of a public utility company) triggers holding company status and thus is presumed to raise sufficient concerns about controlling influence over a subsidiary public utility that regulatory oversight is needed. The Commission also found the 10 percent threshold to be consistent with the blanket authorization granted under section 203(a)(2) in the Order No. 669 rulemaking proceeding, under which holding companies are pre-authorized to acquire up to 9.99 percent of voting securities of a public utility.

9. The Commission further noted that, as part of the existing "parallel" blanket authorization under section 203(a)(2), the Commission already requires the holding company to provide to the Commission copies of any Schedule 13D, Schedule 13G and Form 13F at the same time and on the same basis, as filed with the SEC in connection with any securities purchased, acquired or taken pursuant to the blanket authorization

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For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities, Order No. 697, 72 FR 39903 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007)) (requiring a notification of any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority); 18 CFR 366.4(a) (requiring Form FERC-65 (notification of holding company status)).

under section 203(a)(2) provided in § 33.1(c)(2) of the Commission's regulations.[14] Any person is required to file a Schedule 13 notification with the SEC of an acquisition of beneficial ownership of more than five percent of a class of equity securities.[15] Importantly, a Schedule 13G filer must acquire the subject securities "in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect" over entities whose securities it holds.[16] Because the Commission already receives these filings from the holding company, the Commission proposed not to require additional reporting on the part of individual public utilities to duplicate the reporting of information we are already getting about the same transaction. However, the Commission sought comment on whether any additional reporting by the public utility should be required.

10. The Commission also sought comment on whether blanket authorizations under section 203(a)(1) should be provided for the transfer of securities by a public utility to a holding company granted a blanket authorization under section 203(a)(2) in 18 CFR 33.1(c)(8),[17] 33.1(c)(9),[18] and 33.1(c)(10).[19] In addition, the Commission

[14] 18 CFR 33.1(c)(4).

[15] 17 CFR 240.13d-1(a).

[16] 17 CFR 240.13d-1(b)(1)(i).

[17] 18 CFR 33.1(c)(8) (granting a blanket authorization under section 203(a)(2) to a (continued)

sought comment on whether it should grant a generic blanket authorization under section 203(a)(1) for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers and the contract does not convey control over the operation of a generation or transmission facility.

III. Procedural Matters

11. The Blanket Authorization NOPR invited comments on the proposed regulations. Comments on the Blanket Authorization NOPR were filed by: American Public Power Association and National Rural Electric Cooperative Association (APPA/NRECA); Edison Electric Institute (EEI); Electric Power Supply Association (EPSA); Entergy Services, Inc. (Entergy); Financial Institutions Energy Group (the Financial Group); Mirant Corporation (Mirant); Modesto Irrigation District (Modesto); and Oklahoma Corporation Commission (Oklahoma Commission);.

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person that is a holding company solely with respect to one or more exempt wholesale generators (EWGs), foreign utility companies (FUCOs), or qualifying facilities (QFs) to acquire the securities of additional EWGs, FUCOs, or QFs).

[18] 18 CFR 33.1(c)(9) (granting a conditional blanket authorization under section 203(a)(2) to a holding company, or a subsidiary of that company, 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 Company Act of 1956 as amended by the Gramm-Leach-Bliley Act of 1999).

[19] 18 CFR 33.1(c)(10) (granting a limited blanket authorization under section 203(a)(2) to a holding company, or a subsidiary of that company, for the acquisition of securities of a public utility or a holding company that includes a public utility for purposes of underwriting activities or hedging transactions).

IV. Discussion

12. This Final Rule adopts the proposal in the Blanket Authorization NOPR to pre-authorize a public utility to dispose of less than 10 percent of its voting securities to a public utility holding company if, after the disposition, the holding company and any associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of that public utility. Based on comments to the Blanket Authorization NOPR, this Final Rule also provides four additional blanket authorizations under section 203(a)(1). First, a public utility is granted a blanket authorization under section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization in § 33.1(c)(8) if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility. Second, a public utility is granted a blanket authorization under section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization in § 33.1(c)(9). Third, a public utility is granted a blanket authorization under section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization in § 33.1(c)(10). Fourth, a public utility is granted a blanket authorization under section 203(a)(1) for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, the contract does not

convey control over the operation of a generation or transmission facility, the parties to the transaction are neither affiliates nor associate companies, and the acquirer is a public utility. In addition, this Final Rule provides certain clarifications regarding the existing blanket authorizations under section 203. Finally, this Final Rule clarifies the definitions of the terms "affiliate" and "captive customers."

A. Proposed Blanket Authorizations

1. Scope of the Proposed Blanket Authorization

a. Comments

13. APPA/NRECA, Mirant and the Oklahoma Commission support the limited blanket authorization as proposed by the Commission. The Oklahoma Commission states that the rule would allow utilities to expedite business ventures, but warns that the Commission should use terms in their plain and ordinary meanings to reduce any potential ambiguity. It also recommends that the Commission consider language that would allow state commissions to continue to receive notices of any investigations of regulated public utility companies.

14. In the Blanket Authorization NOPR, the Commission asked for comments on the "in aggregate" limitation. APPA/NRECA support the proposed aggregate ownership limitation, stating that it is needed to help prevent the transfer of control of public utilities. They argue that omitting the "in aggregate" limitation would allow a public utility to sell less than 10 percent of its voting securities in successive transfers to each of

several affiliates or associate companies (or even the same entity). APPA/NRECA further argues that omitting the "in aggregate" limitation is not in the public interest because, absent a case-by-case review, the Commission has no basis for a finding that an indirect transfer of control of a public utility's generation or transmission facilities to a single entity or to several affiliated entities will not harm competition, captive customers, or transmission customers.

15. Mirant also supports the limited blanket authorization with the "in aggregate" limitation. It states that while this does not completely parallel the blanket authorization granted in Order No. 669, it is comparable enough to remedy the problem that exists when one party must seek Commission review of the transaction.

