

*NRC Response 6:* Although the NRC fully supports the efforts of the DOE programs, these activities are not under NRC jurisdiction. However, the NRC believes that DOE's GTRI program is working to address the concerns the commenter mentions.

#### Determination of Petition

The NRC has determined that the petitioner has not provided an adequate basis on which the NRC could act to implement the proposed changes requested by the petitioner. To the extent that the NRC has authority to act, the NRC's position is that the current regulatory framework in conjunction with DOE's GTRI program already works effectively to minimize the use and export of HEU material until a suitable LEU replacement is available.

With respect to export license applications for HEU, bearing in mind the NRC's responsibility to make an overall finding that each export would not be inimical to the common defense and security of the U.S., the NRC intends to continue its practice to carefully review each application to verify that each requested HEU export is justified in accordance with its statutory and regulatory obligations. The NRC will continue to monitor the progress of DOE's GTRI and RERTR programs, including the HEU to LEU conversion schedules.

The NRC will also continue to encourage that the appropriate actions be taken to eliminate U.S.-supplied-inventories of HEU in a manner consistent with the EPA Act 2005 requirements.

For reasons cited in this document, the NRC denies the petition.

Dated at Rockville, MD, January 22, 2010.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Parts 33 and 35

[Docket No. RM09-16-000]

#### 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

January 21, 2010.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations pursuant to sections 203 and 205 of the Federal Power Act (FPA) to grant blanket authorization to acquire securities under section 203 and amend the definitions of "affiliate" in Subpart H and Subpart I of Part 35 of the Commission's regulations. The Commission seeks public comment on the rules and amended regulations proposed herein.

**DATES:** Comments are due March 29, 2010.

**ADDRESSES:** You may submit comments, identified by docket number by any of the following methods:

- *Agency Web site:* <http://www.ferc.gov>. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.

- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

#### FOR FURTHER INFORMATION CONTACT:

Andrew P. Mosier, Jr. (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 502-6274.

Christina Hayes (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 502-6194.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

1. The Federal Energy Regulatory Commission (Commission) proposes to amend its regulations to provide greater

certainty with respect to certain transactions in which a holding company acquires voting securities of a public utility. Specifically, the Commission proposes to amend Part 33 of its regulations to grant a blanket authorization under section 203(a)(2) of the Federal Power Act (FPA), as well as a parallel blanket authorization under section 203(a)(1), for acquisitions of 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or holding company, where the acquiring company files a statement certifying that such securities were not acquired and are not held for the purpose or with the effect of changing or influencing the control of the public utility and such acquiring company complies with certain conditions designed to limit its ability to exercise control (all as set forth in an Affirmation in Support of Exemption from Affiliation Requirements on FERC Form 519-C (Affirmation), the form of which is annexed hereto as Appendix A). The Commission also proposes to amend Subpart H and Subpart I of Part 35 of the Commission regulations to define an "affiliate" of a specified company as any person that controls, is controlled by, or is under common control with such specified company. A public utility in respect of which an Affirmation has been filed would be exempt from certain requirements of an affiliate for purposes of the Commission's market-based rate program, but only with respect to current or subsequent affiliation(s) that result from the transaction that is the subject of such Affirmation and only for so long as the information contained in the Affirmation (as modified through subsequent quarterly updates) is true, complete and correct and the reporting person remains in compliance with the commitments that are made in the Affirmation.

##### II. Background

###### A. Overview

2. Section 203 of the FPA, as amended by the Energy Policy Act of 2005,<sup>1</sup> requires Commission authorization for mergers, and dispositions and acquisitions involving electric generation and transmission companies and their holding companies. The Energy Policy Act of 2005 expanded the Commission's authority over corporate transactions and granted the Commission new regulatory tools to strengthen its ability to prevent the exercise of market power. The

<sup>1</sup> Energy Policy Act of 2005, Public Law 109-58, §§ 1289 *et seq.*, 119 Stat. 594 (2005).

Commission has implemented rules under section 203 to help prevent the accumulation of either horizontal or vertical market power, while at the same time eliminating unnecessary regulatory barriers to the making of needed investment in generation and transmission infrastructure. These rules are complemented by the rules the Commission has implemented under its market-based rate program under section 205 to prevent the exercise of market power in wholesale energy and capacity markets.<sup>2</sup>

3. The Commission has granted, both on a generic basis and on a case-by-case basis, blanket authorizations under section 203 where the Commission has determined that transactions that fall within certain parameters would be consistent with the public interest and would not result in inappropriate cross-subsidization.<sup>3</sup> While these blanket authorizations have facilitated transactions under section 203, the Commission must also consider the effect of transactions under the market-based rate program under section 205. The Commission has codified its rules under the market-based rate program.<sup>4</sup> Under these rules, among other things, a market-based rate seller must demonstrate that neither it nor its affiliates have market power in the relevant geographic market. In this regard, the acquisition or disposition of public utility securities under blanket section 203 authorization may raise questions as to whether the energy assets that are directly or indirectly owned by an investor should be attributed to the public utility whose securities are acquired by the investor for purposes of the public utility's

market power analysis under the market-based rate program.

#### B. EPSA's Petition for Guidance

4. On September 2, 2008, the Electric Power Supply Association (EPSA) filed a petition requesting guidance regarding concepts of control and affiliation as they relate to transactions subject to the Commission's jurisdiction under sections 203 and 205 of the FPA.<sup>5</sup> Specifically, EPSA requested that, where an investor directly or indirectly acquires 10 percent or more but less than 20 percent of a public utility's outstanding voting securities and is eligible to file a statement of beneficial ownership with the Securities and Exchange Commission (SEC) on SEC Schedule 13G,<sup>6</sup> such investment would not be deemed to result in a disposition of the public utility's jurisdictional facilities under section 203(a)(1) of the FPA or to result in affiliation with the public utility for purposes of the Commission's market-based rate requirements under section 205 of the FPA.

5. EPSA states that a number of recent transactions involving investments in publicly-held competitive power supply companies bring to light concerns about when an investment will result in affiliation. EPSA asserts that these concerns threaten to discourage investment in energy infrastructure and also create compliance issues for competitive power supply companies with market-based rates.

6. EPSA states that secondary market transactions in publicly-traded securities can result in situations that could be deemed to result in a transaction subject to Commission authorization under section 203 or

affiliation for market-based rate purposes. EPSC explains that such transactions can subject a public utility to potential compliance issues under sections 203 and 205 of the FPA since they take place without the knowledge of the affected public utility.

7. EPSC's discussion of affiliation for market-based rate purposes is based on the definition of an "affiliate" set forth in Order No. 697-A. That definition has been superseded by the definition adopted in Order No. 697-B, although the changes do not fundamentally alter the issues that EPSC describes. The current definition provides that an affiliate of a specified company is (i) any person that has a 10 percent or greater voting security interest in the specified company; (ii) any company that the specified company has a 10 percent or greater voting interest in; (iii) any person that is under common control with the specified company; or (iv) any person or class of persons that the Commission determines, after notice and opportunity for a hearing, it is necessary or appropriate to treat as an affiliate of the specified company either to promote the public interest or to protect investors and consumers.

8. EPSC states that a number of concerns arise if one strictly applies a 10 percent or greater voting security interest test to determine affiliation. An upstream owner with a 10 percent or greater voting interest in one public utility can acquire a 10 percent or greater voting interest in a second unaffiliated public utility and thereby create a new affiliate relationship between the two public utilities. EPSC states that this could trigger a need for section 203 filings by the acquirer and the second public utility, or only the acquiring company if the securities are acquired on the secondary market.

