

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Control and Affiliation for Purposes of)
Market-Based Rate Requirements)
under Section 205 of the Federal)
Power Act and the Requirements of)
Section 203 of the Federal Power Act)**

Docket No. RM09-16-000

COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association (“EPSA”)¹ hereby submits comments on the notice of proposed rulemaking issued by the Federal Energy Regulatory Commission (the “Commission”) in the above-captioned proceeding on January 21, 2010.² The NOPR proposes to amend Part 33 of the Commission’s regulations³ to grant new blanket authorizations under Section 203 of the Federal Power Act (the “FPA”),⁴ and to amend Part 35 of the Commission’s regulations⁵ to revise the definitions of “affiliate” and to provide exemptions of Part 35’s “affiliate” requirements. As discussed below, EPSA greatly appreciates the Commission’s efforts to provide greater clarity in this area, and strongly supports the NOPR as a means of encouraging needed

¹ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

² *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, FERC Stats. & Regs. ¶ 32,650 (2010) (the “NOPR”).

³ 18 C.F.R. §§ 33.1, *et seq.* (2009).

⁴ 16 U.S.C. § 824b (2006).

⁵ 18 C.F.R. §§ 35.0, *et seq.* (2009).

investment and reducing uncertainty relating to the compliance obligations of regulated public utilities.

As discussed below, EPSA suggests limited modifications and clarifications intended to further the goals embodied in the NOPR. Specifically, EPSA respectfully requests that the Commission:

- Provide an alternative means by which the issuer of publicly-traded securities could obtain exemption from the Part 35 “affiliate” requirements by filing with the Commission a copy of the investor’s Schedule 13G filing with the Securities and Exchange Commission (the “SEC”) and a certification from the issuer similar to the form of affirmation on new FERC Form 519-C (an “Affirmation”) proposed in the NOPR;
- Eliminate or narrow the information-sharing restriction in the proposed form of Affirmation;
- Clarify that the proposed form of Affirmation covers indirect, as well as direct, investments in public utilities;
- Clarify that the filing of a single Affirmation is sufficient where the same investment(s) in the voting securities of the same issuer(s) is deemed to convey control over multiple public utilities;
- Clarify what, if any, action it intends to take after the filing of an Affirmation;
- Clarify that an Affirmation may be filed at any time for purposes of obtaining the exemption from the Part 35 “affiliate” requirements;
- Clarify that the proposed rule will not disturb any prior determinations regarding the absence of control or affiliation; and
- Incorporate the regulatory text regarding the exemption from the Part 35 “affiliate” requirements into Part 35 of the Commission’s regulations.

EPSA submits that these requested modifications and clarifications are fully consistent with the intent of the NOPR, and that they will result in a better, more workable final rule.

I. COMMUNICATIONS

EPSA requests that all pleadings, correspondence and communications concerning these comments be directed to the following persons:

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II. BACKGROUND

On September 2, 2008, EPSA filed a petition for guidance⁶ regarding “control” and “affiliation” for purposes of requirements under Section 203 of the FPA and Part 33 and under the market-based rate (“MBR”) regime established pursuant to Section 205 of the FPA. As discussed in the Guidance Petition, which is provided in Attachment A to these comments, a number of recent transactions have highlighted concerns about when an investment will convey “control” or result in “affiliation,” and these concerns threaten to discourage needed investment in energy infrastructure, and to create potentially serious MBR compliance issues for competitive power supply companies.⁷ In order to address these concerns, the Guidance Petition requested, among other things, that the Commission clarify that investments in publicly-held companies by investors who both own less than 20 percent of the company’s voting securities, and

⁶ See Petition Of The Electric Power Supply Association For Guidance Regarding “Control” And “Affiliation,” Docket No. EL08-87-000 (filed Sept. 2, 2008) (the “Guidance Petition”).

⁷ See *id.* at 1, 3-11.

make filings with the SEC on SEC Schedule 13G, would not be deemed to convey either “control” or result in “affiliation” for MBR or FPA Section 203 purposes.⁸

Following the submission of comments, the Commission determined that the Guidance Petition “raises issues of generic implication to the electric utility industry,” and re-docketed the proceeding with the more general PL docket prefix.⁹ On December 3, 2008, Commission staff held a workshop to address the issues raised in the Guidance Petition.¹⁰ Following the workshop and the submission of post-workshop comments, the Commission decided that the issues involved called for the more formal treatment through a rulemaking.¹¹

On January 21, 2010, the Commission issued the NOPR, proposing to amend its regulations with respect to certain transactions in which voting securities of a public utility are acquired. Specifically, the Commission proposes to create new blanket authorizations under section 203(a)(1) and 203(a)(2) of the FPA¹² for acquisitions of 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or holding company, where the investor acquiring such an interest files an Affirmation within 10 days of the acquisition of such voting securities.¹³ Through an Affirmation, an investor would affirm that 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or holding company, were not

⁸ See *id.* at 12-13.

⁹ See Notice of Redocketing Proceeding, Docket Nos. EL08-87-000 and PL09-3-000 (Nov. 5, 2008).

¹⁰ See Notice Of Workshop, Docket No. PL09-3-000 (Nov. 12, 2008).

¹¹ See NOPR at P 18.

¹² 18 C.F.R. §§ 33.1(c)(2), 33.1(c)(12) (2009).

¹³ NOPR at P 33.

acquired or held with the effect, or for the purpose, of changing or influencing control of the public utility, and that it will abide by relevant conditions regarding the exercise of control.¹⁴ For the purposes of Section 203 of the FPA, the submission of an Affirmation would create a rebuttable presumption that the investor does not control the public utility whose voting securities it has acquired,¹⁵ although the “affected companies are still considered technically affiliates.”¹⁶

In addition, the NOPR proposes to define an “affiliate” under Part 35 of the Commission’s regulations as “any person that controls, is controlled by or is under common control with the specified company.”¹⁷ Under this definition, owning, controlling, or holding with power to vote 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or holding company would presumptively appear to create an affiliate relationship. If an Affirmation were filed within 10 days of the acquisition of such securities, however, the proposed rules would provide for exemption from the “affiliate” requirements set forth in Part 35 of the FPA. In addition, the NOPR provides that an investor not subject to the blanket authorizations under Section 203 of the FPA may independently file an Affirmation in order to permit entities in which it has acquired an interest of 10-20 percent to qualify for the exemption of Part 35 “affiliate” requirements.¹⁸

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at P 56.

18 *Id.* at P 61

III. COMMENTS

A. The Changes Proposed In The NOPR Would Provide Much Needed Certainty And Clarity.

As discussed in detail the Guidance Petition, concerns about when a given investment will be deemed to convey “control” or to result in “affiliation” threaten to discourage investment in energy infrastructure and to create potentially serious compliance issues for MBR sellers and other public utilities.¹⁹ The NOPR would provide needed certainty and clarity by providing a blanket FPA Section 203 authorization and exemption from the “affiliate” requirements in Part 35 of the Commission’s regulations where an investor owning 10-20 percent of a company’s voting securities files an Affirmation. In such circumstances, the NOPR would address the problem that has confronted a number of EPSA’s members with respect to potential obligations to file notifications of change in status regarding, or to observe restrictions on transactions with, “affiliates” of which they may have little or no knowledge and over whose activities they have no control whatsoever.²⁰ It would also provide relief from FPA Section 203 requirements that could apply to such entities or their investors, notwithstanding the fact that the investors do not control the public utilities in any relevant sense. EPSA greatly appreciates the considerable time and effort that clearly went into formulating the NOPR, and strongly supports the proposed rule changes.

¹⁹ See Guidance Petition at 1, 3-11.

²⁰ As noted in the NOPR, the change in status reporting requirements apply “only to changes in circumstances within the **knowledge and control** of the seller.” NOPR at P 49 (citing *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 27 (emphasis added), *on reh’g*, 111 FERC ¶ 61,413 (2005)). While such guidance is helpful, there remains the concern that knowledge or control might be imputed based on some alleged “control” relationship between the investor and the public utility.

In the NOPR, the Commission specifically requests comment on whether the proposed blanket FPA Section 203 authorization “should be limited to acquisitions of publicly-traded utilities,” consistent with the limitation inherent in EPSA’s proposal that the Commission rely on SEC Schedule 13G filings, or whether it “should apply to acquisitions of voting securities of privately-traded companies as well.”²¹ EPSA supports this proposed expansion of the NOPR. Although EPSA’s Guidance Petition focused on investments in publicly-held companies, EPSA agrees with commenters that, from a policy perspective, investments in privately-held companies present similar issues. That the Guidance Petition focused on the former was primarily a function of EPSA’s hope that relying on a preexisting SEC regulatory construct, applicable only to publicly-held companies, would make it less difficult for the Commission to provide the requested relief. With the Commission having elected to amend its regulations and to create its own form of Affirmation, it makes perfect sense to make the blanket authorization equally available for investments in privately- and publicly-held companies. As a result, EPSA welcomes the expansion of the relief originally sought in the Guidance Petition to cover investments in privately-held companies.

B. The Commission Should Provide An Alternative Means By Which The Issuer Of Publicly-Traded Securities Could Obtain Exemption From The Part 35 “Affiliate” Requirements When An Investor Fails To File An Affirmation.

As noted, EPSA strongly supports the NOPR. Consistent with the intent of the NOPR to “provide greater certainty,”²² EPSA suggests that the Commission provide an alternative means by which the issuer of publicly-traded securities could obtain

²¹ NOPR at P 44.

²² *Id.* at P 1.

exemption from the “affiliate” requirements in Part 35 of the Commission’s regulation when a non-controlling investor fails to file an Affirmation.

As a general matter, EPSA does not disagree that an investor “may have an incentive to file the Affirmation to protect the market-based rate authorization of the public utility in which it has invested” even if it would not otherwise require FPA Section 203(a)(2) approval.²³ Nonetheless, EPSA is concerned that the incentives of the investor and the issuer of the publicly-traded securities that has, or whose subsidiaries have, market-based rate authorization will not always be sufficiently aligned to provide the desired level of certainty with respect to the obligations potentially applicable to market-based rate sellers as a result of investments made without a control purpose. For instance, some investors are likely to be relatively less sophisticated in the requirements of this Commission than others and than the companies in which they are investing, and less sensitive to the importance of complying with those requirements than regulated companies and their parent companies. For these and other reasons, investors that have no intent to exercise control over the issuer or its subsidiaries may still fail to make an affirmation in which they make commitments relating to an unfamiliar regulatory regime to an unfamiliar agency.