16. EEI and the Financial Group support the blanket authorization with certain clarifications and recommendations. Specifically, the Financial Group argues that the proposed less than 10 percent blanket authorization under section 203(a)(1) should be expanded to include all acquirers, not just holding companies. It asserts that if a disposition of less than 10 percent of a public utility's voting securities to a holding company raises no concerns with respect to control, markets, or captive customers, then a disposition of less than 10 percent of a public utility's voting securities to an entity that is not a holding company should also raise no concerns. The Financial Group states that, in the case of a disposition of less than 10 percent of the voting securities of a public utility, the interest being disposed of does not convey control and cannot harm markets or

captive customers, so the status of the acquirer – as a holding company, public utility, or an entity that is neither – should be irrelevant. It argues that requiring a public utility to seek approval under section 203(a)(1) when disposing of less than 10 percent of its voting securities to a non-holding company would not serve any regulatory purpose, and adds needless costs and delays to transactions that do not raise section 203 concerns.

17. Similarly, EEI argues that the Commission should not limit its proposed section 203(a)(1) blanket authorization to the entities described in 18 CFR 33.1(c)(2)(ii). EEI states that § 33.1(c)(2)(ii) only covers acquisitions by holding companies of securities of a transmitting utility, electric utility company, or holding company in a holding company system with such utilities. This, EEI argues, excludes a broader class of public utilities as well as non-holding company acquirers. It contends that the Commission would reduce the regulatory burden and encourage investment without causing harm "by extending the new blanket authorization to cover jurisdictional transfers of securities from the broader class of 'public utilities' to 'any person' without the constraints contained in [§] 33.1(c)(2)(ii)."[20]

18. As an additional matter, the Financial Group recommends that the Commission clarify that the aggregate limitation only applies to companies in a holding company system that are 10 percent or more owned by the holding company or its subsidiaries. It

[20] EEI Comments at 8.

argues that this should be clarified by eliminating the reference to "affiliate" altogether in the proposed definition. In the alternative, the Financial Group argues that the Commission clarify that the term does not refer to the PUHCA 2005 definition of affiliate, but rather to an entity that controls, is controlled by, or is under common control with, another entity (where control is rebuttably presumed to mean a voting interest of 10 percent or more).

b. Commission Determination

19. We will adopt the proposed blanket authorization without modification. We will retain the "in aggregate" limitation so that, after a disposition of a public utility's securities under the proposed blanket authorization, the acquiring holding company and any associate or affiliate companies "in aggregate" would own less than 10 percent of the outstanding voting interests of that the public utility. As commenters point out, the limitation helps to prevent a public utility from transferring less than 10 percent of its voting securities in successive transfers to each of several affiliate or associate companies (or even the same entity), and thereby transferring control.

20. We deny the Financial Group's and EEI's requests to expand the blanket authorization to cover not only public utility dispositions of securities to holding companies but also public utility dispositions of securities to "any persons." This request would expand the blanket authorization proposed in the existing NOPR beyond its original intent, which was to ensure that transactions qualifying under the

section 203(a)(2) blanket authorization would not have to seek approval under section 203(a)(1).[21] In addition, limiting the blanket authorization to holding companies allows the Commission to monitor these dispositions for possible changes of control even when they fall under the 10 percent threshold because of holding companies' preexisting reporting requirements.[22] If we were to expand the blanket authorization to "any person," we would need to establish appropriate reporting requirements so that we could monitor transfers to non-holding companies. This is important because, as we explained in the Supplemental Policy Statement, although there is a presumption that less than 10 percent of a utility's shares will not result in a change of control, this presumption is rebuttable. In some instances, the transfer of less than 10 percent of voting shares may constitute a transfer of control.[23] Accordingly, at this time we decline to expand the proposed generic blanket authorization as requested EEI and the Financial Group. However, we recognize that it could reduce regulatory burdens and encourage investment to allow transfers of securities not only to holding companies but to other "persons" and that such transfers will not harm competition or customers as long as there is sufficient ability to monitor possible changes in control of public utilities. Therefore, the Commission is willing to consider such blanket authorizations on a case-by-case basis if applicants can propose

[21] See Blanket Authorization NOPR, FERC Stats. & Regs. ¶ 32,619 at P 9-11.

[22] See, e.g., 18 CFR 366.4; 18 CFR 366.23; 18 CFR parts 367-68.

[23] See Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at n.48.

sufficient reporting requirements to allow adequate monitoring of possible changes in control and assure us that captive customers are adequately protected.

21. We will also deny the Financial Group's suggestion to eliminate the term "affiliate" from the proposed blanket authorization. However, we clarify that the term affiliate for purposes of the blanket authorization does not refer to the PUHCA 2005 definition of affiliate, but rather, to the definition we adopt in the Affiliate Transactions Final Rule issued concurrently with this Final Rule. As discussed in the Affiliate Transactions Final Rule, we find it appropriate to explicitly incorporate the PUHCA 1935 definition of affiliate for EWGs.[24] We also adopt the PUHCA 1935 definition of affiliate for non-EWGs, but with adjustments to reflect our previously-used 10 percent voting interest threshold for non-EWGs and to eliminate certain language not applicable or necessary in the context of the FPA.[25] Accordingly, this definition applies for purposes of the blanket authorizations adopted under section 203.

22. Finally, with regard to the Oklahoma Commission's request for language that would allow state commissions to continue to receive notices of investigations of regulated public utilities, we note that it previously has not been the practice of the Office of Enforcement to inform state commissions of investigations that it is conducting.

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[24] 16 U.S.C. 824m.

[25] See, e.g., Morgan Stanley Capital Group, Inc., 72 FERC ¶ 61,082, at 61,436-37 (1995).

