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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 2 and 33

(Docket No. RM05-34-001; Order No. 669-A)

Transactions Subject to FPA Section 203

(Issued April 24, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission (Commission) reaffirms its determinations in part and grants rehearing in part of Order No. 669, 71 FR 1348 (2006) which revised 18 CFR § 2.26 and 18 CFR Part 33 to implement amended section 203 of the Federal Power Act (FPA).

DATES: This order on rehearing will be effective on [Insert date 30 days after the date of publication in **FEDERAL REGISTER**].

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Transactions Subject to FPA Section 203 Docket No. RM05-34-001

ORDER NO. 669-A

ORDER ON REHEARING

(Issued April 24, 2006)

I. Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005)[1] was signed into law. Section 1289 (Merger Review Reform) of Title XII, Subtitle G (Market Transparency, Enforcement, and Consumer Protection),[2] of EPAct 2005 amends section 203 of the Federal Power Act (FPA).[3] Amended section 203: (1) increases (from $50,000 to $10 million) the value threshold above which certain transactions are subject to section 203; (2) extends the scope of section 203 to include transactions involving certain transfers of generation facilities and certain public utility holding companies' transactions with a value in excess of $10 million; (3) limits the Federal Energy

[1] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[2] EPAct 2005 at 1281 et seq.

[3] 16 U.S.C. 824b (2000).

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Regulatory Commission's (Commission) review of a public utility's acquisition of securities of another public utility to transactions greater than $10 million; (4) requires that the Commission, when reviewing proposed section 203 transactions, examine cross-subsidization and pledges or encumbrances of utility assets; and (5) directs the Commission to adopt, by rule, procedures for the expeditious consideration of applications for the approval of transactions under section 203.

2. On October 3, 2005, the Commission issued a notice of proposed rulemaking (NOPR) requesting comment on its proposal to amend its regulations to implement amended section 203.[4] As discussed below, on December 23, 2005, the Commission issued a final rule (Order No. 669)[5] adopting certain modifications to 18 CFR § 2.26 and 18 CFR Part 33 to implement amended section 203. Generally, Order No. 669:

> (1) Implemented the new applicability of amended section 203;

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[4] Transactions Subject to FPA Section 203, 70 FR 58636 (Oct. 7, 2005), FERC Stats. & Regs. ¶ 32,589 (2005).

[5] Transactions Subject to FPA Section 203, Order No. 669, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005). On January 10, 2006, the Commission issued an errata notice to Order No. 669 revising parts of the regulatory text to conform to the version of the order that was issued in the Federal Register. Transactions Subject to FPA Section 203, 114 FERC ¶ 61,018 (2006). As relevant here, in instruction 7, at 18 CFR 33.11(b)(2), a footnote was added after "(2) transactions that do not require Appendix A analysis," reading: "Inquiry Concerning the Commission's Merger Policy Under the FederalPower Act: Policy Statement," Order No. 592, 61 FR 68595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), reconsideration denied, Order No. 592-A, 62 FR 33340 (June 19, 1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement).

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> (2) Granted blanket authorizations, in some instances with conditions, for certain types of transactions, including acquisitions of foreign utilities by holding companies, intra-holding company system financing and cash management arrangements, certain internal corporate reorganizations, and certain acquisitions of securities of transmitting utilities and electric utility companies;
> (3) Defined terms, including "electric utility company," "holding company," and "non-utility associate company;"
> (4) Defined "existing generation facility;"
> (5) Adopted rules on the determination of "value" as it applies to various section 203 transactions;
> (6) Set forth a section 203 applicant's obligation to demonstrate that a proposed transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company; and
> (7) Provided for expeditious consideration of completed applications for the approval of transactions that are not contested, do not involve mergers, and are consistent with Commission precedent.

3. In Order No. 669, the Commission also announced that, at a technical conference on the Public Utility Holding Company Act of 2005 (PUHCA 2005),[6] to be held within the next year,[7] we will also address certain issues raised in this proceeding. These include whether the blanket authorizations granted in Order No. 669 should be revised

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[6] EPAct 2005 at 1261 et seq. Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667, 70 FR 55805, FERC Stats. & Regs. ¶ 31,197 (2005) (PUHCA 2005 Final Rule).

[7] PUHCA 2005 Final Rule at P 17. The Commission stated that we intend to hold a technical conference no later than one year after PUHCA 2005 became effective to evaluate whether additional exemptions, different reporting requirements, or other regulatory actions need to be considered. The PUHCA 2005 Final Rule took effect on February 8, 2006.

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and whether additional protection against cross-subsidization and pledges or encumbrance of utility assets is needed.[8]

4. In this order, the Commission grants rehearing in part, grants clarification in part, and denies rehearing in part of its Order No. 669. Our actions here will necessitate further changes in the regulations. In light of the number of regulatory text changes, the Commission is including the revised regulations in their entirety. In addition, for the convenience of interested persons, we will include a version of the revised regulations in their entirety that highlights the changes from Order No. 669 as a separate attachment. (See Appendix B.) This attachment will not be published in the Federal Register.

II. Background

5. The background to Order No. 669 is set forth in detail in that order. We will summarize it here.

A. Pre-EPAct 2005 Standards

6. Prior to EPAct 2005, section 203 provided that

> no public utility shall sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it do so.

[8] Order No. 669 at P 4.

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The Commission applied the "public interest" standard in approving proposed transactions. The purpose of the Merger Policy Statement was to ensure that mergers are consistent with the public interest and to provide greater certainty and expedition in the Commission's analysis of merger applications. The Merger Policy Statement sets out three factors the Commission generally considers when analyzing whether a proposed section 203 transaction is consistent with the public interest: effect on competition; effect on rates; and effect on regulation. The Commission later issued the Filing Requirements Rule,[9] a final rule updating the filing requirements under 18 CFR Part 33 of the Commission's regulations for section 203 applications. The Filing Requirements Rule implements the Merger Policy Statement and provides detailed guidance to applicants for preparing applications. The revised filing requirements also assist the Commission in determining whether section 203 transactions are consistent with the public interest, provide more certainty, and provide for expedited review of such applications.

B. EPAct Revisions to Section 203 and Order No. 669

7. Amended section 203(a)(1) states that no public utility shall, without first having secured an order of the Commission authorizing it to do so: (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the

[9] Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 FR 70,984 (Nov. 28, 2000), FERC Stats. & Regs., July 1996-Dec. 2000 ¶ 31,111 (2000), order on reh'g, Order No. 642-A, 66 FR 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001) (codified at 18 CFR Part 33 (2005)) (Filing Requirements Rule).

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Commission, or any part thereof of a value in excess of $10 million; (B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever; (C) purchase, acquire, or take any security with a value in excess of $10 million of any other public utility; or (D) purchase, lease, or otherwise acquire an existing generation facility: (i) that has a value in excess of $10 million; and (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

8. Section 203(a)(2) adds the entirely new requirement that no holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10 million of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10 million without prior Commission authorization.

9. Amended section 203(a)(4) states that, after notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control if it finds that the transaction will be consistent with the public interest. This standard was contained in the pre-EPAct 2005 section 203 as well. Amended section 203(a)(4) also provides a new specific requirement that the Commission must find that the transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate

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company, unless that cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

10. Section 203(a)(5) adds the entirely new requirement that the Commission shall adopt procedures for the expeditious consideration of applications for the approval of section 203 transactions. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the section 203 standards for approval. The Commission shall provide expedited review for such transactions. It further provides that the Commission must act on a proposed section 203 transaction within 180 days of filing but may extend the time for not more than an additional 180 days for good cause.

11. Section 203(a)(6), which is also new, provides that for purposes of this section, the terms "associate company," "holding company," and "holding company system" have the meaning given those terms in PUHCA 2005.[10]

12. Order No. 669 became effective on February 8, 2006. The aspects of Order No. 669 on which rehearing were filed are described in more detail below.[11]

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[10] EPAct 2005 at 1262.

[11] The entities that filed requests for rehearing are listed in an appendix to this order.

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III. Discussion

A. 18 CFR Part 33

1. Section 33.1(b)(3) - Definition of "Value"

13. Section 33.1(b)(3)(i) generally uses market value as the appropriate measure of value for transfers of physical facilities (transmission facilities and generation facilities) for purposes of determining whether the $10 million jurisdictional threshold is met.[12] The rule states that when a transaction occurs between non-affiliates, the Commission will rebuttably presume that market value is the transaction price. For transactions between affiliated companies, value means original cost undepreciated, as defined in the Commission's Uniform System of Accounts, or original book cost,[13] as applicable.

14. Section 33.1(b)(3)(ii) provides that value as applied to transfers of wholesale contracts between non-affiliates also means the market value. The Commission will rebuttably presume that market value is the transaction price. For transfers of contracts between affiliates, value means total expected nominal revenues over the remaining life of the contract.[14]

15. The Commission noted that a complicating factor in relying on transaction price as a measure of market value is that transactions will sometimes include assets whose

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[12] Order No. 669 at P 116. Section 33.1(b)(3)(iii) provides that for securities, value means market value, which is rebuttably presumed to be transaction price.

[13] Book cost, as used here, refers to original book cost.

[14] Order No. 669 at P 120-21.

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transfer is not subject to amended section 203 (non-jurisdictional assets) and the problem arises as to how to value the jurisdictional assets included in the transaction. In this situation, the Commission instructed applicants to rely on a valuation analysis of the individual jurisdictional parts in deciding whether to file for section 203 authorization.

a. Rehearing Requests

16. APPA/NRECA argue that the Commission should require that valuations of asset transactions between non-affiliates under section 203(a)(1)(A) be consistent with generally accepted accounting principles (GAAP), particularly when the transaction also includes non-jurisdictional assets. They assert that, without such a requirement, parties will be able to value jurisdictional assets or weight the value of non-jurisdictional assets to evade Commission review, while maintaining the same total purchase price for all assets.[15]

17. APPA/NRECA are concerned about a possible unintended "spillover effect" of using market value.[16] They request that the Commission confirm that valuation for purposes of determining whether section 203 approval is required will not affect the valuation placed on the assets for purposes of applying cost-based ratemaking standards,

[15] APPA/NRECA Rehearing Request at 24-25.

[16] Id. at 26.

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in particular, the Commission's policy concerning acquisition adjustments in cost-based jurisdictional rates.[17]

18. APPA/NRECA lastly argue that the Commission should require that valuations of wholesale contracts being transferred between non-affiliates be based on the expected contract revenues rather than on market value. They contend that market value, which is based on expected profits, cannot be reliably determined and will be prone to abuse and manipulation. They suggest that "expected profit" has little meaning when the transaction is undertaken as much for risk mitigation purposes as for power supply. Using the same method to value contract transfers between non-affiliates as for affiliates, i.e., expected contract revenues, has the virtue of regulatory simplicity.[18]

19. NARUC argues that the record does not support using "original cost un-depreciated" as market value in transactions between affiliates. NARUC says that net book value is a better way to value the assets in affiliate transactions because it represents the remaining monetary value of an asset that is "used and useful" at the time of the proposed transaction. Net book value, unlike original cost undepreciated, reflects changes in value caused by wear and tear during use of the asset, obsolescence, the return

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[17] Id. The Commission disallows acquisition adjustments in rates absent a showing of ratepayer benefit. See PSEG Power Connecticut, LLC., 110 FERC ¶ 61,020 at P 32 (2005), citing Utilicorp United, Inc., 56 FERC ¶ 61,031 at 61,120 and nn. 26-28, reh'g denied, 56 FERC ¶ 61,427, 62,528-29 (1991).

[18] APPA/NRECA Rehearing Request at 25.

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of capital through annual depreciation expense, and any improvements that have been made since the asset was originally placed in service. These factors, particularly deterioration and improvements, NARUC contends, are typically reflected in the prices negotiated by unaffiliated buyers and sellers.[19]

b. Commission Determination

20. The Commission clarifies that GAAP must be used to value jurisdictional physical assets for purposes of amended section 203 when they are included with non-jurisdictional assets in a transaction between non-affiliates.[20]

21. Order No. 669 states that to place a value on wholesale contracts that are part of a transfer that also includes assets not subject to section 203, the parties should rely on valuation analyses consistent with the value used in audited financial statements and with GAAP requirements.[21] A similar approach is required for the transfer of physical jurisdictional assets included in a transaction with non-jurisdictional facilities.[22] We note that an entity's decision not to seek section 203 approval for a transaction based on its

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[19] NARUC Rehearing Request at 8.

[20] As we held in Order No. 669 at P 117, if a valuation analysis is not performed, the standard of original cost undepreciated is to be used in determining whether section 203 applies to the transaction.

[21] Order No. 669 at P 120.

[22] Consistent with our ruling in Order No. 669 (at P 116), if a transaction between non-affiliates involves only jurisdictional assets, the Commission will rebuttably presume that market value is the transaction price.

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determination of value of the assets, whether physical or paper facilities, can be reviewed based on a complaint or at the Commission's discretion.

22. The Commission also confirms that the use of the market value standard for section 203 purposes does not change the Commission's ratemaking policy, including the Commission's policy concerning acquisition adjustments.[23]

23. The Commission denies APPA/NRECA's request that value as applied to transfers of wholesale contracts between non-affiliates be based on expected contract revenues over the remaining life of the contract, rather than market value. We acknowledge that using expected contract revenues for both non-affiliate transfers and affiliate transfers would have a superficial consistency. However, we continue to believe that market value is the best way to value transactions between non-affiliates generally, and no party has presented a persuasive basis for treating wholesale contracts differently from other kinds of assets.

24. The Commission will also deny NARUC's request that, for transactions between affiliates, value should be net book value rather than original cost undepreciated. We note that almost all generation transactions of any significant size will be jurisdictional under amended section 203, regardless of the measure used. We recognize that marginal cases may occur where the issue of jurisdiction might arise, particularly for older assets. We do not dispute that the deterioration or use which net book value attempts to capture

[23] See supra note 17.

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affects the price a buyer is willing to pay for an asset. However, net book value does not reflect any appreciation of value of assets, as evident in the fact that generation facilities have often sold in recent years at prices significantly above net book value. The Commission has long employed the use of original cost undepreciated to measure value for purposes of determining the need for a section 203 application and finds its continued use appropriate in the context of affiliate transactions. Original cost undepreciated is a simpler, less ambiguous measure that will avoid debate as to the life of the facility, method of depreciation and other factors that are reflected in net book value.

2. Section 33.1(b)(4) – Definitions of "Electric Utility Company" and "Holding Company"

25. A number of parties raised arguments about the Commission's interpretation of new FPA section 203(a)(2). Section 203(a)(2) provides:

> No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000 without first having secured an order of the Commission authorizing it to do so.

26. In particular, parties focus on the terms "electric utility company" and "holding company" as used in section 203(a)(2). In Order No. 669, the Commission concluded that the most reasonable interpretation of the terms are the definitions contained in

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PUHCA 2005. Section 33.1(b)(4) provides that "associate company," "electric utility company," "foreign utility company," "holding company," and "holding company system" have the meaning given those terms in PUHCA 2005. It also provides that the term "holding company" does not include: a state, any political subdivision of a state, or any agency, authority or instrumentality of a state or political subdivision of a state; or an electric power cooperative.

a. "Electric Utility Company"

27. Section 33.1(b)(4) provides that the term "electric utility company" has the same meaning given that term in PUHCA 2005, which is "any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale."[24] The definition thus is broader than the definition of "public utility" under the FPA; it is not limited to entities that engage in wholesale or interstate transactions.

28. The Commission explained in Order No. 669 that the precise meaning of the term "electric utility company" is not clear because it is not defined in the FPA. We pointed out that amended section 203(a)(6) provides that certain other terms used in amended section 203 ("associate company," "holding company," and "holding company system") are to have the same meanings given those terms in PUHCA 2005. However, section 203(a)(6) does not address "electric utility company." Thus, there is Congressional silence in the FPA as to the meaning of the term. In determining what Congress might

[24] EPAct 2005 at 1262(5).

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have meant by "electric utility company," the Commission stated that the only reference point we have in federal electric utility regulatory terminology is the meaning of the term as used in PUHCA 1935[25] and in PUHCA 2005. Congress, in its revisions to the FPA, relied on terms defined in the two PUHCA statutes. Therefore, the Commission concluded that the most reasonable interpretation of "electric utility company," as used in section 203(a)(2) of the FPA (particularly in light of the fact that section 203(a)(2) was enacted as part of coordinated, comprehensive legislation with the repeal of PUHCA 1935 and the enactment of PUHCA 2005) is the meaning in PUHCA 2005.

