# Federal Energy Regulatory Commission
# April 20, 2006 Commission Meeting
# Statement of
# Chairman Joseph T. Kelliher

## E-2: Transactions Subject to FPA Section 203 (RM05-34-001)

"With this rehearing order, the Commission faithfully executes the merger/corporate acquisition provisions of the Energy Policy Act of 2005 (EPAct), which in turn largely codified the merger test the Commission announced in the Merger Policy Statement and subsequently applied in over 100 transactions over the past decade.

EPAct significantly expanded the Commission's merger role in a number of areas. First, EPAct expanded the scope of section 203 of the Federal Power Act to include generation facilities, which improves our ability to prevent accumulation of horizontal market power.

Second, EPAct extended the scope of section 203 to certain holding company mergers and acquisitions, including acquisitions of securities by holding companies and their subsidiaries. That has resulted in a significant increase in Commission review of holding company securities acquisitions, as reflected in the recent *National Grid* order.

Third, EPAct also required the Commission to prevent cross-subsidization at the point of a merger.

In the merger rehearing order, the Commission harmonized discrepancies between the merger final rule and the final rule implementing the Public Utility Holding Company Act of 2005 (PUHCA 2005). We also strengthened the customer protection provisions, by adding certain evidentiary showings, broadened some of the blanket section 203 authorizations previously granted and granted some new blanket authorizations.

The merger rehearing order, like the PUHCA 2005 rehearing order, should facilitate investment in the electricity sector by traditional utilities, nontraditional utilities and financial institutions. We appropriately seek to accommodate efficient day-to-day financial operations of utility systems. At the same time, the merger rehearing order ensures that captive customers of traditional utilities are protected by guarding against cross-subsidization or the pledge or encumbrance of utility assets.

Perhaps the biggest change to Order No. 669 made by the merger rehearing order relates to how the Commission will prevent cross-subsidization or the pledge or encumbrance of utility assets. Specifically, we now apply the four-part test adopted in Order No. 669 for foreign acquisitions to domestic mergers and acquisitions.

Under this approach, a public utility must verify that transaction does not result in: (1) transfers of facilities between traditional public utility associate companies with captive customers and associate companies; (2) new issuances of securities by traditional public utility associate companies with captive customers for the benefit of associate companies; (3) new pledges or encumbrances of assets of traditional public utility associate companies with captive customers for the benefit of associate companies; and (4) new affiliate contracts between non-utility associate companies and traditional public utility associate companies with captive customers.

Extending the reach of this four-part test to domestic acquisitions significantly strengthens our protections against cross-subsidization, pledges and encumbrances.

Under the merger rehearing order, we require all section 203 applicants that do not have blanket authorizations to: (1) include detailed showing that all four tests of the four-part framework are met; or (2) if cross-subsidization or the pledge or encumbrance of utility assets were to occur, how such cross-subsidization, pledge, or encumbrance would nonetheless be consistent with the public interest.

In other areas, we reaffirm our holding in the merger final rule that exempt wholesale generators (EWGs), qualifying facilities (QFs), and foreign utility companies (FUCOs) are electric utility companies for section 203 purposes. However, we grant such holding companies that own only EWGs, QFs or FUCOs blanket authorization to acquire additional EWGs, QFs, and FUCOs.

The order clarifies that public utilities have blanket authorization to acquire securities of other public utilities in intra-system cash management transactions. Holding companies were previously authorized to acquire the securities of subsidiaries.

In the section 203 rehearing order, the Commission modifies the regulatory text to make clear that the previously granted blanket authorization for certain holding company acquisitions involving internal corporate reorganizations also applies to public utility transactions within the holding company, as long as the reorganization does not result in the reorganization of a traditional public utility that has captive customers or that owns or provides transmission service over Commission jurisdictional transmission facilities.

In the merger rehearing order, the Commission grants additional blanket authorizations to certain holding companies and their subsidiaries that are regulated by the Bank Holding Company Act. The order permits these entities to acquire securities in the normal course of business (as fiduciaries) for derivatives hedging purposes incidental to the business of banking and as collateral for a loan or other limited purposes, but subject to certain restrictions and reporting requirements.

The Commission also grants blanket authorization for certain acquisitions of utility securities for purposes of underwriting and hedging transactions, but subject to conditions and reporting requirements. These authorizations are consistent with those granted on a case-by-case basis in recent months following issuance of the section 203 final rule."