UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST FOR REHEARING OR, IN THE ALTERNATIVE, CLARIFICATION OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

On April 24, 2006, the Commission issued Order 669-A, *Transactions Subject to FPA Section 203*, 115 F.E.R.C. ¶ 61,097 (2006), its Order on Rehearing of Order 669, *Transactions Subject to FPA Section 203,* 71 Fed. Reg. 1348 (Jan. 6, 2006), [2001 – 2005 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,200 (to be codified at 18 C.F.R. pts. 2 and 33). In P 52 of Order 669-A, the Commission announced a new "blanket authorization under section 203(a)(2) for holding companies that own or control only EWGs [Exempt Wholesale Generators], QFs [Qualifying Facilities] or FUCOs [Foreign Utility Companies] to acquire the securities of additional EWGs, FUCOs or QFs" (emphasis in original). Pursuant to 16 U.S.C. § 825*l* and Rule 713, 18 C.F.R. § 385.713, the Transmission Access Policy Study Group ("TAPS") requests rehearing or, in the alternative, clarification of the Commission's new blanket authorization.[1]

I. STATEMENT OF ISSUES

Pursuant to Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2), TAPS provides the following statement of issues:

1. Whether the Commission should rehear its decision to provide a blanket authorization under FPA section 203(a)(2), 16 U.S.C. § 824b(a)(2), for holding companies that own or control only EWGs, QFs, or FUCOs to acquire the securities of additional EWGs,

[1] TAPS filed comments on the NOPR that became, and sought rehearing of, Order 669.

FUCOs or QFs in light of the Energy Policy Act of 2005's expansion of Commission authority over generation facility acquisitions and given potential confusion created by the blanket authorization? 5 U.S.C. § 706(2); 16 U.S.C. § 824b.

2. Whether the Commission should clarify and affirm the continuing applicability of section 203(a)(1), 16 U.S.C. § 824b(a)(1), regarding review of certain generation facility dispositions and acquisitions in light of the new blanket authorization under FPA section 203(a)(2) for holding companies that own or control only EWGs, QFs, or FUCOs to acquire the securities of additional EWGs, FUCOs or QFs? 5 U.S.C. § 706(2); 16 U.S.C. § 824b.

II. IDENTIFICATION OF ERRORS

Pursuant to Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1), TAPS identifies the following errors:

1. The Commission erred in creating a new blanket authorization under section 203(a)(2) for holding companies that own or control only EWGs, QFs, or FUCOs to acquire the securities of additional EWGs, FUCOs or QFs.

2. If the Commission does not rehear its creation of a new blanket authorization under section 203(a)(2), it also errs if it fails to clarify and affirm the continuing applicability of Commission review of transactions under section 203(a)(1).

III. ARGUMENT

As noted at the outset, the Commission created in Order 669-A a new "blanket authorization under section 203(a)(2) for holding companies that own or control only EWGs, QFs or FUCOs to acquire the securities of additional EWGs, FUCOs or QFs," (emphasis in original) explaining:

> Thus, our definition allows us to ensure that, for example, cross-subsidization that affects 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.

Order 669-A at P 52. TAPS is sympathetic to the Commission's desire to encourage investment in the electricity industry. However, it believes that in many cases the new blanket authorization is contrary to Congressional intent in expanding the Commission's

section 203 authority and creates confusion that could *discourage* such new investment. If the Commission does not reconsider the blanket authorization under section 203(a)(2), it should clarify its operation by re-affirming prior Commission determinations regarding requirements for review under section 203(a)(1).

The starting point of the analysis is Congress's decision to close a loophole in the Commission's jurisdiction under section 203 prior to the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) ("EPAct 2005"), that the Commission had read as prohibiting it from asserting jurisdiction over transfers of generation facilities where no Commission-jurisdictional facilities, such as transmission, wholesale contracts or rate schedules, were involved. *See, e.g.*, *Perryville Energy Partners, LLC*, 109 F.E.R.C. ¶ 61,019 (2004), *reh'g denied*, 111 F.E.R.C. ¶ 61,006 (2005). Congress sought to expand the Commission's review over generation facility transfers so that, for example, it could ensure that such transfers did not adversely affect competition. Order 669 at P 83 ("the legislative history suggests that Congress intended for the Commission to not only continue, but to expand our review of activities that would affect wholesale competition and ratepayers"). However, in granting a new blanket authorization for holding companies owning or controlling only EWGs, QFs or FUCOs to acquire the securities of additional EWGs, FUCOs or QFs, thus forgoing review under section 203(a)(2), the Commission partially re-opens the loophole that Congress sought to close, particularly if the acquisition does not involve jurisdictional facilities or otherwise is not subject to review under section 203(a)(1).