29. The Commission rejected requests that we explicitly exclude qualifying facilities (QFs)[26] and exempt wholesale generators (EWGs) from the definition of "electric utility company." We stated that:

> regardless of their status under PUHCA 2005, the exemptions set forth under PUHCA 2005 are not dispositive as to the scope of the Commission's amended FPA section 203 authority. These PUHCA 2005 exemptions are set forth in the context of federal access to books and records and, more importantly, unlike PUHCA 2005, FPA section 203 does not give us any express authority to exempt persons or classes of transactions.[27]

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[25] 15 U.S.C. 79a et seq. (2000).

[26] Public Utility Regulatory Policies Act of 1978 (PURPA). 16 U.S.C. 824a-3 (2000).

[27] Order No. 669 at P 59. The Commission also noted that while QFs themselves currently are exempt from section 203's filing requirements by our regulations promulgated under the Public Utility Regulatory Policies Act of 1978, PURPA does not give us authority to exempt holding companies that own QFs.

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30. Further, the Commission stated that were we to interpret "electric utility company" for purposes of FPA section 203(a)(2) not to include EWGs or QFs, this could preclude review of certain acquisitions of securities of EWGs or QFs by holding companies whose systems contain traditional public utilities with transmission facilities and/or captive customers that could be affected by the acquisitions. The Commission stated that such transactions should not be excluded from review under section 203 and concluded that it was reasonable to interpret the statute not to exclude them.[28] We recognized the arguments of some commenters that we should not apply section 203(a)(2) to holding company acquisitions of securities of EWGs and QFs, or at a minimum should not apply it to such acquisitions by holding companies that are holding companies solely by virtue of owning or controlling one or more EWGs, QFs or foreign utility companies (FUCOs).[29] These commenters said that applying section 203(a)(2) in these circumstances would impede investments in QFs and EWGs or result in unnecessary regulation of upstream owners of QFs and EWGs.[30] In response, we stated that the blanket authorizations granted in Order No. 669 (for certain holding company acquisitions of non-voting securities and up to 9.9 percent of voting securities in electric utility companies) will ensure that investment will not be discouraged. The Commission

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[28] Order No. 669 at P 60.

[29] Id.

[30] Id.

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also noted that we would consider on a case-by-case basis granting additional blanket authorizations for holding company acquisitions of securities of EWGs or QFs.

31. In Order No. 669, the Commission explained that this interpretation of "electric utility company" includes FUCOs, but we granted blanket authorizations for certain foreign acquisitions, with conditions to protect U.S. customers.[31] As discussed below, the Commission also provided other blanket authorizations for transactions that do not raise concerns about wholesale markets or protection of wholesale captive customers served by Commission-regulated public utilities.

b. "Holding Company"

32. As required by amended section 203(a)(6), section 33.1(b)(4) provides that the term "holding company" has the meaning given that term in PUHCA 2005.[32]

33. The Commission rejected requests that we state that only companies that own traditional utilities, and not those that own solely FUCOs, EWGs and/or QFs, are "holding companies" under amended section 203.[33] The Commission noted that "holding company" in PUHCA 2005 means "any company that directly or indirectly owns,

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[31] See Section 33.1(c)(5). The regulation requires a company official to verify that the proposed transaction will not have an adverse effect on competition, rates or regulation and that, now or in the future, it will not result in the transfer of public utility facilities to an associate company, issuance of public utility securities or pledge or encumbrance of public utility assets for the benefit of an associate company and will not result in certain new affiliate contracts.

[32] Order No. 669 at P 69 (citing EPAct 2005 at 1262(8)).

[33] Id. at P 70.

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controls, or holds, with the power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company;…"[34] PUHCA 2005 defines "public-utility company" to include an "electric utility company."[35] We explained that the plain words of this definition simply do not exclude holding companies that own or control only EWGs, FUCOs, or QFs. Additionally, the Commission stated that:

> even under PUHCA 2005, persons that own or control only EWGs, FUCOs, or QFs are considered holding companies but are explicitly exempted from PUHCA 2005 by section 1266. There is no similar exemption in amended section 203 and we conclude that it is reasonable to interpret section 203(a)(2) review to include acquisitions of generation or transmission facilities or companies by holding companies owning only FUCOs, QFs, and/or EWGs.[36]

34. The Commission also pointed out that amended section 203(a)(6) requires that we use the PUHCA 2005 definition of "holding company," which, as explained above, includes the owner of an "electric utility company" that is not a public utility under the FPA and that is not otherwise subject to Commission ratemaking jurisdiction under Part II of the FPA. We noted that the definition of "electric utility company" is not limited to entities that engage in interstate commerce. Therefore, the Commission also concluded

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[34] EPAct 2005 at 1262(8).

[35] Id. at 1262(14).

[36] Order No. 669 at P 70.

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that holding companies that own "electric utility companies" whose businesses are solely intrastate technically fall under section 203(a)(2).[37]

c. Rehearing Requests

35. NARUC and Occidental assert that the Commission should not have used the PUHCA 2005 definition of "electric utility company" in its regulations under section 203. They say that this is contrary to Congressional intent and fundamental rules of statutory construction. They point out that section 203(a)(6) specifically states that certain terms ("associate company," "holding company," and "holding company system") have the same meaning in both section 203 and PUHCA 2005; however, section 203(a)(6) does not refer to PUHCA 2005's definition of "electric utility company."[38] NARUC and Occidental argue that the Commission's reliance on the simultaneous enactment of section 203 and PUHCA 2005 is invalid in the face of this statutory language.

36. NARUC also asserts that using the PUHCA 2005 definition of "electric utility company" improperly extends the Commission's authority under amended section 203 to include facilities used for transmission or sales of electric energy in intrastate commerce, facilities used for local distribution, and facilities used for making retail sales. It asserts

[37] However, as discussed below, we agreed in Order No. 669 that reviewing transactions involving Hawaii, Alaska, and Electric Reliability Council of Texas (ERCOT) would involve matters outside our expertise and the core focus of Part II of the FPA, and therefore we granted certain blanket authorizations.

[38] NARUC Rehearing Request at 3-4; Occidental Rehearing Request at 8-9. NARUC states the maxim expressio unius est exlusio alterius (the expression of one thing is the exclusion of another) supports its argument.

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that such facilities fall under exclusive state commission jurisdiction and that the Commission's regulations implementing FPA section 203 should apply to Commission-jurisdictional facilities only.[39]

37. Occidental requests that the Commission reconsider its determination to subject parent companies of QFs to the Commission's authority under section 203(a)(2) by importing the definition of "electric utility company" from PUHCA 2005. It argues that the Commission's reliance solely on the "reference point" of the "electric utility company" definition violates the Commission's continuing duty to encourage cogeneration and small power production under section 210(e) of PURPA[40] and without addressing the statutory QF exemption in PUHCA 1935 and PUHCA 2005, is arbitrary and capricious.[41] It argues that nothing in amended section 203 requires that QFs lose the long-standing exemption from section 203 that the Commission adopted in accordance with PURPA section 210(e). Thus, Occidental argues the Commission should adopt a

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[39] NARUC Rehearing Request at 5-6 (citing New York v. FERC, 535 U.S. 1 (2002); Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003); 16 U.S.C. 824 (2000)).

[40] 16 U.S.C. 824a-3 (2000). Section 210(e) of PURPA provides that the Commission may grant certain exemptions for cogeneration and small power producers.

[41] Occidental also points to the PUHCA 2005 Final Rule, where the Commission stated that "[a]s for QFs, QFs previously received an exemption from PUHCA pursuant to the Commission's regulations under [PURPA]. Nothing in PUHCA 2005 changes that." Occidental Rehearing Request at 10-11.

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blanket authorization under section 203, instead of using a case-by-case approach, for companies that are holding companies solely by virtue of owning QFs.[42]

38. Similarly, BofA/JPMorgan and Industrial Consumers assert that the Commission erred by requiring pre-acquisition approval under section 203(a)(2) of utility interests by companies that qualify as "holding companies" solely by virtue of their ownership interests in QFs and EWGs. They explain that under PUHCA 1935, a company that owned or controlled 10 percent or more of the outstanding voting securities of a QF or EWG did not, by virtue of such ownership, become a "holding company."[43] BofA/JPMorgan and Industrial Consumers assert that, while Congress intended to impose section 203(a)(2) pre-approval requirements on entities that are "holding companies" in a "holding company system that includes a transmitting utility or an electric utility," by a drafting oversight, it adopted the PUHCA 2005 definition of "holding company" (which includes companies that own 10 percent or more of the outstanding voting securities of EWGs and QFs) in section 203(a)(6). However, they state that there is no indication that Congress intended to apply section 203(a)(2) to QF/EWG-only holding companies or expand the scope of the "holding company" definition. BofA/JPMorgan and Industrial

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[42] Occidental Rehearing Request at 10-11.

[43] BofA/JPMorgan Rehearing Request at 26-27; and Industrial Consumers Rehearing Request at 2. They explain that all qualifying cogeneration facilities and certain small power production facilities were previously exempt from status as "electric utility companies" and that EWGs were exempted by section 32(e) from being classified as "electric utility companies" or "public-utility companies" under PUHCA 1935.

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Consumers argue that the Commission's imposition of new burdens on owners of QFs and EWGs not associated with transmission-owning utilities misinterprets Congressional intent in EPAct 2005. Accordingly, BofA/JPMorgan and Industrial Consumers assert that the Commission should construe section 203(a)(2) as not applying in these circumstances.

39. If the Commission decides to continue with that conclusion, then BofA/JPMorgan propose that the Commission provide blanket authorization subject to appropriate conditions and safeguards, such as a status report to the Commission within 30 days following the acquisition, where companies are only holding companies by virtue of owning QFs or EWGs.[44] At a minimum, existing holdings in EWGs and QFs should be grandfathered. This would enable banks and their affiliates to adjust their future practices respecting EWGs and QFs to keep such acquisitions from affecting the core aspects of their business.

40. Similarly, Morgan Stanley argues that the definitions in PUHCA 2005, PUHCA 1935, and the PUHCA 2005 Final Rule demonstrate that EWGs are not "electric utility companies" and that EWG owners are not "holding companies" under PUHCA 2005. Therefore, it says that the Commission should not have found that EWGs are "electric utility companies" and that companies that own only EWGs are "holding companies" for

[44] BofA/JPMorgan Rehearing Request at 30; Industrial Consumers Rehearing Request at 8.

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purposes of section 203(a)(2).[45] Morgan Stanley explains that, in PUHCA 2005, Congress adopted the meaning of EWG from PUHCA 1935, which it contends does not treat EWGs as "electric utility companies."[46] Further, Morgan Stanley states that the PUHCA 2005 Final Rule reflects Congress' intent to continue to define "holding company" to exclude EWG owners, as well as companies that own power marketers, FUCOs, and QFs.[47] However, it states, the Commission adopts a meaning of "electric utility company" for section 203(a)(2) that includes EWGs, and therefore differs from the meaning given in PUHCA 2005. In doing so, Morgan Stanley asserts, the Commission creates two different definitions and types of holding companies, thereby nullifying section 203(a)(6), which states that the term holding company shall have the same meaning given in PUHCA 2005. Thus, Morgan Stanley argues, the Commission should amend its regulations to state that companies owning only EWGs, or some combinations of EWGs, QFs, FUCOs, and/or power marketers, are not "holding companies" bound to obtain prior approval under section 203(a)(2).

d. Commission Determination

41. We do not agree with those who argue that, because of the statutory language and/or policy concerns, the Commission may not assert jurisdiction under new section

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[45] Morgan Stanley Rehearing Request at 3-4.

[46] PUHCA 2005 at 1262(6); PUHCA 1935 at 32(e).

[47] Morgan Stanley Rehearing Request at 5 (citing PUHCA 2005 Final Rule at 366.1 (to be codified at 18 CFR 366.1)).

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203(a)(2) over transactions involving matters that are not under our traditional, pre-EPAct 2005 jurisdiction. The Commission affirms its determination in Order No. 669 that, in light of the ambiguity in section 203(a)(2), the most reasonable interpretation of the term "electric utility company" is the definition in PUHCA 2005. Several factors support this determination.

42. First, the focus of new section 203(a)(2) is on acquisitions by public utility holding companies. The Commission did not previously have jurisdiction over holding companies, and this new authority was enacted as part of coordinated, comprehensive legislation along with the repeal of PUHCA 1935 and the enactment of PUHCA 2005.[48] Section 203(a)(6) states that the term "holding company" has the same meaning given the

[48] There is no legislative history contained in the conference report accompanying the legislation. However, the evolution of the various versions of section 203(a)(2) proposed by members supports our conclusion that Congress purposely did not limit section 203(a)(2) to holding companies that own "public utilities" but, rather, consciously used terminology that, for the most part, reflected terms used in PUHCA 2005. See Electricity Competition and Reliability Act, H.R. 2944, 106th Cong. section 410 (1998); Comprehensive Electricity Competition Act, H.R. 1828, 106th Cong. section 502 (1998); Comprehensive Electricity Competition Act, S. 1047, 106th Cong. section 502 (1998); Electric Power To Choose Act of 1999, H.R. 2050, 106th Cong. section 110 (1998); Energy Policy Act of 2002, S. 1766 106th Cong. section 202 (2001); Energy Policy Act of 2003, S. 14, 108th Cong. (2003); Senate Amendment No. 1412 to S. 14, 149 Cong. Rec. S. 10163 (July 29, 2003); Senate Amendment No. 1413 to S. 14, 149 Cong. Rec. S. 10116-24 (July 29, 2003), 149 Cong. Rec. S. 10204-14 (July 30, 2003); Senate Amendment No. 1537 § 202, 149 Cong. Rec. S. 10739-40 (July 31, 2003); H.R. Rep. No. 108-375 at 302-03 (Nov. 18, 2003), 149 Cong. Rec. S. 15,220 (Nov. 20, 2003); Energy Policy Act of 2005, H.R. 6; Energy Policy Act of 2005, S. 10; H. Rpt. 109-190 (2005), 149 Cong. Rec. S. 9258 (July 28, 2005), 149 Cong. Rec. S. 9359 (July 29, 2005).

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term in PUHCA 2005. PUHCA 2005 defines a "holding company" in terms of a "public-utility company," which, under PUHCA 2005, includes an "electric utility company."

43. Second, the term "electric utility company" is defined in both PUHCA 1935 and PUHCA 2005, but is not defined in the FPA or other statutes under which the Commission exercises authority. It is reasonable in the face of Congressional silence to adopt a definition that has been well understood in electric regulatory law for the past 70 years, particularly when we are not aware of any other federal regulatory definition of the term.

44. Third, had Congress intended to restrict section 203(a)(2) to holding company acquisitions involving only facilities that are traditionally jurisdictional under the FPA or to holding company acquisitions of companies that are "public utilities" under the FPA, it would have done so, just as it did in each part of section 203(a)(1). The expressio unius principle cited by NARUC to support its position can also be cited to support Order No. 669; the fact that Congress specifically limited section 203(a)(1) to actions taken by public utilities, but did not so restrict section 203(a)(2), supports the position that Congress intended the latter provision to have a wider scope. Moreover, NARUC's application of expressio unius in this instance leads to a conclusion at odds with common usage. We elaborate further below.

45. NARUC is correct that section 201(b)(1) of the FPA states that Part II applies to transmission in interstate commerce and the sale of electric energy at wholesale in interstate commerce, but (except as provided for in paragraph 2, which involves sections

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203(a)(2), 206(e), 210-212, and 215-222) not to other sales of electric energy. However, there is a qualifying phrase as well. Section 201(b)(1) states that the Commission shall not have jurisdiction, "except as specifically provided in this Part and the Part next following" over facilities used for the generation of electric energy, or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce or over facilities for the transmission of electric energy consumed wholly by the transmitter.

46. NARUC ignores "except as specifically provided." Congress, in amending section 203, specifically broadened the Commission's previous section 203 jurisdiction.[49] In the new section 203(a)(6), Congress directed the Commission to use the definition of holding company from PUHCA 2005, and that definition includes entities that own "electric utility companies" as defined in PUHCA 2005. The new 203(a)(2) requires holding companies that include transmitting utilities (an FPA definition modified in EPAct 2005 to be limited to transmission in interstate commerce used for wholesale sales) or electric utilities (defined in the FPA as persons that sell electric energy – not limited to sales for resale or to sales in interstate commerce) to obtain Commission approval of certain securities transactions, including acquisitions of securities of an "electric utility company."

[49] For example, in section 203(a)(1)(D) Congress gave the Commission new jurisdiction over certain acquisitions of generation facilities. The Commission under section 201 has no jurisdiction over generation facilities, except as specifically provided.

