

Proposed Rules

Federal Register

Vol. 72, No. 146

Tuesday, July 31, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 33

[Docket No. RM07–21–000]

Blanket Authorization Under FPA Section 203

July 20, 2007.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations pursuant to section 203 of the Federal Power Act (FPA) to provide for a limited blanket authorization under FPA section 203(a)(1). The Commission seeks public comment on the rules and amended regulations proposed herein. The Commission also seeks comment on whether it should grant an additional blanket authorization for certain acquisitions or dispositions of jurisdictional contracts.

DATES: Comments are due August 30, 2007.

ADDRESSES: You may submit comments identified in Docket No. RM07–21–000, by one of the following methods:

Agency Web Site: <http://www.ferc.gov>. Follow the instructions for submitting comments via the eFiling link found in the Comment Procedures section of the preamble.

Mail: Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426. Please refer to the preamble for additional information on how to file paper comments.

FOR FURTHER INFORMATION CONTACT:

Carla Urquhart (Legal Information), Office of the General Counsel, Federal

Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8496.

Roshini Thayaparan (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6857.

Andrew P. Mosier, Jr. (Technical Information), Office of Energy Markets and Reliability, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6274.

SUPPLEMENTARY INFORMATION:

I. Introduction

1. Pursuant to section 203 of the Federal Power Act (FPA),¹ the Commission is proposing to amend its regulations to revise Part 33 of Title 18 of the Code of Federal Regulations (CFR) to provide for an additional blanket authorization under FPA section 203(a)(1). The Commission seeks public comment on the proposed rule.

II. Background

2. EPCA 2005 expanded the scope of the corporate transactions subject to the Commission's review under section 203 of the FPA. Among other things, amended section 203: (1) Expands the Commission's review authority to include authority over certain holding company mergers and acquisitions, as well as certain public utility acquisitions of generating facilities; (2) requires that, prior to approving a disposition under section 203, the Commission must determine that the transaction would not result in inappropriate cross-subsidization of non-utility affiliates or the pledge or encumbrance of utility assets;² and (3) imposes statutory deadlines for acting on mergers and other jurisdictional transactions.

3. Through the Order No. 669 rulemaking proceeding, the Commission promulgated regulations adopting certain modifications to 18 CFR 2.26

and Part 33 to implement amended section 203.³ The Commission also provided blanket authorizations for certain transactions subject to section 203. These blanket authorizations were crafted to ensure that there is no harm to captive utility customers, but sought to accommodate investments in the electric utility industry and market liquidity. Some commenters in the rulemaking proceeding argued that the Commission should have granted additional blanket authorizations that would benefit the marketplace and not harm customers. Other commenters argued that the Commission should adopt additional generic rules to guard against inappropriate cross-subsidization associated with the mergers. Yet other commenters argued that the Commission should modify its competitive analysis for mergers, which has been in place for 10 years. The Commission stated that it would re-evaluate these and other issues at a future technical conference on the Commission's section 203 regulations as well as certain issues raised in the Order No. 667 rulemaking proceeding implementing the Public Utility Holding Company Act of 2005.⁴

4. On December 7, 2006, the Commission held a technical conference (December 7 Technical Conference) to discuss several of the issues that arose in the Order No. 667 and Order No. 669 rulemaking proceedings. The December 7 Technical Conference discussed a range of topics. The first panel discussed whether there are additional

³ *Transactions Subject to FPA Section 203*, Order No. 669, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, 71 FR 28422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, 71 FR 42579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

⁴ EPCA 2005, Pub. L. 109–58, 1261, *et seq.*, 119 Stat. 594, 972–78 (2005) (PUHCA 2005). See also *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 75592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g*, Order No. 667-A, 71 FR 28446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667-B, 71 FR 42750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g*, Order No. 667-C, 72 FR 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007).

These issues included matters related to inappropriate cross-subsidization and pledges or encumbrance of utility assets, whether our current merger policy should be revised, and whether additional exemptions, different reporting requirements, or other regulatory action (under PUHCA 2005 or the FPA or Natural Gas Act (NGA)) needed to be considered.