To address this problem and to ensure that needed certainty is available even when an investor has not filed or may be unwilling to file an Affirmation, EPSA proposes a limited modification to the NOPR that would provide an alternative means of obtaining the same exemption from the “affiliate” requirements in Part 35 of the Commission’s regulations. Specifically, this exemption would be available to an issuer and its market-

²³ *Id.* at P 61.

based rate seller subsidiaries with respect to a given investor based upon the filing, within 30 days²⁴ of the issuer's receipt of a Schedule 13G filing indicating that the investor's holdings exceeded 10 percent of the issuer's outstanding voting securities, of (1) the relevant Schedule 13G filing by the investor and (2) a certification (an "Alternative Certification"). The provisions of the proposed Alternative Certification are intended to mirror, to the extent practicable, the officer's certification in the Commission's form of Affirmation (FERC Form 519-C). Specifically, in an Alternative Certification, a corporate officer of the issuer would certify that:

1. Neither the investor nor any of its employees, officers, or representatives serves on the board of directors (or equivalent governing body) of the issuer;
2. Neither the investor nor any of its employees, officers, or representatives serves as an officer, agent or employee of the issuer; and
3. Neither the investor nor any of its employees or officers has, to the best of the issuer's knowledge, attempted to influence, in any way, by voting shares of the voting securities of the issuer or otherwise, the management or conduct of the day-to-day operations of the issuer or any of its public utility subsidiaries, including but not limited to decisions to:
 - a. purchase or sell electric energy, ancillary services, or inputs to electric power production by the issuer or any of its public utility subsidiaries;
 - b. schedule power production at any jurisdictional facility owned by or under the control of the issuer or any of its public utility subsidiaries;
 - c. hire or fix compensation of executive officers or employees of the issuer or any of its public utility subsidiaries;
 - d. schedule maintenance or outages at any jurisdictional facility owned by or under the control

²⁴ The proposed deadline of 30 days allows time for the issuer to file the Alternative Certification once it has concluded that the investor is not going to file an Affirmation.

- of the issuer or any of its public utility subsidiaries;
or
- e. determine or influence whether generation, transmission, distribution, or other physical assets of the issuer or any of its public utility subsidiaries are made available or withheld from the marketplace.

The foregoing certifications address the Commission's concern that Schedule 13G, alone, "does not provide sufficient information to the Commission to monitor markets and protect the public interest"²⁵ by providing additional information and evidence regarding the absence of control. In this respect, what EPSA is proposing is consistent with various orders granting blanket authorizations under Section 203 of the FPA in which the Commission has relied upon the applicant's eligibility to file with the SEC on Schedule 13G as one, but not the sole, factor demonstrating an absence of control.²⁶ At the same time, it provides a means by which entities, like EPSA's members, that are committed to complying with the Commission's requirements for market-based rate sellers can protect themselves, their market-based rate subsidiaries, and their other investors from one non-controlling investor's failure to file an Affirmation.

To be clear, this filing by the issuer of the publicly-traded securities would address only the relevant obligations of the issuer and its subsidiaries under the Commission's market-based rate regime. It would not provide any blanket authorization under Section 203(a)(2) of the FPA that the investor might require. Thus, in the case where an investor needed FPA Section 203(a)(2) approval and had failed to obtain such

²⁵ NOPR at P 18.

²⁶ See, e.g., *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209 at PP 45-50 (2008) ("*Horizon*"); *The Goldman Sachs Group, Inc.* 121 FERC ¶ 61,059 at PP 30-41 (2007); *Morgan Stanley*, 121 FERC ¶ 61,060 at PP 37-49 (2007), *clarified*, 122 FERC ¶ 61,094 (2008).

approval or to file an Affirmation, that investor would not be protected by the filing of a Schedule 13G and an Alternative Certification by the issuer, as it would have been had it timely filed Affirmation. This should operate to provide an added incentive to investors to submit an Affirmation and thereby to minimize reliance on this alternative approach.

C. The Commission Should Eliminate Or Narrow The Information-Sharing Restriction In The Proposed Affirmation

Among other things, the form of Affirmation proposed in the NOPR would require that a corporate officer of the investor certify that “[n]either the reporting person nor any of its employees, officers, or investors shall request or receive disclosure of non-public information, either directly or indirectly, concerning the business or affairs of the issues.”²⁷ EPSA is concerned that this provision will unreasonably and unnecessarily discourage eligible investors from submitting Affirmations.

Particularly troubling is language that would require the investor to certify that it will not **receive** non-public information about the business or affairs of the issuer. In the context of privately-held companies not subject to SEC disclosure requirements, most of the information relevant to an investor’s investment decisions, including basic financial information that a publicly-held company would disclose through filings with the SEC, is “non-public” in the sense that it is only made available to existing and prospective investors and not to the general public. Read literally, the language in the proposed form of Affirmation could require that an investor wishing to file an Affirmation forego the right to receive such information. It is hard to imagine many investors being willing to execute an Affirmation that would deprive them of the opportunity to receive even the most basic financial information about the issuer’s business and affairs.

²⁷ NOPR, Appendix A.

Similarly, because publicly-held companies are generally required to disclose material information,²⁸ publicly-held companies can and often do provide non-public nonmaterial information about their “business and affairs” to investors who agree not to trade on that information. Publicly-held companies also provide material non-public information to certain investors when they solicit, on a non-public basis and subject to non-disclosure agreements, input from significant investors on contemplated major transactions (e.g., mergers). The language of the proposed form of Affirmation concerning the receipt of non-public information could thus discourage investors in publicly-held companies from filing Affirmations.

In EPSA’s view, this provision of the form of Affirmation is unnecessary in light of the other certifications, including, but not limited to, the certification that the investor will not “seek to influence, in any way, by voting shares of the voting securities of the issuer or otherwise, the management or conduct of the day-to-day operations of the issuer. . . .”²⁹ The Commission has consistently made clear that in both the FPA Section 203 and the MBR settings, its “guiding principle” is that “an entity controls the facilities when it controls the decision-making authority over sales of electric energy, including discretion as to how, when and to whom it could sell power generated by these facilities.”³⁰ It is hard to see the relevance of a restriction on sharing non-public

²⁸ See generally 17 C.F.R. Part 229 (2009). See also *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (stating that the disclosure requirements extend to information that would be significant to a “reasonable investor” in light of the “total mix” of information available).

²⁹ NOPR, Appendix A.

³⁰ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 176 (emphasis omitted), clarified, 121 FERC ¶ 61,260 (2007), *on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008), *on partial reh’g & clarification*, 124 FERC ¶ 61,055, *on reh’g & clarification*,

information that would be available to other investors when the investor has committed not even to exert control in this sense.

Even assuming *arguendo* that there is some reason to require an investor to make a certification regarding information, the focus should be on requesting material information not available to non-controlling investors, not the unsolicited receipt of non-public information. Specifically, if the Commission elects to retain this provision (and EPISA would urge it not to do so), EPISA suggests that it be revised as follows:

Neither the reporting person nor any of its employees, officers, or investors shall request ~~or receive~~ disclosure of material non-public information not available to non-controlling investors, either directly or indirectly, concerning the business or affairs of the issuer. . . .

D. The Commission Should Increase The Time Allowed For The Filing Of An Affirmation To Obtain FPA Section 203 Approval To 20 Days After The Acquisition

In the NOPR, the Commission proposes to require that an investor seeking the benefit of the proposed FPA Section 203 blanket authorization file an Affirmation within 10 days of acquiring an interest of 10 percent or more but less than 20 percent of the voting securities of a specified company. EPISA requests that the Commission increase this time period to 20 days in order to allow issuers a better opportunity to discuss these issues with investors potentially eligible to file Affirmations. Publicly-held companies often only learn that a given investor has crossed the 10 percent threshold through Schedule 13D and 13G filings that are, like the Affirmations, required to be submitted

Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009). *See also, e.g., Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 53 (2007), *on clarification & reconsideration*, 122 FERC ¶ 61,157 (2008).

within 10 days of the acquisition.³¹ Allowing an additional 10 days beyond the SEC deadline will afford an affected public utility or holding company a better opportunity to identify and approach an investor that is potentially eligible to file an Affirmation and, frankly, to educate that investor about the regulatory issues presented.

E. Requested Clarifications And Clarifying Changes

Again consistent with the intent of the NOPR to “provide greater certainty,”³² EPSA respectfully requests that the Commission clarify several aspects of the NOPR, the proposed form of Affirmation (FERC Form 519-C), and the proposed regulatory text.

1. The Commission Should Clarify The Language Of Proposed FERC Form 519-C And The Regulatory Text To Make Clear That Indirect Investments In Public Utilities Are Covered.

Although it appears that the NOPR is intended to cover indirect investments in public utilities (*e.g.*, the blanket FPA Section 203(a)(2) authorization would cover acquisitions of interests in holding companies), there is language in the proposed FERC Form 519-C and the proposed regulatory text that could be construed as implying otherwise. Because the reasoning of the NOPR applies equally to direct and indirect investments in public utilities, EPSA respectfully requests that the Commission clarify this language to reflect the fact that the issuer will not necessarily be a public utility.

EPSA is concerned specifically with language in Item (02) of proposed FERC Form 519-C and proposed Section 33.1(c)(2)(B)(III). As proposed, Item (02) of proposed FERC Form 519-C requires that the investor (*i.e.*, the reporting person)

³¹ See 17 C.F.R. §§ 240.13d-1(a), 240.13d-1(b)(c) (2009). See also 17 C.F.R. § 240.13d-2(d) (2009) (requiring amendments to certain Schedule 13G filings to be submitted within 10 days of an investor’s acquiring an interest in excess of 10 percent).

³² NOPR at P 1.

provide the “[n]ame and location of public utility (issuer) in which reporting person has acquired 10 percent or more of the outstanding voting securities.”³³ In order to account for the possibility that the investment could occur indirectly through the acquisition of the voting securities of one or more upstream holding companies (*i.e.*, issuers), EPSA proposes that Item (02) be subdivided into two parts along the lines of the following:

- (a) Name and location of public utility(ies) in which reporting person has acquired, directly or indirectly, 10 percent or more of the outstanding voting securities.
- (b) Name and location of the issuer(s) of the voting securities through which reporting person acquired the interest in the public utility(ies) identified in response to (a).