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47. It is reasonable to conclude that, in repealing PUHCA 1935 and importing into the FPA these PUHCA terms – a statute and terms not limited to companies engaging in interstate sales, interstate transmission or wholesale transactions – Congress intended to transfer to this Commission certain corporate review authority that might involve intrastate/retail acquisitions that could affect interstate commerce and customers of Commission-regulated interstate utilities. Further, as discussed above, in other provisions of section 203 Congress specifically limited the Commission's review to transactions involving "facilities subject to the jurisdiction of the Commission." It did not place this limitation in section 203(a)(2).[50]

48. NARUC cites the principle of expressio unius and argues that Congress' specific statement in section 203(a)(6) that three other terms have the same meaning as in PUHCA 2005 shows that Congress did not intend "electric utility company" to have the

[50] We note that, in PUHCA 1935, which was not limited to facilities or companies operating in interstate commerce, Congress directed the Securities and Exchange Commission (SEC) in section 3 to exempt predominantly intrastate holding companies and holding companies whose operations are confined to one state or contiguous states (because the states could adequately regulate these types of holding companies and their activities) unless the SEC found it detrimental to the public interest or the interests of investors or consumers. Although Congress did not give the Commission authority under section 203(a)(2) to actually exempt companies from the provision, our blanket waivers serve a similar purpose of deferring to the states, as the SEC did under the 1935 Act. If, however, we find harm to wholesale competition or customers, the Commission can take an appropriate action.

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same meaning as in PUHCA 2005.[51] One can just as convincingly argue that Congress inadvertently omitted the term from section 203(a)(6) or that if Congress had intended to require us to adopt a particular definition, it would have done so. The fact is that Congress left us with no express definition of the term and that we have exercised reasonable discretion in interpreting it.

49. Several parties argue that the policy behind EPAct 2005 requires us to define "electric utility company" to exclude companies that own only EWGs or QFs. We disagree. Congress specifically required, in section 203(a)(6) of the FPA, that the term "holding company" be given the same meaning that was given the term in PUHCA 2005. Under PUHCA 2005, as explained above, a company is a holding company if it acquires 10 percent or more of an electric utility company. EWGs, FUCOs[52] and QFs fall within the definition of "electric utility company" under section 1262(5) of PUHCA 2005 because they own or operate facilities used for the generation, transmission or distribution of electric energy for sale. Moreover, including EWGs, FUCOs and QFs as electric utility companies is consistent with common usage, which supports defining

[51] The three other terms are: associate company, holding company and holding company system.

[52] The Commission explained in Order No. 669 that it interpreted section 203(a)(2) of the FPA as applying to foreign acquisitions and therefore interpreted "electric utility company" to include FUCOs.

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electric utility companies as companies owning facilities (generation, transmission or distribution) for the sale of electric energy.

50. Further, as discussed in Order No. 669 and Order No. 667-A (the PUHCA 2005 rehearing order), while Congress expressly excluded from the definition of holding company certain banks and other institutions, it did not similarly exclude from the definition of holding company entities that only own QFs, EWGs or FUCOs. Rather, section 1266(a) of PUHCA 2005 specifically directs the Commission to exempt QF/EWG/FUCO holding companies from the federal access to books and records provision; thus, the very language of the provision recognizes that such entities are holding companies. It directs the Commission to issue a final rule to exempt "any person that is a holding company, solely with respect to one or more [QFs, EWGs, or FUCOs]."

51. Therefore, consistent with our determination in the PUHCA 2005 rehearing order, we are giving full effect to the statutory language when we conclude that companies that acquire 10 percent or more of an EWG, FUCO or QF are holding companies as that term is used in PUHCA 2005 as well as FPA section 203(a)(2).

52. However, we also have provided an exemption from the PUHCA section 1264 books and records requirements, as required by section 1266 of PUHCA 2005. Further, based on consideration of the rehearing comments filed, we will grant a blanket authorization under section 203(a)(2) for holding companies that own or control <u>only</u> EWGs, QFs or FUCOs to acquire the securities of additional EWGs, FUCOs or QFs. Thus, our definition allows us to ensure that, for example, cross-subsidization that affects

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matters under our traditional jurisdiction does not occur, while at the same time ensuring (through blanket authorizations) that investment in the electric industry is not hampered and that encouragement of QFs is not undermined.

53. We recognize, however, parties' claims that there were inconsistencies because of certain statements in Order No. 667 that EWGs would not be considered "electric utility companies." A similar statement was included with respect to QFs in our recent QF final rule.[53] On rehearing of the Order No. 667, we are eliminating these statements with respect to EWGs and clarifying that we intend to eliminate a similar statement in the QF final rule rehearing.[54] Thus, our interpretation under section 203(a)(2) is consistent with our interpretation under PUHCA 2005, and Morgan Stanley's claim that we are creating two different definitions is not correct.

54. We also reject Morgan Stanley's argument as it relates to power marketers, but for a different reason. We decided in the PUHCA 2005 Final Rule to treat power marketers in a manner consistent with SEC precedent for purposes of interpreting PUHCA 2005, and therefore, decided not to treat power marketers as "electric utility

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[53] Revised Regulations Governing Cogneration and Small Power Production, Order No. 671, 71 FR 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006).

[54] Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667-A, 71 FR [**insert page, date of publication in the Federal Register]**, FERC Stats. & Regs. ¶ 31,213 at P 14 & n. 32 (2006).

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companies."[55] By extension, therefore, a company owning only a power marketer is not holding an "electric utility company" and is not a holding company. However, power marketers remain public utilities under the FPA.

3. Section 33.1(c)(1) - Blanket Authorizations: Intrastate Commerce, Local Distribution, and Internal Corporate Reorganizations

55. Section 33.1(c)(1) provides that 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 FPA to purchase, acquire, or take any security of: (i) a transmitting utility or company that owns, operates, or controls only facilities used solely for transmission in intrastate commerce and/or sales of electric energy in intrastate commerce; (ii) a transmitting utility or company that owns, operates, or controls only facilities used solely for local distribution and/or sales of electric energy at retail regulated by a state commission; or (iii) a transmitting utility or company if the transaction involves an internal corporate reorganization that does not present cross-subsidization issues and does not involve a traditional public utility with captive customers.

a. Section 33.1(c)(1)(i) and (ii) - Blanket Authorizations for Intrastate Commerce and Local Distribution

56. In Order No. 669, the Commission stated that it was not reasonable to interpret section 203(a)(2) as being limited solely to holding company acquisitions and mergers

[55] Order No. 667 at P 123.

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involving wholesale sales or transmission in interstate commerce. However, we concluded that there would be no benefit from the Commission's case-by-case evaluation of certain transactions under section 203(a)(2).[56]

57. The Commission explained that our core jurisdiction under Part II of the FPA continues to be transmission and sales for resale of electric energy in interstate commerce. A major impetus behind section 203(a)(2) was to clarify the Commission's jurisdiction over mergers of holding companies that own public utilities as defined in the FPA.[57] Accordingly, we concluded that it is consistent with the public interest to grant blanket authorizations for the following: (1) section 203(a)(2) purchases or acquisitions by holding companies of companies that own, operate, or control facilities used solely for transmission or sales of electric energy in intrastate commerce; and (2) section 203(a)(2) purchases or acquisitions by holding companies of facilities used solely for local distribution and/or sales at retail regulated by a state commission.[58]

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[56] An acquisition or merger involving "any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale" is not on its face limited to interstate facilities.

[57] Illinois Power Co., 67 FERC ¶ 61,136 (1994) (noting that the Commission does not have jurisdiction over public holding company mergers or consolidations, but concluding that, ordinarily, when public utility holding companies merge, an indirect merger involving their public utility subsidiaries also takes place, and that Commission approval under section 203 would be required).

[58] Order No. 669 at P 56.

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58. The Commission concluded that these blanket authorizations are consistent with the public interest because: (1) the identified categories do not raise concerns with respect to competitive wholesale markets for sales in interstate commerce or protection of wholesale captive customers served by Commission-regulated public utilities – matters within this Commission's core responsibility and expertise; (2) if these categories raise competitive issues in intrastate commerce, i.e., in ERCOT, Hawaii, and Alaska,[59] those issues are within the expertise of, and more appropriately addressed by, state commissions; and (3) if competition and retail ratepayer protection issues are raised by a holding company's acquisition of local distribution or other retail facilities, these issues also are within the expertise of, and more appropriately addressed by, state commissions.[60]

i. Rehearing Requests

59. APPA/NRECA assert that the Commission erred in granting blanket authorization of acquisitions of "intrastate" utilities by holding companies. They state that in order for the Commission's justification to be true, i.e., that these transactions do not affect Commission-regulated wholesale sales in interstate commerce or Commission-regulated public utilities, the blanket authorization would have to be confined to acquisitions of

[59] Similarly, although not raised by the parties, the blanket authorization would apply to any organized Territory of the United States.

[60] For these blanket authorizations, the Commission did not impose any type of filing requirement.

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such intrastate utilities by intrastate holding companies. However, APPA/NRECA argue that the regulation allows any holding company (including a holding company that owns a Commission-jurisdictional public utility operating in interstate commerce) to acquire an intrastate utility.[61] They state that the regulation is overbroad, authorizes transactions that on their face would affect interstate commerce in electricity, and raises the possibility of cross-subsidization and pledge or encumbrance of utility assets for the benefit of the holding company at the expense of captive customers. However, APPA/NRECA assert that if the blanket authorization were limited to wholly intrastate transactions in accordance with the Commission's rationale, then the Commission would lack FPA jurisdiction over these transactions in the first place, so no blanket authorization should be required. Therefore, they state that the Commission should delete the section 33.1(c)(1)(i) blanket authorization from its regulations.

60. APPA/NRECA also assert that the Commission erred in granting blanket authorization of acquisitions of "local-distribution-only" or "retail-only" utilities. They assert that the blanket authorization is broader than the Commission's rationale (which is that these transactions do not affect Commission-regulated wholesale sales in interstate commerce or Commission-regulated public utilities), authorizes transactions that would affect Commission-jurisdictional interstate commerce in electricity and creates

[61] APPA/NRECA Rehearing Request at 27.

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opportunities for cross-subsidization or pledge or encumbrance of utility assets for the benefit of the holding company and at the expense of captive customers.[62] APPA/NRECA assert that, if, on the other hand, the holding company does not own any Commission-jurisdictional public utilities before the transaction, and it is acquiring a retail-only or local-distribution-only utility that also is not Commission-jurisdictional, then the Commission would have no jurisdiction to act on the transaction in the first place. They argue that, if the Commission's rationale for this blanket authorization holds, the Commission's authority to grant the blanket authorization evaporates. Thus, APPA/NRECA state that section 33.1(c)(1)(ii) should be deleted from the regulations.

61. APPA/NRECA further argue that the Commission's own reasoning in Order No. 669 relating to distinctions between the uses of generating facilities for wholesale sales and retail sales undermines the basis for granting blanket authorizations for acquisition of securities of "retail-only" utilities. They note that in connection with defining "existing generation facility," the Commission stated that utilities do not ordinarily separate the dispatch of their plants for retail sales and wholesale sales and thus adopted the rebuttable presumption that existing generation facilities are used for both wholesale sales and retail sales.[63] APPA/NRECA assert that this premise also leads to the rebuttable presumption that a holding company that acquires a utility that owns generation is not acquiring a

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[62] Id. at 28-29.

[63] Order No. 669 at P 86.

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"retail-only" utility, thus eliminating the basis for granting a blanket authorization of such a transaction without evidence of that fact. In addition, they note that any "retail-only" utility that does not own any generation but meets its power needs through a portfolio of power contracts and ancillary services is likely to be selling excess wholesale power during some periods. As a consequence, they believe that there is no basis to presume that retail-only utilities exist or to provide a blanket authorization for such acquisitions.

ii. Commission Determination

62. We reaffirm our decision to grant blanket authorization under section 203(a)(2) for acquisitions of companies that own, operate or control only facilities used solely for intrastate transmission or intrastate energy sales or for local distribution or retail energy sales regulated by a state commission. The energy sales or transmission transactions by electric utility companies that fall within this blanket authorization are relatively small compared to such transactions by other electric utility companies. These transactions are unlikely to adversely affect wholesale competition. With respect to possible adverse effects on rates of retail captive customers, this can be addressed by the state commissions with jurisdiction over and expertise with these types of transactions. Adverse effects on rates of wholesale captive customers or customers receiving transmission service over jurisdictional transmission facilities are unlikely but, if they occur, we believe we can adequately address any concerns using our rate authority under FPA sections 205 and 206. Thus, while APPA/NRECA are correct that there may be some interstate effects as a result of such transactions, at this time we believe that such

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effects would not be significant and thus that individual pre-approval by this Commission under section 203 is not necessary. We disagree with APPA/NRECA's argument that the blanket authorization for acquisitions of "retail-only" utility securities is inconsistent with the Commission's rebuttable presumption in Order No. 669 that all generating facilities are used for at least some wholesale sales. If a company engages in other than de minimis wholesale transactions, the blanket authorization will not apply. However, in response to APPA/NRECA's concern, we will require that if any public utility within the holding company system has captive customers or owns or provides transmission service over jurisdictional transmission facilities, the holding company must report the acquisition to the Commission, including any state actions and conditions related to the transaction, and provide an explanation of why the transaction does not result in cross-subsidization.[64]

63. We clarify that the Commission is not asserting jurisdiction over intrastate facilities, local distribution facilities, or retail-only companies under the blanket

[64] In response to APPA's concerns regarding the protection of transmission customers, we believe it is appropriate, as discussed infra, at P 147, to apply this reporting requirement to holding companies that include public utilities that own or provide transmission service over jurisdictional transmission facilities. Similarly, where relevant for conditions or requirements applicable to blanket authorizations granted herein or to implementing standards for review of section 203 applications not receiving blanket authorizations, certain conditions and requirements will apply to holding company acquisitions where the holding company includes a public utility that has captive customers or owns or provides transmission service over jurisdictional transmission facilities.

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authorizations. Rather, we are asserting jurisdiction over holding company acquisitions of such companies or facilities for the purpose of ensuring that interstate interests are not adversely affected and we may consider eliminating these blanket authorizations if necessary to protect customers.[65]

b. Section 33.1(c)(1)(iii) - Blanket Authorizations for Internal Corporate Reorganizations

64. Section 33.1(c)(1)(iii) provides that

> 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 any security of … (iii) a transmitting utility or company if the transaction involves an internal corporate reorganization that does not present cross-subsidization issues and does not involve a traditional public utility with captive customers.

65. In Order No. 669's preamble, the Commission explained that internal corporate reorganizations that do not present cross-subsidization issues and do not involve captive customers are unlikely to cause anticompetitive effects.[66]

i. Rehearing Requests

66. EEI, Entergy, and Duke/Cinergy request that the Commission grant blanket authorization for internal corporate reorganizations under section 203(a)(1) (which addresses public utilities) as well as under 203(a)(2) (which addresses holding

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[65] See our response to NARUC, supra PP 45-47.

[66] Order No. 669 at P 192.

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companies).[67] They note that, in the preamble of Order No. 669, the Commission stated that it "is granting blanket authorization for internal corporate reorganizations that do not present cross-subsidization issues and that do not involve a traditional public utility with captive customers," [68] without drawing any distinction between section 203(a)(1) and section 203(a)(2). However, the actual regulatory text grants blanket authorization for internal corporate reorganizations only under section 203(a)(2).

67. National Grid requests that the Commission grant blanket authorization for internal reorganizations involving intermediate holding companies and other non-utility associate companies (i.e. the consolidation or dissolution of such companies and the purchase of securities of one such company by another such company).[69]

68. EEI, Entergy, Duke/Cinergy, and National Grid request that the Commission explain what it meant by a reorganization that does not "involve" a traditional public utility with captive customers.[70] They state that a broad reading could deny blanket

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[67] EEI Rehearing Request at 6-7; Entergy Rehearing Request at 4; and Duke/Cinergy Rehearing Request at 4.

[68] Order No. 669 at P 192.

[69] National Grid Rehearing Request at 7-8 (citing National Grid Transco, Order Authorizing Various Financing Transactions, Money Pool; Reservation of Jurisdiction, Holding Company Act Release No. 35-27898; 83 S.E.C. Docket 2653 (Sept. 30, 2004)).

[70] EEI previously provided an example of such an internal corporate reorganization: "…if a holding company that owns one or more traditional public utilities with captive customers also owns several EWGs, FUCOs, or other utilities without captive customers but seeks only to reorganize some of these non-traditional companies (e.g., by moving them under other intermediate holding companies), this

(continued)

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authorizations for a reorganization of an intermediate holding company between the public utility and the ultimate parent holding company even in cases where the transaction does not affect the organization of the public utility itself. These parties suggest that the Commission revise the regulation to grant blanket authorization for internal reorganizations that do not "result in the reorganization of a traditional public utility with captive customers."[71]

69. In addition, EEI, Entergy, and Duke/Cinergy recommend that the Commission consider granting blanket authorization for certain internal corporate reorganizations that result in the reorganization of a traditional public utility company with captive customers, as long as an authorized corporate official verifies that the transaction will have no adverse effect on competition, rates, or regulation and makes additional verifications (similar to the verifications required for the blanket authorization in section 33.1(c)(5)(ii) for FUCOs with captive customers in the U.S.).[72] They explain that the verifications would ensure that this automatic approval would apply only when the transaction cannot harm a traditional utility company with captive customers.