9. In addition, the transaction could trigger a market-based rate change in status reporting requirement for both the first and second public utilities and their existing affiliates. This requirement could exist even though the affected public utilities are not aware that the new affiliate relations had been created. EPSC claims that the public utilities would thus not be in a position to make a change in status filing, even though failure to make a necessary filing could result in revocation of market-based rate authority and/or the imposition of penalties. EPSC states that the consequences could be even more serious if any of the entities involved is a traditional public utility with captive customers. Where a public utility with market-based rate authority is selling to a traditional public utility with captive customers and subsequently becomes

<sup>2</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 FR 39904 (Jul. 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 FR 25832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008), *order on reh'g and clarification*, Order No. 697-B, 73 FR 79610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, 74 FR 30924 (Jun. 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009).

<sup>3</sup> *See Transactions Subject to Federal Power Act 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 (Jul. 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006). *See also Goldman Sachs Group*, 121 FERC ¶ 61,059 (2007), *clarified*, 122 FERC ¶ 61,005 (2008) (*Goldman Sachs*); *Capital Research & Mgmt. Co.*, 116 FERC ¶ 61,267 (2006) (*Capital Research*).

<sup>4</sup> *See* Order No. 697, 72 FR 39,904 (Jul. 20, 2007), FERC Stats. & Regs. ¶ 31,252 at P 1078-1105; Order No. 697-A, 73 FR 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 at P 527-533.

<sup>5</sup> The petition was originally docketed as EL08-87-000 and was subsequently redocketed as PL09-3-000.

<sup>6</sup> As relevant here, a Schedule 13G is filed with the SEC pursuant to section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (2000) (1934 Act), and the SEC's rules thereunder, by any person (referred to here as a "passive investor") when such person has acquired beneficial ownership of more than five percent but less than 20 percent of the outstanding voting equity securities of a company that are registered under section 12 of and the 1934 Act and such person certifies that it has not acquired, and does not hold, such securities for the purpose of or with the effect of changing or influencing the control of the issuer. The 20 percent limit on the acquisition of voting securities reflects the SEC's view that "it would be unusual for an investor to be able to make the necessary certification of a passive investment purpose when beneficial ownership approaches 20 percent," where the investor is not subject to other limitations. *Amendments to Beneficial Ownership Reporting Requirements*, File No. S7-16-96, 1998 SEC LEXIS 63, at \* 17 n. 20 (Jan. 12, 1998). EPSC appears to have adopted the 20 percent limitation based on its desire to use the filing of Schedule 13G as dispositive of an investor's non-control status.

affiliated with the traditional public utility as the result of investment by a common owner, the market-based rate seller would become subject to the Commission's affiliate sales restrictions, even though it was unaware of the new affiliate relationship.

10. To address its concerns, EPSA requests that the Commission make three basic findings. First, EPSA requests that the Commission state that no control or affiliation exists for market-based rate or section 203 purposes where an investor holds less than 20 percent of a public utility's outstanding voting securities and files a Schedule 13G with the SEC. EPSA also requests a finding that where an investor meets these requirements and thus is deemed not to control the public utility or be an affiliate of it: (1) The public utility need not make a change in status filing in instances where it has market-based rate authorization; (2) subsequent market power analyses submitted in connection with either market-based rate authorizations or section 203 applications need not include generation and inputs owned or controlled by other entities in which the investor holds an interest; and (3) affiliate sales restrictions will not apply to transactions between a publicly-held company and its subsidiaries with market-based rate authorization, on the one hand, and other entities in which the investor has interests, on the other.

11. EPSA recommends that the Commission rely on the SEC's sanctions associated with Schedule 13G filings, and it also recommends the following additional safeguards: (1) As a condition to an investor's reliance on a Schedule 13G filing as the basis for foregoing case-specific approval under section 203(a)(2) for particular investments, the investor would have to file a copy of its Schedule 13G with the Commission within 30 days of filing it with the SEC<sup>7</sup>; and (2) when an investor ceases to meet Schedule 13G eligibility requirements, it must observe the requirements of the SEC's "cooling off period" while awaiting the Commission's section 203 approval, which means that the investor could not acquire additional securities until prior

authorization under section 203 is granted and must refrain from voting its securities during this period.

12. Second, EPSA requests that if the Commission finds no control for section 203 purposes, that finding should also apply for market-based rate authorization purposes, such that the transaction will not be deemed to result in affiliation for market-based rate purposes. This would mean that a public utility with market-based rate authority would not have to file a change in status if an entity that holds an interest in it has also acquired an interest in another utility that did not convey control. As a result, the market power analysis of the public utility with market-based rate authority would not include the second utility's generation and inputs in any required change in status filing.

13. Third, EPSA proposes that when an entity that is upstream of a publicly-held company invests in an entity that is not otherwise related to the publicly-held company, that investment should not be deemed to be within the knowledge and control of the publicly-held company's subsidiaries that have market-based rate authorization.

14. On December 3, 2008, Commission staff held a workshop to address the issues raised by EPSA. Additional comments were submitted on January 16, 2009, and EPSA filed a subsequent response on February 2, 2009.

15. Calpine Corporation and Tenaska Energy, Inc. (Calpine), Mirant Corporation (Mirant), the Edison Electric Institute (EEI), and several other commenters generally support EPSA's proposal. The Financial Institutions Energy Group (FIEG) and Harbinger Management Corporation (on behalf of certain affiliated investment funds) (Harbinger) contend that the absence of a Schedule 13G filing with the SEC does not necessarily indicate the existence of a control relationship. They also assert that the SEC's definition of control is broader than the Commission's view of control, which they contend is limited to matters involving the ability of capacity to reach the market and the decision-making over sales of electric energy.

16. American Public Power Association (APPA) and National Rural Electric Cooperative Association (NRECA) do not oppose EPSA's request that a determination of "no control" under section 203 also apply under the market-based rate program under section 205. But they, as well as Transmission Access Policy Study Group (TAPS) and American Antitrust Institute (AAI), oppose reliance on a

Schedule 13G filing as the sole basis for finding that the investor does not control a utility in which it has invested. Instead, at the workshop APPA and NRECA recommended that the Commission create its own form to evaluate whether an investor has acquired control over a public utility.

17. AAI raises concerns about an investor with a partial interest in rival generating assets, which could diminish competition and lead to a common owner serving as a conduit for commercially sensitive information between rivals. AAI contends that the Department of Justice and the FTC consider these issues of "cross-ownership" and that this Commission should consider these issues, as well. The FTC also encourages the Commission to consider issues associated with an investor's partial ownership of multiple utilities and the investor's related incentives to compete less vigorously, collude to avoid price wars, and share commercially sensitive information.

### III. Discussion

#### A. Overview of Proposal

18. As indicated above, EPSA only sought "guidance" on the issues it raised and did not propose a Commission rulemaking. However, in the course of considering the comments submitted and the discussions at the December 3, 2008 workshop, the Commission has determined that the issues involved may call for more formal treatment. In particular, an additional blanket authorization under section 203(a)(2) may be necessary to achieve the desired result. In addition, the approach EPSA proposed is at odds with aspects of the definition of an "affiliate" applicable under the Commission's market-based rate regulations. Finally, the Commission finds that the Schedule 13G does not provide sufficient information to the Commission to monitor markets and protect the public interest, and therefore is proposing adoption of a form better tailored to the Commission's needs.