In addition, EPSA suggests that the language of proposed Section 33.1(c)(2)(B)(III) be clarified to account for indirect investments for which approval under Section 203(a)(2) of the FPA is not required.³⁴ As drafted, this language provides that, where an investor determines that it no longer wishes to be bound by the commitments made in an Affirmation, it must either seek FPA Section 203 authorization or “reduce its ownership interest to below 10 percent of the outstanding voting securities of the company that has issued such securities. . . .”³⁵ This language is appropriate when, but for the filing of an Affirmation, the investment would have required FPA

³³ *Id.*, App. A.

³⁴ Existing language from Section 33.1(c)(12) of the Commission’s regulations, 18 C.F.R. § 33.1(c)(12) (2009), that would be carried forward into the revised version of that section is silent as to whether the blanket authorization granted therein applies to indirect transfers, but it appears that this provision has been construed as applying to both direct and indirect transfers. *Entegra Power Group LLC, et al.*, 125 FERC ¶ 61,143 at P 11 (2008) (describing the indirect transfer of less than 10 percent of a public utility’s shares as having occurred pursuant to the existing Section 33.1(c)(12) blanket authorization), *on reh’g*, 129 FERC ¶ 61,156 (2009). With the expansion of this provision to cover transactions undertaken using Affirmations, confirmation that this provision applies to both direct and indirect transfers of interests in a public utility would be beneficial.

³⁵ NOPR, Proposed regulatory text 18 C.F.R. § 33.1(c)(2)(B)(III).

Section 203(a)(2) approval for a holding company's acquisition of voting securities of a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric utility company if that acquisition would result in its owning 10 percent or more of the voting securities of the subject transmitting utility, electric utility, or holding company.³⁶ This language could be confusing, however, in circumstances when no such approval is required, such as where an investor has acquired more than 10 percent of the voting securities of a public utility indirectly through investments in non-holding company owners of that public utility's voting securities (e.g., by acquiring 100 percent of the voting securities of three entities that each owns five percent of the voting securities of the same public utility). In this instance, this language could be construed as requiring that the interests in the upstream issuers of the voting securities held by the investor, as opposed to aggregate indirect voting interests in the public utility, be reduced below 10 percent. For example, in the hypothetical where the investor acquired 100 percent of the voting securities of each of three entities that owns five percent of the voting securities of the same public utility, the proposed language could be construed as requiring that the investor reduce its interests to less than 10 percent of the voting interests in *each issuer*, which would equate to an aggregate interest in the public utility of less than 1.5 percent.

EPSA requests that the Commission clarify this language to focus on the direct or indirect interest in the public utility rather than the company issuing securities.

³⁶ If the acquisition resulted in the holding company owning less than 10 percent of the voting securities, it would be covered by the blanket authorization in Section 33.1(c)(2)(ii) of the Commission's regulations, 18 C.F.R. § 33.1(c)(2)(ii) (2009).

Specifically, EPSA suggests the underlined language be added in Section 33.1(c)(2)(B)(III):

. . . subsequently determines that it no longer wishes to be bound by the circumstances set forth in the Affirmation in Support of Exemption from Affiliation Requirements, the investor must

(i) reduce its ownership interest to below 10 percent of the outstanding voting securities of the company that has issued such securities, if approval under Section 203(a)(2) of the Federal Power Act would have been required but for the filing of the Affirmation in Support of Exemption from Affiliation Requirements,

(ii) reduce its direct or indirect ownership interest to below 10 percent of the outstanding voting securities of the public utility, if no approval under Section 203(a)(2) of the Federal Power Act would have been required, or

(iii) file with the Commission an application under section 203 of the Federal Power Act . . .

2. The Commission Should Clarify That A Single Affirmation Is Sufficient Where The Same Investment(s) In The Voting Securities Of The Same Issuer(s) Is Deemed To Convey Control Over Multiple Public Utilities.

Consistent with the revisions to Item (02) of proposed FERC Form 519-C suggested in Part III.E.1, EPSA requests that the Commission make clear that where the same investment(s) in the voting securities of the same issuer(s) convey control over multiple public utilities (e.g., where the investor has acquired the voting securities of a company that has more than one public utility subsidiary), the investor should be allowed to file a single Affirmation on FERC Form 519-C. In addition, EPSA submits that in such circumstances, it would be reasonable if the identification of the issuer (in EPSA's proposed Item (02)(b)) were controlling. As the Commission knows, a single

issuer may be the parent company of literally scores of public utility subsidiaries, and an investor, who is understandably more focused on the issuer's assets and operations than on the corporate vehicles through which the issuer owns those assets and conducts those operations, may have difficulty assembling a complete list of the public utilities in which it has acquired interests within the prescribed time period. In other words, an investor's inadvertent failure to identify one or more public utilities in which the investor acquired interests of 10-20 percent through the same investment(s) in the same issuer(s) should not call the effectiveness of an Affirmation, either as to the investor or the affected public utilities (including those inadvertently not mentioned in the Affirmation), into question.

3. The Commission Should Clarify What, If Any, Action It Intends To Take After The Filing of an Affirmation.

In discussing the effect of FERC Form 519-C for FPA Section 203 purposes, the NOPR states that an "Affirmation would create a rebuttable presumption for purposes of section 203 that the investor does not control the public utility," but further states that "the Affirmation is a representation by the filer and does not operate as a conclusive finding that the investor does not control the public utility. . . ." ³⁷ It is not clear what, if any, action the Commission intends to take after an Affirmation has been filed or whether the blanket FPA Section 203 authorization and the exemption from the "affiliate" requirements of Part 35 of the Commission's regulations would take effect automatically upon the filing of an Affirmation. In EPSA's view, no action should be required after an investor files an Affirmation. An Affirmation should automatically take

³⁷ NOPR at P 33.

effect as of the date of the triggering event when filed within the prescribed number of days or upon and from the date of filing in other cases.³⁸

To the extent the Commission intends to take action on Affirmations, however, EPSA urges the Commission to provide additional clarity as to the nature of that action and the effect of the filing of an Affirmation. Specifically, EPSA suggests that the Commission establish a process similar to that used with respect to the filing of self-certifications of exempt wholesale generators or foreign utility companies pursuant to Section 366.7 of the Commission's regulations,³⁹ whereby the blanket authorization and exemptions would apply, on a temporary basis, from date of the triggering acquisition as a result of the timely, good faith filing of an Affirmation. If Commission action is contemplated, EPSA suggests the following language be included in the final regulations:

Persons who file FERC Form 519-C in good faith shall be deemed to have temporary blanket authorizations under §§ 33.1(c)(2) and (c)(12) upon filing. If the Commission has taken no action within 30 days after the date of filing FERC Form 519-C, the waivers shall be deemed to have been granted. The Commission may toll the 30-day period to request additional information or for further consideration of the request; in such case, the temporary blanket authorization will remain in effect until such time as the Commission has determined whether to grant or deny the exemption.

Persons who file FERC Form 519-C in good faith shall be deemed to have temporary waivers from the affiliate restrictions in Part 35 upon filing. If the Commission has taken no action within 30 days after the date of filing FERC Form 519-C, the waivers shall be deemed to have been

³⁸ As discussed below in Part III.E.4, EPSA submits that an investor should be allowed to file an Affirmation at any time in order to obtain the exemption from the Part 35 "affiliate" requirements.

³⁹ 18 C.F.R. § 366.7 (2009).

granted. The Commission may toll the 30-day period to request additional information or for further consideration of the request; in such case, the temporary waiver will remain in effect until such time as the Commission has determined whether to grant or deny the exemption.

In the event the Commission is not inclined to give an investor even the temporary benefit of the blanket FPA Section 203 authorization until the Commission makes a decision, it would still be appropriate to allow the public utility in which the investment was made to enjoy the benefit of the exemption from the “affiliate” requirements of Part 35 of the Commission’s regulations on a temporary basis until such time as the Commission has rejected an Affirmation and placed the public utility on notice that it must comply with the affiliate requirements.

4. The Commission Should Clarify That An Affirmation Can Be Filed At Any Time For Purposes Of Obtaining Exemption From The Part 35 “Affiliate” Requirements.

In the NOPR, the Commission proposes to allow investors that do not require blanket authorization under Section 203 of the FPA to file an Affirmation in order to obtain the benefits of the exemption from “affiliate” requirements of Part 35 of the Commission’s regulations for the public utilities in which they have invested.⁴⁰ The NOPR does not specify whether or not there is a time period in which such investors have to file an Affirmation. As discussed previously, public utilities and their investors may not always have the information to discern which entities are affiliated. Because entities may learn of affiliates well after the closing of a transaction by which the investor acquired more than 10 percent of the voting securities of a public utility, EPSA requests

⁴⁰ See NOPR at P 61.

that the Commission clarify that an Affirmation may be filed at any time to obtain the exemption from Part 35 “affiliate” requirements.⁴¹

An investor should be allowed to file an Affirmation in order to obtain the exemption from Part 35 “affiliate” requirements at any time, even if the investor did require FPA Section 203 approval and failed to file the Affirmation, or to seek FPA Section 203 approval, on a timely basis. To be clear, EPSA recognizes that the Commission has generally denied requests for retroactive FPA Section 203 approval,⁴² and is not suggesting that the late filing of an Affirmation would remedy any FPA Section 203(a)(2) violations associated with the investment. But there is no reason that the investor’s failure to file the Affirmation within the prescribed number of days after it crosses the 10 percent threshold should deprive the affected public utilities of the benefit of the exemption from Part 35 “affiliate” requirements on a prospective basis from the date on which the investor files the Affirmation.

5. The Commission Should Clarify That The Proposed Regulations Will Not Disturb Any Prior Determinations Regarding Control Or Affiliation.

In various orders issued pursuant to Section 203 of the FPA and Part 35 of the Commission’s regulations, the Commission has expressly or implicitly held that a given

⁴¹ The NOPR specifically discusses the example of an investor that is not a holding company and that does not, therefore, require FPA Section 203(a)(2) approval for a given acquisition. EPSA notes that there may be other situations in which an investor does not require FPA Section 203(a)(2) approval, and will, therefore, have a reduced incentive to file an Affirmation. For example, the investor may have obtained case-specific FPA Section 203 authorization for the acquisition, or the acquisition may be covered by another blanket authorization.