¹ 16 U.S.C. 824b, *amended by* Energy Policy Act of 2005, Pub. L. 109–58, 1289, 119 Stat. 594, 982–83 (2005) (EPCA 2005).

² Section 203(a)(4) is not an absolute prohibition on the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. If the Commission determines that the cross-subsidization, pledge or encumbrance will be consistent with the public interest, such action may be permitted.

actions, under the FPA or the NGA, that the Commission should take to supplement the protections against cross-subsidization that were implemented in the Order No. 667 and Order No. 669 rulemaking proceedings. The second panel discussed whether, and if so how, the Commission should modify its Cash Management Rule⁵ in light of PUHCA 2005 and whether the Commission should codify specific safeguards that must be adopted for cash management programs and money pool agreements and transactions. The third panel discussed whether modifications to the specific exemptions, waivers and blanket authorizations set forth in the Order No. 667 and Order No. 669 rulemaking proceedings are warranted. Post-technical conference comments were accepted.

5. On March 8, 2007, the Commission held a second technical conference (March 8 Technical Conference) to discuss whether the Commission's section 203 policy should be revised and, in particular, whether the Commission's Appendix A merger analysis is sufficient to identify market power concerns in today's electric industry market environment. The first panel discussed whether the Appendix A analysis is appropriate to analyze a merger's effect on competition, given the changes that have occurred in the industry (e.g., the development of Regional Transmission Organizations (RTOs)) and statutory changes (e.g., as a result of the repeal of the Public Utility Holding Company Act of 1935⁶ and new authorities given to the Commission in EPAct 2005⁷). The second panel assessed the factors the Commission uses in reviewing mergers and the coordination between the Commission and other agencies (including state commissions) with merger review responsibility.

6. This Notice of Proposed Rulemaking is one of three actions being taken based on the Commission's experience implementing amended FPA section 203 and PUHCA 2005, as well as the record from the Commission's December 7 and March 8 Technical Conferences regarding section 203 and PUHCA 2005. In this docket, the Commission is proposing to grant an additional blanket authorization for certain dispositions of jurisdictional facilities under FPA section 203(a)(1). In

addition, in separate orders, the Commission is concurrently issuing a section 203 Supplemental Policy Statement⁸ and a Notice of Proposed Rulemaking proposing to codify restrictions on affiliate transactions between franchised public utilities with captive customers and their market-regulated power sales affiliates or non-utility affiliates.⁹ The proposed changes to the regulations in this proceeding are discussed below.

III. Discussion

7. The Commission proposes to amend 18 CFR part 33 (Applications Under Federal Power Act Section 203) to provide for an additional blanket authorization under FPA section 203(a)(1).

8. In the Order No. 669 rulemaking proceeding, the Commission set forth several blanket authorizations under which participants to FPA section 203-jurisdictional transactions need not seek *ex ante* Commission approval. These authorizations included a blanket authorization under section 203(a)(2) under which certain holding companies may acquire the voting securities of a public utility if the acquisition would give the holding company less than 10 percent ownership of the outstanding voting securities of such public utility.¹⁰ The Commission found in Order No. 669 that several classes of transactions covered by amended section 203(a)(2) would not harm competition or captive customers, including acquisitions of voting securities that would give the acquiring entity not more than 9.99 percent ownership of the outstanding voting securities of the acquired utility or company.¹¹ While parties sought an additional blanket authorization under

section 203(a)(1) to parallel that provided under section 203(a)(2), the Commission could not make a determination with respect to section 203(a)(1) at that time. Specifically, with regard to the request for parallel blanket authorization under section 203(a)(1) for equity ownership interests in public utilities that result in a change in control over the underlying public utility, we found in Order No. 669—A that such a blanket authorization would not address the “[c]oncerns with control, markets and protections of captive customers or customers receiving transmission service over jurisdictional transmission facilities”¹² implicated by section 203(a)(1). However, in Order No. 669—B, in response to comments that the lack of a parallel section 203(a)(1) authorization could thwart utility investment, the Commission stated that this issue would be included in the forthcoming technical conferences.¹³