Section 1b.9 of our regulations requires that all investigative proceedings shall be treated as non-public by the Commission and its staff except to the extent that the Commission authorizes public disclosure, the matter is made a matter of public record during an adjudicatory proceeding, or disclosure is required under the Freedom of Information Act.[26] The Commission concludes that the disclosure of such information could impede the willingness of market participants to self-report and otherwise cooperate in investigations. As such, we decline to grant the Oklahoma Commission's request.[27]

2. Reconciling the Proposed Blanket Authorization with the Presumption Provided in the Supplemental Policy Statement

a. Comments

23. Both the Financial Group and EEI question whether the blanket authorization is necessary in light of the Supplemental Policy Statement that creates a presumption of no transfer of control for security transfers of under 10 percent of a company's securities. They state that absent such a change in control, the Commission has indicated that a sale of securities is not a transaction subject to section 203(a)(1) jurisdiction. If that is the

[26] 18 CFR 1b.9.

[27] Our determination on this issue is also stated in the concurrently-issued Notice of Proposed Rulemaking in Docket Nos. AD07-7-000 and RM07-19-000 (Wholesale Competition in Regions with Organized Electric Markets) with regard to releasing information to state commissions on referrals by market monitoring units to the Commission for investigation.

case, EEI questions why there should be a blanket authorization covering security transfers of up to 10 percent from utility companies to holding companies.

24. EEI also states that it assumes that the proposed blanket authorization is meant to supplement and not modify other blanket authorizations and clarifications so, for example, the new authorization would apply as to securities transfers only in excess of $10 million.

25. Mirant contends that, absent the Blanket Authorization NOPR, no pre-approval would be required from the Commission for a public utility to transfer up to 10 percent of voting securities, though it recognizes the "possibility" that there is a presumption that control could be exercised over the management or policies of the public utility. Accordingly, it states that the Commission should adopt the proposed blanket authorization to remove the presumption that exists in the Supplemental Policy Statement with respect to transfers of voting securities from a public utility to a public utility holding company. It further contends that the proposed blanket authorization will remove the inconsistency in the filing requirements between holding companies and public utilities.

b. Commission Determination

26. The Commission provided guidance in the Supplemental Policy Statement that a transfer of less than 10 percent would be rebuttably presumed not to be a transfer of control in order to assist applicants in determining the need for prior authorization under

section 203, not to define the scope or limit of our jurisdiction. We agree with commenters that if there is no change in control of a public utility as a result of the transfer of a public utility's securities, then the public utility has not "otherwise disposed" of its jurisdictional facilities under section 203(a)(1)(A) and no Commission authorization is required. However, as the Commission stressed in the Supplemental Policy Statement, we cannot make an ex ante determination regarding what is control for purposes of the Commission's section 203 analysis absent facts of a specific case. The circumstances that convey control vary depending on a variety of factors, including the transaction structure, the nature of voting rights and/or contractual rights and obligations conveyed in the transaction. Because of the possibility that transfers of up to 10 percent could result in a change in control, the rebuttable presumption in the Supplemental Policy Statement and the blanket authorization should help eliminate uncertainties. Moreover, we view the "in aggregate" limitation in the blanket authorization as important to ensure that companies do not circumvent section 203(a)(1)(A) through multiple dispositions of less than 10 percent.

27. In response to EEI, we clarify that the new blanket authorization in this Final Rule is meant to supplement and not modify other blanket authorizations and clarifications in the Order No. 669 series. We also clarify that, consistent with the statute, it applies only to section 203(a)(1)(A) transfers of securities of a value in excess of $10 million.

3. Reporting Requirement

28. In the Blanket Authorization NOPR, the Commission sought comment on whether, in association with the proposed blanket authorization, additional reporting by the public utility should be required.

a. Comments

29. Most commenters, including EEI, the Financial Group, Mirant, and the Oklahoma Commission argue that the Commission should not impose a reporting requirement associated with the proposed blanket authorization. These commenters contend that no additional reporting obligation is required because the relevant information will be submitted by the holding company that is acquiring the securities.

30. EEI argues that if the Commission expands the proposed blanket authorization to cover jurisdictional transfer of securities by public utilities to other entities, the Commission may wish to impose a counterpart to the 18 CFR 33.1(c)(4) holding company reporting requirement on the public utility, but should do so only for those transactions not already covered by § 33.1(c)(4).

31. The Oklahoma Commission also argues that additional reporting is not needed. However, the Oklahoma Commission proposes that the relevant state commission be notified of additional reviews or requests about individual public utilities' current acquisition information. The Oklahoma Commission also urges the Commission to add language that states that section 203 does not preempt applicable state law concerning

reporting requirements, which would further protect the interest and authority of state commissions.

32. In contrast, APPA/NRECA argue that the Commission should require a public utility to report on all dispositions of its securities undertaken pursuant to the blanket authorization. APPA/NRECA argue that the reporting burden is minimal and that the Commission should not have to (and, in fact, may not be able to) piece together this information from existing reports.

b. Commission Determination

33. We will not require additional reporting requirements at this time. In the Blanket Authorization NOPR, the Commission proposed not to impose additional reporting requirements because existing regulations require the submission of schedules and forms that are also provided to the SEC.[28] While we agree with APPA/NRECA that additional reporting requirements might provide greater efficiency to the Commission, at this time we believe the potential reporting burden on public utilities outweighs the possible efficiency gains.

[28] For example, the Commission already requires the holding company to provide to the Commission copies of any Schedule 13D, Schedule 13G and Form 13F, at the same time and on the same basis, as filed with the SEC in connection with securities purchased, acquired or taken pursuant to the blanket authorization under section 203(a)(2) provided in § 33.1(c)(2) of the Commission's regulations. 18 CFR 33.1(c)(4).