⁴² See, e.g., *Horizon* at P 61; *Northern Iowa Windpower II LLC*, 110 FERC ¶ 61,059 at P 8 (2005) (granting FPA Section 203 authorization “prospectively” for a previously-consummated transaction). *But see also JPMorgan Chase & Co., et al.*, 123 FERC ¶ 61,088 (2008) (granting retroactive FPA Section 203 approval “[i]n light of the unique and extraordinary circumstances” surrounding a transaction undertaken “to stabilize the financial markets”).

investment does not convey control and/or does not result in affiliation. For example, the Commission has authorized transactions that would otherwise have raised competitive issues subject to conditions that ensured that the transaction would not convey control.⁴³ Elsewhere, the Commission has accepted notifications of change in status that were predicated upon an absence of control or affiliation. Although the NOPR evinces no intent to disturb these holdings, EPSA requests that the Commission explicitly provide clarification to this effect. Otherwise, investors may feel compelled to file Affirmations relating to existing investments long after the triggering event out of an abundance of caution and despite prior orders confirming that those investments do not convey control or result in affiliation.

6. In Order To Avoid Confusion, The Regulatory Text Relating To The Exemption From Part 35 “Affiliate” Requirements Should Be Incorporated Into Part 35 Of The Commission’s Regulations.

As proposed, the regulatory text relating to the exemption from Part 35 “affiliate” requirements would be contained in Section 33.1(c)(ii)(B)(II) of the Commission’s regulations. In order to avoid confusion, EPSA suggests that this language be incorporated into Part 35 of the Commission’s regulations itself. Specifically, the Commission may want to add a subsection (iii) to the revised definitions of “affiliate” proposed to be promulgated in Sections 35.36(a)(9) and 35.43(a)(1) to the effect that: “A public utility whose voting securities are acquired, directly or indirectly, in a transaction described in Section 33.1(c)(ii)(B) or with respect to which an Affirmation in Support of Exemption from Affiliation Requirements, Form 519-C, has otherwise been

⁴³ See, e.g., *Entegra* at PP 37-38.

filed and remains in effect shall be exempt from the requirements of an 'affiliate' in this part."

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA endorses the Commission's proposed rulemaking, and requests that the Commission consider and incorporate these comments, modifications, and clarifications in its future action in this proceeding.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

By: _____ /s/

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On behalf of the
Electric Power Supply Association

Dated: March 29, 2010

Attachment A
EPSA's Guidance Petition

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September 2, 2008

VIA HAND DELIVERY

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

FILED
SECRETARY OF THE
COMMISSION
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FEDERAL ENERGY
REGULATORY COMMISSION


Re: Electric Power Supply Association, Docket No. EL08-____-000
Petition for Guidance Regarding "Control" and "Affiliation"

Dear Secretary Bose:

Enclosed for filing please find an original and fourteen copies of the "Petition of the Electric Power Supply Association for Guidance Regarding 'Control' and 'Affiliation.'" Although not required by the Commission's regulations, a form of notice suitable for publication in the *Federal Register* and an electronic version of that form of notice are also provided as a courtesy.

Should you need any additional information, please do not hesitate to contact the undersigned.

Very truly yours,


David G. Tewksbury

Counsel for the
Electric Power Supply Association

Enclosures

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Electric Power Supply Association)

Docket No. EL08-_____-000

**PETITION OF THE ELECTRIC POWER SUPPLY ASSOCIATION
FOR GUIDANCE REGARDING “CONTROL” AND “AFFILIATION”**

Pursuant to Rule 207(a)(5) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),¹ the Electric Power Supply Association (“EPSA”)² hereby respectfully submits this petition for guidance with respect to the question of when investments in publicly-held companies will be deemed to convey “control” or to result in “affiliation” for purposes of the Commission’s market-based rate (“MBR”) requirements under Section 205 of the Federal Power Act (the “FPA”)³ and the requirements of Section 203 of the FPA⁴ and the Commission’s regulations thereunder.⁵ As discussed in more detail below, a number of recent

¹ 18 C.F.R. § 385.207(a)(5) (2008).

² EPSA is a national trade association that represents the competitive power industry. Its members have significant financial investments in electric generation and electricity marketing operations across the country. EPSA’s organizational mission is the promotion of a favorable market environment for the competitive electric industry. EPSA supports the development of legislative and regulatory policies that encourage the development and implementation of a competitive market for electricity. The views expressed in this petition represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

³ 16 U.S.C. § 824d (2000).

⁴ 16 U.S.C. § 824b (2000 & Supp. V 2005).

⁵ Rule 207(a)(5) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.207(a)(5) (2008), permits the filing of a petition for action committed to the discretion of the Commission where the rules do not prescribe another form of pleading. This petition seeks guidance with respect to rules and policies for MBR and FPA Section 203 matters most recently addressed in other proceedings. See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,352 (2007) (“Order No. 697”), *on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008) (“Order No. 697-A”), *on partial reh’g and clarification*, 124 FERC ¶ 61,055 (2008), *reh’g pending* (addressing MBR rules and policies in Docket Nos. RM04-7-000, *et al.*); *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005) (“Order No. 669”), *on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *on reh’g*, Order No. 669-B, FERC

transactions involving investments in publicly-held competitive power supply companies have highlighted concerns about when an investment will convey “control” or result in “affiliation.” These concerns threaten to discourage needed investment in energy infrastructure and also create potentially serious MBR compliance issues for competitive power supply companies.

In order to address these concerns and thereby to facilitate investment and compliance with the Commission’s requirements, EPSA requests guidance on three points. First, EPSA asks that the Commission state that investments in publicly-held companies by investors owning less than 20 percent of such companies’ voting securities and making filings with the Securities and Exchange Commission (the “SEC”) on Schedule 13G, certifying that the investment is not for the purpose of controlling the company, will not be deemed to convey “control” or to result in “affiliation” for MBR or FPA Section 203 purposes. Second, EPSA seeks confirmation that Commission findings that a given entity does not “control” another entity made in the FPA Section 203 setting apply equally in the MBR setting to affected MBR sellers. Third, EPSA requests that the Commission state that investments by entities upstream of a publicly-held company in entities not otherwise related to the publicly-held company will not be deemed to be within the knowledge and control of the publicly-held company’s subsidiaries with MBR authorization, and, therefore, those MBR subsidiaries will not be

Stats. & Regs. ¶ 31,225 (2006), *reh’g pending* (addressing FPA Section 203 rules and policies in Docket Nos. RM05-34-000, *et al.*); *Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 53 (2007) (“*Supplemental Policy Statement*”), *on clarification & reconsideration*, 122 FERC ¶ 61,157 (2008) (“*Supplemental Policy Statement Clarification Order*”) (addressing FPA Section 203 policies in Docket Nos. PL07-1-000, *et al.*). The guidance requested herein would not fit squarely within the scope of any one of these proceedings, inasmuch as it relates to both MBR and FPA Section 203 matters. Moreover, these proceedings are all either concluded or at a relatively advanced stage that would appear to make filing in the applicable dockets inappropriate. Accordingly, EPSA is requesting guidance through a new petition filed in a new docket.

required to file a notification of change in status or to include generation or inputs to generation owned or controlled by the other entities in future market power analyses.

I. COMMUNICATIONS AND SERVICE

All pleadings, correspondence and other communications concerning this petition should be directed to the following persons, who should be placed on the official service list in this proceeding:

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II. BACKGROUND

As discussed below, the concepts of “control” and “affiliation” play a critical role in both the MBR and FPA Section 203 settings. A number of recent transactions involving investments in publicly-held companies have demonstrated the need for guidance in this area beyond that which the Commission was in a position to offer when it issued Order Nos. 669 and 697 and the *Supplemental Policy Statement*.

A. “Control” And “Affiliation” In The MBR and FPA Section 203 Settings

The Commission’s regulations do not explicitly define control for MBR or FPA Section 203 purposes, but the Commission has made clear that, in both settings, its “guiding principle” is that “an entity controls the facilities when it controls the decision-making authority over sales of electric energy, including discretion as to how, when and

to whom it could sell power generated by these facilities.”⁶ Specifically, the Commission has explained that lack of control is evidenced when “the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities.”⁷

Prior to Order No. 697-A, the Commission’s most recent guidance regarding affiliation was its reference in Order No. 652 to provisions of its regulations that “define ‘affiliated companies’ as ‘companies that directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, the [subject] company.’”⁸ In Order No. 697-A, the Commission adopted a definition of “affiliate” for market-based rate purposes that (1) presumes “control” based upon ownership of 10 percent of the voting securities of a public utility that is not an exempt wholesale generator (“EWG”), and (2) when EWGs are involved, uses an ownership standard of five percent of voting securities (based on the definition of “affiliate” found in the repealed Public Utility Holding Company Act of 1935).⁹ For purposes of FPA Section 203, the Commission’s “general policy” is “to presume that a transfer of less than 10 percent of a public utility’s voting securities is not a transfer of control. . . .”¹⁰

⁶ Order No. 697 at P 176 (emphasis omitted). See also *Supplemental Policy Statement* at P 53; *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 18 (“Order No. 652”), *on reh’g*, 111 FERC ¶ 61,413 (2005).

⁷ *Supplemental Policy Statement* at P 54.

⁸ Order No. 652 at P 18 n.15 (citing 18 C.F.R. Part 101; 18 C.F.R. § 161.2; *Morgan Stanley Capital Group*, 72 FERC ¶ 61,082 (1995)) (alteration in the original).

⁹ See Order No. 697-A at PP 182-183. In response to requests by EPSA and others for rehearing of this aspect of Order No. 697-A, the Commission has proposed to delete the separate definition of “affiliate” for EWGs, and to apply the same definition, based on a 10 percent threshold for control, to both EWGs and non-EWGs. See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 124 FERC ¶ 61,213 at P 12 (2008).

¹⁰ *Supplemental Policy Statement* at P 57.

Whether one entity is deemed to control, to be controlled by, or to be under common control with, or to be an affiliate of, another entity comes into play in several ways in the MBR and FPA Section 203 settings. In the MBR setting, a change in control and/or affiliation has three impacts of particular relevance here. First, for an entity with MBR authorization, a change in control or affiliation may trigger a requirement to report, within 30 days, a “change in status that would reflect a departure from the characteristics that the Commission relied upon in granting market-based rate authority.”¹¹ Reportable changes in status include ownership or control of generation capacity or inputs to generation and affiliation with entities that own or control generation or inputs to generation.¹² MBR sellers are only required to report “changes in circumstances within the knowledge and control of the [seller].”¹³

Second, for purposes of the Commission’s market power analysis, an MBR seller is attributed all of the generation and inputs to generation that it owns or controls, as well as all of the generation and inputs to generation that its affiliates own or control.¹⁴ Thus, to the extent that an entity with MBR authorization is deemed to control, or to be affiliated with an entity that owns or controls, generation or inputs to generation, it may need to include those assets in its vertical or horizontal market power analysis, which could impact its ability to retain MBR authorization.