9. Based on the record from the technical conferences (including both oral and written comments) and the Commission's experience under amended section 203 to date, the Commission proposes to provide for a limited blanket authorization to public utilities under section 203(a)(1). This blanket authorization would work in conjunction with the blanket authorization granted to holding companies under section 203(a)(2) in 18 CFR 33.1(c)(2)(ii).¹⁴ Under this limited blanket authorization, a public utility would be pre-authorized to dispose of less than 10 percent of its voting securities to a public utility holding company but only if, after the disposition, the holding company and any associate company *in aggregate* will own less than 10 percent of that public utility. We note that this proposed blanket authorization would not entirely “parallel” the section 203(a)(2) authorization since the section 203(a)(2) authorization does not contain the “in aggregate” limitation. However, we believe this limitation would provide better protection against possible transfer of “control” of a public utility. We seek comment on this limitation.

10. The Commission believes that the disposition of such limited voting interests (less than 10 percent), with the proposed “in aggregate” restriction and the existing reporting requirements

⁵ *Regulation of Cash Management Practices*, Order No. 634, 68 FR 40500 (July 8, 2003), FERC Stats. & Regs. ¶ 31,145, revised, Order No. 634—A, 68 FR 61993 (Oct. 31, 2003), FERC Stats. & Regs. ¶ 31,152 (2003) (Cash Management Rule).

⁶ 16 U.S.C. 79a *et seq.* (PUHCA 1935).

⁷ These include new authorities through amended FPA section 203 as well as PUHCA 2005.

⁸ *FPA Section 203 Supplemental Policy Statement*, 119 FERC ¶ 61,060 (2007) (issued in Docket No. PL07–1–000).

⁹ *Cross-Subsidization Restrictions on Affiliate Transactions*, 119 FERC ¶ 61,061 (2007) (issued in Docket No. RM07–15–000).

¹⁰ The section 203(a)(2) blanket authorization states:

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: * * * (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.

18 CFR 33.1(c)(2)(ii). Because a “transmitting utility” or “electric utility company” may also be a “public utility” as defined in the FPA, the public utility may need to obtain separate authorization for the same transaction under FPA section 203(a)(1), which requires authorization for public utilities to dispose of jurisdictional facilities.

¹¹ Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 141.

¹² Order No. 669—A, FERC Stats. & Regs. ¶ 31,214 at P 103.

¹³ Order No. 669—B, FERC Stats. & Regs. ¶ 31,225 at P 26.

¹⁴ See *supra* note 10.

applicable to holding companies,¹⁵ will not harm competition or captive customers. Moreover, this 10 percent threshold is consistent with the definition of "holding company" under section 1262(8)(A) of PUHCA 2005. Under that definition, any company that has the power to vote *10 percent or more* of the securities of a public utility company (or a holding company of a public utility company) triggers holding company status and thus is presumed to raise sufficient concerns about controlling influence over a subsidiary public utility that regulatory oversight is needed. The 10 percent threshold is also consistent with the blanket authorization granted under section 203(a)(2) in the Order No. 669 rulemaking proceeding, under which holding companies are pre-authorized to acquire up to 9.99 percent of voting securities of a public utility.

11. As noted, as part of the existing "parallel" blanket authorization under section 203(a)(2), the Commission already requires the holding company to provide to 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 SEC in connection with any securities purchased, acquired or taken pursuant to the blanket authorization under section 203(a)(2) provided in § 33.1(c)(2) of the Commission's regulations.¹⁶ Importantly, a Schedule 13 filer must acquire the subject securities "in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect" over entities whose securities it holds.¹⁷ It is also required to file a notification with the SEC of any acquisition of beneficial ownership of more than five percent of a class of equity securities.¹⁸ Because we already receive these filings from the holding company, we propose not to require additional reporting on the part of individual public utilities to duplicate the reporting of information

we are already getting about the same transaction. However, we seek comments on whether any additional reporting by the public utility should be required.

12. Further, we seek comment on whether the blanket authorization under section 203(a)(1), proposed herein, should be extended to the transfer of securities by a public utility to a holding company granted a blanket authorization under section 203(a)(2) in §§ 33.1(c)(8),¹⁹ 33.1(c)(9),²⁰ and 33.1(c)(10)²¹ of the Commission's regulations.