34. We clarify, as requested by the Oklahoma Commission, that section 203 does not preempt applicable state law concerning reporting requirements. With regard to the Oklahoma Commission's request that state commissions be notified of additional reviews or requests about individual public utilities' current acquisition information, to the extent that such reviews or requests relate to an investigation, they are subject to the Commission's rules governing investigations as described supra. However, if the reviews or requests are made as the result of a public inquiry, such notification may be made. For example, the Commission's Division of Audits in the Office of Enforcement has provided notice of public final audit reports of jurisdictional companies to affected states. We continue to encourage our audits staff to continue this practice.

B. Expansion of the Proposed Blanket Authorization

1. Blanket Authorization to "Parallel" Those Granted Under Section 203(a)(2)

a. Comments

35. The Blanket Authorization NOPR also requested comments on whether the proposed blanket authorization under section 203(a)(1) should be extended to the transfer of securities by a public utility to a holding company granted a blanket authorization: (1) § 33.1(c)(8) for a person that is a holding company solely with respect to owning one or more EWGs, FUCOs, or QFs to acquire the securities of additional EWGs, FUCOs, or QFs; (2) § 33.1(c)(9) for a bank holding company or subsidiary that is regulated by the Federal Reserve Board or Comptroller of the Currency to acquire and hold an unlimited

amount of the securities of holding companies that include a transmitting utility or an electric utility company if such acquisitions and holdings are in the normal course of business and the securities are held for certain identified purposes[29]; and (3) § 33.1(c)(10) for a holding company or subsidiary to acquire public utility or holding company securities for underwriting or hedging purposes under certain conditions.[30]

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[29] The securities must be held: (i) as a fiduciary; (ii) as principal for derivatives hedging purposes incidental to the business of banking and it commits not to vote such securities to the extent they exceed 10 percent of the outstanding shares; (iii) as collateral for a loan; or (iv) solely for purposes of liquidation and in connection with a loan previously contracted for and owned beneficially for a period of not more than two years, with the following conditions and reporting requirement: The holding does not confer a right to control, positively or negatively, through debt covenants or any other means, the operation or management of the public utility or public utility holding company, except as to customary creditors' rights or as provided under the United States Bankruptcy Code; and the parent holding company files with the Commission on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held. 18 CFR 33.1(c)(9).

[30] For purposes of conducting underwriting activities, the blanket authorization is subject to the condition that holdings that the holding company or its subsidiary are unable to sell or otherwise dispose of within 45 days are to be treated as holdings as principal and thus subject to a limitation of 10 percent of the stock of any class unless the holding company or its subsidiary has within that period filed an application under FPA section 203 to retain the securities and has undertaken not to vote the securities during the pendency of such application; and the parent holding company files with the Commission on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held. For purposes of engaging in hedging transactions, the blanket authorization is subject to the condition that if such holdings are 10 percent or more of the voting securities of a given class, the holding company or its subsidiary shall not vote such

(continued)

36. EEI, the Financial Group and Mirant support extension of the blanket authorizations. They generally argue that if holding company acquisitions authorized by §§ 33.1(c)(8), (c)(9) and (c)(10) pose no concern warranting Commission review, counterpart public utility transfers subject to the same constraints should also pose no concern. They also argue that there is no benefit to the acquiring entity under a blanket authorization under section 203(a)(2) unless there is a reciprocal blanket authorization under section 203(a)(1).

37. In addition, the Financial Group recommends that the § 33.1(c)(8) blanket authorization be extended to companies that will become holding companies only after the transaction has been consummated (e.g., special purpose vehicles that are created to acquire and hold the jurisdictional assets of another company) in order for those companies to take advantage of the blanket. The Financial Group also argues that the proposed blanket authorization under section 203(a)(1) should be extended so that a public utility can transfer an unlimited amount of its securities to any entity that will acquire and hold such securities for the four purposes enumerated in § 33.1(c)(9). It asserts that the Commission has previously found in the section 203(a)(2) context that these types of transactions cannot harm competition or captive customers because the securities are being transferred for reasons other than to exercise control over the public

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holdings to the extent that they are 10 percent or more. 18 CFR 33.1(c)(10).

utility. Thus, it argues, these transactions do not constitute a change in control over a public utility, which is the core focus of section 203(a)(1). Similarly, with regard to § 33.1(c)(10), the Financial Group argues that the proposed blanket authorization under section 203(a)(1) should be extended to a public utility transferring its securities to any entity.

38. APPA/NRECA argue against granting a parallel blanket authorization under section 203(a)(1) for a public utility to transfer securities of EWGs, FUCOs or QFs (to parallel § 33.1(c)(8)) or to transfer securities to a non-bank holding company or its subsidiary for purposes of engaging in hedging transactions (to parallel § 33.1(c)(10)). They argue that preauthorizing an EWG or QF that is a public utility to transfer all or any part of its securities to a holding company would enable a public utility to transfer control of its generation facilities to a holding company that already controls another public utility without Commission scrutiny of the transaction for competitive harm.

39. Regarding the proposal for a section 203(a)(1) blanket authorization to parallel § 33.1(c)(10), APPA/NRECA state that there is no basis for finding that transactions covered by this blanket are consistent with the public interest even with the 10 percent voting limitation imposed on the holding company.[31] Further, they state that "hedging

[31] Under § 33.1(c)(10)(ii), a holding company or its subsidiaries that acquire 10 percent or more of the voting securities of a public utility or a holding company for hedging transactions are limited to voting less than 10 percent of those securities.

transactions" are not defined in the regulations or in the NOPR, and there is no requirement that the acquiring company be in some business other than the utility, power or energy business, and thus no assurance that the hedging transaction is only incidental to the holding company's main business.[32] They recommend that, however, if the Commission were to grant a further blanket authorization under section 203(a)(1), it should contain a 10 percent "in aggregate" limitation.

b. Commission Determination

40. We will adopt the proposal to extend a blanket authorization under section 203(a)(1) to a public utility in circumstances where a holding company qualifies for, and the exercise of the blanket authorization is for the purpose of facilitating the transactions authorized under the §§ 33.1(c)(8), 33.1(c)(9) or a 33.1(c)(10) blanket authorizations under section 203(a)(2).