¹¹ 18 C.F.R. § 35.42(a), (b) (2008).

¹² See 18 C.F.R. § 35.42(a) (2008).

¹³ Order No. 652 at P 27.

¹⁴ See 18 C.F.R. Pt. 35, Subpt. H., App. A (2008) (“Standard Screen Format” for two horizontal market power screens directs MBR sellers to include all “Seller and Affiliate Capacity”). See also generally *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *on reh’g*, 108 FERC ¶ 61,026 (2004).

Third, the Commission's regulations, as amended in Order No. 697, prohibit transactions between a franchised public utility with captive customers and market-regulated power sales affiliates without prior Commission authorization under Section 205 of the FPA.¹⁵ This prohibition reflects the Commission's longstanding concern that a franchised public utility and a market-regulated power sales affiliate may transact in ways that transfer benefits from captive customers of the franchised public utility to the affiliate and their common shareholders.¹⁶

Control and affiliation concepts also significantly impact the determination of whether Section 203 of the FPA applies to a given transaction, and, if it does, whether the transaction will be deemed to have an adverse impact on competition. Section 203(a)(1) of the FPA requires prior Commission approval for certain dispositions¹⁷ and acquisitions¹⁸ of control over FERC-jurisdictional facilities. As noted, the Commission has adopted a presumption that, absent special circumstances warranting a different conclusion, a transfer of less than 10 percent of the interests in a public utility will not be considered a transfer of control if, "after the transaction, the acquiror and its affiliates

¹⁵ 18 C.F.R. § 35.44(a) (2008).

¹⁶ See *Boston Edison Company Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 at 62,167 n.56 (1991). See also *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 3, *on reh'g*, Order No. 707-A, 124 FERC ¶ 61,047 (2008).

¹⁷ See 16 U.S.C. § 824b(a)(1)(A) (2000 & Supp. V 2005) (no public utility may, without prior FERC approval, "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 \$10,000,000").

¹⁸ See 16 U.S.C. § 824b(a)(1)(B) (2000 & Supp. V 2005) (no public utility may, without prior FERC approval, "merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever"). The "merge or consolidate" clause has been construed as "encompass[ing] acquisitions of facilities. . . ." *Duke Power Co. v. FPC*, 401 F.2d 930, 933 (D.C. Cir. 1968).

and associate companies, directly or indirectly, in aggregate will own less than 10 percent of such public utility. . . .”¹⁹

In the *Supplemental Policy Statement*, the Commission clarified that approval is not required under FPA Section 203(a)(1)(A) for dispositions of control over a public utility or its parent company that might otherwise be deemed to occur as a result of “secondary market transactions,” defined as “purchases or sales of the securities of a public utility or its upstream holding company by a third-party investor.”²⁰ The Commission did so in recognition of the fact that it would be “virtually impossible” for the public utility to know about such transactions before they occurred.²¹

As in the MBR setting, if a proposed transaction would result in an acquiror obtaining control over a nonaffiliated entity, the acquiror and the target are treated as a single corporate family in the FPA Section 203 competitive analysis.²² In other words, the applicant(s) must treat all generation or inputs to generation owned or controlled by the entities being combined and their post-transaction affiliates as being under common control.

B. Recent Transactions And Potential Implications In Light Of Past Guidance On “Control” And “Affiliation”

As the Commission knows, a number of recent transactions have resulted, or would result, in hedge funds and other investment entities acquiring significant interests

¹⁹ *Supplemental Policy Statement* at P 57.

²⁰ *Id.* at P 36. “Secondary market transactions” include only transactions involving securities that are publicly-traded. See *Supplement Policy Statement Clarification Order* at P 5.

²¹ *Supplemental Policy Statement* at P 36.

²² 18 C.F.R. §§ 33.3(a)(1) and 33.4(a)(1) (2008).

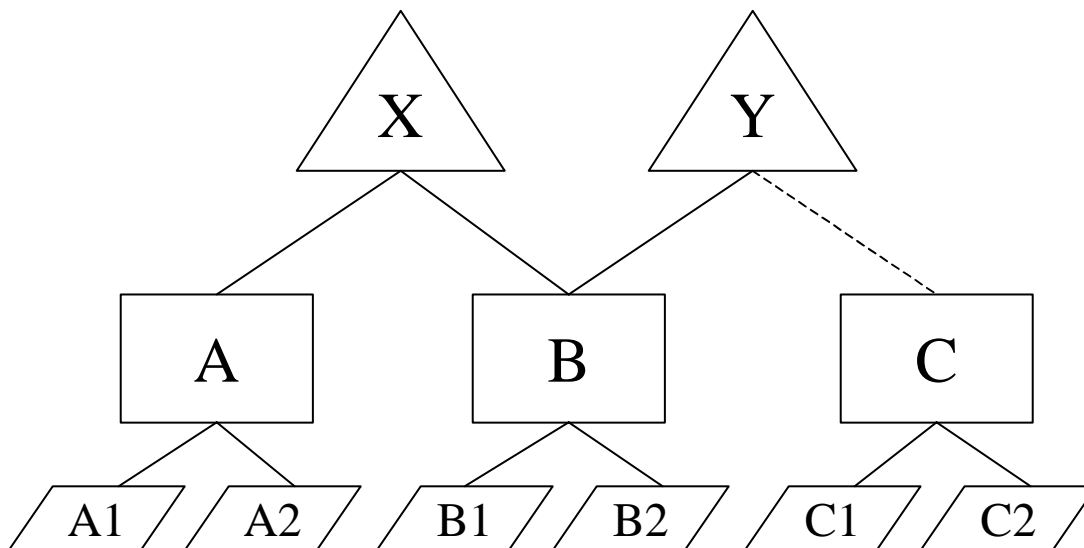
in publicly-held competitive power supply companies and other holding companies.²³ While several of these transactions present issues that will need to be addressed on a case-specific basis in pending proceedings,²⁴ the fact and number of these transactions underscores broader issues that, in EPSA's view, should be addressed on a generic basis.

The following hypothetical example may help illustrate the MBR and FPA Section 203 concerns that can arise if one strictly applies a rule that ownership of 10 percent or more of the voting securities of a given entity conveys "control" to the investor and creates "affiliation" between the company (and its subsidiaries) and other companies (and their subsidiaries) in which the investor owns comparable interests. In this

²³ See, e.g., *Calpine Corp., et al.*, 121 FERC ¶ 62,223 (2007) (granting Section 203 approval for the acquisition of more than 10 percent of the common stock of Calpine Corporation ("Calpine"), including the Commission-approved acquisitions of more than 10 percent of the common stock of Calpine by Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. (together, "Harbinger") and by SPO Partners II, L.P. and San Francisco Partners II, L.P.); *Calpine Corp., et al.*, 122 FERC ¶ 62,238 (2008) (granting Section 203 approval for the acquisition of more than 10 percent of the common stock of Calpine by LS Power Development, LLC ("LSP Development") and Luminus Management, LLC ("Luminus")); Application for Approval Under Section 203 of the Federal Power Act, Docket No. EC08-59-000 (Mar. 21, 2008) ("EC08-59 Application") (Harbinger's application for Section 203 approval in connection with its acquisition of 10-25 percent of the common stock of Mirant Corporation ("Mirant")); Petition by Horizon Asset Management for Disclaimer of Jurisdiction, or in the Alternative, for Blanket Authorization to Acquire Securities under Section 203 of the Federal Power Act, Docket No. EC08-91-000 (May 19, 2008) (petition for disclaimer of jurisdiction or, in the alternative, for blanket FPA Section 203 approval in connection with direct and indirect investments in public utilities); Joint Application For Approval Under Section 203 Of The Federal Power Act, Docket No. EC08-87-000 (May 9, 2008) ("EC08-87 Application") (joint application of Harbinger and Entegra Power Group LLC ("Entegra") for Section 203 approval in connection with Harbinger's proposed acquisition of 10-20 percent of the voting securities of Entegra); Joint Application for Approval Under Section 203 of the Federal Power Act and Request for Expedited Review, Docket No. EC08-67-000 (Apr. 8, 2008) ("EC08-67 Application") (application of LSP Development and Luminus for Section 203 approval in connection with the acquisition of 10-20 percent of the common stock of TransAlta Corporation).

²⁴ See, e.g., Conditional Protest and Comments of Mirant Entities, Docket Nos. ER01-642-010, *et al.* (Mar. 4, 2008) (conditional protest to change in status filing by certain indirect subsidiaries of Harbinger relating to Harbinger's investments in Calpine and Mirant); Motion to Intervene and Conditional Protest of Calpine Corporation, Docket No. EC08-59-000 (Apr. 11, 2008) ("EC08-59 Protest") (conditional protest to Harbinger's EC08-59 Application); Motion to Intervene and Conditional Protest of Calpine Corporation, Docket No. EC08-67-000 (Apr. 30, 2008) (conditional protest to LSP Development's and Luminus's EC08-67 Application); Motion to Intervene and Conditional Protest of TransAlta Corporation, Docket No. EC08-67-000 (May 8, 2008) (same); Motion to Intervene and Conditional Protest of Calpine Corporation, Docket No. EC08-87-000 (May 30, 2008) (conditional protest to Harbinger's EC08-87 Application).

example, X and Y are investment entities, having existing interests (indicated by solid lines) or proposed interests (indicated by a dotted line) in publicly-held companies A, B and C, each of which is, in turn, the parent company of entities with MBR authorization.



If X owns 10 percent of the voting stock of competitive power supply companies A and B and Y owns 10 percent of the voting stock of competitive power supply company B, Y's proposed acquisition of 10 percent of the voting stock of competitive power supply company C could present a number of issues if one assumes that a direct or indirect voting interest of 10 percent or more is deemed to convey control for both MBR and FPA Section 203 purposes.

