

October 2005

A DESCRIPTION OF NOTICE OF PROPOSED RULEMAKING TO IMPLEMENT NEW MERGER GUIDELINES IN THE ENERGY POLICY ACT OF 2005

Summary

The [Energy Policy Act of 2005](#) (“EPAAct 2005”) revises and expands the authority of The Federal Energy Regulatory Commission (“Commission” or “FERC”) to review and approve merger and other transactions involving public utility facilities under [Section 203 of the Federal Power Act](#) (“FPA”). The revised and expanded Section 203 becomes effective February 8, 2006. The Commission has issued a [Notice of Proposed Rulemaking](#) (“NOPR”) proposing regulations to implement its new merger authority under EPAAct 2005. Comments on the proposed rulemaking are due at the Commission by November 7, 2005.

Background

Currently, Section 203 of the FPA provides that Commission authorization is required for: (1) mergers or consolidations involving jurisdictional facilities of a public utility; (2) the sale, lease or other disposition of jurisdictional facilities with a value in excess of \$50,000; and (3) the purchase by a public utility of the securities of another public utility. “Jurisdictional facilities” are generally deemed to include both physical and paper (e.g., power purchase agreements, market-based rate authorizations, etc.) assets related to the transportation of electric power in interstate commerce or the sale of electric power for resale (wholesale sales). A “public utility” for purposes for Section 203 is generally deemed to be any person who owns or operates jurisdictional facilities. Transactions involving only electric generating facilities and electric distribution facilities (retail) are generally not subject to the Commission’s jurisdiction under Section 203.

Section 203 requires the Commission to authorize a proposed transaction if it determines that the transaction is consistent with the public interest. To make this determination, the Commission will review the proposed transaction’s effect on: (1) competition, (2) rates, and (3) regulation.

Highlights:

The Commission’s proposed new rules implementing the merger provisions of the Energy Policy Act of 2005 would:

1. Increase the value threshold from \$50,000 to \$10 million for most classes of transactions subject to Section 203;
2. Extend Commission jurisdiction to transactions involving generation facilities and public utility holding companies; and
3. Require the Commission to examine possible cross-subsidization as a result of a transaction.

Helpful Links

- [The Federal Power Act](#)
- [The Code of Federal Regulations](#)
- [The Energy Policy Act of 2005](#)
- [The Public Utilities Holding Company Act of 1935](#)
- [Hart-Scott-Rodino Act](#)

Relevant Web Sites

- [The Federal Energy Regulatory Commission](#)
- [The Securities and Exchange Commission](#)
- [The Federal Trade Commission](#)

- With regard to the effect on competition, the Commission generally adopts the analytical framework contained in the Department of Justice/Federal Trade Commission 1992 [Horizontal Merger Guidelines](#) and, in addition, it applies analytical screens that allow quick identification of transactions that do not raise competitive concerns.
- With regard to effect on rates, the Commission generally focuses on the presence of measures designed to insulate consumers from any harm resulting from the transaction.
- With regard to effect on regulation, the Commission generally examines any potential shift in regulation from the Commission to the Securities and Exchange Commission due to a transaction creating a registered public utility holding company under the Public Utility Holding Company Act of 1935 (“PUHCA 1935”). The Commission will usually require applicants to commit to abide by the Commission’s policies with regard to affiliate transactions involving non-power goods and services.

New Merger Related Requirements in EAct 2005

EAct 2005 revises and expands the Commission’s authority under Section 203 of the FPA in several material respects.

1. The value of a sale, lease or disposition of jurisdictional facilities by a public utility must now be in excess of \$10 million to require Commission authorization under Section 203.
2. The purchase, lease or acquisition of an existing generation facility by a public utility with a value in excess of \$10 million now requires Commission authorization under Section 203.
3. The value of a purchase, acquisition or other “taking” of a security by a public utility of another public utility must now exceed \$10 million to require Commission authorization under Section 203.
4. Commission authorization is required under Section 203 before a holding company in a holding company system, including a jurisdictional public utility, may acquire securities with a value in excess of \$10 million, or either directly or indirectly merge or consolidate a jurisdictional public utility or a holding company in a holding company system that includes a jurisdictional public utility, with a value in excess of \$10 million.
5. Section 203’s requirement that no public utility shall merge or consolidate its jurisdictional facilities or any part thereof with any other person without first obtaining Commission authorization remains unchanged. There is no value threshold required to trigger the obligation to obtain Commission authorization.

6. Perhaps the most significant addition to the Commission's merger review authority is that, in addition to determining whether the proposed transaction is consistent with the public interest in order to authorize a proposed transaction under Section 203, the FPA now explicitly requires the Commission to prohibit transactions that would result in cross-subsidization of a non-utility associate company or a pledge or an encumbrance of utility assets for the benefit of an associate company, unless doing so would be consistent with the public interest.

Issues on Which the Commission Seeks Comments

In the NOPR, the Commission explains how it plans to address some issues that arise in EPCRA 2005 and seeks public comment regarding other issues.

Defining "Value": Where the transfer of physical facilities is concerned, the Commission proposes to define "value" as the market value of such facilities, though in the absence of a readily ascertainable market value, the Commission may consider original undepreciated cost. With respect to paper jurisdictional facilities, the Commission proposes to define "value" based on total expected contract revenues over the remaining life of the contract. The Commission proposes to define the "value" of a security as its market value when acquired, and sought comment regarding the measure of "value" of security transactions involving affiliates or thinly traded securities. The Commission seeks comment on its proposed definitions of "value." The Commission does not appear to have looked to the well-developed policies of the Federal Trade Commission that guide its valuation of transactions for review under the [Hart-Scott-Rodino Act](#).

Defining "Existing Generation Facility": The Commission proposes to define an "existing generation facility" as a facility that is operational at the time the transaction is consummated. The Commission seeks comment on this proposal.

Defining "Electric Utility Company": Noting that the provision giving it authority over the acquisition of public utility securities by a holding company in a holding company system including an electric or transmitting utility company does not define the term "electric utility company," the Commission proposed to define that term as it is defined in the Public Utility Holding Company Act of 2005, which is any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale. FERC seeks comment on the use of this definition.

Prohibition of Cross-Subsidization: Other than proposing a definition of the term "non-utility associate company" to mean any associate company in a holding company system other than a public utility or electric utility company subject to cost-based regulation, the Commission does not propose new measures in this area. The Commission stated that it uses its existing statutory authority over rates to protect against cross subsidization between regulated utilities

and their non-regulated affiliates, and seeks comments on whether additional measures are necessary.

Expedited Review Process: To satisfy the new requirement that the Commission shall establish a process to review transactions on an expedited basis, FERC proposes that if it does not act on an application within 180 days, the application will be deemed granted, unless the Commission extends the review period for good cause. The proposal also allows for expedited approval of non-contested non-merger applications, including the acquisition of a foreign utility company by a U.S. holding company, and seeks comment regarding how the Commission can expedite review of such transactions while protecting captive U.S. customers.

The Commission is accepting comments on the NOPR through November 7, 2005.

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