41. As to the blanket authorization to parallel § 33.1(c)(8), we will require that the transfer of securities by a public utility to a holding company under that blanket be subject to the 10 percent "in aggregate" limitation as in the proposed limited blanket authorization described above. We recognize that the blanket authorization we adopt in this Final Rule to facilitate transactions undertaken by holding companies under

[32] APPA/NRECA note that these problems already exist in the context of the blanket authorization under section 203(a)(2) provided in 18 CFR 3.1(c)(10)(ii).

§ 33.1(c)(8) does not precisely parallel the section 203(a)(2) authorization since the section 203(a)(2) authorization does not include the "in aggregate" limitation. However, we believe this limitation will provide better protection against possible transfer of control of a public utility and the acquisition of generation market power by the acquiring holding company without Commission approval.

42. The Financial Group's request to extend the proposed section 203(a)(1) blanket to public utilities transferring securities to entities that will become holding companies only after the transaction has been consummated is moot because, as discussed above, the "parallel" 33.1(c)(8) blanket is restricted to cases where, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility. Therefore, the scenario presented by the Financial Group would not occur because an entity that was not previously a holding company could not become a holding company as a result of a transaction whereby the acquiring entity is limited to owning less than 10 percent of the shares of the public utility.[33]

[33] Transfers of securities that result in the acquiring company holding less than 10 percent of the outstanding voting shares of a public utility would have the presumption of not being a change in control and, therefore, not requiring section 203(a)(1) authorization. See Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 57.

43. As to the request for a blanket authorization under section 203(a)(1) to parallel that granted under section 203(a)(2) in § 33.1(c)(9), we note that that authorization under section 203(a)(2) applies only to acquisitions by bank holding companies or subsidiaries that are regulated by the Federal Reserve Board or Comptroller of the Currency (banks) of the securities of holding companies that include transmitting utilities and electric utility companies if such acquisitions and holdings are in the normal course of the acquiring bank's business and are held for certain purposes. In some cases the entity whose securities are acquired by the bank would have an obligation under section 203(a)(1) to seek Commission review before disposing of its securities. Typically, these cases would occur when the disposing holding company is a public utility and is also the issuer of the securities being acquired by the bank for those limited circumstances set forth in § 33.1(c)(9). As stated in Order No. 669-A, entities that are subject to the regulatory oversight of the Federal Reserve Bank or the Comptroller of the Currency "are likely to be significantly constrained in their use of those securities so as to not affect regulation, rates or competition under the FPA."[34] Further, the Commission conditioned the authorization such that the holding of the securities does not confer a right to control the utility operation or management and required a quarterly reporting on the securities so held by the bank. Accordingly, we will adopt the proposal to extend the section

[34] Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 124.

203(a)(1) blanket to a disposing holding company that is also a public utility. Because the entities eligible for the § 33.1(c)(9) blanket authorization are already subject to numerous conditions and reporting requirements, we do not believe additional conditions are required.

44. With respect to the Financial Group's request that the section 203(a)(1) blanket authorization be extended so that a public utility can transfer an unlimited amount of its securities to any entity that will acquire and hold such securities for the four enumerated purposes in § 33.1(c)(9), we cannot be assured that protections such as those that are in place for entities that are subject to the regulatory oversight of the Federal Reserve Bank or the Comptroller of the Currency would apply to entities that are not subject to such regulatory oversight. Therefore, we will continue to evaluate requests for blanket authorizations for entities that are not subject to regulatory oversight by the Federal Reserve Bank or the Comptroller of the Currency to acquire public utility securities, and for a public utility to transfer securities to such entities, on a case-by-case basis when such authorizations are needed.[35]

45. As to the request for a blanket authorization under section 203(a)(1) to facilitate the transactions authorized under § 33.1(c)(10), we grant an unlimited authorization for

[35] See Morgan Stanley, 121 FERC ¶ 61,060 (2007), clarified by, 122 FERC ¶ 61,094 (2008); The Goldman Sachs Group, Inc., 121 FERC ¶ 61,059 (2007), clarified by, 122 FERC ¶ 61,005 (2008).

facilitating such transactions under section 203(a)(1). In granting the blanket authorization for the transactions for hedging purposes under section 203(a)(2), the Commission limited the voting ability of the entity acquiring the securities. If the amount held is 10 percent or more of the relevant class, the acquiring entity is limited to voting less than 10 percent of those securities. This existing condition on the party acquiring the securities for hedging purposes should be adequate to ensure that any disposing entity facilitating such transactions and requiring authorization under section 203(a)(1) does not affect a disposition or change in control of the issuer of the public utility securities.[36]

2. Blanket Authorization as to Certain Jurisdictional Contracts

46. In the Blanket Authorization NOPR, the Commission sought comment as to whether the Commission should grant a blanket authorization under section 203(a)(1) for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers and the contract does not convey control over the operation of a generation or transmission facility.

a. Comments

47. The Commission received comments from: APPA/NRECA and Modesto (referred to herein as Customers); EEI, EPSA and Mirant (referred to herein as Sellers); and the Financial Group. Customers oppose the blanket authorization, Sellers support it,

[36] Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 132.

and the Financial Group not only supports it, but proposes expanding the blanket authorization.