In justifying the re-opened loophole, the Commission appears to have overlooked Congress's concern for the competitive effects of generation facility acquisitions. The

Commission's discussion in Order 669-A mentions only cross-subsidization concerns, suggesting that the blanket authorization does not trigger such concerns because holding companies owning/controlling only EWGs, QFs, or FUCOs would not have traditional utility customers. Order 669-A at P 52. It is clear, however, that a holding company's acquisition of additional EWGs and QFs could raise competition concerns, for example, where the holding company owns other EWGs or QFs in the same geographic market, especially a geographic market that was a load pocket. In such cases, the Commission has an obligation to review the transaction upfront to protect consumers from adverse competitive effects:

> The Commission must decide at the time of a section 203 application whether an acquisition will adversely affect competition or the public interest. Our responsibility under section 203 is to protect the public interest, and Congress intended us to take action *before* the disposition of facilities is consummated.

Ameren Energy Generating Co., 108 F.E.R.C. ¶ 61,081, P 61 (2004) (emphasis in original). The Commission should thus re-hear its decision to grant the new blanket authorization under section 203(a)(2).

In addition to being contrary to Congress's intent in expanding Commission jurisdiction over generation facility acquisitions, the new blanket authorization creates confusion regarding which transactions are subject to section 203 review and which are not. As discussed below, the Commission has said that certain EWG and QF transactions will trigger review under section 203(a)(1), and the new blanket authorization under section 203(a)(2) presumably does not relieve the Commission of its obligation to review transactions under section 203(a)(1), even where the same transaction would fall under the section 203(a)(2) blanket exemption. However, the resulting uncertainty over which

transactions are and are not subject to review could chill the investment that the Commission sought to encourage by creating the blanket authorization in the first place. It could also invite abuse to the extent parties try to structure transactions to avoid section 203(a)(1) review and to squeeze them under the section 203(a)(2) blanket authorization.

The most straight-forward means to eliminate this confusion is to eliminate the blanket authorization, or narrow it to the limited cases set forth in Section C below. If the Commission does not eliminate the blanket authorization in its entirety, it should at least clarify, based upon Commission policy and precedent, which transactions remain subject to section 203(a)(1) review.

A. Holding Company Acquisition of an EWG Involving Jurisdictional Facilities

The first category of transaction that the Commission should affirm remains subject to section 203 review involves the acquisition by a holding company owning/controlling only EWGs, QFs, or FUCOs of an EWG that is a public utility and that disposes of jurisdictional facilities. In Order 669, the Commission stated (at P 60 n.55):

> We note that a holding company acquisition of securities of an EWG would in some circumstances trigger section 203 review in any event by virtue of section 203(a)(1). This is because the EWG could well be a public utility and, to the extent the holding company acquired "control" of the EWG, we would construe the EWG to be "disposing" of its jurisdictional facilities and thus required to file for approval under section 203(a).

The Commission did not disavow this statement in Order 669-A. However, some might construe the new blanket authorization to apply even where the EWG is disposing of jurisdictional facilities. To avoid conflict with Congress's desire that the Commission

review generation acquisitions as well as to create certainty about the obligation to file for review under section 203(a)(1), the Commission should affirm that its recent conclusion in Order 669 remains goods law.