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transaction would not involve or affect the traditional utilities. . ." November 7, 2005 rulemaking comment of EEI (at fn. 17) in Docket No. RM05-34-000.

[71] EEI Rehearing Request at 7, and Attachment A at 1; Entergy Rehearing Request at 5; Duke/Cinergy Rehearing Request at 4; and National Grid Rehearing Request at 9.

[72] EEI Rehearing Request at 7-8; Entergy Rehearing Request at 5; and Duke/Cinergy Rehearing Request at 5. See also EEI Comments, Docket No. RM05-34-000, at 25.

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70. Similarly, Coral Power requests that the Commission grant a blanket authorization under section 203(a)(1) for internal corporate reorganizations that do not present cross-subsidization concerns and do not involve a traditional public utility with captive customers, provided that the reorganization is for a lawful objective within the company's corporate purposes, compatible with the public interest, and reasonably necessary or appropriate for such purposes.[73]

71. If the Commission will not grant this blanket authority, EEI, Entergy, and Duke/Cinergy alternatively request that the Commission revise section 33.11(b) to provide for expeditious consideration of "internal corporate reorganizations that result in the reorganization of a traditional public utility with captive customers but do not present cross-subsidization issues."

72. APPA/NRECA note that Order No. 669 discussed the adoption of safeguards to prevent cross-subsidization involving certain cash-management programs and intra-holding company financing arrangements. However, the Commission erred in granting blanket authorizations of holding company acquisitions involving internal corporate reorganizations without protective conditions similar to those imposed on blanket

[73] Coral Power Rehearing Request at 6. Coral Power explains that the Commission does not currently require a competitive analysis under pre-EPAct 2005 section 203 for such internal corporate reorganizations because there are no competitive concerns or changes in the control of jurisdictional assets where the ultimate parent company remains the same and all intermediary holding companies remain under the same parent company.

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authorizations in section 33.1(c)(2) for certain securities purchases by holding companies.[74]

ii. Commission Determination

73. The Commission finds no basis for distinguishing between section 203(a)(1) and section 203(a)(2) in determining that "internal corporate reorganizations that do not present cross-subsidization issues are unlikely to cause anticompetitive effects." In contrast to other types of transactions, we see no need to require case-by-case filings under section 203(a)(1) for such transactions since, by their very nature, internal corporate reorganizations that do not affect the organization of the public utility itself cannot involve changes of ownership and ultimate control of the jurisdictional or generation facilities. Such transactions would not ordinarily result in a change in direct ownership or control of jurisdictional facilities. However, we emphasize that any internal reorganization that would result in a change of direct ownership of or control over jurisdictional facilities will require a filing under section 203(a)(1). Accordingly, we will grant blanket authorization under section 203(a)(1) for internal corporate reorganizations that do not present cross-subsidization issues and that do not involve (i.e, do not result in the reorganization of, as explained below) a traditional public utility with captive

[74] APPA/NRECA Rehearing Request at 30-31. These blanket authorizations pertain to acquisitions of non-voting securities, voting securities of less than 10 percent and securities of a subsidiary company within the holding company system.

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customers or that owns or provides transmission service over jurisdictional transmission facilities .

74. EEI, Entergy, Duke/Cinergy, and National Grid are correct that the phrase "does not involve a traditional public utility with captive customers" could be interpreted to deny blanket authority in situations where the transaction does not affect the organization of the traditional public utility itself. Their suggestion to substitute the phrase "result in the reorganization of a traditional public utility with captive customers" is reasonable and we will modify the regulation accordingly. We also will expand the blanket authorization to cover reorganizations of intermediate holding companies, non-utility associate companies, and public utilities that are not traditional public utilities that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, so long as the reorganization does not present cross-subsidization issues. As a result, we are revising section 33.1(c)(1)(iii) to address a different issue, as noted below and adding a new section 33.1(c)(6) to incorporate the blanket authorizations for internal corporate reorganizations, as discussed here.[75]

75. We will not grant herein a blanket authorization for internal corporate reorganizations that result in the reorganization of a traditional public utility with captive customers. To ensure that captive customers and customers receiving transmission

[75] Internal corporate reorganizations, as discussed here, are provided blanket authorization whether they are accomplished through the acquisition of securities or through a merger or consolidation.

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service over jurisdictional transmission facilities are protected, we will continue to evaluate such internal corporate reorganizations on a case-by-case basis. However, we are revising section 33.11(b) to separately provide in new section 33.11(c)(3) for expeditious consideration of internal corporate reorganizations that result in the reorganization of a traditional public utility with captive customers or customers receiving transmission service over jurisdictional transmission facilities but that do not present cross-subsidization issues.

76. We are not convinced by APPA/NRECA's argument that Order No. 669 granted blanket authorizations involving internal corporate reorganizations without adequate protective conditions. The blanket authorization applies only if no cross-subsidization issues are present and only if there are no affected captive customers or customers receiving transmission service over jurisdictional transmission facilities. APPA/NRECA does not explain why additional conditions or requirements are necessary.

c. Requests for Additional Blanket Authorizations

i. Rehearing Request

77. GS Group recommends that the Commission give blanket authorization under section 203(a)(2) for a holding company in a holding company system that includes a transmitting utility or electric utility to acquire securities of industrial self-generators. An industrial self-generator would be "any company that owns generating facilities that total

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100 MW or less in size and are used fundamentally for its own load or for sales to affiliated end-users."[76]

78. GS Group explains that its various non-utility subsidiaries engage in proprietary trading and merchant banking activities and, in the ordinary course of these business activities, regularly acquire utility securities. They acquire these securities for the purpose of distribution or resale, as broker/dealers in a fiduciary capacity, or for their own accounts (proprietary holdings). GS Group states it has requested blanket authorization under section 203(a)(2) for acquisitions of securities in excess of the $10 million threshold. Even if such authorizations were granted, GS Group states that its non-utility subsidiaries would not be allowed to acquire in a proprietary capacity 10 percent or more of the voting securities of any electric utility company or holding company that includes an electric utility company without obtaining separate approval from the Commission.[77]

79. Furthermore, GS Group says that the blanket authorizations under section 33.1(c)(1)(i) and section 33.1(c)(1)(ii) do not allow its non-utility subsidiaries to acquire 10 percent or more of the voting securities of an electric utility company. While GS

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[76] GS Group Rehearing Request at 4.

[77] The Commission granted blanket authorizations to GS Group that allow its non-utility subsidiaries to hold, in a proprietary capacity, up to 10 percent of the voting securities of electric utility companies, subject to certain reporting requirements. See The Goldman Sachs Group, Inc., 114 FERC ¶ 61,118 at P 22, 27 (2006).

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Group acknowledges that this may be reasonable for acquiring securities of a traditional utility with captive customers, it contends that such a limitation is unnecessary as applied to the acquisition of securities of an industrial company or manufacturer that generates power itself and consumes most of the generated power. GS Group notes that many industrial self-generators sell only a small amount of surplus power at wholesale to the local interconnected utility. The same public policy considerations (the lack of effects on competitive wholesale markets for sale in interstate commerce or on wholesale captive customers) that underlie a blanket authorization covering acquisitions of such companies' securities (in section 33.1(c)(1)(i)) apply to acquisitions of securities of industrial self-generators. GS Group argues that the 100 MW size limit will assure that transactions involving the acquisition of securities of industrial self-generators will not have an effect on competition in wholesale power markets.

80. Furthermore, GS Group argues that this modification would be consistent with the PUHCA 2005 Final Rule, 18 CFR § 366.3(c), which waives the accounting, record-retention and filing requirements in Part 366 for holding companies that own 100 MW of generation or less that is used "fundamentally for their own load or for sales to affiliated end-users." GS Group notes that the SEC exempted industrial self-generators and their parent holding companies from regulation as electric utility companies or holding companies. It says that the SEC also exempted acquisitions of voting securities of such companies from the pre-approval requirements of PUHCA 1935.

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81. Coral Power requests that the Commission grant a blanket authorization under section 203(a)(1) (which regulates transactions involving public utilities) for transfers of wholesale market-based rate contracts between affiliates that have the same ultimate upstream ownership and that are not affiliated with traditional public utilities with captive ratepayers. It states that this would be consistent with the public interest because such transfers have no adverse effect on competition, rates, or regulation. Such transfers will not harm competition because they will not result in any change in ultimate control over the wholesale contracts, over any other electric generation, transmission, or distribution facilities, or over inputs to generation. Coral Power explains that following such transfers, the Commission will continue to have jurisdiction over the contracts. It states that such transfers have no effect on captive ratepayers (since customers under market-base rate contracts are not captive), and therefore will not raise any cross-subsidization issues.

ii. <u>Commission Determination</u>

82. The Commission will grant a blanket authorization to allow any company in a holding company system that includes a transmitting utility or an electric utility to acquire the securities of an electric utility company that owns generating facilities that total 100 MW or less and are used fundamentally for the acquired company's own individual load or for sales to affiliated end-users (industrial self-generators). Such transactions meet the standards of section 203. They are consistent with the public interest (because they will not harm competition, ratepayers, or regulation) and will not

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result in the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. This blanket authorization will be reflected in section 33.1(c)(1)(iii).

83. The Commission also is persuaded by the rationale provided by Coral Power and will grant a blanket authorization for transfers of wholesale market-based rate contracts between affiliates that have the same ultimate upstream ownership and that are not affiliated with a traditional public utility with captive customers. Such transactions meet the standards of section 203. They will not harm competition because even if a contract confers control over a generating resource, the transfer of the contract does not result in a change in ultimate control. There also will be no effect on cost-based rates to captive customers or to customers that receive transmission service over jurisdictional transmission facilities, or on regulation. Further, since the affiliates are not affiliated with a public utility with captive ratepayers, the transaction will not result in the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that the assignment or transfer of wholesale contracts is subject to section 205 filing requirements, which include, among other things, designation of the jurisdictional entity that will be the supplier under the contract.

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4. Blanket Authorizations for Cash Management Programs, Money Pools, and Intra-Holding Company Financing Arrangements

84. In Order No. 669, the Commission stated that cash management programs, money pools, and other intra-holding company financing arrangements[78] are a routine and important tool used by many large companies to lower the cost of capital for their regulated subsidiaries and to improve the rate of return the holding company and its subsidiaries can receive on their money.[79] These transactions often involve issuances and acquisitions of securities that are subject to FPA sections 204 and 203.[80] The Commission stated that it did not intend to make it more difficult for companies to take advantage of these types of transactions. Transfers of funds between such companies do not generally present competitive problems. Thus, we found that it was consistent with

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[78] While there are several different types of cash management programs, a cash management program generally involves pooling the cash resources of several affiliated companies into a "money pool." Affiliates can then borrow against the funds in the pool, often at below market rates. Additionally, the parent company is often able to achieve a higher rate of return on its money pool investments than any single affiliate could on its own. For a more detailed discussion of cash management programs, see Regulation of Cash Management Practices, Order No. 634, 68 FR 40500 (July 8, 2003), III FERC Stats. & Regs. ¶ 31,145 (June 26, 2003), Order No. 634-A, 68 FR 61993 (Oct. 31, 2003), FERC Stats. & Regs. ¶ 31,152 (Oct. 23, 2003) (Cash Management Rule).

[79] Order No. 669 at P 142.

[80] The Commission's authority under section 204 governing the issuance of securities by a public utility was often superseded by the authority of the SEC under section 318 of the FPA. Section 318 of the FPA resolved conflicts of jurisdiction between the FPA and PUHCA 1935 regarding, among other things, the issuance of securities in favor of the SEC. Section 318 was repealed under section 1277 of PUHCA 2005.

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the public interest to grant blanket authorization under section 203(a)(2)for holding companies and their subsidiaries to take part in intra-system cash management-type programs.

a. Rehearing Requests

85. EEI, Entergy, and Duke/Cinergy request that the Commission modify the regulatory text to also grant blanket authorization under FPA section 203(a)(1) for intra-system financial transactions between public utility affiliates. They point out that, while intra-system financings may be jurisdictional under section 203(a)(1) (which applies to acquisitions of securities by public utilities) and/or section 203(a)(2) (which applies to acquisitions of securities by holding companies), section 33.1(c)(2) grants blanket authorization under section 203(a)(2) only. They explain that intra-system cash management or financing programs typically involve both: (i) "horizontal" transactions between two public utility subsidiaries (e.g., one public utility lending money to an affiliated public utility), which may be jurisdictional under section 203(a)(1); and (ii) transactions between a holding company and its subsidiaries (e.g., a holding company lending money "downward" to a subsidiary public utility), which may be jurisdictional under section 203(a)(2).

86. EEI, Entergy, and Duke/Cinergy assert that, based on the preamble discussion, the Commission apparently intended to cover both types of transactions, but the regulatory text did not incorporate them. In the preamble, we stated that "it is consistent with the public interest to grant a blanket authorization to allow holding companies and their

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subsidiaries to take part in intra-system cash management-type programs."[81] EEI, Entergy, and Duke/Cinergy state that because these transactions among public utility affiliates are very frequent, it is impractical for them to file for section 203 approval for such transactions. Thus, blanket authorization for intra-system financings between public utility affiliates is necessary to allow companies to effectively manage their financial needs.[82]

87. Similarly, National Grid asserts that, while the Commission explicitly stated in the preamble of Order No. 669 its intent to grant blanket pre-authorization under FPA section 203 for public utility participation in cash management programs, the Commission provided no regulatory text to allow for utilities and their associate companies (other than holding companies) to participate in cash management programs. It asserts that to ensure that the blanket authority granted by the Commission in paragraph 142 of Order No. 669 enables cash management programs to continue, the Commission should expand the regulatory text to allow all associate companies that participate as borrowers in cash management programs to continue to "acquire securities" in all other program participants. Specifically, it states that the Commission should revise section 33.1(c)(2)

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[81] EEI Rehearing Request at 4 (citing Order No. 669 at P 142 (emphasis added); Entergy Rehearing Request at 2; and Duke/Cinergy Rehearing Request at 2.

[82] See EEI Rehearing Request at Attachment A at 1-2, section 33.1(c)(3). Attachment A contains a black-lined version of regulation 33.1(c), revised to include a blanket authorization for intra-system financial transactions between public utility affiliates under section 203(a)(1).

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to cover both holding companies and any transmitting utility, electric utility company, or public utility within the holding company system.[83] National Grid states that the provision should also be revised to incorporate requisite blanket authority under FPA section 203(a)(1) for public utilities to participate in cash management programs.

88. APPA/NRECA assert that the Commission granted blanket authorization for intra-holding company financing transactions without adequate safeguards against cross-subsidization or pledges or encumbrances of utility assets. In discussing the blanket approval of these arrangements, Order No. 669 states that applicants "must adopt sufficient safeguards, including any necessary cash management controls (such as restrictions on upstream transfers of funds, ring fencing, etc.) to prevent any cross-subsidization between holding companies and their new subsidiaries before receiving section 203 approval."[84] However, APPA/NRECA point out that these requirements do not appear in the Commission's accompanying regulations.

b. Commission Determination

89. First, we clarify that the blanket authorization granted for money pool transactions is intended to authorize "horizontal" transactions between public utility company subsidiaries as well as "downward" loans from the holding company to its public utility company subsidiaries and we will add new regulatory text to reflect this. However, the

[83] National Grid Rehearing Request at 5.

[84] APPA/NRECA Rehearing Request at 30 (citing Order No. 669 at P 143).

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blanket authorization does not extend to acquisition of securities issued by entities outside the money pool.

90. Rather than modify the regulatory text in the Final Rule, which addressed only "vertical" transactions between public utility holding companies and their subsidiaries, in section 33.1(c)(7), we have adopted stand-alone regulatory text addressing "horizontal" public utility money pool transactions subject to FPA section 203(a)(1)(C). We note that section 203(a)(1)(C) jurisdiction applies only to public utility acquisitions of securities of other public utilities. Such authorization is not required under section 203(a)(1) for a public utility to acquire securities of a non-public utility. Therefore, there is no need to broaden the regulatory text as requested by National Grid to cover public utility acquisitions of securities of non-public utilities.

91. In response to APPA/NRECA, we note that the blanket authorizations under section 203(a)(2) for holding company acquisitions of non-voting securities, voting securities of less than 10 percent of a company, and securities of subsidiaries are all subject to the requirement that the holding company provide the Commission with copies of certain information required to be filed with the SEC. Further, the new blanket authorization in section 33.1(c)(7), which applies to public utility participation in intra-system cash management programs, is subject to safeguards to prevent cross-subsidization or encumbrances of utility assets. We also note that public utilities have filing requirements under the Commission's Cash Management Rule. With respect to whether the Commission should codify specific safeguards that must be adopted for

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money pool transactions, we will consider this issue at the technical conference to be held later this year regarding PUHCA and certain FPA section 203 issues.