19. The proposed Affirmation would create a rebuttable presumption for purposes of section 203 that the investor does not control the public utility whose voting securities it has acquired. The Affirmation is a representation by the filer and does not operate as a conclusive finding that the investor does not control the public utility, which the Commission finds would be necessary for an ownership interest of 10 percent or more, and less than 20 percent, of the outstanding voting securities of a public utility to fall

<sup>7</sup> EPSA notes that there may be circumstances in which an investor is either not subject to section 203(a)(2) (for example, because the investor is not a holding company) or is able to rely on some other blanket authorization under the regulations. In such circumstances, the investor would not need to rely on the filing of Schedule 13G for section 203(a)(2) purposes. Nevertheless, EPSA asserts that the publicly-held company (that is, the utility or its holding company whose securities are acquired) should still be allowed to rely upon the investor's filing of Schedule 13G with the SEC for purposes of control and affiliation determinations.

outside of the definition of affiliate, as used in its regulations under Part 35. Nevertheless, while the affected companies are still considered affiliates, under the Commission's proposal, the affected companies would qualify for a waiver of certain regulatory requirements pertaining to an affiliate, specifically, the obligation to include the energy assets of the affiliate for purposes of a market power analysis, the change in status reporting requirement and the affiliate transaction restrictions under Part 35 of the Commission's regulations.

20. The Commission is therefore issuing this notice of proposed rulemaking. In it, we propose a new blanket authorization under section 203(a)(2), in Part 33, which would allow a holding company to acquire 10 percent or more, but less than 20 percent, of a public utility's or holding company's outstanding voting securities, provided that the investor files an Affirmation with the Commission on Form 519-C. The Affirmation, while similar to the Schedule 13G in that it would set forth the investor's certification of non-control intent, has been tailored to provide additional information and to impose restrictions on certain activities to better meet the requirements of the FPA and Commission policy. In particular, as described in greater detail below, the Affirmation will serve as the source of information that would otherwise be required under Part 33 of the Commission's regulations in an application under section 203. Further, by filing an Affirmation, the investor would commit to specific restrictions on its actions and to ongoing reporting obligations. The investor would file the Affirmation within 10 days following the acquisition. We believe the use of this newly developed form and the restrictions contained therein will help address the concerns raised by APPA, NRECA, AAI, TAPS, and the FTC.

21. The Commission also proposes to amend the definition of "affiliate" in section 35.36(a)(9) of its market-based rate program regulations.<sup>8</sup> As proposed to be amended, an "affiliate" of a specified company would mean "any person that controls, is controlled by, or is under common control with, such specified company." Currently, the Commission's regulations create a rebuttable presumption that a person that owns less than 10 percent of the outstanding voting securities of a public

utility lacks control of that public utility.<sup>9</sup> The Commission proposes to amend its regulations under Part 33 to provide that in any case in which 10 percent or more but less than 20 percent of the outstanding voting securities of a public utility are owned, the public utility would be exempt from certain restrictions applicable to affiliates if the acquiring person has filed an Affirmation and continues to comply with all of the other conditions and reporting obligations set forth therein. Thus, the market-based rate filing requirements, including the filing of a notice of change in status, would not be triggered. The Affirmation would allow the Commission to monitor and sanction entities that violate it.

22. If an investor that is a public utility holding company desires to acquire 20 percent or more of the outstanding voting securities of a public utility, or an interest of 10 percent or more, but less than 20 percent that is not the subject of an Affirmation, then the investor would be required to file a stand-alone application under section 203(a)(2), unless the investor qualifies for one of the other blanket authorizations provided for in the regulations.

23. As discussed above, EPSA notes that an investor's acquisition of the voting securities of a public utility with market-based authorization could trigger the need for change in status filings by both the public utility whose securities are acquired and by any other public utility affiliate of the investor. This requirement could exist even though the affected public utilities are not aware that the new affiliate relations had been created. EPSA further states that the public utilities would thus not be in a position to make a change in status filing, even though failure to make a necessary filing could result in revocation of market-based rate authority and/or the imposition of penalties. The consequences could be even more serious if any of the entities involved is a traditional public utility with captive customers. Where a public utility is selling to a traditional public utility with captive customers and subsequently becomes affiliated with the traditional public utility as the result of investment by a common owner, the public utility would become subject to the Commission's affiliate sales restrictions, even though it was unaware of the new affiliate relationship.

24. In light of these concerns and the fact that the Commission's rules require certain information regarding affiliates

from market-based rate sellers and impose certain restrictions on transactions between affiliates in order to ensure that rates are just and reasonable, we believe that the holding company whose acquisition of voting securities of a public utility results in affiliations between or among public utilities is in the best position to facilitate an affected public utility's compliance with the Commission's regulations pertaining to affiliate relationships. For instance, the holding company may be in the best position to provide to an affected public utility certain information regarding the holding company's investments in other utilities with which the affected public utility would be deemed affiliated, in order to enable the affected public utility to comply with our regulatory requirements regarding affiliate relationships.

25. As EPSA notes, since a public utility with market-based rate authority that fails to comply with market-based rate reporting requirements may risk losing its market-based authorization, and a public utility that fails to comply with our requirements relating to affiliate transactions may be subject to penalties, we expect that a holding company whose investment has created the affiliate relationship between and among affected public utilities would also have an economic incentive to preserve the market-based rate authority of a public utility in which it has invested, and to ensure that a public utility in which it has invested is in compliance with our regulations. A holding company may elect to file the Affirmation in order to relieve the public utility of its obligation to report certain information regarding its affiliations through the holding company investor, and to assist the public utility in complying with our regulations pertaining to affiliate relationships resulting from the investment by the holding company.

#### *B. Section 203*

##### 1. Requirements of Section 203

26. Section 203(a)(1) of the FPA requires prior Commission authorization for a public utility to (A) sell, lease, or otherwise dispose of its facilities; (B) merge or consolidate its facilities with any other person; (C) purchase, acquire, or take any security in excess of \$10 million of any other public utility; or (D) purchase, lease, or otherwise acquire an existing generation facility valued in excess of \$10 million and that is used in interstate wholesale

<sup>8</sup> As discussed below, the Commission also proposes to amend the definition of "affiliate" for purposes of Subpart H, Cross-Subsidization Restrictions on Affiliation Transactions.

<sup>9</sup> 18 CFR 35.36(a)(9)(v) (2009).

sales and over which the Commission has ratemaking jurisdiction.<sup>10</sup>

27. Section 203(a)(2) requires prior Commission authorization for a holding company in a holding company system that includes a transmitting utility or an electric utility to purchase, acquire, or take any security with a value in excess of \$10 million of 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 million.

28. The Commission must approve an application under section 203 if it finds the proposed transaction is consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or any pledge or encumbrance against utility assets for the benefit of an associate company, unless the cross-subsidization or pledge or encumbrance are found to be consistent with the public interest. The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) The effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>11</sup> The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>12</sup>

## 2. Existing Blanket Authorizations and Case-Specific Approvals

29. Under section 203(a)(5), the Commission is authorized to identify classes of transactions that meet these standards and provide expedited review for such transactions. Pursuant to this authority, the Commission has granted blanket authorizations in its regulations, thereby pre-authorizing certain transactions.<sup>13</sup> However, as it is an ex

*ante* determination as to the appropriateness of a category of transactions under section 203, a blanket authorization can be granted only after the Commission is assured that the statutory standards will be met, including ensuring that the interests of captive customers are safeguarded and that public utility assets are protected under all circumstances.<sup>14</sup>

30. For instance, a blanket authorization has been granted under section 203(a)(2) for an acquisition of less than 10 percent of the outstanding voting securities of a public utility.<sup>15</sup> In granting a blanket authorization for acquisitions of less than 10 percent of the voting securities of a utility, the Commission determined that such a blanket authorization would be consistent with the public interest and Congressional intent in repealing the Public Utility Holding Company Act of 1935 (PUHCA 1935) and encouraging incentives for additional investment.<sup>16</sup> In considering a parallel blanket authorization under section 203(a)(1), the Commission declared a general policy, to be applied on a case-by-case basis, of presuming that a transfer of less than 10 percent of a public utility's outstanding voting securities is not a transfer of control if: (1) After the transaction, the acquirer and its affiliates and associate companies, directly or indirectly, in aggregate will own less than 10 percent of the outstanding voting securities of such public utility; and (2) the facts and circumstances do not indicate that such companies would be able to directly or indirectly exercise a controlling influence over the management or policies of the public utility.<sup>17</sup>