48. Customers argue that the proposal would not protect transmission customers against cross-subsidization in the same way that captive wholesale and retail power customers are protected. They therefore propose narrowing the blanket authorization to cases where "neither the acquirer nor the transferor has captive customers or owns or provides transmission service over Commission-jurisdictional facilities."[37] They also argue that, even if revised to include the situation where neither the acquirer nor the transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, allowing an entity such as a power marketer or independent power producer to transfer its book of jurisdictional power sales contracts at any time and without the purchaser's consent (which may or may not be expressly in the contract) would leave the purchaser with no recourse other than a section 206 complaint and the burden of proof and costs associated therewith. They maintain that purchasers under the jurisdictional contract, even if not "captive" may be a load-serving entity dependent on the contract for a reliable power supply or to meet regulatory or contractual obligations. They also maintain that a purchaser would have no say in the type of entity to whom a seller would transfer contracts, creating the possibility that the entity may not

[37] APPA/NRECA Comments at 13-14.

be a suitable counterparty based upon factors such as creditworthiness or other financial criteria, or inexperience in administering the functions contemplated in the subject contract. Some Customers suggest that transfers may result in problems similar to the mortgage-loan business.

49. Sellers support the blanket authorization provided that it focuses only on transactions within the Commission's jurisdiction under section 203, and would supplement and not override or otherwise limit the proposed blanket authorization to parallel § 33.1(c)(2)(ii) or existing blanket authorizations. Sellers argue that with the stated constraints, the acquisition or disposition should pose no competitive or rate concerns or impacts on customers that would warrant case-by-case approval because: (1) the transfer of a wholesale power contract which does not provide for the control of generation or transmission cannot affect horizontal or vertical market power; (2) the transfer of a wholesale power contract to a party that does not have captive customers cannot affect the rates of captive customers (and therefore has no rate or cross-subsidization impacts); and (3) the transfer of a wholesale power contract does not affect the Commission's ability to regulate the contract or the parties to the transaction. Sellers assert that there is no regulatory purpose served by requiring section 203 approval for these transactions and states that it is unaware of a single instance where significant issues have been raised with respect to requests for approval of wholesale power

contracts of this type. Further, Sellers argue that requiring pre-authorization in this circumstance results in delays and costs.

50. The Financial Group also supports the additional blanket authorization. In addition, it suggests that the blanket authorization not be limited to cases where the transferor also does not have captive customers. The Financial Group argues that where a transferor has captive customers, the issue is whether the transferor would be transferring the contract at a below-market price, thereby depriving its captive customers of the full value of the contract. However, where the transacting parties are not affiliates, it should be assumed that the transferor would seek market price, regardless of whether or not it has captive customers. Accordingly, it proposes the following addition to § 33.1(c): "Any public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to dispose of, transfer, or acquire a contract for the sale of electric energy in interstate commerce where the contract does not convey control over the operation of a generation or transmission facility, the transferor and acquirer are not affiliated, and the acquirer does not have captive customers."[38]

b. Commission Determination

51. We adopt the proposed blanket authorization with modifications to address commenters' concerns. We agree with Sellers that the transfer of a wholesale power

[38] Financial Group Comments at 18.

contract which does not provide for the control of generation or transmission cannot affect horizontal or vertical market power. We also agree that, with the modification proposed by APPA/NRECA, the transfer of a wholesale power contract from one party that does not have captive customers or owns or provides transmission service over jurisdictional transmission facilities to another party that also does not have captive customers or owns or provides transmission service over jurisdictional transmission facilities cannot affect the rates of captive customers or transmission customers (and therefore has no rate or cross-subsidization impacts). However, in at least one case involving a transfer from one affiliated company to another, significant issues were raised with respect to requests for section 203 approval of wholesale power contracts of this type.[39] Such transactions do not have the market discipline that is present in arm's-length negotiations between unaffiliated parties. Finally, Sellers' argument that the transfer of a wholesale power contract would not affect the Commission's ability to regulate the contract or the parties to the transaction ignores the possibility of the contract being transferred to a non-jurisdictional entity, in which case the Commission could lose the ability to regulate the contract or parties to the contract. Therefore, we will adopt the blanket authorization proposed in the Blanket Authorization NOPR, narrowing the

[39] Mirant Corp., 111 FERC ¶ 61,425 (2005). Pursuant to its bankruptcy reorganization, Mirant transferred power agreements with PEPCO to a newly-formed entity within the corporate family.

blanket to apply in cases where neither the acquirer nor the transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, and adding the following language to the end of the proposed blanket authorization: the parties to the transaction are neither associate nor affiliate companies, and the acquirer is a public utility.

52. Customers argue that granting a blanket authorization for the transfer of such jurisdictional contracts without the purchaser's consent (which may or may not be expressly in the contract) would result in the purchaser having no say in the type of entity to whom a seller would transfer contracts, thus leaving the purchaser with no recourse other than a section 206 complaint and the burden of proof and costs associated therewith. We do not find that argument compelling because a section 203 proceeding is unlikely to be the forum for a purchaser to protect its interest under a contractual arrangement. The Commission has stated that contractual provisions are beyond the scope of a section 203 proceeding.[40] Based on our experience, as discussed above, the transfer of such contracts, with the additional conditions on the purchaser and acquirer of the contracts also discussed above, would not adversely affect competition, rates or regulation, and would not result in cross-subsidization, and therefore would be consistent with the public interest. Moreover, whether the contracts were being transferred pursuant

[40] See, e.g., American Electric Power Service Corporation, 107 FERC ¶ 61,209, at P 17 (2004).

to a blanket authorization or an individual section 203 authorization, purchasers would be able to protect their interests by exercising any relevant contractual provisions and, if necessary, by filing a section 206 complaint. Thus, granting the blanket authorization does not adversely affect a purchaser's ability to protect its interests.

53. We decline to adopt the Financial Group's proposal to expand the blanket authorization to cover cases where the transferor does have captive customers but the acquirer does not. We agree with the Financial Group that, presumably, the transferor would seek market price regardless of whether or not it has captive customers. However, captive customers of the transferor would not necessarily receive the benefit from such transactions and could be faced with paying higher rates due to increased costs for replacement power.