13. In addition, certain participants to the technical conferences argue that a blanket authorization under section 203(a)(1) should be granted for transactions in which a public utility or a holding company is acquiring or disposing of a jurisdictional contract where the acquirer does not have captive customers and the contract does not convey control over the operation of a generation or transmission facility. These commenters argue that, because acquisition of these contracts cannot create competitive or rate concerns, the Commission should grant blanket authorization under section 203(a)(1) for such transactions. Because the specific request for blanket authorization may present concerns where the transferor has captive customers, we seek comment on whether the Commission should grant a generic blanket authorization under section 203(a)(1) for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers and the contract does not convey control over the operation of a generation or transmission facility.

IV. Information Collection Statement

14. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection and data retention

requirements imposed by agency rules.²² Therefore, the Commission is submitting the proposed modifications to its information collections to OMB for review and approval in accordance with section 3507(d) of the Paperwork Reduction Act of 1995.²³

15. The Commission is proposing amendments to the Commission's regulations to provide for a limited blanket authorization under FPA section 203(a)(1). The regulations that the Commission proposes should have a minimal impact on the current reporting burden associated with an individual application, as they do not substantially change the filing requirements with which section 203 applicants must currently comply. Further, the Commission does not expect the total number of section 203 applications under amended section 203 to increase, but rather expects the total number of section 203 applications to decrease. This is due to the proposed rule providing for a category of jurisdictional transactions for which the Commission would not require applications seeking before-the-fact approval. This would reduce the burden on the electric industry, because it will reduce the number of applications that need to be made with the Commission.

16. Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

Burden Estimate: The Public Reporting and records retention burden for the proposed reporting requirements and the records retention requirement are as follows.

Title: FERC-519, "Application Under the Federal Power Act, Section 203".

Action: Revised Collection.

OMB Control No: 1902-0082.

The applicant will not be penalized for failure to respond to this information collection unless the information collection displays a valid OMB control number or the Commission has provided justification as to why the control number should not be displayed.

Respondents: Businesses or other for profit.

Frequency of Responses: N/A.

Necessity of the Information: This proposed rule proposes codification of a limited blanket authorization under

¹⁵ See, e.g., 18 CFR 33.1(c)(4) (requiring the filing of Securities and Exchange Commission (SEC) Schedule 13D, Schedule 13G, and Form 13F, if applicable); 18 CFR 35.42(a) (effective 60 days after publication in the *Federal Register* of *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities*, Order No. 697, 72 FR 39903 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007)) (requiring a notification of any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority); 18 CFR 366.4(a) (requiring Form FERC-65 (notification of holding company status)).

¹⁶ 18 CFR 33.1(c)(4).

¹⁷ 17 CFR 240.13d-1(b)(1)(i).

¹⁸ 17 CFR 240.13d-1(a).

¹⁹ 18 CFR 33.1(c)(8) (granting a blanket authorization under section 203(a)(2) to 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) to acquire the securities of additional EWGs, FUCOs, or QFs).

²⁰ 18 CFR 33.1(c)(9) (granting a conditional blanket authorization under section 203(a)(2) to 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).

²¹ 18 CFR 33.1(c)(10) (granting a limited blanket authorization under section 203(a)(2) to a holding company, or a subsidiary of that company, for the acquisition of securities of a public utility or a holding company that includes a public utility for purposes of underwriting activities or hedging transactions).

²² 5 CFR part 1320.

²³ 44 U.S.C. 3507(d).

FPA section 203(a)(1), providing for a category of jurisdictional transactions under section 203(a)(1) for which the Commission would not require applications seeking before-the-fact approval.

Internal Review: The Commission has conducted an internal review of the public reporting burden associated with the collection of information and assured itself, by means of internal review, that there is specific, objective support for its information burden estimate.

17. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone (202) 502-8415, fax (202) 273-0873, e-mail: michael.miller@ferc.gov]. Comments on the requirements of the proposed rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, fax (202) 395-7285, e-mail: oir_submission@omb.eop.gov].