31. In several recent section 203 cases, the Commission has relied upon an applicant's eligibility to file statements of beneficial ownership with the SEC on Schedule 13G as one factor in the Commission's section 203 analysis of control.<sup>18</sup> Under section 13(d)(1) of the 1934 Act and the SEC's rules

thereunder,<sup>19</sup> any person who acquires beneficial ownership of more than five percent of any voting equity security of a class that is registered under section 12 of the 1934 Act (which would include securities that are listed for trading on a national securities exchange) must, within 10 days of such acquisition, file a statement on SEC Schedule 13D with the SEC containing information about the acquiring person and the amount of securities acquired, the source of the funds used to complete the acquisition, whether the purpose for the acquisition is to acquire control, and whether there are any contracts or understandings with respect to the securities acquired relating to various types of transactions, and such other information as the SEC may by rules and regulations prescribe as necessary and appropriate in the public interest or for the protection of investors. However, as noted above, the SEC's rules allow so-called "passive investors" to instead file a much abbreviated disclosure statement on Schedule 13G.<sup>20</sup>

32. A "passive investor" filing Schedule 13G certifies only that the securities that are the subject of the filing "were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect." The SEC defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."<sup>21</sup> The Schedule 13G also does not provide information regarding the investor's other holdings. While the Commission has considered an applicant's eligibility to file a Schedule 13G with the SEC an indication that the applicant will not be able to assert control over a public utility, the Commission has not accepted Schedule 13G eligibility as a definitive statement regarding control.<sup>22</sup>

## 3. Proposal

33. The Commission proposes to amend 18 CFR Part 33 (Applications Under Federal Power Act section 203) to provide a new blanket authorization under section 203(a)(2) for a holding company to acquire 10 percent or more, but less than 20 percent, of the

<sup>10</sup> 16 U.S.C. 824b (2006).

<sup>11</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 FR 68595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), reconsideration denied, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 FR 70984 (Nov. 28, 2000), FERC Stats. & Regs., Regulations Preambles July 1996–Dec. 2000 ¶ 31,111 (2000), order on reh'g, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

<sup>12</sup> 18 CFR 33.2(j).

<sup>13</sup> See Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 141 (2005), order on reh'g, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, at P 55–133, order on reh'g, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225, at P 24–44 (2006). See also Order No. 708, 73 FR 11003 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,265, order on reh'g, Order No. 708–

A, 73 FR 43066 (Jul. 24, 2008), FERC Stats. & Regs. ¶ 31,273 (2008).

<sup>14</sup> *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 33 (2007).

<sup>15</sup> 18 CFR 33.1(c)(2)(ii).

<sup>16</sup> Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 145.

<sup>17</sup> *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 57.

<sup>18</sup> See, e.g., *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209, at P 45–50 (2008) (*Horizon*); *Goldman Sachs*, 121 FERC ¶ 61,059, at P 30–41; *Morgan Stanley*, 121 FERC ¶ 61,060, at P 37–49 (2007), clarified, 122 FERC ¶ 61,094 (2008) (*Morgan Stanley*); *Legg Mason, Inc.*, 121 FERC ¶ 61,061, at P 26–30 (2007) (*Legg Mason*); *Capital Research*, 116 FERC ¶ 61,267, at P 16–20.

<sup>19</sup> 17 CFR 240.13d-1 *et seq.*

<sup>20</sup> See 17 CFR 240.13d-1(c). See also discussion at n.6.

<sup>21</sup> 17 CFR 240.12b-2.

<sup>22</sup> *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 41.

outstanding voting securities of a public utility, provided that the holding company files an Affirmation, on Form 519-C, within 10 days of the acquisition of such voting securities. The Affirmation would create a rebuttable presumption for purposes of section 203 that the investor does not control the public utility where the holding company acquires 10 percent or more, but less than 20 percent of the voting securities of the public utility. Therefore, the Commission believes that the acquisition by the holding company, and the disposition by the public utility, of 10 percent or more, but less than 20 percent of voting securities, with the filing of the Affirmation, will not harm competition, rates, regulation or captive customers. However, as explained above, the Affirmation is a representation by the filer and does not operate as a conclusive finding that the investor does not control the public utility, which the Commission finds would be necessary for an ownership interest of 10 percent or more, and less than 20 percent, of the outstanding voting securities of a public utility to fall outside of the definition of affiliate. Thus, while the affected companies are still considered technically affiliates, the affected companies would qualify for a waiver of the regulatory requirements pertaining to affiliated companies. The Commission seeks comments on this proposal.

34. The Commission also proposes to amend 18 CFR Part 33 to provide a parallel blanket authorization under FPA section 203(a)(1). Under the proposed section 203(a)(1) blanket authorization, a public utility whose outstanding voting securities are acquired in a transaction that falls within the proposed 203(a)(2) blanket authorization would be pre-authorized under 203(a)(1) to dispose of those securities. We believe that these new blanket authorizations, along with the proposed revised definitions of "affiliate" in Part 35 discussed in further detail below, will address EPSA's concerns, while at the same time provide the Commission with a mechanism to ensure that acquisitions are consistent with the public interest under section 203, are subject to effective monitoring, and do not present concerns under the Commission's market-based rate program. We believe that this proposal also addresses concerns raised by the FTC, APPA/NRECA, AAI, and TAPS, because the Affirmation will require the investor to abide by commitments to not take specific actions that would unduly influence the management of the utility,

interfere with the operation of the utility's facilities, or request or receive non-public information. We seek comments on this proposal.

#### a. Affirmation in Support of Exemption From Affiliation Requirements

35. EPSA's proposal relies on the filing of SEC Schedule 13G to demonstrate conclusively that an investor will not control the public utility in which it has invested. While the Commission has relied on these filings, in conjunction with other conditions and reporting requirements in the past for various purposes, we believe the Commission could better fulfill its statutory responsibilities if it did not rely exclusively on the Schedule 13G. The primary regulatory purpose of the beneficial ownership disclosure requirements under section 13(d) of the 1934 Act is to provide companies and their shareholders with information about large accumulations of a company's stock, which could be indicative of a possible takeover attempt which, in turn, could affect the market value of the issuer's securities. The requirements of section 13(d) do not bar an investor from acquiring control of a company, which is of utmost importance to this Commission.

36. Therefore, the Commission proposes that, to be eligible for the new blanket authorizations, the investor must file an Affirmation, which, as more fully described below, will serve a similar purpose to SEC Schedule 13G. As is the case with Schedule 13G, the investor, by signing the Affirmation, certifies that the securities referred to in the filing were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect. The Affirmation will provide information on the number of shares of voting securities (and percent of the total shares outstanding) of the public utility in respect of which the statement is filed. In addition, the Affirmation must include the name and location of any other public utility that is an affiliate of the investor and a description and the location of "inputs to electric power production" (as defined in section 35.36(a)(4) of the Commission's regulations) that are owned or controlled by the investor or by any affiliate of the investor. This latter information (which would not be disclosed in a Schedule 13G filing) will assist the Commission in its task of ensuring that investment in a public utility does not, in fact, create

opportunities or incentives for the investor or the public utility to engage in anti-competitive conduct. To be eligible for the blanket authorizations, an investor would need to file an Affirmation for each public utility in which the investor acquired securities.