1. FPA Section 203

If Y is acquiring the interests in C other than through "secondary market transactions" (e.g., through an initial public offering), both Y and C's public utility subsidiaries might need to obtain prior Commission authorization for the proposed

transaction under FPA Section 203.²⁵ If Y is acquiring its interest solely through “secondary market transactions” involving C’s publicly-traded securities, only Y may need to obtain prior FPA Section 203 approval.²⁶

2. MBR Requirements

This transaction could trigger a change in status reporting requirement for the B and C subsidiaries with MBR authority, if it is assumed that the operating subsidiaries of B and C become affiliated with each other (*i.e.*, based on Y’s 10 percent interest in B and C creating a potential presumption of common control over those entities and their operating subsidiaries). This requirement could be triggered, despite the fact that B and its subsidiaries have no knowledge of, or control over, the transaction (*i.e.*, Y’s investment in C), and that C and its subsidiaries may not know or have any way of determining that B is affiliated with Y. Because compliance with this reporting requirement is a condition to retaining their MBR authority,²⁷ B, C, and their MBR subsidiaries would need to be concerned that, if they were somehow deemed to have knowledge of, and control over, Y’s investment in C and/or the affiliation that might be deemed to result from that investment, failure to report the transaction and affiliation

²⁵ See *Supplemental Policy Statement Clarification Order* at P 5. If C were privately-held, it might need to obtain approval under Section 203(a)(1) of the FPA in connection with the transaction. See *id.* See also EC08-87 Application at 11 (explaining why the secondary market transactions guidance does not cover Harbinger’s proposed acquisition of 10-20 percent of the voting securities of Entegra). Alternatively, if the transaction did not result in a change in control, but the value of the securities acquired exceeded \$10 million, Y would have to obtain prior Commission authorization under FPA Section 203. See 16 U.S.C. § 824b(a)(2) (2000 & Supp. V 2005).

²⁶ See *Supplemental Policy Statement* at P 36 (explaining that the public utility subsidiaries need not obtain FPA Section 203 approval in such circumstances).

²⁷ See Order No. 652 at P 113.

with other entities in which Y has invested could potentially result in revocation of their MBR authority or the imposition of other Commission penalties.²⁸

B, C and their respective subsidiaries could face an additional – and potentially even more serious – problem if any of those entities was a traditional public utility with captive customers. For example, if C1 was a traditional public utility with captive customers and it was buying power from, or selling power to B1, which was not a traditional public utility with captive customers, C1 and B1 could be deemed to have violated, albeit inadvertently, the Commission’s affiliate sales restrictions. As discussed above, it is unlikely that C1 or B1 would even know that their transactions might implicate the Commission’s affiliate restrictions.

III. REQUESTED GUIDANCE ON “CONTROL” AND “AFFILIATION”

To mitigate the problems described above, EPSA requests that the Commission provide guidance with respect to its MBR and FPA Section 203 policies by stating that:

- (1) An investment in a publicly-held company by an investor owning less than 20 percent of such company’s voting securities and filing with the SEC on Schedule 13G, certifying that the investment is not for the purpose of controlling the company, will not be deemed to convey “control” or to result in “affiliation” for MBR or FPA Section 203 purposes.
- (2) Findings of “no control” made in the FPA Section 203 setting apply equally in the MBR setting to the affected public utilities (*i.e.*, that such transaction will not be deemed to convey “control” or to result in “affiliation” for MBR purposes).
- (3) Investments by entities upstream of a publicly-held company involving entities not otherwise related to the publicly-held company will not be deemed to be within the knowledge and control of a publicly-held company or its subsidiaries with MBR authorization, and thus will not trigger any obligation on the part of such MBR sellers to file a notification

²⁸ Ironically, the MBR authorizations of the entities least likely even to be aware of – to say nothing of having knowledge of, or control over – the transaction (*i.e.*, B, B1 and B2) could be at the greatest risk. B, B1 and B2 may need to account not only for B and C and their subsidiaries but also A and its subsidiaries in their market power analyses.

of change in status with respect to those investments by their investors or to include the generation or inputs to generation owned or controlled by the other entities in future market power analyses.

The requested policy guidance would benefit the public interest by ensuring that the Commission's MBR requirements and the FPA Section 203 regulatory framework do not unnecessarily discourage investment or work at cross purposes, while leaving undiminished the Commission's ability to review transactions that present market power concerns. As the Commission knows, there is a pressing need for additional investment in electric infrastructure, especially new electric generation.²⁹ In addition, the requested guidance will facilitate compliance with the Commission's requirements by MBR sellers, investors, and other entities engaged in transactions subject to the Commission's jurisdiction. Such guidance should also serve to reduce the burden on the Commission's resources imposed by filings submitted "out of an abundance of caution."

A. Investments In Publicly-Held Companies By Certain Investors Filing On Schedule 13G Should Not Be Deemed To Convey "Control" Or To Result In "Affiliation"

EPSA requests that the Commission declare that an investment in a publicly-held company by a "Passive Investor" (as defined below) filing a Schedule 13G with the SEC or by a "Qualified Institutional Investor" (as defined below) filing a Schedule 13G with the SEC, and owning less than 20 percent of the publicly-held company's voting securities, will not be deemed to convey "control" or to result in "affiliation" for MBR or FPA Section 203 purposes. Specifically, EPSA requests clarification that such

²⁹ See Federal Energy Regulatory Commission Office of Enforcement, *Increasing Costs in Electric Markets* (June 19, 2008) available at <http://ferc.gov/legal/staff-reports/06-19-08-cost-electric.pdf>. See also, e.g., The Brattle Group, *Transforming America's Power Industry: The Investment Challenge* at 4 (Apr. 21, 2008) (predicting that through 2030 the U.S. power sector will require an additional 150,000 MW of new and replacement generation plant at an approximate cost of \$560 billion), available at <http://www.edisonfoundation.net/events/2008-04-21/BrattlePresentation.pdf>.

ownership will not result in the publicly-held company or its subsidiaries being deemed to be under common control or affiliated with the investor or the other holdings of the investor, and thus (1) no change in status filing will be required in connection with the investment; (2) generation or inputs to generation owned or controlled by other entities in which the investor has interests will not be attributed to the publicly-held company or its public utility subsidiaries in market power analyses; and (3) affiliate sales restrictions will not apply to transactions between the publicly-held company and its subsidiaries with MBR authorization, on the one hand, and other entities in which the investor has interests, on the other hand. EPSC asks that the Commission further clarify that such investments will not be deemed to convey control to the investor such that prior approval under FPA Section 203 would be required.³⁰ As discussed below, the stringent SEC filing requirements and sanctions associated with Schedule 13G provide ample assurance that ownership by a “Passive Investor” (as defined below) filing on Schedule 13G or a “Qualified Institutional Investor” (as defined below) filing on Schedule 13G, and owning less than 20 percent of the publicly-held company’s voting securities, will not permit such an investor to control generation or inputs to generation owned or controlled by the publicly-held company, to exercise decision-making authority over sales of electric power, or otherwise to control the publicly-held company or its subsidiaries.

³⁰ Such clarification would typically be relevant only to the investor, because the Commission has already found that neither the publicly-held company nor its public utility subsidiaries are required to obtain approval under Section 203(a)(1)(A) in connection with dispositions that might otherwise be deemed to occur as a result of “secondary market transactions.” *Supplemental Policy Statement* at P 36.

1. Schedule 13G Generally

Section 13(d)(1) of the Securities Exchange Act of 1934 (the “Exchange Act”)³¹ requires the beneficial owner of five percent or more of a class of a stock to make certain disclosures that will “alert the marketplace to every large, rapid aggregation of or accumulation of securities . . . which might represent a potential shift in corporate control.”³² Schedule 13G is an abbreviated form for making Section 13(d)(1) disclosures that may be filed by so-called “Passive Investors” and “Qualified Institutional Investors.”³³ In this context, the SEC uses the term “Passive Investors” to refer to:

shareholders beneficially owning more than five percent of the class of subject securities and who can certify that the subject securities were not acquired or held for the purpose of and do not have the effect of changing or influencing the control of the [publicly-held company] and were not acquired in connection with or as a participant in any transaction having such purpose or effect.³⁴

The term “Qualified Institutional Investor” refers to:

a broker or dealer registered under Section 15(b) of the Exchange Act [15 U.S.C. 78o(b)], a bank as defined in Section 3(a)(6) of the Exchange Act [15 U.S.C. 78c(a)(6)], an insurance company as defined in Section 3(a)(19) of the Exchange Act [15 U.S.C. 78c(a)(19)], an investment company registered under Section 8 of the Investment Company Act of 1940 [15 U.S.C. 80a-8], an investment adviser registered under Section 203 of the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 *et seq.*], an employee

³¹ 15 U.S.C. § 78m(d)(1) (2000 & Supp. V 2005).

³² *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971) (“*Milstein*”).

³³ Schedule 13G may also be filed by what the SEC terms “Exempt Investors.” See *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538, 63 Fed. Reg. 2,854, 2,854 n.8 (Jan. 16, 1998) (“*Beneficial Ownership Reporting*”). Exempt Investors are persons who acquired the securities of the publicly-held company through an acquisition not subject to Section 13(d) of the Exchange Act (*e.g.*, prior to registration of the securities). See *id.* This petition does not seek relief with respect to investments by Exempt Investors filing on Schedule 13G.

³⁴ *Id.* at 2,854 n.9. See also 17 C.F.R. § 240.13d-1(c) (2008) (setting forth the eligibility requirements for filing on Schedule 13G as a Passive Investor).

benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act of 1974 [codified principally in 29 U.S.C. 1001-1461], and related holding companies and groups (collectively, “institutional investors”).³⁵

Both Passive Investors and Qualified Institutional Investors filing on Schedule 13G must provide sworn certifications that the publicly-held company’s securities:

were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the [publicly-held company] and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect.³⁶

Only persons beneficially owning ***less than 20 percent*** of the class of securities are eligible to file on Schedule 13G as Passive Investors.³⁷ Although no similar ownership limitation applies to Qualified Institutional Investors filing on Schedule 13G, EPSA proposes that the requested guidance for such investors apply only to the extent they likewise own less than 20 percent of the publicly-held company’s voting securities.

Section 13(d)(2) of the Exchange Act requires investors promptly to amend their Section 13(d) disclosure filings, including Schedule 13G filings, when a material change in the underlying facts occurs, including a change in ownership of one percent or

³⁵ *Beneficial Ownership Reporting* at 2,854 n.7 (alterations in the original). See also 17 C.F.R. § 240.13d-1(b) (2008) (setting forth the eligibility requirements for filing on Schedule 13G as a Qualified Institutional Investor).