C. New Requests for Clarification and/or Blanket Authorizations

1. Blanket Authorization Under Section 203(a)(1) for Public Utility Sales of Non-Voting Securities

a. Comments

54. EEI argues that the Commission should disclaim jurisdiction under section 203(a)(1) over public utility sales of non-voting securities. EEI argues that such an authorization would parallel the authorization in 18 CFR 33.1(c)(2)(i) for holding companies to acquire non-voting securities, if the acquisition does not transfer control.

b. Commission Determination

55. We agree that if a non-voting security does not convey control, its transfer is not jurisdictional under the "or otherwise dispose" provision in section 203(a)(1)(A).[41] As the Commission stated in the Supplemental Policy Statement, and has recently held in case-specific requests for blanket authorizations under section 203(a)(1),[42] transactions that do not transfer control of a public utility or jurisdictional facilities do not fall within the "otherwise dispose" language of section 203(a)(1)(A) and thus do not require approval under section 203(a)(1)(A).[43] If a non-voting security conveys control (e.g., through veto rights or some other means), our requirements regarding transfers of control apply.

2. Clarification Regarding a Public Utility's Transfer of Securities to its Holding Companies

a. Comments

56. EEI argues that the Commission should clarify that a public utility that is a subsidiary of a holding company may transfer its own securities to that holding company

[41] We note that the situation is different under section 203(a)(2). Jurisdiction over acquisitions of securities under section 203(a)(2) attaches whether or not there is a transfer of control if the acquisition is over $10 million.

[42] Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 37; see, e.g., Legg Mason, Inc., 121 FERC ¶ 61,061, at P 18 (2007).

[43] This does not affect a public utility's responsibilities under sections 203(a)(1)(C) or 203(a)(1)(D), which apply to public utilities' acquisitions of public utility securities and generating facilities.

without a separate authorization as a counterpart to the 18 CFR 33.1(c)(2)(iii) authorization for holding companies to acquire such securities. EEI argues that because the holding company acquisition of such securities (which is inherently part of what it means to be a holding company) can result in no change of control, the Commission lacks jurisdiction.

b. Commission Determination

57. We find that a public utility that is the subsidiary of a single holding company may transfer its own securities to that holding company without a separate authorization under section 203(a)(2) for holding companies to acquire such securities. Where a single holding company system already has control of a subsidiary public utility, the transfer of securities from that public utility to the holding company would not be a change in control.[44]

3. Clarification Regarding the Internal Corporate Reorganization Blanket Authorization

a. Comments

58. EEI asks the Commission to discuss and/or revise the internal corporate reorganization blanket authorization under 18 CFR 33.1(c)(6)[45] to clarify that non-

[44] Our determination here does not affect any separate requirement that the public utility may have under section 204 of the FPA regarding the issuance of securities. 16 U.S.C. 824c.

[45] This is a blanket authorization under both sections 203(a)(1) and section 203(a)(2) for internal corporation reorganizations that do not result in the (continued)

traditional public utilities with market-based rates should not be considered traditional public utilities merely by ownership of incidental transmission facilities.[46]

59. EEI states that while the Commission has clarified that the blanket authorization in 18 C.F.R. § 33.1(c)(6) allows "upstream" reorganizations of "non-traditional public utilities," the blanket authorization does not allow the reorganization of a traditional public utility. EEI states that to qualify as a non-traditional public utility under the language of § 33.1(c)(6), the entity may not "own or provide transmission service over jurisdictional transmission facilities."

60. According to EEI, because many non-traditional utilities, including EWGs and others with market-based rates, own some incidental jurisdictional transmission facilities (e.g., step-up transformers), the blanket authorization rule for internal corporate reorganizations may unnecessarily restrict the reorganization of what otherwise would clearly be a non-traditional public utility. EEI argues that ownership of step-up transformers or other incidental transmission facilities should not change the fact that case-by-case approval by the Commission is unnecessary for the reorganization of such

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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. 18 CFR 33.1(c)(6).

[46] EEI notes that it is not proposing to expand the blanket authorization for internal corporate reorganizations to cover the transfer of assets from one non-traditional public utility subsidiary to another, as such proposal was rejected in the Supplemental Policy Statement.

otherwise non-traditional utilities with no captive customers and whose reorganization would pose no cross-subsidization issues and would not change the ultimate control of the entities.

b. Commission Determination

61. We grant EEI's request for clarification. The term "traditional public utility," as used in the Order No. 669 rulemaking proceeding was taken from prior Commission orders where the term was used to refer to utilities with franchised service territories.[47] In the Notice of Proposed Rulemaking prior to issuance of Order No. 669, the Commission further noted that, "[i]n the context of considering cross-subsidization or affiliate abuse concerns associated with power transactions between public utility affiliates, the Commission has differentiated between utility activities and non-utility activities according to whether they were being conducted by a public utility with captive wholesale or retail customers served under cost-based rates (sometimes described as a 'traditional public utility')."[48] In Order No. 669, the Commission continued to implicitly define traditional utility as a public utility with wholesale or retail customers served

[47] See, e.g., Sierra Pacific Power Co., 95 FERC ¶ 61,193, at 61,178-79 (2001).

[48] Transactions Subject to FPA Section 203, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,589, at P 43 (2005). In Order No. 669, the Commission continued to define "traditional public utility" as those with wholesale or retail customers served under cost-based regulation. Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 169.

under cost-based regulation.[49] Thus, EWGs and other utilities that do not have franchised service territories are not considered to be "traditional public utilities" in the first instance, and therefore, their ownership of merely incidental transmission facilities does not make such a utility a traditional public utility by virtue of its ownership of those facilities.