37. In addition, by filing an Affirmation, the investor makes certain additional commitments. Specifically, the investor certifies that the acquisition was not for the purpose, or with the effect, of changing or influencing control over the public utility, and also commits:

- Not to seek or accept representation on the public utility's board of directors or otherwise serve in any management capacity;
- Not to request or receive non-public information, either directly or indirectly, concerning the business or affairs of the public utility;
- Not to solicit, or participate in any solicitation of, proxies involving the public utility; and
- Not to seek to influence the management or conduct of the day-to-day operations of the public utility in such areas as
  - Purchasing or selling electricity or inputs to generation,
  - Scheduling power production, including, but not limited to, the dispatching of generation units or scheduling outages,
  - Hiring or fixing compensation of the public utility's officers, directors and employees.<sup>23</sup>

It is not intended that these restrictions would preclude the exercise of voting rights on any matter properly submitted for a vote of shareholders.

38. We propose to require that the Affirmation be filed within 10 days after the acquisition, that a copy thereof be provided to the company whose securities have been acquired, and that the information provided on share ownership in the initial filing be updated quarterly.<sup>24</sup>

<sup>23</sup> These restrictions are similar to, and in fact, based on, restrictions that the Commission has imposed in orders approving 10 percent or greater investments in utilities. See *Cascade Investment, LLC*, 129 FERC ¶ 61,011, at P 20–21 (2009); *Mach Gen, LLC*, 127 FERC ¶ 61,127, at P 24–31 (2009); *Franklin Resources, Inc.*, 126 FERC ¶ 61,250, at P 21 (2009), order on reh'g, 127 FERC ¶ 61,224 (2009); *Entegra Power Group LLC*, 125 FERC ¶ 61,143, at P 40 (2008), order on clarification and reh'g denied, 129 FERC ¶ 61,156 (2009).

<sup>24</sup> This ongoing reporting obligation is also consistent with other Part 33 reporting requirements, as well as quarterly reporting obligations that the Commission routinely imposes under its section 203 orders granting blanket authorizations. See, e.g., 18 CFR 33.1(c)(4); *Horizon*, 125 FERC ¶ 61,209 at P 49; *Goldman Sachs*, 122 FERC ¶ 61,005 (2008).

39. Consistent with the case-specific blanket authorizations under section 203(a)(2),<sup>25</sup> the Commission believes that a blanket authorization for the acquisition of 10 percent or more, but less than 20 percent, of the outstanding voting securities of a utility, limited by the commitments of non-control set forth in the proposed Affirmation, would not result in any adverse effect on competition, rates, or regulation, or 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. Under the companion blanket authorization under section 203(a)(1) that we are proposing, a public utility whose securities are acquired in a transaction that falls within the proposed 203(a)(2) blanket authorization would have no obligation to seek approval under section 203(a)(1). This parallel treatment of control issues under section 203(a)(1) with blanket authorizations under section 203(a)(2) follows the same approach that we have previously taken in Part 33<sup>26</sup> and is also consistent with blanket authorizations that we have granted by order.<sup>27</sup>

#### b. Administration of Proposed Affirmation in Support of Exemption From Affiliation Requirements

40. Given the nature of the transaction, the limited ownership interest of the reporting person, and the continuing nature of the conditions and reporting obligations imposed (as described above), the Affirmation will enable the Commission to monitor the new affiliations that are created and provide the Commission with a sufficient basis to conclude that a transaction that is the subject of an Affirmation is consistent with the public interest because it will not have an adverse effect on competition, rates or effective regulation, or result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets. The Commission believes that the information, representations and commitments required of, and the conditions imposed on, the filer of the Affirmation (including the obligation to file quarterly updates to ownership of the issuer's voting securities) are consistent with those requirements imposed on an applicant seeking case-by-case section 203 authorization for a similar transaction. Specifically, the information provided in the Affirmation

is the same or similar to the information that would be required by section 33.2(a) of the Commission's regulations (name and business address of the reporting person), section 33.2(c)(2) (identity of and ownership interests in other energy affiliates), section 33.2(e) (description of the transaction, which, in the particular circumstances covered by the proposed new blanket authorization, would always be an acquisition of 10 percent or more but less than 20 percent of the issuing public utility's outstanding voting securities), and section 33.2(i) (other regulatory approvals). Other specific information requirements of an application under section 203 are unnecessary in the case of any transaction that is the subject of an Affirmation. For example, specific disclosure otherwise required by section 33.2(c)(5) of the Commission's regulations (identity of common officers or directors of parties to the transaction) is unnecessary since such management interlocks are precluded by the conditions imposed on the reporting person under the Affirmation. Similarly, statements concerning the impact of the transaction on the public interest and on competition, rates and regulation and whether the transaction will result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets, which would be required by sections 33.2(g) and 33.2(j) of the Commission's regulations in an application under section 203, are unnecessary given the specific conditions and restrictions imposed on the reporting person. Finally, the information contained in the initial Affirmation and quarterly updates will provide the Commission with the means to monitor the new affiliations created by any transaction that is the subject of an Affirmation and, to take further action as necessary.

41. The Commission seeks further comments on the procedures that should be in place to protect consumers and the marketplace if an investor, having filed an Affirmation, no longer can comply, or wishes not to comply, with the commitments made in the Affirmation. In the context of section 203, the Commission is proposing that, in any such case, the investor may file an application under section 203 to request authorization to retain the securities previously acquired under the blanket authorization if the investor determines that it no longer wishes to be bound by the terms of the commitments it has made in the Affirmation. During the pendency of any such proceeding, the investor may not acquire any

additional voting securities of the public utility and must continue to comply with all of the commitments made in the Affirmation. In addition, depending on the final disposition of the section 203 application, the public utility may be required to file a notice of change in status and the restrictions on affiliate transactions may become applicable.

#### c. Applicability of Proposed Blanket Authorization

42. EPSA's request for guidance related only to acquisitions of voting securities of publicly-held companies, that is, securities that are registered under section 12 of the 1934 Act and, therefore, subject to the beneficial ownership reporting requirements of section 13(d) of the 1934 Act. The Commission's proposed blanket authorization, however, makes no distinction between the securities of publicly-traded utilities or securities of privately-held utilities. On the one hand, this approach might be reasonable because the distinction between public utilities whose securities are publicly-held and public utilities whose securities are privately-held is not critical to the issues of control presented under the FPA, and the affirmations and ongoing commitments made in the form of Affirmation annexed hereto are not in any way dependent upon the status of the issuer as a publicly-held company. We note that Harbinger argues that the distinction that EPSA would make between publicly-traded securities and securities of privately-held companies would lead to a nonsensical situation, namely, that in the case where an investor owns interests in both non-publicly-held and publicly-held utilities, the non-publicly-held utility would have to presume an affiliation that the publicly-held utility would not.<sup>28</sup>

43. On the other hand, expanding EPSA's request to apply to voting securities of privately-held utilities may impact existing blanket authorizations and their related conditions. For example, if the blanket authorizations under section 203 that we are proposing today could be relied upon for transactions that have previously been authorized by order,<sup>29</sup> then the

<sup>28</sup> Harbinger comments at 16–17 (EL08–87–000) (September 30, 2008).

<sup>29</sup> Specifically, in a series of orders, the Commission granted blanket authorizations for a period of two years for acquisitions and holdings of up to 20 percent of the voting securities of certain public utilities. Although the Commission made no findings on whether the acquisition of securities would result in a transfer of control of the public utility, it imposed conditions to address concerns over transfers in control and potential adverse effects on competition. Among these conditions is

<sup>25</sup> See *Horizon*, 125 FERC ¶ 61,209; *Capital Research*, 116 FERC ¶ 61,267 (2006).

<sup>26</sup> See, e.g., 18 CFR 33.1(c)(11)–(15).