³⁶ 17 C.F.R. § 240.13d-102, Items 10(a) & (b) (2008) (emphasis added) (Item (a) sets forth the certification to be provided by a person filing a Schedule 13G pursuant to 17 C.F.R. § 240.13d-1(b) (*i.e.*, by a Qualified Institutional Investor), and Item (b) sets forth the certification to be provided by a person filing a Schedule 13G pursuant to 17 C.F.R. § 240.13d-1(c) (*i.e.*, by a Passive Investor)). So-called “Exempt Investors” filing on Schedule 13G are not required to make this certification. As indicated above, this filing does not seek relief with respect to such investors. See *supra* n.33.

³⁷ 17 C.F.R. § 240.13d-1(c)(3) (2008). In adopting this limitation on the availability of Schedule 13G to Passive Investors, the SEC emphasized that it “does not intend these new rules to create a presumption that beneficial ownership of 20 percent or more indicates control or a control purpose.” *Beneficial Ownership Reporting* at 2,856 n.20.

more.³⁸ If and when an investor ceases to meet the eligibility requirements for Schedule 13G – either by virtue of having a disqualifying purpose or effect such that it can no longer make the required certification³⁹ or as a result of crossing the 20-percent ownership threshold – it must file a more detailed disclosure on Schedule 13D within 10 days.⁴⁰ Upon an investor’s ceasing to meet the Schedule 13G eligibility requirements, the SEC’s regulations provide for a 10-day “cooling off” period during which the investor is barred from voting its securities or acquiring additional securities of the publicly-held company or any person controlling the publicly-held company.⁴¹

2. “Control” As Used In Schedule 13G

As noted, Passive Investors and Qualified Institutional Investors must certify that the publicly-held company’s shares were not acquired, and are not held, “for the purpose of or with the effect of changing or influencing the *control* of the” company.⁴² The SEC defines “control” for purposes of filings pursuant to Section 13 of the Exchange Act, including Schedule 13G filings, as “the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a

³⁸ 15 U.S.C. § 78m(d)(2) (2000 & Supp. V 2005). See also 17 C.F.R. § 240.13d-1(a) (2008).

³⁹ See *Beneficial Ownership Reporting* at 2,854 n.9 (explaining that an investor unable to make the certification regarding the purpose of its investment is considered to have a “disqualifying purpose or effect”).

⁴⁰ See 17 C.F.R. § 240.13d-1(e)(1), (f)(1) (2008). See also *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1063-64 (D. Del. 1982) (“*Jacobs*”); *In re The Gabelli Group, Inc.*, Rel. No. 34-2006, 41 S.E.C. Docket 876, 1988 WL 902604 at *7 (1988) (“*Gabelli*”). The SEC’s regulations allow investors that have lost their eligibility, either as a result of possessing a disqualifying purpose or effect or of exceeding the ownership limitation, to resume filing on Schedule 13G at such time as they reestablish their eligibility. See 17 C.F.R. § 240.13d-1(h) (2008). In adopting this provision, the SEC reasoned that “investors and the market will be better informed if reporting persons are able to switch back to Schedule 13G after reestablishing their eligibility, since the filing of a Schedule 13D will be a clearer indicator of investors that currently have a disqualifying purpose or effect or investors that hold 20 percent or more of the class.” *Beneficial Ownership Reporting* at 2,856.

⁴¹ See 17 C.F.R. § 240.13d-1(e)(2), (f)(2) (2008). See also *Jacobs* at 1064.

⁴² 17 C.F.R. § 240.13d-102, Items 10(a) & (b) (2008) (emphasis added).

person, whether through the ownership of voting securities, by contract, or otherwise.”⁴³ “As a matter of law,” this definition “contemplates that influence can be an element of control” by virtue of the fact that it “include[s] ‘the (Indirect) power to . . . cause the direction of . . . policies.’”⁴⁴ The term “purpose” as used in this definition has been “equated with *intention*.”⁴⁵

An investor will naturally be considered to have a purpose to control a publicly-held company when it is acquiring the company’s shares pursuant to a fixed plan to take over the management of the latter (e.g., by mounting a proxy fight). But an investor also has an obligation to disclose a control purpose, “regardless of the definiteness or even the existence of any plans to implement this purpose.”⁴⁶ Moreover, the relevant “notion of control is not limited to cases in which a person has or seeks ownership of a majority interest in a[] [publicly-held company]’s securities or majority representation on a board of directors.”⁴⁷ Rather, a control purpose will also be found where the investor “desire[s] to ***influence substantially the policies, management and actions***” of a publicly-held company,⁴⁸ or “has a ***perceptible desire to influence substantially the [company]’s operations***.”⁴⁹

⁴³ 17 C.F.R. § 240.12b-2 (2008).

⁴⁴ *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 246 (8th Cir. 1979) (“*Chromalloy*”) (quoting 17 C.F.R. § 240.12b-2).

⁴⁵ *SEC v. Amster & Co.*, 762 F. Supp. 604, (S.D. N.Y. 1991) (emphasis in the original) (citing *Milstein* at 717).

⁴⁶ *Chromalloy* at 247. See also, e.g., *In re John Joslyn*, Rel. No. 34-50588, 2004 WL 2387455 at *9 (Oct. 26, 2004).

⁴⁷ *Graphic Sciences, Inc. v. Int’l Mogul Mines Ltd.*, 397 F. Supp. 112, 125 (D. D.C. 1974) (“*Graphic Sciences*”).

⁴⁸ *Chromalloy* at 246 (emphasis added).

⁴⁹ *Id.* at 246-47 (emphasis added). See also *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1226 n.9 (4th Cir. 1980) (“*Dan River*”) (under the definition of “control” set forth in 17 C.F.R. § 240.12b-2, “section

Courts have distinguished between investments having a control purpose and those having a purely investment purpose.⁵⁰ For example, in *General Aircraft Corp. v. Lampert*,⁵¹ the United States Court of Appeals for the First Circuit held that investors with an aggregate interest of approximately 12 percent improperly described stock purchases as having an investment, rather than a control, purpose in their Schedule 13D filing, in light of their having: (1) forced management to expand the board of directors; (2) elected two of their own nominees to the expanded board; (3) proposed “drastic changes regarding the business and corporate structure of” the publicly-held company; and (4) enlisted prospective nominees for a dissident slate of directors.⁵² In *Chromalloy*, the United States Court of Appeals for the Eighth Circuit found that an investor had a control purpose that was required to be disclosed based on its: (1) plans to acquire 20 percent of the publicly-held company’s stock; (2) attempts to gain representation on the company’s board of directors; (3) intent continually to review its position with respect to the publicly-held company; and (4) having prepared an “acquisition model” with the publicly-held company as the “target.”⁵³

In *Gulf & Western*, the United States Court of Appeals for the Second Circuit found evidence of a control purpose where an investor that owned approximately 4 percent of a publicly-held company’s outstanding shares was making a tender offer for a

13(d) [of the Exchange Act] requires disclosure of a control purpose whenever “the securities purchaser has a perceptible desire to influence substantially the issuer’s operations” (quoting *Chromalloy* at 246-47)); *Gulf & W. Indus. v. Great Atl. & Pac. Tea Co., Inc.*, 476 F.2d 687, 695-97 (2nd Cir. 1973) (“*Gulf & Western*”) (finding that an investor had a control purpose where it sought “substantially [to] influence the operations” of the publicly-held company).

⁵⁰ See *Standard Fin., Inc. v. LaSalle/Kross Partners, L.P.*, 1997 WL 80946 at *4 (N.D. Ill. 1997) (unreported) (reviewing relevant precedent) (“*Standard Financial*”).

⁵¹ 556 F.2d 90, 92 (1st Cir. 1977).

⁵² *Id.* at 92.

⁵³ See *Chromalloy* at 246.

further 15 percent of the company's shares based on various factors including: (1) the investor's "well-established practice of eventually acquiring firms in which it initially purchased only a small percentage of the outstanding shares"; (2) the fact that the tender offer "represent[ed] the largest single commitment in [the investor]'s history"; and (3) the investor's apparent intent to substitute management of a competing company it controlled for that of the publicly-held company.⁵⁴ Interestingly, when considered in light of this Commission's concern about control as it relates to "decision-making authority over sales of electric energy,"⁵⁵ the Second Circuit made these control findings in the context of allegations that the investor not only intended to take over the publicly-held company, but that it could use its influence to exercise horizontal and vertical market power.⁵⁶

The SEC and the courts have similarly found investors to have a control purpose in a wide variety of other circumstances in which there was no indication that the investors themselves intended to take over the publicly-held company. In these cases, the focus has been on whether the investors intended substantially to influence the publicly-held company's policies, management, actions, or operations.⁵⁷

⁵⁴ *Gulf & Western* at 697.

⁵⁵ Order No. 697 at P 176 (emphasis omitted).

⁵⁶ See *Gulf & Western* at 693-95, 697. Although the investor's failure to disclose its control purpose and the risk of antitrust litigation were considered as separate omissions of material fact, see *id.* at 695, they were presumably related inasmuch as the "substantial likelihood that [the investor] will seek to obtain control of [the publicly-held company] and that it has the potential to attain that goal" informed the Second Circuit's determination that the proposed transaction was reasonably likely to lessen competition, see *id.* at 694.

⁵⁷ See also *Dan River* at 1225-26 (holding that a control purpose could be found where an investor group holding approximately eight percent of the voting securities of a publicly-held company based on the fact that the investors had pledged all of a corporate member's assets and the major stockholders' personal credit in order to obtain a loan that could finance the acquisition of approximately 20 percent of the company's voting securities); *Graphic Sciences* at 125-26 (finding serious questions about whether investors had a control purpose on the grounds that "[i]t is unlikely" that investors would have undertaken

As the foregoing demonstrates, the concepts of control and control purpose that apply under the Exchange Act are not limited to efforts to acquire the company itself, but are broadly defined to include activities to influence the policies, management and actions of the company or where the investor has a perceptible desire to influence substantially the company's operations.⁵⁸ Rather, the control standards applied by the SEC in administering its Exchange Act responsibilities are quite broad and more than broad enough to encompass "control" in the sense that concerns this Commission in the MBR and FPA Section 203 settings. An investor that intended to "control[] the decision-making authority over sales of electric energy"⁵⁹ simply could not make the certification required to file on Schedule 13G as a Passive Investor or a Qualified Institutional Investor. At the very least, an investor with such an intent would have a control purpose in the form of "a perceptible desire to influence substantially the [company]'s operations"⁶⁰ that would disqualify it from filing on Schedule 13G.

a "concerted stock-buying project . . . merely to insure a minority voice in company affairs"; would have requested major changes in the board "absent some power to back the request"; "contacts with unaffiliated directors would be made merely to voice displeasure with management"; and "an option agreement would take account of a possible tender offer unless the parties had information regarding such an offer"; *Standard Financial* at *5 (finding investors' claim to have an "investment" purpose [to be] inaccurate in light of . . . : (1) [investors] expressed intent to gain two seats on the board of directors and (2) [their] expert[s] . . . opinion that defendants could enhance their returns by influencing management"); *Gabelli* at *7-8 (finding that an investor group holding approximately 28 percent of a publicly-held company's stock had a control purpose based on its having proposed a leveraged buyout of the company and having exceeded diversification limits in one of the investor group entities in order to acquire additional interests in the company); *Colish, Faith*, 1980 WL 14282 (Mar. 24, 1980) (SEC no-action letter finding that Schedule 13G would not be available to professional risk arbitrageurs purchases of stock after the public announcement of tender offer or proposed offer was announced, because the SEC Staff was unable to conclude that such purchases "are not made in connection with any transaction having the effect of changing control" over the publicly-held company).