5. Section 33.1(c)(2)-(c)(4) - Blanket Authorizations: Purchases of Voting and Non-Voting Securities Under Section 203

92. Section 33.1(c)(2) provides that 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 FPA 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, the holding company will own less than 10 percent of the outstanding voting securities; or (iii) any security of a subsidiary company within the holding company system.

93. Section 33.1(c)(3) provides that the blanket authorizations granted under section (c)(2) are subject to the conditions that the holding company shall not: (i) borrow from any electric utility company subsidiary in connection with such acquisition; or (ii) pledge or encumber the assets of any electric utility company subsidiary in connection with such acquisition.

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94. Section 33.1(c)(4) provides that a holding company granted blanket authorizations in section (c)(2) shall provide the Commission with the same information, on the same basis, that the holding company provides to the SEC in connection with any securities purchased, acquired or taken pursuant to this section.

a. Section 33.1(c)(2)(i) - Purchases of Non-Voting Securities by a Holding Company

95. In Order No. 669, the Commission found that there is no need for case-by-case examination of a holding company's purchase of non-voting securities. Such securities generally do not convey control and hence do not give the holding company additional market power, harm competitive markets, or otherwise harm captive customers.[85] We did not impose any type of filing requirement with respect to such transactions.[86]

i. Rehearing Request

96. APPA/NRECA assert that the Commission should not have granted this blanket authorization. They state that the Commission cites no basis in the record for its finding that such transactions generally do not harm competition or otherwise disadvantage captive customers.[87] According to APPA/NRECA, non-voting securities may take many different forms, limited only by the imagination of creative deal-makers and lawyers.

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[85] See Cash Management Rule at 29 (discussing exception for non-voting interests that convey significant veto rights).

[86] Order No. 669 at P 144.

[87] APPA/NRECA Rehearing Request at 31 (citing Order No. 669 at P 144).

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APPA/NRECA assert, for instance, that securities that are non-voting can be important in the overall financial structure of many corporations or may, in the future, accrue voting rights, such as in the case of convertible debt. Therefore, they argue, the Commission should review such transactions on a case-by-case basis. If a party is uncertain whether a particular acquisition is a transfer of control that warrants a section 203 application, it can seek a declaratory order.

ii. Commission Determination

97. APPA/NRECA has not persuaded us that customers will be harmed by the blanket authority to acquire non-voting securities. An acquisition of non-voting securities generally does not result in a change of control because such securities generally lack mechanisms like voting or veto rights necessary to influence or control management of the company. Moreover, section 33.1(c)(3) specifically prohibits holding companies that use the blanket authorization from borrowing from any electric utility company subsidiary in connection with the transaction or from pledging or encumbering assets of an electric utility company subsidiary. In those instances where the security is non-voting when issued or acquired but can be converted to voting at a later date, we will treat the security as a voting security when it is converted. This blanket authorization for acquisition of non-voting securities by a holding company only relieves the holding company of the requirement to file an application under section 203(a)(2) to obtain prior authorization from the Commission in a specific situation and with certain conditions.

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b. Section 33.1(c)(2) – Holding Company Purchases of Less than 10 Percent of Outstanding Voting Securities

98. The Commission granted blanket authorization for a holding company in a holding company system to purchase less than 10 percent of the outstanding voting securities of a public utility or a holding company covered by section 203(a)(2). We conditioned the blanket authorization "by requiring the purchaser of such securities to provide the Commission, not more than 45 days after the purchase, with the same information on the same basis that the holding company now provides to the SEC."[88] The Commission stated that it would issue notices of these filings for informational purposes only.

i. Rehearing Requests

99. APPA/NRECA assert that the Commission should not have granted this blanket authorization. They assert that the Commission should set the ownership threshold at less than 5 percent, as with the safe harbor provisions of the RTO Rule[89] governing active ownership interests by market participants in regional transmission organizations (RTOs).

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[88] Order No. 669 at P 145. This could include Schedules 13D or 13G and Forms 8-K or 10-Q.

[89] Regional Transmission Organizations, Order No. 2000, 65 FR 809, 855 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089, at 31,108 (1999), order on reh'g, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001) (RTO Rule).

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APPA/NRECA assert that the Commission provides no justification for using a higher percentage threshold for blanket authorization here than it did in its RTO rule.

100. Coral Power asserts that the Commission should grant a blanket authorization under FPA section 203(a)(1) for dispositions of less than 10 percent of the outstanding voting securities by a public utility to match the blanket authorization granted to holding companies to acquire such securities. It states that the Commission has long interpreted section 203 to apply to changes in control over jurisdictional facilities.[90] New FPA section 203(a)(4) codifies this precedent and gives the Commission express authority to review changes in control under section 203. Coral Power asserts that the disposition of up to 10 percent of the outstanding voting securities of a public utility or any of its upstream owners is not a change in control for purposes of FPA section 203(a)(1), as long as the acquiring entity does not hold a direct or indirect managing interest in the public utility. It states that, where there is no change in control, there can be no harm to competition or captive ratepayers as a result of such a transaction.

ii. <u>Commission Determination</u>

101. APPA/NRECA advocate a reduction, from 10 percent to 5 percent, in the level of outstanding voting securities in a public utility or a public utility holding company that another holding company may acquire under the blanket authorization the Commission granted in Order No. 669. They cite to the Commission's conclusion in the RTO Rule

[90] Coral Power Rehearing Request at 7.

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that limited market participants to no more than a 5 percent active ownership interest in an RTO. We will deny APPA/NRECA's request for rehearing. In the RTO Rule, we reviewed various thresholds for presuming a lack of independence, including those found in the decisions of other agencies. We concluded that, because of particular concerns with the independence of RTOs, a limitation of 5 percent was appropriate. However, we noted that, in other contexts, we had determined that holding 10 percent of a company's voting stock was the level at which a rebuttable presumption of control applied for purposes of determining whether a company was an affiliate.[91]

102. The fact that the Commission adopted a 5 percent ownership interest as a measure of control for purposes of determining an RTO's independence from market participants does not dictate the maximum threshold for a blanket authorization under section 203(a)(2). The two situations are quite different. For Order No. 2000, the Commission was faced with the task of building confidence that the RTOs would not be subject even to influences or the appearance of influences that would favor one market participant over another. As a result, the Commission set the threshold relatively low, prohibiting an ownership interest of no more than 5 percent. Our decision here reflects a reasonable balance in determining what is consistent with the public interest under section 203, taking into account Congress' intent in EPAct 2005 to remove obstacles to much-needed investment in the electric utility industry and to protect ratepayers. Nothing in the request

[91] RTO Rule, FERC Stats. & Regs ¶ 31,089 at 31,070.

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for rehearing has convinced us that allowing blanket approval for a holding company to acquire less than 10 percent of the securities in a public utility or another holding company will harm customers. Setting the level at the higher end of the rather short spectrum (the low considered by the Commission of 5 percent and the high of 10 percent) described by the Commission in the RTO Rule will encourage increased investment because it lifts the burden of obtaining pre-authorization under FPA section 203(2).

103. Coral Power suggests that the Commission give essentially the same blanket authorization to public utilities under section 203(a)(1) that we gave to public utility holding companies under section 203(a)(2). The Commission declines to do so and will continue to review dispositions of jurisdictional facilities by public utilities under FPA section 203(a)(1) on a case-by-case basis. Concerns with control, markets and protection of captive customers or customers receiving transmission service over jurisdictional transmission facilities are closely linked with assets directly controlled by the public utilities.

c. Section 33.1(c)(4) – SEC Information Provided to the Commission

104. As noted above, the Commission conditioned the blanket authorization for holding companies under section 33.1(c)(2) "by requiring the purchaser of such securities to provide the Commission, not more than 45 days after the purchase, with the same

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information on the same basis that the holding company now provides to the SEC."[92] The Commission stated that it would issue notices of these filings for informational purposes only.

i. Rehearing Requests

105. EEI, Entergy, Duke/Cinergy, and GS Group request that the Commission revise section 33.1(c)(4) to list the specific SEC schedules and forms that the Commission directed companies to file with the Commission, rather than just making the more general reference to the "same information" provided to the SEC.[93] They state that this change would make the text of the rule consistent with the Commission's discussion in the

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[92] Accordingly, the Commission directed that the purchaser of such securities file with the Commission copies of SEC Schedules 13D, 13G, and Form 13F. The Commission explained that SEC Schedule 13D is required to be filed by any entity acquiring beneficial ownership of more than 5 percent of a class of a company's securities. The Schedule 13D filing requires, among other things, a statement of the purpose(s) of the acquisition of the securities of the issuer and a description of any plans or proposals the reporting person may have that relate to or would result in the acquisition of additional securities of the issuer; any extraordinary corporate transactions, such as a merger, reorganization or liquidation of the issuer or its affiliates; and any changes in the board of directors or management of the issuer. Schedule 13G is the same form, but is used when the person or entity is making the purchase for investment only. Institutional investment managers who exercise investment discretion over $100 million or more must report their holdings on SEC Form 13F. We noted that requiring this information should impose only a de minimis burden on the holding company, since we are merely requiring the same information that was filed with the SEC. Further, the Commission stated that, should the SEC change its reporting requirements, this information must continue to be filed with the Commission.

[93] See, e.g., EEI Rehearing Request at 6, and Attachment A at 2-3, section 33.1(c)(5); Entergy Rehearing Request at 3; Duke/Cinergy Rehearing Request at 3-4; and GS Group Rehearing Request at 7.

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preamble and in footnote 107, which refers specifically to SEC Schedules 13D and 13G and Form 13F. GS Group is concerned that the general directive to provide the "same information" is overly broad, creates uncertainty regarding the type of information that must be filed with the Commission, and could be construed to include oral communications with the SEC, correspondence, documents produced in response to a data request, and other investor disclosure documents that are only tangentially related to an acquisition of securities pursuant to section 33.1(c)(4).

106. Further, GS Group and MidAmerican explain that, while the preamble indicates that the SEC filings must be provided to the Commission not later than 45 days after the purchase of securities being reported, the text of the rule merely indicates that copies of SEC filings must be provided to the Commission "on the same basis" provided to the SEC.[94] They state that the 45-day deadline is inconsistent with the filing deadlines for Schedule 13D, Schedule 13G and Form 13F.

107. MidAmerican states that should the SEC eliminate such reporting requirements, the acquirer of any securities under the blanket authorization should continue to provide the information that had been required under the rescinded SEC rule to the Commission no later than the time that would have been required under the rescinded SEC rule.

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[94] Id. at 8; MidAmerican Rehearing Request at 5.

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108. MidAmerican seeks clarification of the rule as it pertains to Schedule 13G only to the extent a Schedule 13G is to be filed with respect to the reporting of beneficial ownership interests of less than 10 percent of voting equity securities

109. MidAmerican and GS Group also request that the Commission clarify that, if the submission to the SEC qualifies for confidential treatment, the Commission also should give it confidential treatment. MidAmerican explains that the investment strategies of banks, brokers, investment managers, pension funds, and other investors often involve proprietary and confidential information and that release of this information could harm these entities.

ii. Commission Determination

110. In response to the many industry requests on rehearing, we will specify that it is SEC Schedule 13D, Schedule 13G and Form 13F that the companies are directed to file. To ensure that this filing requirement imposes only a de minimis burden, copies of these SEC Schedules 13D and 13G and Form 13F must be filed with the Commission under the same filing deadlines provided in the SEC rules. We are revising section 33.1(c)(4) accordingly.

111. We clarify that, if the SEC eliminates such reporting requirements, the acquirer of securities under the blanket authorization must continue to provide the information required under the rescinded SEC rule to the Commission no later when it would have been required under the rescinded SEC rule. MidAmerican's request for clarification of the reporting requirement as it pertains to Schedule 13G is unclear, as is the specific

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change, if any, that it proposes. As noted above, however, the Commission is revising the reporting requirement as it relates to the SEC schedules and form to make filing deadlines and content commensurate with SEC requirements.

112. Further, we clarify that requests for confidential treatment of copies of the schedules must follow the established procedures for requests for special treatment of documents submitted to the Commission.[95] Under those procedures, any person submitting a document may request privileged treatment by claiming that some or all of the information is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (FOIA),[96] and should be withheld from public disclosure. The Commission places documents for which privileged treatment is requested in a non-public files. When a FOIA requester seeks a document for which privileged treatment has been claimed or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information will notify the person who submitted the document and give that person at least five calendar days in which to comment. Notice of a decision to deny a claim of privilege will be given to any person claiming that the information is privileged no less than five calendar days before disclosure. In addition, when a FOIA requester brings suit in

[95] 18 CFR 388.112 (2005).

[96] 5 U.S.C. 552 (2000).

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Federal court to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the document.

6. Other Requested Blanket Authorizations – Holding Company Purchasing Its Own Securities, Fiduciary Investments and Bank Underwriting/Hedging

a. Holding Company Purchasing Its Own Securities

i. Rehearing Requests

113. EEI, Entergy, and Duke/Cinergy request that the Commission clarify that a holding company may buy its own securities under blanket authority and need not make a filing under section 203. They state that, while it may seem obvious that a holding company can acquire its own securities without section 203 authorization, there is some confusion created by the differing statutory language of 203(a)(1)(C) and 203(a)(2). Before EPAct 2005, section 203(a) required prior approval for a public utility to acquire the security "of any other public utility." In contrast, new section 203(a)(2), requires prior approval for a holding company to acquire "any security with a value in excess of $10,000,000 of . . . a holding company in a holding company system that includes a transmitting utility or an electric utility company."

114. National Grid raises similar arguments and adds that repurchase transactions are routine and serve a variety of business needs, including facilitating stock issuances under legitimate stock plans and managing capital structure.

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ii. Commission Determination

115. In an order issued after the final rule, the Commission ruled that the most reasonable interpretation of section 203(a)(2) is that a holding company is not required to obtain Commission authorization to repurchase its own stock.[97]

b. Fiduciary Investments and Bank Underwriting and Hedging Activities

i. Rehearing Requests

116. BofA/JPMorgan ask that the Commission clarify that section 203(a)(2) does not apply to fiduciary investments by non-bank financial institutions in a Regulated Banking Group.[98] They explain that it would not be feasible for non-bank fiduciaries to obtain section 203(a)(2) approval before making such investments because many Regulated Banking Groups have non-bank subsidiaries that routinely acquire and dispose of equity and debt positions in utility securities in fiduciary capacities. These fiduciary relationships include the function of trustee, agent, executor, administrator, guardian,

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[97] National Grid plc and National Grid USA, 114 FERC ¶ 61,115 at P 11 (2006).

[98] By use of the term "Regulated Banking Group," BofA/JPMorgan means: (i) banks chartered and regulated under the laws of the United States or a U.S. state, and (ii) bank holding companies registered as such with (and subject to supervision and regulation by) the Federal Reserve Board under the Bank Holding Company Act of 1956 (as amended by the Gramm-Leach-Bliley Act of 1999, in each case together with their subsidiaries. BofA/JPMorgan also explain that the Commission's blanket authorization of the acquisition of up to 10 percent of voting equity of utilities does not provide adequate relief, since on an aggregate basis all holdings in a fiduciary and/or proprietary capacity under a large banking group may in the ordinary course of business exceed the 10 percent threshold. BofA/JPMorgan Rehearing Request at 13-14.

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asset manager, and discretionary investment adviser.[99] BofA/JPMorgan assert that these passive investments are not made to permit the Regulated Banking Group to exercise control over the operations of the issuer. Further, they state that such investments are already comprehensively regulated under federal and state regimes applicable to financial institutions. These regulatory regimes are designed to assure that the holdings by a Regulated Banking Group in a fiduciary capacity are not used to impermissibly support investments in a public utility as principal, and do not provide a basis to exercise impermissible control over a public utility issuer. For these reasons, BofA/JPMorgan seek a determination that fiduciary investments by their non-bank financial institutions do not require approval under section 203(a)(2). In the alternative, they request blanket authorization for such fiduciary investments.

117. BofA/JPMorgan request that the Commission confirm that relief from the "acquisition of securities" clause under section 203(a)(1) applies under section 203(a)(2). Specifically, they assert that the Commission has granted banks that function as power marketers relief from the "acquisition of securities" clause in section 203(a)(1).[100] Such banks need not seek prior approval from the Commission when they acquire utility

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[99] Id. at 13.