D. Clarification of the Definition of "Captive Customer"

62. In considering the comments in this docket, in response to the Affiliate Transactions NOPR and on rehearing of the Market-Based Rate Final Rule, and in reviewing the use of the definition of captive customers in our other rules, we believe it appropriate to modify the definition of captive customers to make explicit what was only implicit in our earlier rules – that the definition is intended to apply to customers served by a franchised public utility under cost-based regulation. Accordingly, the Commission will revise the definition of captive customers in 18 CFR 33.1(b)(5) to mean any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

V. Information Collection Statement

63. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection and data retention requirements imposed by

[49] Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 169.

agency rules.[50] The information collection requirements in this Final Rule are identified under the Commission's data collection, FERC-519, "Applications Under Federal Power Act Section 203." Under section 3507(d) of the Paperwork Reduction Act of 1995,[51] the reporting requirements in this rulemaking will be submitted to OMB for review.

64. The "public protection" provisions of the Paperwork Reduction of 1995 require each agency to display a currently valid control number and inform respondents that a response is not required unless the information collection displays a valid OMB control number on each information collection or provides a justification as to why the information collection control number cannot be displayed. In the case of information collections published in regulations, the control number is to be published in the Federal Register.

Public Reporting Burden: As the Commission stated in the Blanket Authorization NOPR, the regulations should have a minimal impact on the current reporting burden associated with an individual application, as they do not substantially change the filing requirements with which section 203 applicants must currently comply. Further, the Commission does not expect the total number of section 203 applications under amended section 203 to increase, but rather expects the total number of section 203 applications to

[50] 5 CFR 1320.

[51] 44 U.S.C. 3507(d).

decrease. This is because the regulations provide categories of jurisdictional transactions for which the Commission would not require applications seeking before-the-fact approval. This would reduce the burden on the electric industry because it will reduce the number of applications that need to be made to the Commission. The Commission received eight comments on the Blanket Authorization NOPR and no entity specifically addressed the Commission's information collection statement.

The Commission is submitting a copy of this Final Rule to OMB for review and approval. In their notice of November 28, 2007, OMB took no action on the Blanket Authorization NOPR, instead deferring their approval until review of the Final Rule.

Title: FERC-519, "Application Under the Federal Power Act, Section 203"

Action: Revised Collection

OMB Control No: 1902-0082

The applicant will not be penalized for failure to respond to this information collection unless the information collection displays a valid OMB control number or the Commission has provided justification as to why the control number should not be displayed.

Respondents: Businesses or other for profit.

Frequency of Responses: N/A

Necessity of the Information: This Final Rule codifies limited blanket authorizations under FPA section 203(a)(1), providing for categories of jurisdictional transactions under

section 203(a)(1) for which the Commission would not require applications seeking before-the-fact approval.

Internal Review: The Commission has conducted an internal review of the public reporting burden associated with the collection of information and assured itself, by means of internal review, that there is specific, objective support for its information burden estimate.

65. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426 [Attention: Michael Miller, Office of the Executive Director, Phone (202) 502-8415, fax (202) 273-0873, e-mail: michael.miller@ferc.gov]. Comments on the requirements of the Final Rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, fax (202) 395-7285, e-mail oira_submission@omb.eop.gov].

VI. Environmental Analysis

66. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[52] The Commission has categorically excluded certain actions

[52] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-
(continued)

from this requirement as not having a significant effect on the human environment.[53] The Final Rule is categorically excluded as it "do[es] not substantially change the effect of legislation or regulations being amended" and addresses actions under section 203.[54] Accordingly, no environmental assessment is necessary and none has been prepared in this Final Rule.

VII. Regulatory Flexibility Act

67. The Regulatory Flexibility Act of 1980 (RFA)[55] generally requires a description and analysis of Final Rules that will have significant economic impact on a substantial number of small entities.[56] However, the RFA does not define "significant" or "substantial." Instead, the RFA leaves it up to an agency to determine the effect of its regulations on small entities.

1990 ¶ 30,783 (1987).

[53] 18 CFR 380.4.

[54] See 18 CFR 380.4(a)(2)(ii), 380.4(a)(16).

[55] 5 U.S.C. 601-12.

[56] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal year did not exceed 4 million MWh. 13 CFR 121.201.

68. Most filing companies regulated by the Commission do not fall within the RFA's definition of small entity.[57] Moreover, as noted above, this Final Rule codifies blanket authorizations under FPA section 203(a)(1), providing for categories of jurisdictional transactions under section 203(a)(1) for which the Commission would not require before-the-fact approval. Thus, filing requirements are reduced by the rule. Therefore, the Commission certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required.

VIII. Document Availability

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

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

[57] 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 632. Section 3 of the Small Business Act defines a "small-business concern" as a business which is independently owned and operated and which is not dominant in its field of operation.

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

IX. Effective Date and Congressional Notification

72. These regulations are effective [insert date 30 days from publication in **FEDERAL REGISTER**]. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of subjects in 18 CFR part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission amends Part 33, Chapter I, Title 18, Code of Federal Regulations, to read as follows:

PART 33 – APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203.

1. The authority citation for part 33 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352; Pub. L. No. 109-58, 119 Stat. 594.

2. In § 33.1, paragraph (b)(5) is revised to read as follows:

§ 33.1 Applicability, definitions, and blanket authorizations.

* * * * *

(b) * * *

(5) For purposes of this part, the term captive customers means any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

3. In § 33.1, paragraphs (c)(12) through (c)(15) are added to read as follows:

§ 33.1 Applicability, definitions, and blanket authorizations.

* * * * *

(c) * * *

(12) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to any holding company granted blanket authorizations in paragraph (c)(2)(ii) of this section if, after the

transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility.

(13) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to any holding company granted blanket authorization in paragraph (c)(8) of this section if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility.

(14) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to any holding company granted blanket authorization in paragraph (c)(9) of this section.

(15) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to any holding company granted blanket authorization in paragraph (c)(10) of this section.

(16) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, the contract does not convey control over the operation of a generation or transmission facility, the parties to the transaction are neither associate nor affiliate companies, and the acquirer is a public utility.