<sup>27</sup> See, e.g., *Morgan Stanley*, 121 FERC ¶ 61,060 at P 34; *Legg Mason*, 121 FERC ¶ 61,061 at P 18.

conditions imposed in those orders, to limit the adverse impact on competition and create transparency through reporting requirements, would arguably no longer apply.<sup>30</sup>

44. As proposed herein, the proposed blanket authorizations make no distinctions between the securities of publicly-traded utilities or securities of privately-held utilities. The Commission invites comment on whether its proposed blanket authorizations under section 203 should be limited to acquisitions of voting securities of publicly-traded utilities, or whether the proposed blanket authorizations should apply to acquisitions of voting securities of privately-traded companies as well.

45. Further, although the affiliate compliance issues that EPSA focused on in its petition result largely from secondary market purchases of a public utility's voting securities, the rules that we are proposing under Part 33 make no distinctions between secondary market purchases and direct acquisitions of securities from the issuing public utility. The Commission invites comment on whether the proposed blanket authorizations under section 203 should be limited to secondary market transactions or should apply regardless of the form of the transaction.

#### d. Filing of Affirmation in Support of Exemption From Affiliation Requirements

46. Most filings made under the blanket authorizations in Part 33 are submitted in dockets established for each blanket authorization, which are updated by year. For instance, a Schedule 13D, Schedule 13G, or Form 13F filed under 18 CFR § 33.1(c)(4) would be submitted in Docket No. HC09-5, if submitted in 2009, and Docket No. HC10-5, if submitted in 2010. For consistency, the Commission is proposing that one docket should be established for filing of all Affirmations and quarterly updates. In addition, because the acquisition of 10 percent or more of the outstanding voting

a requirement that the acquiring party must be a financial-type entity and not primarily engaged in an energy-related business. The Commission also restricted the acquiring party from holding more than five percent of another jurisdictional asset within the same market area. In addition, the Commission imposed certain reporting requirements on the public utility disposing of its securities under such a blanket authorization. *See, e.g., Entegra Power Group, LLC*, 115 FERC ¶ 62,038 (2006) (delegated letter order); *MACH Gen, LLC*, 113 FERC ¶ 61,138 (2005).

<sup>30</sup> Because the securities of these companies are traded privately and therefore there is less transparency of ownership interests, the Commission conditioned approval of requests for authorizations by imposing reporting requirements. *MACH Gen*, 113 FERC ¶ 61,138 at P 40.

securities of a public utility is likely to have broad implications for that company, the Commission is also proposing that the filer of an Affirmation be required to provide a paper copy of the Affirmation to the public utility whose securities are acquired at the same time as it is filed with the Commission. The Commission invites comment on these proposals.

#### C. Definition of Affiliate

##### 1. Market-Based Rate Program

###### a. Market Power Analysis

47. Under the market-based rate regulations, an "affiliate" of a specified company includes, among other things, "[a]ny person that is under common control with the specified company."<sup>31</sup> The Commission allows power sales at market-based rates if the seller and its affiliates lack or have adequately mitigated both horizontal and vertical market power. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen, both of which consider the generation assets owned or controlled by the seller and its affiliates. If a seller passes both of the screens, there is a rebuttable presumption that the seller lacks horizontal market power.

48. To demonstrate a lack of vertical market power, a seller that owns, operates or controls transmission facilities, or whose affiliates own, operate or control transmission facilities, must have an Open Access Transmission Tariff (OATT) on file with the Commission. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis. The Commission requires a seller to provide information describing its ownership or control of, or affiliation with an entity that owns or controls, inputs to electric power production.<sup>32</sup> A seller must also make an affirmative statement that it has not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

<sup>31</sup> Order No. 697-A, 73 FR 25832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, at P 182-83. "[O]wning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control." 18 CFR 35.36(a)(9)(E).

<sup>32</sup> Inputs to electric power production means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership or control over who may access transportation of coal supplies.

##### b. Change in Status Reporting

49. As a condition of obtaining and retaining market-based rate authority, sellers must timely report to the Commission "any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority."<sup>33</sup> The Commission clarified in Order No. 697 that the change in status requirements are intended to track the requirements embedded in the horizontal and vertical analyses and the affiliate abuse representations.<sup>34</sup> Market-based rate sellers are required to file notices of change in status for ownership or control of generation capacity that results in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities. In addition, "[a]ffiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation facilities or inputs to electric power production, affiliation with any entity not disclosed in the application for market-based rate authority that owns, operates or controls transmission facilities, or affiliation with any entity that has a franchised service area" are reportable changes in status.<sup>35</sup> In Order No. 652, the Commission concluded that the reporting obligation should extend only to changes in circumstances within the knowledge and control of the seller.<sup>36</sup>

50. When submitting a notice of change in status regarding a change that impacts the pertinent assets held by a seller or its affiliates with market-based rate authorization, a seller must also include an asset appendix, which lists the filing entity and all of its energy affiliates and their associated generation assets as well as electric transmission assets, natural gas intrastate pipelines, and gas storage facilities owned or controlled by the entity or its energy affiliates.<sup>37</sup>

##### c. Affiliate Restrictions

51. The concept of affiliation is also important in determining the scope of the Commission's restrictions on affiliate transactions. The Commission

<sup>33</sup> 18 CFR 35.42(a).

<sup>34</sup> *See* Order No. 697, 72 FR 39904 (Jul. 20, 2007), FERC Stats. & Regs. ¶ 31,252 at P 1018.

<sup>35</sup> 18 CFR 35.42(a)(2).

<sup>36</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 FR 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, at P 27 (2005), *order on reh'g*, 111 FERC ¶ 61,413 (2005).

<sup>37</sup> Part 35, Subpart H, Appendix B. An asset appendix is required for new market-based rate applications and updated market analyses.



has adopted restrictions on affiliates in the market-based rate regulations.<sup>38</sup> These regulations govern power sales, sales of non-power goods and services, separation of functions, and information sharing between franchised public utilities with captive customers and their market-regulated power sales affiliates.

52. The Commission has also adopted cross-subsidization restrictions on affiliate transactions in Subpart I of its regulations, as discussed further below.<sup>39</sup> These regulations govern power and non-power goods and services transactions between franchised public utilities with captive customers and their market-regulated power sales and non-utility affiliates.

53. Both sets of rules regulate affiliate transactions to address the Commission's concern that a franchised public utility and an affiliate may be able to engage in transactions in ways that transfer benefits from the captive customers of the franchised public utility to the affiliate and its shareholders.<sup>40</sup> Any changes to the definition of affiliate would necessarily affect the scope of both of these sets of restrictions.

#### d. Other Implications of Affiliation in the Market-Based Rate Program

54. Affiliation also plays a key role in determining whether a seller qualifies as a Category 1 Seller, a limited category that is exempt from the requirement of filing a regularly scheduled updated market power analysis every three years.<sup>41</sup> A Category 1 Seller cannot be affiliated with an entity that owns, operates or controls transmission facilities in the same region as the seller's generation assets and cannot be affiliated with a franchised public utility in the same region as the seller's generation assets. Moreover, a Category 1 Seller can only own or control 500 MW or less of generation in a region. Affiliate generation is included in the 500 MW or less determination. Finally, in order to qualify as a Category 1 Seller, a seller cannot raise "other vertical market power issues." In that regard, the Commission will consider whether the seller's affiliate has holdings that raise

vertical market power issues and can erect barriers to entry.