[100] See UBS AG and Bank of America, N.A., 101 FERC ¶ 61,312 (2002), reh'g granted in part and denied in part, 103 FERC ¶ 61,284 (2003), reh'g granted, 105 FERC ¶ 61,078 (2003) (UBS/Bank of America); JPMorgan Chase Bank, N.A., Docket No. ER05-283 (unpublished letter order dated March 18, 2005).

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securities in debt, fiduciary, trading, or hedging capacities. However, BofA/JPMorgan explain that a number of banks have recently become power marketers and when that happens, the bank becomes a public utility for purposes of FPA section 203. They assert that, under EPAct 2005, many banks that are public utilities are now also "holding companies." Congress provided that certain holdings of banks, bank operating subsidiaries, and broker-dealers do not make them "holding companies" in section 1262(8) of EPAct 2005. BofA/JP Morgan state that the statutory exemption also specifically covers loan collateral, loan liquidation, and fiduciary holdings.

118. However, BofA/JPMorgan explain that when banks act as underwriters, they will not know at the outset whether they will be successful in disposing of a sufficient number of shares to assure that their holdings do not exceed 5 percent of the issuer after 45 days.[101] To comply with section 203, however, they would have to seek the Commission's approval immediately to retain the shares or risk noncompliance. Thus, BofA/JPMorgan ask that the Commission issue blanket authorization under section 203(a)(2) for failed underwritings and hedging holdings on the same terms and conditions imposed in the Commission's orders granting blanket authorization to bank power

[101] BofA/JPMorgan Rehearing Request at 19. They explain that in a successful underwriting, the underwriter purchases shares from the issuer and immediately resells those shares in the market. In a failed underwriting, the underwriter is not able to resell those shares immediately and will attempt to sell the unsold shares in an orderly manner over a period of time following the closing of the initial purchase.

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marketers under section 203(a)(1).[102] Further, they request that Order No. 669 be clarified to authorize: (i) underwriting holdings to exceed 45 days and (ii) equity derivative hedging holdings, to the extent permitted under the Commission's orders applicable to bank power marketers.

119. Similarly, Morgan Stanley requests that the Commission revise the blanket authorizations adopted in Order No. 669 to permit certain additional securities acquisitions and to differentiate between the acquisition of securities by a public utility and by non-utility affiliates. It requests that the Commission grant blanket authorizations to allow holding companies and their affiliates to hold: (1) voting and non-voting securities, without limitation, on behalf of customers as fiduciaries; (2) voting and non-voting securities, without limitation, in the ordinary course of their business as underwriters or dealers;[103] (3) up to the less than 10 percent limit in section 33.1(c)(2)(ii) of voting securities as principal of each class of voting securities issued by a utility or holding company, provided that such ownership interest does not include a right to control the jurisdictional activities of the issuer; (4) utility securities in connection with underwriting activities so that underwriting activities are not subject to the 10 percent

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[102] BofA/JPMorgan Rehearing Request at 20 (citing UBS/Bank of America, 103 FERC ¶ 61,284).

[103] Morgan Stanley explains that any utility securities held as part of underwriting or dealer/trader activities are transitory, so the underwriter or dealer/trader does not have the ability or incentive to exercise control over the issuer. Id. at 13.

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limit in section 33.1(c)(2), provided that the holding company or its affiliates file an application for section 203(a) approval within 45 days of any failed underwriting to retain the securities and commits while the applications remains pending not to vote the utility securities held as a result of the failed underwriting; (5) utility securities in connection with their trading activities so that the dealer/trader activities are not subject to the 10 percent limit in section 203(c)(2); (6) utility securities as lenders so that the acquisitions of debt securities are not subject to the 10 percent limit in section 33.1(c)(2), except that application under section 203 would be required before the holding company or its affiliate could take control by foreclosure, bankruptcy, or otherwise; (7) utility securities of any entity formed to acquire, finance, and lease utility assets to any public utility, electric utility company, or transmitting utility under a long-term net lease; and (8) utility securities in the course of routine dealing and trading as principals for their own account so that utility securities acquired as principal for hedging purposes are excluded from the 10 percent limit in section 33.1(c)(2), if the holding company or its affiliate commits not to vote such securities.[104]

120. Morgan Stanley explains that fiduciary holdings by holding companies or their affiliates will not result in control over a public utility because the fiduciary has an obligation to manage those holdings in the interest of the persons on whose behalf such

[104] Morgan Stanley Rehearing Request at 7-9.

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securities are held.[105] It also explains that any utility securities held as part of underwriting or dealer/trader activities are transitory, so the underwriter or dealer/trader does not have the ability or incentive to exercise control over the issuer.[106] With respect to hedging activities, Morgan Stanley asserts that, if the acquiring entity agrees not to vote an interest held as principal beyond the authorized 10 percent limit, it will not exercise control over the public utility. Finally, if the acquiring entity engages in passive lease financing for public utilities, the Commission has held that it does not need to regulate such activity.[107]

121. Morgan Stanley argues that its requested blanket authorizations do not give the acquiring entity additional market power or enable it to undermine competition or disadvantage captive customers. Instead, the blanket authority would promote the public interest by bringing more capital investment to the utility industry. If the Commission finds that blanket authorizations should not apply to all holding companies, Morgan Stanley requests that they apply to the activities of non-utility affiliates of financial institutions.

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[105] Id. at 9 (citing UBS/Bank of America, 103 FERC ¶ 61,284, at P 11).

[106] Id. (citing UBS/Bank of America, 103 FERC ¶ 61,284, at P 13).

[107] Id. (citing Alliant Energy Corp., 111 FERC ¶ 61,458 (2005)).

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ii. Commission Determination

122. Section 1262(8)(B) of PUHCA 2005 excludes from classification as "holding companies" certain entities that hold the securities of public utilities or public utility holding companies under certain conditions. Among these entities are banks, savings associations and trust companies, or the operating subsidiaries of these institutions, holding, as fiduciaries, these securities in the ordinary course of their respective businesses, and broker-dealers holding these securities under certain conditions. The Commission recognizes that Order No. 669 does not apply in these situations.

123. BofA/JPMorgan request clarification that entities that are not banks or operating subsidiaries of banks, but are subject to regulation as banks,[108] either qualify for the statutory exclusions in section 1262(8)(B) or have a blanket authorization to acquire and hold covered securities in any amount as fiduciaries in the normal course of their business. We cannot find that these entities qualify for the statutory exclusion. The statutory exclusion is specific only to certain entities under certain conditions.

124. However, we agree that entities holding covered securities in any amount as fiduciaries in the normal course of their business or as collateral for loans or in

[108] Such regulation applies to: (i) banks, and their subsidiaries, chartered and regulated under the laws of the United States or a U.S. state, and (ii) bank holding companies registered as such with the Federal Reserve Board, together with the subsidiaries of those holding companies, and subject to the supervision and regulation of the Federal Reserve Board under the Bank Holding Company Act of 1956 (as amended by the Gramm-Leach-Bliley Act of 1999). 12 U.S.C 1843 (2000).

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connection with loan liquidation and that are, in the course of that business, subject to the regulatory oversight of the Board of Governors of the Federal Reserve Bank, or the Office of Comptroller of the Currency are likely to be significantly constrained in their use of those securities so as to not affect regulation, rates or competition under the FPA. Therefore, subject to certain conditions and reporting requirements, the Commission will grant to entities that are subject to the regulatory oversight of the Federal Reserve Bank or the Comptroller of the Currency because they are affiliated with banks or bank holding companies regulated by the Federal Reserve Bank under the Bank Holding Company Act of 1956, as amended by the Gramm-Leach-Bliley Act of 1999, a blanket authorization under section 203(a)(2) to acquire and hold as fiduciaries in the normal course of their business or as collateral for loans or in connection with loan liquidation an unlimited amount of covered securities of public utilities or public utility holding companies. The conditions and reporting requirements are: (1) the holding does not confer a right to control, positively or negatively, the operations through debt covenants or any other means, the operation or management of the public utility or public utility holding company, except as to customary creditor's rights or as provided under the United States Bankruptcy Code; and (2) the parent holding company files with the Commission on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held.

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125. Morgan Stanley requests a blanket authorization under section 203(a)(2) of the FPA and section 33.1(c)(2) of the Commission's regulations to acquire and hold up to the percentage limit under section 33.1(c)(2)(ii) on holdings of voting securities. There is no need to grant the requested authorization. Section 33.1(c)(2)(ii) grants blanket authorization to acquire voting securities under the condition stated in the regulation notwithstanding that the acquisition may exceed $10 million.

126. Morgan Stanley requests blanket authorization under section 203(a)(2) of the FPA and section 33.1(c)(2) of the Commission's regulations to acquire and hold securities in connection with passive lease financing of public utilities. Such authority is already granted under section 33.1(c)(2)(i). Similarly, Morgan Stanley requests blanket authorization to acquire and hold as a lender without regard to the percentage limitation under section 33.1(c)(2)(ii). Authority to hold debt instruments, which normally do not convey a right to control the public utility and which Morgan Stanley implies is the case in its request, is already provided under section 33.1(c)(2)(i).

127. Morgan Stanley requests reconsideration of Order No. 669 or, in the alternative, blanket authorization under section 203(a)(2) of the FPA so that it may, without the 10 percent or more limitation on outstanding securities, acquire and hold as a fiduciary any amount of covered securities. Morgan Stanley does not claim exemption under section 1262(8)(B) of PUHCA 2005**,** nor does it claim that its holdings as a fiduciary would be subject to regulatory oversight, such as that provided by the Federal Reserve Bank.

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Finally, while Morgan Stanley cites to UBS AG and Bank of America, N.A,[109] it does not explain how the safeguards of banking regulation relied upon by the Commission in those cases regarding holdings as a fiduciary apply to Morgan Stanley's situation. Therefore the Commission will not grant Morgan Stanley's request to provide a blanket authorization in our regulations. However, we will not preclude companies from seeking a blanket authorization on a case-by-case basis.

128. BofA/JPMorgan request confirmation that banks that are power marketers and that have blanket authorizations under section 203(a)(1) of the FPA also have blanket authorizations under section 203(a)(2) of the FPA as holding companies acquiring and holding public utility securities for the acquisition and holding of an unlimited amount of covered securities as a result of failed underwritings, if they are classified as holding companies because they own EWGs or QFs. The Commission in individual cases has granted conditional blanket authorizations to certain banks and their subsidiaries to acquire and hold an unlimited amount of covered securities in connection with failed underwritings. These authorizations contained two conditions. First, the authorization ends 45 days after acquisition unless the entity has, within that period, filed an application for approval under section 203 to keep the securities. Second, the bank or subsidiary must commit, during the pendency of that application, not to vote the

[109] Morgan Stanley Rehearing Request at 9 (citing UBS/Bank of America, 103 FERC ¶ 61,284 at P11).

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securities. The Commission's regulatory interests under section 203(a)(2) in holdings as a result of failed underwritings are similar to its interests in such holdings under section 203(a)(1). Therefore, with the two conditions above, we will grant blanket authorization under section 203(a)(2) to banks and their subsidiaries to acquire and hold an unlimited amount of covered securities in connection with failed underwritings.

129. Morgan Stanley also requests blanket authorization to acquire and hold an unlimited amount of covered securities in connection with underwriting activities. It is unclear whether Morgan Stanley is requesting authority only for failed underwritings. Of course, if Morgan Stanley or other entities are excluded entities under PUHCA section 1262(8)(B), then they are not holding companies; in that case, blanket authorizations to hold covered securities in connection with a failed underwriting is not necessary.

130. The blanket authorization that the Commission has granted in connection with failed underwritings relies more heavily on the two conditions described above than it does on the oversight of an alternative regulatory body, such as the Comptroller of Currency or the Federal Reserve System in the Bank of America/UBS AG series of decisions, to ensure that holdings resulting from failed underwritings are not used to exert control.[110] Therefore, the Commission will grant a blanket authorization under section 203(a)(2) for a holding company to acquire and hold an unlimited amount of covered

[110] UBA AG and Bank of Amercia, N.A., 101 FERC ¶61,312 (2002); 103 FERC ¶ 61,284 (2003); 105 FERC ¶ 61,078 (2003).

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securities in connection with a failed underwriting subject to the same conditions imposed in the Bank of America/UBS AG cases. We will add regulatory text to reflect this.

131. BofA/JPMorgan request clarification that the same blanket authorization previously granted for banks to hold equity securities of public utilities and public utility holding companies as principal for derivatives hedging purposes continues to apply under section 203(a)(2). The Commission has, for several years, granted blanket authority to certain banks to hold covered securities for hedging purposes incidental to the business of banking.[111] This has been based in part on the fact that the banks are subject to a supervisory standard that generally limits such holdings so that they typically do not exceed 5 percent of the outstanding shares. The Commission, however, has specifically conditioned the blanket authorizations on a limitation of the banks' authorization to vote the equity shares to 5 percent of the outstanding shares. Under PUHCA 2005, a company is a holding company if it owns 10 percent or more of the securities of a public-utility company or of a holding company of any public-utility company. The Commission agrees that the holding by banks of covered securities for hedging purposes that are incidental to the business of banking are an important part of the transactions necessary to the financing of the utility business. Therefore, the Commission will grant blanket

[111] See supra note 110.

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authorization under section 203(a)(2), subject to the condition that the bank not vote more than 10 percent of the outstanding shares. We will add regulatory text to reflect this.

132. Morgan Stanley requests clarification that holding covered securities in connection with hedging transactions is not subject to the limitation of up to 10 percent of outstanding securities provided under Order No. 669. It proposes that the Commission condition the grant on the commitment of the entity holding the securities, as well as its affiliates, not to vote securities held in connection with hedging transactions, to the extent that its holdings are 10 percent or more of the outstanding securities in that class. A condition removing the holder's power to vote the securities held for hedging purposes to the extent they are 10 percent or more of the securities in the class outstanding, even though the amount held for hedging is not limited, will address the Commission's concerns with control. Therefore, the Commission will grant the blanket authorization under section 203(a)(2) for companies to hold an unlimited amount of covered securities for hedging purposes on the condition that they do not vote the securities held to the extent they are 10 percent or more of the outstanding securities in the class. We will add regulatory text to reflect this.

133. We have granted above certain blanket authorizations for holding public utility securities as a fiduciary, for hedging purposes or for purposes of loan collateralization or liquidation. All these blanket authorizations require that such holdings occur in the normal course of business of the company holding the securities. In response to BofA/JP Morgan, we clarify that holdings that are exempt by virtue of section 1262(8)(B) of

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PUHCA 2005 will not be counted for purposes of determining whether the company holding such securities is a holding company under section 1262(8) of PUHCA 2005; in other words, holdings exempt by statute will not be aggregated with securities held in other capacities. Holdings by companies as principal for derivatives hedging purposes are not exempt under section 1262(8)(B) and, therefore, will be counted for purposes of determining whether the company is a holding company.

7. Section 33.2(j) - General Information Requirements Regarding Cross-Subsidization

134. Section 33.2(j) provides that a section 203 applicant must provide an explanation, with appropriate evidentiary support (Exhibit M to the application): (1) of how it is providing assurance that the proposed transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company; or (2) if no such assurance can be provided, an explanation of how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

135. In Order No. 669, the Commission also stated that certain protections may be necessary, on a case-by-case basis, in order to protect against cross-subsidization, pledge or encumbrance of utility assets, and affiliate abuse. The Commission stated that applicants should proffer ratepayer protection mechanisms to assure that captive

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customers are protected from the effects of cross-subsidization.[112] Among the types of protection mechanisms that can be proposed by are: a general hold harmless provision, which must be enforceable and administratively manageable, where the applicant commits that it will protect wholesale customers from any adverse rate effects resulting from the transaction for a significant period of time following the transaction; a moratorium on increases in base rates (rate freeze), where the applicant commits to freezing its rates for wholesale customers under a certain tariff for a significant period of time.[113] The Commission stated that it will address the adequacy of the proposed mechanisms on a case-by-case basis.

136. Order No. 669 also stated that certain verifications provided in an application could streamline the approval process by avoiding a detailed examination of cross-subsidization and encumbrance concerns.[114] We stated that we may accept, along with

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[112] The Commission also stated that the applicant bears the burden of proof to demonstrate that customers will be protected. See Central Vermont Pub. Serv. Corp., 39 FERC ¶ 61,295, at 61,960 (1987) (finding of a potential for abuse, the Commission may disapprove the transaction or place conditions on it).

[113] Order No. 669 at P 167. These protection mechanisms are offered only as examples. Whether these types of protection mechanisms are sufficient in a particular case will depend on the circumstances. See, e.g., Merger Policy Statement at 30,121-24.