V. Environmental Analysis

18. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.²⁴ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.²⁵ The proposed regulations are categorically excluded as they address actions under section 203.²⁶ Accordingly, no environmental assessment is necessary and none has been prepared in this NOPR.

VI. Regulatory Flexibility Act Certification

19. The Regulatory Flexibility Act of 1980 (RFA)²⁷ requires agencies to prepare certain statements, descriptions and analyses of proposed rules that will have a significant economic impact on a substantial number of small entities.²⁸

However, the RFA does not define “significant” or “substantial.” Instead, the RFA leaves it up to an agency to determine the effect of its regulations on small entities.

20. Most filing companies regulated by the Commission do not fall within the RFA’s definition of small entity.²⁹ Moreover, as noted above, this proposed rule proposes codification of a limited blanket authorization under FPA section 203(a)(1), providing for a category of jurisdictional transactions under section 203(a)(1) for which the Commission would not require before-the-fact approval. Thus, filing requirements are reduced by the rule. Therefore, the Commission certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required.

VII. Comment Procedures

21. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due August 30, 2007. Comments must refer to Docket No. RM07-21-000, and must include the commenter’s name, the organization they represent, if applicable, and their address in their comments. Comments may be filed either in electronic or paper format.

22. Comments may be filed electronically via the eFiling link on the Commission’s Web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats, but requests commenters to submit comments in a text-searchable format rather than a scanned image format. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

23. All comments will be placed in the Commission’s public files and may

be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VIII. Document Availability

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

25. 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 the docket number (excluding the last three digits of the docket number), in the docket number field.

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

List of Subjects in 18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 33, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

1. The authority citation for part 33 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; Pub. L. 109–58, 119 Stat. 594.

2. In § 33.1, paragraph (c)(12) is added to read as follows:

§ 33.1 Applicability, definitions, and blanket authorizations.

* * * * *

²⁴ *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

²⁵ 18 CFR 380.4.

²⁶ See 18 CFR 380.4(a)(16).

²⁷ 5 U.S.C. 601–12.

²⁸ The RFA definition of “small entity” refers to the definition provided in the Small Business Act, which defines a “small business concern” as a business that is independently owned and operated and that is not dominant in its field of operation.

¹⁵ U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal year did not exceed 4 million MWh. 13 CFR 121.201.

²⁹ 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 632. Section 3 of the Small Business Act defines a “small-business concern” as a business which is independently owned and operated and which is not dominant in its field of operation.

(c) * * *

(12) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to any holding company granted blanket authorizations in paragraph (c)(2)(ii) of this section if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility.

[FR Doc. E7-14619 Filed 7-30-07; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM07-15-000]

Cross-Subsidization Restrictions on Affiliate Transactions

July 20, 2007.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations pursuant to sections 205 and 206 of the Federal Power Act to codify restrictions on affiliate transactions between franchised public utilities with captive customers and their market-regulated power sales affiliates or non-utility affiliates. The Commission seeks public comment on the rules and amended regulations proposed herein.

DATES: *Comment Date:* Comments are due August 30, 2007.

ADDRESSES: You may submit comments identified in Docket No. RM07-15-000, by one of the following methods:

Agency Web site: <http://www.ferc.gov>. Follow the instructions for submitting comments via the eFiling link found in the Comment Procedures section of the preamble.

Mail: Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426. Please refer to the Comment Procedures section of the preamble for additional information on how to file paper comments.

FOR FURTHER INFORMATION CONTACT:

Carla Urquhart (Legal Information), Office of the General Counsel, Federal

Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8496.

Roshini Thayaparan (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-6857.

David Hunger (Technical Information), Office of Energy Markets and Reliability, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8148.

Stuart Fischer (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8517.

SUPPLEMENTARY INFORMATION:

I. Introduction

1. Pursuant to sections 205 and 206 of the Federal Power Act (FPA),¹ the Commission is proposing to amend its regulations to revise Part 35 of Title 18 of the Code of Federal Regulations (CFR) to codify affiliate restrictions that would be applicable to all power and non-power goods and services transactions between franchised public utilities with captive customers and their market-regulated power sales and non-utility affiliates.² The Commission's goal in proposing these prophylactic restrictions is to protect against inappropriate cross-subsidization of market-regulated and unregulated activities by the captive customers of public utilities. The proposed restrictions are based upon those already imposed by the Commission in

¹ 16 U.S.C. 824d, 824e.