#### 2. Cross-Subsidization Restrictions on Affiliate Transactions

55. In Order No. 707, the Commission added Subpart I to Part 35 of its regulations to codify affiliate restrictions applicable to all power and non-power goods and services transactions between franchised public utilities with captive customers and their market-regulated power sales and non-utility affiliates. The Commission also promulgated pricing restrictions on the sale of non-power goods and services.<sup>42</sup> For purposes of Subpart I, the Commission also adopted a definition of "affiliate."<sup>43</sup> As is the case with the definition of "affiliate" in Subpart H, an "affiliate" of a specified company for purposes of Subpart I includes "[a]ny person that is under common control with the specified person."<sup>44</sup>

#### 3. Proposal

56. Under the Commission's current rules, an investor is an "affiliate" of a public utility if it "owns, controls, or holds with power to vote" 10 percent or more of the public utility's outstanding voting securities. Also under this analysis, the public utility is considered to be an affiliate of the investor, and two companies under common control are also considered affiliates. Owning, controlling or holding with power to vote less than 10 percent of the outstanding voting securities of a specified public utility company creates a rebuttable presumption of lack of control.

57. The Commission proposes to modify this definition so that an affiliate relationship exists when an investor is able to control a public utility. The proposed definition also provides that the Commission may, after appropriate notice and opportunity for hearing, determine that any person is an affiliate of a specified company if it finds that such person exercises directly or

indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a degree of influence (through ownership of voting securities or otherwise) over the management or policies or operations of the specified company as to make it necessary or appropriate in the public interest that the person be treated as an affiliate. Owning, controlling, or holding with power to vote less than 10 percent of the outstanding voting securities would continue to create a rebuttable presumption of lack of control.

58. Under the proposed amendments to Part 33, owning, controlling, or holding with power to vote 10 percent or more, but less than 20 percent, of the outstanding voting securities, as long as the Affirmation had been filed within 10 days after the acquisition, would create an affiliate relationship, but would qualify for a waiver of the regulatory requirements pertaining to affiliated companies.

59. As a consequence of this modified definition, a public utility subject to the Affirmation in Part 33 would not be required to file a notice of change in status or include the investor or the investor's other affiliates in its market power analysis, and would not be subject to the affiliate transaction rules for transactions with the investor or the investor's other affiliates. The Commission proposes these changes because it believes that the commitments required by the Affirmation, and the Commission's related enforcement of those commitments, will be rigorous enough to ensure adequate oversight of public utilities and protection of utility customers.

60. The Commission proposes to adopt the same definition of "affiliate" for purposes of the cross-subsidization rules in Subpart I so that the definitions of "affiliate" in Subparts H and I are consistent. We believe that the proposed changes to the definition of "affiliate" in the cross-subsidization regulations will not adversely impact our ability to protect against cross-subsidization. In connection with these changes, the Commission is also proposing to add a definition of "voting security" to both section 35.36 and section 35.43. As proposed, the term "voting security" would mean "any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company." This is the same meaning as given under the Public Utility Holding Company Act of 2005.<sup>45</sup>

<sup>42</sup> These rules are codified at 18 CFR 35.44.

<sup>43</sup> 18 CFR 35.43(a)(1).

<sup>44</sup> 18 CFR 35.43(a)(1)(D). The definitions of the term "affiliate" in Subpart H and Subpart I differ in other respects, such as the definition in Subpart I has a five percent threshold for affiliation for exempt wholesale generators, due principally to the fact that definitions were adopted in parallel rulemakings that were not synchronized. As discussed below, the Commission is proposing herein to conform the definition of "affiliate" used in Subpart I to the definition (as proposed to be amended) used in Subpart H. The five percent threshold for affiliation for exempt wholesale generators under Subpart H was eliminated in Order No. 697-B, FERC Stats. & Regs. ¶ 31,285, at P 48, and we propose to eliminate that separate threshold under Subpart I here, for the same reasons.

<sup>38</sup> These rules are codified at 18 CFR 35.39.

<sup>39</sup> These rules are codified at 18 CFR 35.43 and 35.44.

<sup>40</sup> For a discussion see *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 FR 11013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264, at P 4-5, *order on rehearing*, Order No. 707-A, 73 FR 43072 (Jul. 24, 2008), FERC Stats. & Regs. ¶ 31,272 (2008).

<sup>41</sup> 18 CFR 35.36(a)(2).

<sup>45</sup> 42 U.S.C. 16451(17) (2006); see also *AES Creative Resources, L.P.*, 129 FERC ¶ 61,239, at P 24 (2009) (confirming that the term "voting

Comment is also requested on this proposal.

61. We note that this framework will apply to public utilities whose outstanding voting securities have been acquired by a holding company that has filed an Affirmation as part of the blanket authorization under section 203. However, where the investor is not a holding company and therefore not subject to section 203(a)(2), the investor will not have filed an Affirmation with the Commission, and the public utility will be affiliated with the investor and its other holdings,<sup>46</sup> raising concerns related to the requirements of the market-based rate program discussed above. To address this situation, the Commission proposes to allow investors that are not subject to the blanket authorizations proposed above to also file the Affirmation with the Commission. Such an investor may have an incentive to file the Affirmation to protect the market-based rate authorization of the public utility in which it has invested. The public utility would then be relieved of the requirements discussed above. The Commission invites comment on its proposal.

#### IV. Information Collection Statement

62. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection and data retention requirements imposed by agency rules.<sup>47</sup> Therefore, the Commission is submitting the proposed modifications to its information collections to OMB for review and approval in accordance with section 3507(d) of the Paperwork Reduction Act of 1995.<sup>48</sup>

63. The "public protection" provisions of the Paperwork Reduction Act 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

security," as used in the market-based rate regulations, was intended to have the same meaning as the definition of "voting security" adapted from the PUHCA 1935 and set forth in PUHCA 2005).

<sup>46</sup> To the extent that the investor has holdings in, and the public utility becomes affiliated with, a company that controls, for instance, sources of coal supplies and the transportation of coal supplies such as barges and rail cars, then the public utility must account for these inputs in its market power analysis. 18 CFR 35.37.

<sup>47</sup> 5 CFR 1320.

<sup>48</sup> 44 U.S.C. 3507(d).

regulations, the control number is to be published in the **Federal Register**.

64. The Commission is proposing amendments to the Commission's regulations to provide for limited blanket authorizations under FPA section 203(a)(1) and FPA section 203(a)(2). Although the Affirmation constitutes a new reporting requirement, it is offset by the reduction in applications under section 203 and related reporting requirements under section 205 under the market-based rate program. In lieu of a section 203 application, the Affirmation would need to be filed with the Commission, reducing the filing burden. Moreover, the related filings under the market-based rate program under section 205, such as the notices of change in status, would also decrease. This would reduce the burden on the electric industry because it will reduce the number of filings that need to be made with the Commission.

65. The Commission estimates there will be 10 initial filers each filing an average of 1.2 Affirmations annually with an estimated time of response of 3.5 hours, for a total of 42 hours. The Commission further estimates that there will be 40 annual updates to the initial filings with an estimated time of response of 1 hour each, for a total of 40 hours. Therefore the Affirmation would create a total reporting burden of 82 hours annually. Since the Affirmation is voluntary for holding companies that wish to avoid filing a complete application of approval under section 203(a)(2) of the FPA, the Commission believes the preparation of the Affirmation will consume less time than preparation of an application for approval under section 203(a)(2).

*Title:* FERC-519C, Applications Under Federal Power Act Section 203; FERC-516, Electric Rate Schedule Filings.

*Action:* Proposed Collection.

*OMB Control No.:* To be determined by OMB following issuance of the final rule.

*Respondents:* Businesses or other for-profit institutions.

*Frequency of Responses:* Occasionally.

*Necessity of the Information:* The Commission is proposing limited blanket authorizations under section 203(a)(1) and section 203(a)(2), providing for a category of jurisdictional transactions under section 203 for which the Commission would not require applications seeking prior approval. Under the proposed blanket authorization, the public utility whose securities are acquired would be exempt from the requirements of the market-

based rate program and restrictions on affiliate transactions under Part 35. The information collected pursuant to this Affirmation will allow the Commission to monitor public utility holding companies that are granted an exemption of affiliate reporting requirements and to ensure that a holding company's acquisitions and subsequent conduct are consistent with the public interest. Commission enforcement staff may periodically review and seek to verify the statements made in filed Affirmations.