[114] Order No. 669 at P 169. The Commission stated that such verifications, considered on a case-by-case basis in light of the given transaction, and explanations relating to those verifications, as well as other explanations of how the transaction will not result in cross-subsidization, pledge, or encumbrance of utility assets for the benefit of an associate company – or if it does result in such, an explanation of how such cross-

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any protection mechanisms (discussed above), on a case-by-case basis, in lieu of or in addition to any other explanation, the following four verifications that the proposed transaction does not result in, at the time of the transaction or in the future: (1) transfers of facilities between a traditional utility associate company with wholesale or retail customers served under cost-based regulation and an associate company; (2) new issuances of securities by traditional utility associate companies with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; and (4) new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail customers served under cost-based regulation, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

a. <u>Rehearing Requests</u>

137. APPA/NRECA argue that the Commission should have required substantive structural protections to ensure that section 203 transactions do not result in cross-subsidization or pledges or encumbrances of utility assets. They request that the Commission describe the specific issues a section 203 application must address and the

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subsidization, pledge, or encumbrance will be consistent with the public interest – is to be included as Exhibit M to the application.

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specific assurances and protective conditions that must be included to demonstrate that the proposed transaction meet the standards of amended FPA section 203(a)(4).[115]

138. More fundamentally, however, APPA/NRECA argue that the Commission improperly narrowed the scope of statutory concerns to be addressed under amended section 203. They say that ratepayer protection conditions such as temporary hold harmless commitments are not sufficient because Congress was concerned about more than simply ratepayer protection. APPA/NRECA assert that the ratepayer protection conditions discussed in Order No. 669 would be relevant, at most, to how cross-subsidization might affect rates; the conditions do not address the more structural financial problems of asset pledges or encumbrances.[116] APPA/NRECA contend that the statute focuses not just on rate issues, but more broadly on preventing the erosion of the financial viability of regulated utilities by draining off their resources into non-utility businesses. They assert that Order No. 669 elsewhere acknowledges this broader focus when it permits applicants seeking to avoid a hearing to make the four verifications described above, which concern the financial viability of the regulated utility and cross-subsidization, asset pledges and encumbrance issues.[117] APPA/NRECA also note that the Commission conditioned its grant of blanket authorization for intra-holding company

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[115] APPA/NRECA Rehearing Request at 13.

[116] Id. at 17.

[117] Id. at 18 (citing Order No. 669 at P 169).

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financing arrangements, including cash management programs, by requiring applicants to adopt safeguards to prevent any cross-subsidization between holding companies and their new subsidiaries. They urge the Commission to impose a similar requirement on all section 203 applicants, not just those seeking blanket approval of intra-holding company financing arrangements.[118]

139. Rather than allowing applicants to avoid a hearing by using the four verifications, APPA/NRECA assert that the Commission should require all section 203 applicants to demonstrate that cross-subsidization and encumbrance of utility assets cannot occur or to adopt safeguards against such cross-subsidization or asset encumbrance. All section 203 applicants should be required to make a detailed showing that the four conditions discussed in paragraph 169 of Order No. 669 are satisfied or that a transaction that fails any of these tests is nonetheless "consistent with the public interest."[119] This would add substance to 18 CFR. § 33.2(j).

140. APPA/NRECA also argue that the Commission erred by not requiring section 203 applications to demonstrate compliance with the Westar Energy[120] conditions on public utility debt or to explain why such requirement is unnecessary. They explain that, in Westar Energy, the Commission announced restrictions on all future issuances of secured

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[118] Id. (citing Order No. 669 at P 143).

[119] Id. at 20.

[120] Westar Energy, 102 FERC ¶ 61,186, clarified, 104 FERC ¶ 61,018 (2003).

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and unsecured debt by public utilities under section 204 of the FPA. These conditions "were designed to prevent investor-owned utilities' shareholders and management, whose interests may be different than the interests of utility customers, from taking actions which might jeopardize the utility's ability to perform its utility function and adversely affect its customers."[121] APPA/NRECA contend that the same cross-subsidization concerns underlie the express finding that the Commission is now required to make under amended section 203(a)(4) before approving any section 203 application.

141. In addition, APPA/NRECA assert that the Commission should have required section 203 applicants to disclose all existing pledges and encumbrances of utility assets. In the same vein, TAPSG contends that the Commission should have imposed an ongoing requirement that applicants disclose future pledges, encumbrances, or cross-subsidization involving the assets or businesses that are the subject of a section 203 application.

142. APPA/NRECA further request that the Commission clarify the meaning of the term "traditional utility with captive customers" in paragraphs 169, 192, and 193 of Order No. 669. They believe that, at a minimum, this term should include any public utility: (1) selling electricity at wholesale under cost-based rates; (2) selling electricity at retail under cost-based rates; or (3) owning or providing transmission service over jurisdictional transmission facilities (which, at least today, also implies cost-based

[121] APPA/NRECA Rehearing Request at 23.

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rates).[122] APPA/NRECA also would include transmission customers, as well as retail customers and wholesale customers, as "captive customers." Furthermore, APPA/NRECA say that even a utility with market-based rates can have captive customers and, therefore, can be a traditional utility. The Commission should not assume that a utility with market-based rates does not have captive customers, in light of impediments to wholesale competition generally in the industry and the Commission's own actions in revising the tests for market power and then withdrawing market-based rate authority in some cases.

143. Finally, TAPSG requests that the Commission clarify that it will consider adverse competitive effects associated with cross-subsidization.[123] TAPS argues that cross-subsidization not only harms the ratepayers who bear its expense, but also can injure competition in the market where the cross-subsidized company sells. TAPSG contends that a commitment by a utility to hold captive customers harmless from increased costs associated with a section 203 transaction will not address this concern.[124]

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[122] Id. at 20-21.

[123] TAPSG Request for Rehearing at 3.

[124] APPA/NRECA, in response to footnote 118 in Order No. 669, appear to share the same concern. They argue that a utility charging market-based rates can subsidize those rates by inflating its retail and transmission rates, thereby unfairly eliminating wholesale competitors and, in the long run, lessening wholesale competition and raising wholesale rates. APPA/NRECA Rehearing Request at 21, n. 25.

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b. Commission Determination

144. On further consideration, the Commission will grant APPA/NRECA's request for rehearing and will require all section 203 applicants (which do not include those who have blanket authorization) to include, as part of Exhibit M of the application, a detailed showing that either: (1) all four tests of the four-part framework set forth in Order No. 669 (at P 169), as modified herein, are met, thus demonstrating that the transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company; or (2) if cross-subsidization or pledges or encumbrances of utility assets were to occur, how such cross-subsidization, pledges or encumbrances would nonetheless be consistent with the public interest.[125] We believe this will assure better customer protection and we will amend the regulatory text to require this demonstration. We do not believe that requiring a detailed showing that all four conditions are met imposes an unreasonable burden on section 203 applicants.

145. However, not withstanding APPA/NRECA's request, we do not find it necessary to generally require, except as noted below, section 203 applicants to demonstrate that the

[125] We will continue to require verifications, rather than a showing or demonstration, as a condition of the blanket authorization for holding company acquisitions of FUCOs, if the holding company or its affiliates, subsidiaries, or associate companies within the holding company have captive customers or own or provide transmission service over jurisdictional transmission facilities in the United States, as provided in section 33.1(c)(5). The Commission's verification requirements are set forth in 18 CFR 385.2005(b).

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transaction satisfies the Westar Energy conditions relating to the future issuance of secured and unsecured debt or to certify that they will comply with such conditions in the future. However, if a public utility were to issue secured or unsecured debt pursuant to a Commission section 204 authorization to finance a section 203 transaction undertaken either by itself or its parent or affiliate, the public utility would have to comply with the Westar Energy conditions as a consequence of receiving section 204 authorization for the issuance of debt.

146. The Commission also will require that applicants disclose all existing pledges or encumbrances of utility assets as part of the application. However, contrary to TAPSG' request, we will not generally require the continuing disclosure of future pledges or encumbrances of utility assets as a condition of authorization. On a case-by-case basis, the Commission may determine that such a condition is necessary to ensure that the transaction is consistent with the public interest. Moreover, section 203(b) authority will allow the Commission to revisit its authorization to determine if a further condition requiring continuing disclosure is necessary.

147. In response to APPA/NRECA's request for clarification regarding the meaning of "traditional utility with captive customers," although we will retain and clarify our original definition of the term "captive customer," as discussed below, we will also separately include APPA's language to cover public utilities that own or provide transmission service over Commission-jurisdictional transmission facilities. Thus, various conditions or restrictions will apply where a traditional public utility has captive

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customers (defined as wholesale or retail electric energy customers served under cost-based regulation) and also where the public utility owns or provides transmission service over Commission-jurisdictional transmission facilities. However, contrary to APPA/NRECA's proposed interpretation, a public utility selling power only pursuant to market-based regulation will not be regarded as a "traditional public utility with captive customers" and, hence, customers served at market-based rates will not be regarded as "captive customers." The fact that the Commission is revisiting its tests for granting market-based rate authority or that the authority of some utilities to sell at market-based rates has been withdrawn does not undermine a conclusion that customers of utilities with legitimate market-based rate authority are not "captive customers." We do not approve market-based rates unless we find that the utility does not have market power.

148. TAPSG requests that the Commission clarify that we will consider the effect of cross-subsidization on competition. Intervenors can always argue that a particular transaction may result in cross-subsidization and that this may affect competition. We will address such arguments based on the facts in a particular case.

8. Section 33.11(b) - Commission Procedures for Consideration of Applications under Section 203 of the FPA

149. Section 33.11(b) states that the Commission will expeditiously consider completed section 203 applications that are not contested, do not involve mergers, and are

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consistent with Commission precedent.[126] It provides that dispositions of only transmission facilities, "particularly" those that both before and after the transaction are under the functional control of a Commission-approved RTO or ISO, will generally receive expedited treatment.[127] In Order No. 669, the Commission explained that ISOs and RTOs are pro-competitive and are effective at preventing market power abuse because they have market monitoring and mitigation measures.

a. Rehearing Requests

150. APPA/NRECA assert that the Commission provides no plausible justification for providing expedited review for dispositions of only transmission facilities. They argue that because owning transmission facilities is one of the major means of exercising market power, consolidations of control over transmission facilities should be carefully evaluated. They also argue that the Commission's regulation of transmission service does not mean that transactions involving only transmission should be accomplished with minimal Commission scrutiny.

151. Alternatively, APPA/NRECA state that if the Commission retains section 33.11(b)(1), it should be clarified and revised. They state that the word "particularly" in section 33.11(b)(1) either makes the regulation superfluous or makes its meaning unclear. If the Commission intended for this clause to be restrictive (in other words, a disposition

[126] Order No. 669 at P 188.

[127] Id. at P 190-91.

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of only transmission facilities does not generally warrant expedited review unless the condition in the clause is met), then it should omit the word "particularly."[128]

152. Further, they say that the regulation should provide for expedited review only if the transmission facilities will remain in the same RTO or ISO. They state that such transactions should receive special scrutiny, not expedited review.

b. Commission Determination

153. We will delete the word "particularly," as it is confusing, from section 33.11(b)(1), newly restated as section 33.11(c)(1). However, we will not require that to warrant expedited review, the transaction must maintain the transmission facilities in the same RTO or ISO. As we stated in Order No. 669**:**

> the standards set forth in Order No. 2000 require extensive information from RTO applicants that we believe will demonstrate whether the proposal is in the public interest. It also has been our experience that anticompetitive effects are unlikely to arise with regard to internal corporate reorganizations or transactions that only involve the disposition of transmission facilities[129]

154. Participation in any Commission-approved RTO or ISO is pro-competitive. We note that the regulation does not provide that such transactions will always qualify for expedited review. Intervenors may inform us in a particular case if switching RTOs may

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[128] APPA/NRECA Rehearing Request at 34.

[129] Order No. 669 at 190 (citing Filing Requirements Rule at 31,902).

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cause problems, and the Commission will perform its review on an unexpedited basis if justified.

155. The Commission will also take this opportunity to generally address requests for expedited review. We often receive section 203 filings in which an applicant requests that the Commission expedite its review process and act on the filing within a specified time period, occasionally thirty days or less. In some of these instances, applicants also ask us to give a notice period of less than 21 days. Sometimes, applicants offer no reason for seeking expedited action, or when they do, the reason is simply that they wish to close the transaction as soon as possible. The Commission notes that applicants themselves are in the best position to influence the timing of Commission action. In order to have the authorization they require at the time they seek to close the transaction, they should file an application at the earliest possible time. The Commission (and its staff, for transactions that are acted on under delegated authority) will try to act as quickly as possible on all applications, but particularly on those that warrant expedited review.[130] However, the Commission and its staff take seriously the regulation that provides for a 21-day notice period for applications that we deem qualify for expedited review. We believe that, in most circumstances, 21 days is the minimum period necessary for interested persons to conduct an adequate review of the application. Applicants that seek

[130] By law, the Commission is required to take initial action on an application no later than 180 days after filing.

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a lesser notice period or that request action within a specified time period must clearly identify a significant harm to the public interest, as opposed to a private commercial interest, that justifies action within that time period. We remind applicants that they must also provide a fully completed application, responsive to all of the regulations, to avoid the need for a deficiency letter, which creates delay.[131]

B. Amendments to 18 CFR § 2.26 - The Merger Policy Statement

156. In response to the NOPR, APPA/NRECA and TAPSG recommended that the Commission rethink our current merger policy and what "consistent with the public interest" means in light of amended section 203 and the repeal of PUHCA 1935. In particular, they suggested that the Commission's Appendix A analysis, which focuses on the effect on competition in "common" markets in which applicants operate, will not be well suited to address the effects on competition from the "cross-country" mergers that the repeal of PUHCA 1935 will likely encourage.

157. In response, in Order No. 669, the Commission stated that we are not persuaded to change our current policies now. We said that our standard of review is sufficiently flexible to consider changes in market structure that might result from EPAct 2005 and

[131] On occasion, applicants have not identified all of the entities that must have approval for the transaction, have not adequately identified or described the facilities, the ownership, control or operation of which may be affected directly or indirectly by the transaction, or have not provided the underlying transaction agreement and offered little, if any, reason, for failing to do so. As a consequence, unnecessary additional time is consumed in obtaining the information from applicants and in providing an opportunity for others to comment on the information.

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the repeal of PUHCA 1935. However, we also stated that, as we gain experience in evaluating mergers under the new statute, we may reevaluate our merger policy.[132]

1. Rehearing Requests

158. APPA/NRECA continue to assert that the Commission should reevaluate its criteria for analyzing mergers in order to address the likely market response to the changed regulatory environment. They expect significant merger activity, consolidation and restructuring of the industry in the wake of the repeal of PUHCA 1935. The Commission should reconsider whether its existing merger policy, crafted when PUHCA 1935's ownership restrictions were in place, addresses the dangers to competition and consumers presented by new section 203 transactions. The Commission should consider new approaches to analyzing the effect on competition beyond those in the current Appendix A approach. APPA/NRECA state that they do not expect the Commission to develop a new policy for evaluating mergers on rehearing of Order No. 669. However, they urge the Commission to set out the procedures and timetable for a reexamination of its merger policy.[133]

159. TAPSG concurs with APPA/NRECA's thoughts on the need to revise merger policy and also asserts that the Commission should not wait to revise its merger policy.[134]

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[132] Order No. 669 at P 202.

[133] APPA/NRECA Rehearing Request at 38.

[134] TAPSG Rehearing Request at 2-3 and 18-30.

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TAPSG notes that the Commission adopted its current merger policy almost ten years ago and that much has changed since then, including the development of RTOs with their complicated markets and locational marginal pricing, repeal of PUHCA 1935, and new time constraints on Commission merger review. At a minimum, TAPSG asserts that the Commission should commit to review its current merger policy as part of the technical conference that the Commission will hold within a year to address issues raised in this proceeding and the PUHCA 2005 Final Rule proceeding.[135]

2. Commission Determination

160. We will not reevaluate our criteria for analyzing the competitive effects of mergers as part of this rulemaking. In Order No. 669, we explained that, after the Commission has gained more experience in evaluating section 203 applications under the new statute, we may reevaluate our merger policy.[136] We continue to believe that more experience with the new section 203 will provide us with better guidance as to whether to reevaluate our merger policy.

161. We also note that, consistent with amended section 203(a)(4), we added new section 2.26(f) to our regulations. It provides that the Commission will not approve a transaction that will result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company unless

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[135] Order No. 669 at P 4.

[136] Id. at P 202.

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that cross-subsidization, pledge, or encumbrance will be consistent with the public interest. Thus, in Order No. 669, the Commission properly updated its merger policy to address Congress' specific concerns with respect to new section 203.

162. However, the Commission commits to consider whether our current merger policy should be revised as part of the technical conference to be held within one year.[137] That technical conference will address issues raised both in this proceeding and the PUHCA 2005 Final Rule proceeding implementing PUHCA 2005.