² For purposes of this Notice of Proposed Rulemaking, a "market-regulated" power sales affiliate means any power sales affiliate, other than a franchised public utility, whose power sales are regulated in whole or in part on a market basis. This would include, e.g., a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate permitted to make some or all of its power sales at market-based rates. A "non-utility" affiliate would include an affiliate that is not in the power sales or transmission business, e.g., a coal mining company, construction company, real estate company, energy-related technology company, communications systems company, among others. While the Commission, in previous documents, has referred to both categories of affiliates as "non-regulated," consistent with the discussion on cross-subsidization issues in our recent Market-Based Rate Final Rule, we believe the term "market-regulated" more accurately describes power sellers with market-based rates since they remain subject to regulation. *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities*, Order No. 697, 72 FR 39903 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 490 (2007) (Market-Based Rate Final Rule). Accordingly, we have modified our terminology in this Notice of Proposed Rulemaking.

the context of certain FPA section 203³ and 205 approvals, but expand the transactions and entities to which they apply.⁴ The Commission seeks public comment on the proposed rules.

II. Background

2. The Commission requires public utilities to implement codes of conduct with regard to affiliate transactions where an entity seeks market-based rate authorization. The Commission also imposes codes of conduct on entities seeking merger authorization under section 203 of the FPA. The discussion below summarizes the Commission's existing practices in these two areas.

A. Affiliate Transactions in the Context of Market-Based Rate Authorizations

1. Historical Approach

3. The Commission began considering proposals for market-based pricing of wholesale power sales and attendant cross-subsidy issues in 1988. At that time, the Commission acted on market-based rate proposals filed by various wholesale suppliers on a case-by-case basis. In doing so, the Commission considered whether there was evidence of affiliate abuse or reciprocal dealing involving the seller or its affiliates.⁵ As the Commission explained, "[t]he

³ 16 U.S.C. 824b, amended by Energy Policy Act of 2005, Pub. L. 109-58, 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005).

⁴ This Notice of Proposed Rulemaking is one of three actions being taken based on the Commission's experience implementing amended FPA section 203 and the Public Utility Holding Company Act of 2005, EPAct 2005, Pub. L. No. 109-58, 1261, et seq., 119 Stat. 594, 972-78 (2005) (PUHCA 2005), as well as the record from the Commission's December 7, 2006 and March 8, 2007 technical conferences regarding Section 203 and PUHCA 2005. In addition, in separate orders, the Commission is concurrently issuing a section 203 Supplemental Policy Statement, *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 (2007) (issued in Docket No. PL07-1-000), and a Notice of Proposed Rulemaking proposing to grant a limited blanket authorization for certain dispositions of jurisdictional facilities under FPA section 203(a)(1), *Blanket Authorization Under FPA Section 203*, 120 FERC ¶ 61,062 (2007) (issued in Docket No. RM07-21-000).

⁵ See *Heartland Energy Services Inc.*, 68 FERC ¶ 61,223, at 62,062 (1994) (*Heartland*) (discussing the potential for abuse in the case of affiliated power marketers); *Commonwealth Atlantic Limited Partnership*, 51 FERC ¶ 61,368, at 62,245 (1990) (discussing potential for reciprocal dealing if a buyer agrees to pay more for power from a seller in return for that seller (or its affiliates) paying more for power from that buyer (or its affiliates)).

The other three "prongs" of the Commission's "four-prong" analysis include: (1) Whether the seller and its affiliates lack, or have adequately mitigated, market power in generation; (2) whether the seller and its affiliates lack, or have adequately mitigated, market power in transmission; and (3) whether the seller or its affiliates can erect other barriers to entry. See *Market-Based Rate Final Rule*, FERC Stats. & Regs. ¶ 31,252 at P 7. These additional "prongs" are not directly at issue in this proceeding.