*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.

66. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502-8415, fax: (202) 273-0873, e-mail: [michael.miller@ferc.gov](mailto:michael.miller@ferc.gov)].

67. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Information and Regulatory Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone (202) 395-7345, fax: (202) 395-7285, e-mail: [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov)].

#### V. Environmental Analysis

68. 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.<sup>49</sup> The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. The proposed regulations are categorically excluded as they address actions under section 203<sup>50</sup> and section 205.<sup>51</sup> Accordingly, no environmental assessment is necessary

<sup>49</sup> *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

<sup>50</sup> 18 CFR 380.4(a)(16).

<sup>51</sup> 18 CFR 380.4(a)(15).

and none has been prepared in this NOPR.

## VI. Regulatory Flexibility Act Analysis

69. The Regulatory Flexibility Act of 1980 (RFA)<sup>52</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. Most filing companies regulated by the Commission do not fall within the RFA's definition of small entity.<sup>53</sup> Moreover, as noted above, this proposed rule provides for a blanket authorization under section 203 that would extend to an exemption from certain filing requirements under Part 35 of the Commission's regulations. Thus, filing requirements are reduced by the rule. Therefore, the Commission certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required.

## VII. Comment Procedures

70. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due March 29, 2010. Comments must refer to Docket No. RM09-16-000, and must include the commenters' name, the organization they represent, if applicable, and their address in their comments.

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

72. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the

Commission, 888 First Street, NE., Washington, DC 20426.

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

## VIII. Document Availability

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

75. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

76. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or e-mail at [ferconlinesupport@ferc.gov](mailto: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](mailto:public.referenceroom@ferc.gov).

## List of Subjects

### 18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

### 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By direction of the Commission.  
Commissioner Norris voting present.

**Nathaniel J. Davis, Sr.,**  
*Deputy Secretary.*

In consideration of the foregoing, the Commission proposes to amend parts 33 and 35, Chapter I, Title 18, *Code of Federal Regulations*, 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. Section 33.1 is amended by revising paragraphs (c)(2), (c)(12), and (c)(17) to read as follows:

### § 33.1 Applicability, definitions, and blanket authorizations.

\* \* \* \* \*

(c) \* \* \*

(2) Any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to purchase, acquire, or take:

(i) Any non-voting security (that does not convey sufficient veto rights over management actions so as to convey control) 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; or

(ii) Any 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:

(A) The holding company will own less than 10 percent of the outstanding voting securities of such company; or

(B) The holding company will own 10 percent or more but less than 20 percent of the outstanding voting securities of such company, provided that such holding company has not acquired, and does not hold, such securities for the purpose of or with the effect of changing or influencing the control of the specified company, and has not acquired, and does not hold, such securities in connection with or as a participant in any transaction having that purpose or effect, and must within 10 days following such acquisition file with the Commission an Affirmation in Support of Exemption from Affiliation Requirements, Form 519-C, and provide a copy to such company.

(1) The statement must be signed by a senior executive officer of the company filing the statement, and must be verified under oath.

(2) A public utility whose voting securities are acquired, directly or indirectly, in a transaction described in paragraph (c)(2)(ii)(B) of this section shall be exempt from the requirements of an "affiliate" in Part 35.

(3) If a holding company that has filed with the Commission an Affirmation in Support of Exemption from Affiliation Requirements subsequently determines that it no longer wishes to be bound by the commitments set forth in the Affirmation in Support of Exemption

<sup>52</sup> 5 U.S.C. 601-12.

<sup>53</sup> 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.

from Affiliation Requirements, the holding company must either reduce its ownership interest to below 10 percent of the outstanding voting securities of the company that has issued such securities or file with the Commission an application under section 203 of the Federal Power Act to request authorization to retain such securities, provided that, during the pendency of any application, it shall continue to comply with all of the commitments made in the Affirmation in Support of Exemption from Affiliation Requirements; or

(iii) Any security of a subsidiary company within the holding company system.

\* \* \* \* \*

(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:

(i) 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:

(A) Less than 10 percent of the outstanding voting securities of such public utility, or

(B) 10 percent or more and less than 20 percent of the outstanding voting securities of such public utility, provided that the holding company has complied with all requirements of paragraph (c)(2)(ii)(B) of this section; or

(ii) Any person other than a holding company if, after the transfer, the person and any of its associate or affiliate companies in aggregate will own:

(A) Less than 10 percent of the outstanding voting securities of the public utility and within 30 days after the end of the calendar quarter in which such transfer has occurred the public utility notifies the Commission in accordance with paragraph (c)(17) of this section, or

(B) 10 percent or more but less than 20 percent of the outstanding voting securities of the public utility, provided that the person has filed Form 519-C and continues to abide by the commitments stated in the form.

\* \* \* \* \*

(17) A public utility granted blanket authorization under paragraph (c)(12)(ii)(A) of this section to transfer its outstanding voting securities shall, within 30 days after the end of the calendar quarter in which such transfer has occurred, file with the Commission a report containing the following information:

(i) The names of all parties to the transaction;

(ii) Identification of the pre- and post-transaction voting security holdings (and percentage ownership) in the public utility held by the acquirer and its associate or affiliate companies;

(iii) The date the transaction was consummated;

(iv) Identification of any public utility or holding company affiliates of the parties to the transaction; and

(v) A statement indicating that the proposed transaction will not result in, at the time of the transaction or in the future, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company as required in § 33.2(j)(1).

### PART 35—FILING OF RATE SCHEDULES AND TARIFFS

3. The authority citation for part 35 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.

4. In § 35.36, paragraph (a)(9) is revised, and paragraph (a)(10) is added, to read as follows:

#### § 35.36 Generally.

(a) \* \* \*

(9) *Affiliate* of a specified company means any person that controls, is controlled by, or is under common control with the specified company.

(i) Owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

(ii) The Commission may, after appropriate notice and opportunity for hearing, determine that any person is an affiliate of a specified company if it finds that the person exercises directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a degree of influence (through ownership of voting securities or otherwise) over the management or policies or operations of the specified company as to make it necessary or appropriate in the public interest that the person be treated as an affiliate.

(10) *Voting security* means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.

\* \* \* \* \*

6. In § 35.43, paragraph (a)(1) is revised and paragraph (a)(6) is added, to read as follows:

#### § 35.43 Generally.

(a) \* \* \*

(1) *Affiliate* of a specified company means any person that controls, is

controlled by, or is under common control with the specified company.

(i) Owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

(ii) The Commission may, after appropriate notice and opportunity for hearing, determine that any person is an affiliate of a specified company if it finds that the person exercises directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a degree of influence (through ownership of voting securities or otherwise) over the management or policies or operations of the specified company as to make it necessary or appropriate in the public interest that the person be treated as an affiliate.

\* \* \* \* \*

(6) *Voting security* means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.

\* \* \* \* \*

[FR Doc. 2010–1544 Filed 1–27–10; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 23 CFR Part 1340

[Docket No. NHTSA–2010–0002]

RIN 2127–AK41

#### Uniform Criteria for State Observational Surveys of Seat Belt Use

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This NPRM proposes amendments to the regulations establishing the criteria for designing and conducting State seat belt use observational surveys, procedures for obtaining NHTSA approval of survey designs, and a new form for reporting seat belt use rates to NHTSA. NHTSA proposes these amendments so that future surveys will give States more accurate data to guide their occupant protection programs.

**DATES:** Written comments may be submitted to this agency and must be received no later than March 29, 2010.

**ADDRESSES:** You may submit comments identified by DOT Docket ID Number