IV. Information Collection Statement

163. The regulations of the Office of Management and Budget (OMB)[138] require that OMB approve certain information requirements imposed by an agency. OMB has approved the information requirements contained in Order No. 669. Specifically, OMB approved the following information collection and assigned the corresponding OMB control numbers: "Application under Federal Power Act Section 203" (FERC-519).

164. This order on rehearing adopts a number of changes in response to the requests for rehearing of Order No. 669. Four of these are important with respect to information collection. First, as noted above, we will require that for holding company acquisitions of securities of intrastate utilities or utilities that own or control facilities used solely for local distribution or retail sales of electric energy regulated by a state commission, if any

[137] PUHCA 2005 Final Rule at P 17.

[138] 5 CFR § 1320.12.

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public utility within the holding company system has captive customers, the holding company must report the acquisition to the Commission, including any state actions and conditions related to the acquisition and provide an explanation why the transaction does not result in cross-subsidization. Second, we will require that for certain holding company acquisitions of securities of electric utility companies or transmitting utilities, or of holding companies that include such entities, the parent company file with the Commission, on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal of the securities, each by class, unless the holdings within a class are less than one percent of outstanding shares. Third, with regard to the submission of Exhibit M of the application, all section 203 applicants (excluding those whose transactions fall under blanket authorizations) must demonstrate that they have met all four tests of a four-part framework, as elaborated herein and in Order No.669, showing that the transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrances of utility assets for the benefit of an associate company, or if cross-subsidization or pledges or encumbrances of utility assets were to occur, that such results are nonetheless consistent with the public interest. Fourth, also as part of Exhibit M to the application, applicants are required to disclose all existing pledges or encumbrances as part of utility assets. We do not believe that this information requirement will impose an unreasonable burden on section 203 applicants.

165. Any increases in burden will be offset by the additional blanket authorizations that the Commission is granting in this proceeding. Specifically, the Commission will

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grant a blanket authorization under section 203(a)(1) of the Federal Power Act for certain internal corporate reorganizations, provided that the public utility does not have captive customers and the transaction does not present cross-subsidization issues. The Commission will also grant a blanket authorization for holding companies that own or control only EWGs, QFs or FUCOs to acquire the securities of additional EWGs, FUCOs or QFs. In addition, the Commission will grant a blanket authorization allowing any company in the holding company system to acquire the securities of an electric company that owns generating facilities that total 100 MW or less and are primarily used for the acquired company's own load or for sales to affiliated end-users. The Commission will also grant a blanket authorization for transfers of wholesale market-based rate contracts between public utility affiliates that have the same upstream ownership and are not affiliated with a traditional public utility with captive ratepayers. For those entities that are subject to regulatory oversight of the Federal Reserve Bank or the Comptroller of the Currency because of their affiliation with banks or bank holding companies that are regulated by the agencies identified above, the Commission will grant a blanket authorization to acquire and hold an unlimited amount of covered securities for fiduciaries, collateral for loans or for loan liquidation, subject to certain reporting requirements. Further, the Commission will grant a blanket authorization to the banks and their subsidiaries to acquire and hold an unlimited amount of covered securities in connection with failed underwritings, subject to certain conditions. The Commission will also grant a blanket authorization for certain non-banking financial institutions to acquire

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covered securities in a fiduciary capacity or for hedging purposes, subject to certain conditions and reporting requirements. In sum, taking into account both the additional requirements and the additional blanket authorizations, we believe that one offsets the other and will allow the original projected burden estimates expressed in Order No. 669 to stand. We will, however, adjust these burden estimates accordingly as we receive filings and we will notify OMB of any changes that may be necessary. The Commission did not receive any comments on burden estimates in response to Order No. 669.

166. Interested persons may obtain information on the information requirements by contacting the following: The Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, ED-34, Phone: (202)502-8415, Fax: (202) 273-0873, e-mail: michael.miller@ferc.gov.

167. To submit comments concerning the collection(s) of information and provide estimates on the associated burden of these requirements, please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503 {Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202)395-4650. Comments should be e-mailed to oira_submission@omb.eop.gov and reference the OMB Control number listed above.

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V. Document Availability

168. 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 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 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

169. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, 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 "RM05-34" in the docket number field.

170. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

VI. Effective Date

171. Changes to Order No. 669 made in this order on rehearing will become effective on [insert 30 days after publication in the **FEDERAL REGISTER**].

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List of subjects in 18 CFR Part 2

Administrative practice and procedure, Electric power, Natural gas, Pipelines, Reporting and recordkeeping requirements

List of subjects in 18 CFR Part 33

Electric utilities; Reporting and recordkeeping requirements; Securities

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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In consideration of the foregoing, under the authority of EPAct 2005, the Commission is amending Parts 2 and 33 of Chapter I, Title 18, Code of Federal Regulations, as set forth:

PART 2 – GENERAL POLICY AND INTERPRETATIONS.

1. The authority citation for Part 2 is revised to read as follows:

Authority: 5 U.S.C. 601; 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 792-825y, 2601-2645; 42 U.S.C. 4321-4361, 7101-7352; Pub. L. No. 109-58, 119 Stat. 594.2.

2. Section 2.26 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 2.26. Policies concerning review of applications under section 203.

* * * * *

(e) Effect on regulation. (1) Where the affected state commissions have authority to act on the transaction, the Commission will not set for hearing whether the transaction would impair effective regulation by the state commissions. The application should state whether the state commissions have this authority.

(2) Where the affected state commissions do not have authority to act on the transaction, the Commission may set for hearing the issue of whether the transaction would impair effective state regulation.

(f) Under section 203(a)(4) of the Federal Power Act (16 U.S.C. 824b), in reviewing a proposed transaction subject to section 203, the Commission will also consider whether the proposed transaction will result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an

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associate company, unless that cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

PART 33 – APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203.

3. The authority citation for Part 33 is revised to read as follows:

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

4. The heading of Part 33 is revised to read as set forth above.

5. Section 33.1 is revised to read as follows:

§ 33.1. Applicability, definitions, and blanket authorizations.
(a) Applicability.

(1) The requirements of this part will apply to any public utility seeking authorization under section 203 of the Federal Power Act to:

(i) Sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10 million;

(ii) Merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(iii) Purchase, acquire, or take any security with a value in excess of $10 million of any other public utility; or

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(iv) Purchase, lease, or otherwise acquire an existing generation facility:

(A) That has a value in excess of $10 million; and

(B) That is used in whole or in part for wholesale sales in interstate commerce by a public utility.

(2) The requirements of this part shall also apply to any holding company in a holding company system that includes a transmitting utility or an electric utility if such holding company seeks to purchase, acquire, or take any security with a value in excess of $10 million of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10 million.

(b) Definitions. For the purposes of this part, as used in section 203 of the Federal Power Act (16 U.S.C. 824b)

(1) Existing generation facility means a generation facility that is operational at or before the time the section 203 transaction is consummated. "The time the transaction is consummated" means the point in time when the transaction actually closes and control of the facility changes hands. "Operational" means a generation facility for which construction is complete (i.e., it is capable of producing power). The Commission will rebuttably presume that section 203(a) applies to the transfer of any existing generation facility unless the utility can demonstrate with substantial evidence that the generator is used exclusively for retail sales.

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(2) Non-utility associate company means any associate company in a holding company system other than a public utility or electric utility company that has wholesale or retail customers served under cost-based regulation.

(3) Value when applied to:

(i) Transmission facilities, generation facilities, transmitting utilities, electric utility companies, and holding companies, means the market value of the facilities or companies for transactions between non-affiliated companies; the Commission will rebuttably presume that the market value is the transaction price. For transactions between affiliated companies, value means original cost undepreciated, as defined in the Commission's Uniform System of Accounts prescribed for public utilities and licensees in part 101 of this chapter, or original book cost, as applicable;

(ii) Wholesale contracts, means the market value for transactions between non-affiliated companies; the Commission will rebuttably presume that the market value is the transaction price. For transactions between affiliated companies, value means total expected nominal contract revenues over the remaining life of the contract; and

(iii) Securities, means market value for transactions between non-affiliated companies; the Commission will rebuttably presume that the market value is the agreed-upon transaction price. For transactions between affiliated companies, value means market value if the securities are widely traded, in which case the Commission will rebuttably presume that market value is the market price at which the securities are being

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traded at the time the transaction occurs; if the securities are not widely traded, market value is determined by:

(A) Determining the value of the company that is the issuer of the equity securities based on the total undepreciated book value of the company's assets;

(B) Determining the fraction of the securities at issue by dividing the number of equity securities involved in the transaction by the total number of outstanding equity securities for the company; and

(C) Multiplying the value determined in paragraph (b)(3)(iii)(A) of this section by the value determined in paragraph (b)(3)(iii)(B) of this section (i.e., the value of the company multiplied by the fraction of the equity securities at issue).

(4) The terms associate company, electric utility company, foreign utility company, holding company, and holding company system have the meaning given those terms in the Public Utility Holding Company Act of 2005. The term holding company does not include: a State, any political subdivision of a State, or any agency, authority or instrumentality of a State or political subdivision of a State; or an electric power cooperative.

(5) For purposes of this Part, the term captive customers means any wholesale or retail electric energy customers served under cost-based regulation.

(c) Blanket Authorizations.

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(1) 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 any security of:

(i) A transmitting utility or company that owns, operates, or controls only facilities used solely for transmission in intrastate commerce and/or sales of electric energy in intrastate commerce, provided that if any public utility within the holding company system has captive customers, or owns or provides transmission service over jurisdictional transmission facilities, the holding company must report the acquisition to the Commission, including any state actions or conditions related to the transaction, and shall provide an explanation of why the transaction does not result in cross-subsidization;

(ii) A transmitting utility or company that owns, operates, or controls only facilities used solely for local distribution and/or sales of electric energy at retail regulated by a state commission, provided that if any public utility within the holding company system has captive customers, or owns or provides transmission service over jurisdictional transmission facilities, the holding company must report the acquisition to the Commission, including any state actions or conditions related to the transaction, and shall provide an explanation of why the transaction does not result in cross-subsidization; or

(iii) An electric utility company that owns generating facilities that total 100 MW or less and are fundamentally used for its own individual load or for sales to affiliated end-users.

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(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, the holding company will own less than 10 percent of the outstanding voting securities; or

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

(3) The blanket authorizations granted under paragraph (c)(2) of this section are subject to the conditions that the holding company shall not:

(i) Borrow from any electric utility company subsidiary in connection with such acquisition; or

(ii) Pledge or encumber the assets of any electric utility company subsidiary in connection with such acquisition.

(4) A holding company granted blanket authorizations in paragraph (c)(2) of this section shall provide the Commission copies of any Schedule 13D, Schedule 13G and Form 13F, at the same time and on the same basis, as filed with the Securities and

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Exchange Commission in connection with any securities purchased, acquired or taken pursuant to this section.

(5) 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 acquire a foreign utility company. However, if such holding company or any of its affiliates, its subsidiaries, or associate companies within the holding company system has captive customers in the United States, or owns or provides transmission service over jurisdictional transmission facilities in the United States, the authorization is conditioned on the holding company, consistent with 18 C.F.R. 385.2005(b), verifying by a duly authorized corporate official of the holding company that the proposed transaction:

(i) Will not have any adverse effect on competition, rates, or regulation; and

(ii) Will not result in, at the time of the transaction or in the future:

(A) Any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company;

(B) Any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company;

(C) Any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission

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service over jurisdictional transmission facilities, for the benefit of an associate company; or

(D) Any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.

(iii) A transaction by a holding company subject to the conditions in paragraphs (c)(5)(i) and (ii) of this section will be deemed approved only upon filing the information required in paragraphs (c)(5)(i) and (ii) of this section.

(6) Any public utility or any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under sections 203(a)(1) or 203(a)(2) of the Federal Power Act, as relevant, for internal corporate reorganizations that do not result in the reorganization of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and that do not present cross-subsidization issues.

(7) Any public utility in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to purchase, acquire, or take any security of a public utility in connection with an intra-system cash management program, subject to safeguards to prevent cross-subsidization or pledges or encumbrances of utility assets.

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(8) A person that is a holding company solely with respect to one or more exempt wholesale generators (EWGs), foreign utility companies (FUCOs), or qualifying facilities (QFs) is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to acquire the securities of additional EWGs, FUCOs, or QFs.

(9) A holding company, or a subsidiary of that company, that is regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency, under the Bank Holding Company Act of 1956 as amended by the Gramm-Leach-Bliley Act of 1999, is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to acquire and hold an unlimited amount of the securities of holding companies that include a transmitting utility or an electric utility company if such acquisitions and holdings are in the normal course of its business and the securities are held:

(i) As a fiduciary;

(ii) As principal for derivatives hedging purposes incidental to the business of banking and it commits not to vote such securities to the extent they exceed 10 percent of the outstanding shares;

(iii) As collateral for a loan; or

(iv) Solely for purposes of liquidation and in connection with a loan previously contracted for and owned beneficially for a period of not more than two years, with the following conditions and reporting requirement: the holding does not confer a right to control, positively or negatively, through debt covenants or any other means, the

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operation or management of the public utility or public utility holding company, except as to customary creditors' rights or as provided under the United States Bankruptcy Code; and the parent holding company files with the Commission on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held.

(10) Any holding company, or a subsidiary of that company, is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to acquire any security of a public utility or a holding company that includes a public utility:

(i) For purposes of conducting underwriting activities, subject to the condition that holdings that the holding company or its subsidiary are unable to sell or otherwise dispose of within 45 days are to be treated as holdings as principal and thus subject to a limitation of 10 percent of the stock of any class unless the holding company or its subsidiary has within that period filed an application under section 203 of the Federal Power Act to retain the securities and has undertaken not to vote the securities during the pendency of such application; and the parent holding company files with the Commission on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held;

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(ii) For purposes of engaging in hedging transactions, subject to the condition that if such holdings are 10 percent or more of the voting securities of a given class, the holding company or its subsidiary shall not vote such holdings to the extent that they are 10 percent or more.

(11) Any public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer a wholesale market-based rate contract to any other public utility affiliate that has the same ultimate upstream ownership, provided that neither affiliate is affiliated with a traditional public utility with captive customers.

6. Section 33.2 is amended to add paragraph (j) to read as follows:

§ 33.2. Contents of application – general information requirements.

* * * * *

(j) An explanation, with appropriate evidentiary support for such explanation (to be identified as Exhibit M to this application):

(1) Of how applicants are providing assurance that the proposed transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, including:

(i) Disclosure of existing pledges and/or encumbrances of utility assets; and

(ii) A detailed showing that the transaction will not result in:

(A) Any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company;

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(B) Any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company;

(C) Any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or

(D) Any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act; or

(2) If no such assurance can be provided, an explanation of how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

7. Section 33.11 is added to read as follows:

§ 33.11. Commission procedures for the consideration of applications under section 203 of the FPA.

(a) The Commission will act on a completed application for approval of a transaction (i.e., one that is consistent with the requirements of this part) not later than 180 days after the completed application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based

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on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of section 203(a)(4) of the FPA and issues, by the 180th day, an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

(b) The Commission will provide for the expeditious consideration of completed applications for the approval of transactions that are not contested, do not involve mergers, and are consistent with Commission precedent.

(c) Transactions, provided that they are not contested, do not involve mergers and are consistent with Commission precedent, that will generally be subject to expedited review include:

(1) A disposition of only transmission facilities, including, but not limited to, those that both before and after the transaction remain under the functional control of a Commission-approved regional transmission organization or independent system operator; and

(2) Transactions that do not require an Appendix A analysis;[139] and

(3) Internal corporate reorganizations that result in the reorganization of a traditional public utility that has captive customers or owns or provides transmission

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[139] Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 FR 68,595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), reconsideration denied, Order No. 592-A, 62 FR 33,340 (June 19, 1977), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement).

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service over jurisdictional transmission facilities, but do not present cross-subsidization issues.

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APPENDIX A

NOTE: The following Appendix will not be published in the Code of Federal Regulations.

Petitioner Acronyms

Acronym	Name
APPA/NRECA	American Public Power Association and the National Rural Electric Cooperative Association
BofA/JPMorgan	Bank of America, N.A. and JPMorgan Chase Bank, N.A.
Coral Power	Coral Power, L.L.C.
Duke/Cinergy	Duke Energy Corporation and Cinergy Corporation
EEI	Edison Electric Institute
Entergy	Entergy Services, Inc.
GS Group	The Goldman Sachs Group, Inc.
Industrial Consumers	Electricity Consumers Resource Council, the American Iron and Steel Institute, and the American Chemistry Council
MidAmerican	MidAmerican Energy Holdings Company
Morgan Stanley	Morgan Stanley Capital Group, Inc.
NARUC	National Association of Regulatory Utility Commissioners
National Grid	National Grid USA
Occidental	Occidental Chemical Corporation
TAPSG	Transmission Access Policy Study Group