B. Holding Company Acquisition of EWGs or QFs Not Involving Jurisdictional Facilities

Amended section 203(a)(1)(D) states that:

> No public utility shall, without first having secured an order of the Commission authorizing it to do so … purchase, lease or otherwise acquire an existing generation facility- (i) that has a value in excess of $10,000,000; and (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

16 U.S.C. § 824b(a)(1)(D). Congress added this provision as part of EPAct 2005, and it provides the Commission with authority to review generation plant acquisitions that do not otherwise involve jurisdictional facilities. *See Perryville, supra*. As discussed immediately above, Order 669 states that an EWG's disposition of jurisdictional facilities would trigger section 203(a)(1)(A) review, presumably even if the holding company acquiring an EWG owned only EWGs or QFs. However, where a transaction does not involve jurisdictional facilities, the Commission should clarify that despite the blanket authorization, the acquisition of the EWG or a QF by a holding company that is a public utility or that owns or controls a public utility (such as an EWG) triggers review under section 203(a)(1)(D).

In the case involving a holding company that is a public utility, the plain language of section 203(a)(1)(D) requires review of acquisitions of generators, such as EWGs, having value of $10,000,000 or more and used for wholesale sales, even where the holding company owns or controls only EWGs (or QFs or FUCOs). It would be ironic

indeed (as well as contrary to Congress's intent) if the Commission rendered meaningless its new authority to review generation acquisitions by operation of the blanket authorization.

A similar result should apply where the holding company is a public utility, owns or controls only EWGs, QFs or FUCOs, and acquires a QF. Addressing the scope of section 203(a)(1)(D) in Order 669, the Commission stated (P 87):

> Finally, in response to commenters' requests that section 203 approval be required for the acquisition of a QF, we clarify that if a public utility acquires an existing generation facility used for Commission-jurisdictional sales, whether a QF or any other type of generation facility, the transaction is subject to section 203. Although certain QFs themselves are exempted from any filing requirements under section 203 by virtue of our PURPA regulations, this does not mean that public utilities that acquire QFs are exempt.

The blanket authorization should not override the Commission's conclusion that QF acquisitions by public utilities are subject to section 203 review, even if the holding company owns only other QFs, EWGs or FUCOs.

The Commission should further clarify that a transaction will trigger section 203(a)(1)(D) review, and not be exempted by the blanket authorization, where a holding company that is not a public utility but owns a public utility (such as an EWG) acquires another EWG or QF. Such a result would be a straight-forward application of *Enova Corp. and Pacific Enterprises*, 79 F.E.R.C. ¶ 61,107 (1997). There, the Commission explained that it "may disregard corporate form and regard a parent and its subsidiary as a unit in order to determine whether statutory mandates would be frustrated by the proposed transaction." *Id.* at 61,494. It thus asserted jurisdiction over one holding company's acquisition of another holding company, because the acquired holding

company owned/controlled public utilities with jurisdictional assets. *Id.* The Commission claimed jurisdiction even though at that time (unlike now) it did not have jurisdiction over holding company mergers where the holding companies themselves were not public utilities. *Id.* It follows from *Enova* that where the holding company itself is not a public utility but its owns or controls a public utility (such as an EWG), the acquisition of another EWG or QF (whether or not a public utility) should trigger review under section 203(a)(1)(D). It also follows directly from *Enova* that section 203(a)(1)(D) review would be triggered where a holding company that is not a public utility acquires another holding company that is also not a public utility but that owns a public utility.

C. Transactions Apparently Eligible for Blanket Authorization

In light of the foregoing, if the Commission retains the blanket authorization, it should clarify that it applies only in the following circumstances:

- A holding company owning/controlling only EWGs, QFs, or FUCOs that (a) is not a public utility, (b) does not yet own or control a public utility (such as an EWG), and (c) is acquiring its first EWG or QF. In such cases, the blanket authorization would be available to help encourage investment and the transaction would not usually trigger market power concerns.[2]
- A holding company owning/controlling only EWGs, QFs, or FUCOs that acquires a FUCO.

[2] In the usual case, a holding company owning no other generation facilities and acquiring its first one should not trigger market power concerns.

CONCLUSION

The Commission should grant rehearing and revoke its newly created blanket authorization under section 203(a)(2) for holding companies owning/controlling only EWGs, QFs, or FUCOs. If it does not eliminate the blanket authorization, the Commission should clarify and affirm that it will continue to review transactions subject to section 203(a)(1) as set forth above.

Respectfully submitted,

/s/ Mark S. Hegedus

Robert C. McDiarmid
Cynthia S. Bogorad
Mark S. Hegedus

Attorneys for
Transmission Access Policy Study Group

Law Offices of:
Spiegel & McDiarmid
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

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