⁵⁸ See, e.g., *Dan River* at 1226 n.9; *Chromalloy* at 246-47; *Gulf & Western* at 696; *Graphic Sciences* at 125.

⁵⁹ Order No. 697 at P 176 (emphasis omitted).

⁶⁰ *Chromalloy* at 246-47.

3. Sanctions For Making False Or Misleading Statements In A Schedule 13G Filing Or For Failing To File A Schedule 13D

The sanctions for making any false or misleading statement in a Schedule 13G filing (or similar filing) or for failing to file a Schedule 13D when required (e.g., as a result of ceasing to be eligible to file on Schedule 13G) are severe.⁶¹ The Exchange Act specifically provides for substantial civil and criminal penalties and other sanctions for any failure to file, or for making any false or misleading statements of material fact in, Schedule 13G filings and other filings.

For serious violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and that either resulted in substantial losses or created a significant risk of substantial losses to other persons, the SEC may bring a civil action for money damages equal to the greater of (i) \$130,000 for a natural person, or \$650,000 for any other person, for each such violation, or (ii) the gross amount of pecuniary gain.⁶² In addition, the SEC may seek temporary or permanent injunctive relief whenever it appears that any person has engaged in or is about to

⁶¹ While the discussion below focuses on sanctions under the Exchange Act and SEC regulations thereunder, EPSA does not mean to suggest that the guidance requested herein would immunize investors from otherwise applicable sanctions under the FPA and FERC regulations thereunder. To the contrary, the Commission's authority would be undiminished by the guidance requested herein.

⁶² 15 U.S.C. § 78u(d)(3)(B)(iii) (2000 & Supp. V 2005). See also 17 C.F.R. § 201.1003, Subpt. E, Tbl. III (2008). The Exchange Act establishes a three-tier system of penalties, depending on the seriousness of the violation. The third-tier penalties are described above, and apply to the most serious violations. The SEC may seek to impose first-tier penalties for any violation. The maximum amount for first-tier penalties is the greater of (i) \$6,500 for a natural person, or \$65,000 for any other person, for each violation, or (ii) the gross amount of pecuniary gain. Second-tier penalties apply to more serious violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, for which the maximum penalty is the greater of (i) \$65,000 for a natural person, or \$325,000 for any other person, for each such violation, or (ii) the gross amount of pecuniary gain. 15 U.S.C. § 78u(d)(3)(B)(i)-(ii) (2000 & Supp. V 2005). See also 17 C.F.R. § 201.1003, Subpt. E, Tbl. III (2008).

engage in a violation of the Exchange Act or the rules or regulations thereunder,⁶³ and can seek disgorgement of any ill-gotten gains resulting from violations of the Exchange Act.⁶⁴ Finally, for persons who knowingly make false and misleading statements of material fact on documents required to be filed under the Exchange Act, including Schedule 13G,⁶⁵ the Exchange Act provides that violations may be punished by a maximum criminal fine of \$5 million for a natural person, or \$25 million for any other person, and up to 20 years imprisonment.⁶⁶

Over and above actions by the SEC, a person failing to make required Schedule 13D filings or making materially misleading statements in a Schedule 13G filing would have potential exposure to private lawsuits. Private litigants may seek injunctive relief for failure to file Schedule 13D.⁶⁷ In addition, a private litigant may bring a Rule 10b-5 action for damages if a Schedule 13D or 13G includes materially misleading statements.⁶⁸

⁶³ 15 U.S.C. § 78u(d)(1) (2000 & Supp. V 2005). See also *SEC v. Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994) (permanent injunction granted and disgorgement ordered for violations of Sections 10(b) and 13(d) of the Exchange Act); *Chris-Craft Industries v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), cert. denied, 414 U.S. 910 (1973) (defendant barred for five years from voting shares obtained in violation of Section 14(e) of the Exchange Act, which, like Section 13(d), regulates tender offers).

⁶⁴ See, e.g., *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587 (S.D. N.Y. 1993), aff'd sub. nom. *SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994), cert. denied, 513 U.S. 1077 (1995) (disgorgement ordered for violations of various Exchange Act provisions, including Section 13(d)).

⁶⁵ See, e.g., *U.S. v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991).

⁶⁶ 15 U.S.C. § 78ff (2000 & Supp. V 2005).

⁶⁷ See, e.g., *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975) (acknowledging existence of private injunctive remedy). See also 5 Thomas L. Hazen, *Securities Regulation* § 11.9 (5th Ed. 2005) (discussing injunctive relief granted for violations of Section 13(d) of the Exchange Act, including enjoining purchasing additional shares until Schedule 13D had been filed and enjoining shareholder vote until corrective disclosures had been made).

⁶⁸ See, e.g., *Levie v. Sears Roebuck & Co.*, 2006 WL 756063 (N.D. Ill. 2006).

4. Additional Safeguards

In addition to the safeguards inherent in Schedule 13G and the proposed 20 percent limitation on the availability of the requested guidance to Qualified Institutional Investors described above, EPSA proposes certain additional safeguards. First, in order to ensure that the Commission can monitor non-controlling investments by investors otherwise subject to Section 203(a)(2) of the FPA, EPSA proposes that, as a condition to an investor's relying on a Schedule 13G filing as the basis for not seeking case-specific FPA Section 203(a)(2) approval for a given investment, an investor would be required to file the Schedule 13G, as well as any subsequent amendments thereto, with the Commission within 30 days of filing with the SEC.

EPSA does not propose that reliance by the publicly-held company or its subsidiaries with MBR authorization be similarly conditioned upon the filing of the Schedule 13G with the Commission by the investor, the publicly-held company or the publicly-held company's MBR subsidiaries. Instead, the publicly-held company and its MBR subsidiaries would be entitled to rely on the Schedule 13G for MBR and FPA Section 203(a)(1) purposes to the extent proposed above, irrespective of whether a copy was timely filed with the Commission. There are certain circumstances in which the investor either may not be subject to, or may be entitled to the benefit of some other authorization under, FPA Section 203, and may not, therefore, elect to rely on the filing of Schedule 13G for FPA Section 203(a)(2) purposes.⁶⁹ Regardless of the investor's

⁶⁹ Such circumstances could include, for example, situations in which: (i) the investor is not at the time of the investment a holding company for Section 203(a)(2) purposes and therefore is not required to obtain Section 203 approval for its investment; (ii) the investor is a holding company but the investment is subject to a blanket authorization like the one found in Section 33.1(c)(8) of the Commission's regulations, 18 C.F.R. § 33.1(c)(8) (2008), entities that are holding companies solely with respect to EWGs, qualifying facilities ("QFs") or foreign utility companies ("FUCOs") to acquire additional EWGs,

reason for not filing the Schedule 13G with the Commission, the rationale for allowing the publicly-held company and its subsidiaries to rely on a Schedule 13G filing by a Passive Investor or a Qualified Institutional Investor owning less than a 20 percent interest is equally compelling in such circumstances, because the substantive criteria for lack of control have been met.

Second, EPSA proposes a mechanism to address the circumstance in which an investor ceases to be eligible to file on Schedule 13G or, in the case of a Qualified Institutional Investor, ceases to meet the 20 percent limitation, in order to ensure that the requested guidance does not serve as a vehicle for an investor to acquire control without the requisite prior approval under Section 203(a)(2) of the FPA. An interest in a publicly-held company that would otherwise be deemed controlling upon the investor's ceasing to be eligible to file on Schedule 13G or, in the case of a Qualified Institutional Investor, remaining eligible to file on Schedule 13G but exceeding the 20 percent ownership limitation proposed above, would not be deemed to be controlling pending the receipt of FPA Section 203 approval for such interest, provided the investor observed the requirements of the SEC's "cooling off" period (*i.e.*, refrained from voting the securities or acquiring additional voting securities of the publicly-held company or any company controlling it) beyond the 10-day period prescribed in the SEC's regulations until it obtains Section 203 approval. This voluntary mechanism would ensure that the requested guidance does not result in an investor acquiring a controlling

QFs or FUCOs where no notice filings to the Commission are required; or (iii) the investor has received specific blanket authorization from the Commission.

interest in a public utility or its publicly-held parent without prior Section 203(a)(2) approval.⁷⁰

B. The Commission Should Make Clear That Findings Of “No Control” Made In The FPA Section 203 Setting Apply Equally In The MBR Setting

Consistent with the request that the guidance on “control” and “affiliation” for ownership by investors filing on Schedule 13G apply in both the MBR and FPA Section 203 settings, EPSA requests that the Commission also clarify more broadly that findings of “no control” made in FPA Section 203 proceedings apply equally in MBR proceedings. In other words, if the Commission has granted, or dismissed a request for, FPA Section 203 authorization based on a finding that a given interest will not convey “control,” that interest should likewise be considered not to convey “control” or to result in “affiliation” in related MBR proceedings. Specifically, EPSA requests clarification that such ownership will not result in the publicly-held company or its subsidiaries being deemed to be under common control or affiliated with the investor or the other holdings of the investor, and thus (1) no change in status filing will be required in connection with the investment; (2) generation or inputs to generation owned or controlled by other entities in which the investor has interests will not be attributed to the publicly-held company or its public utility subsidiaries in market power analyses; and (3) affiliate sales restrictions will not apply to transactions between the publicly-held

⁷⁰ This mechanism would not apply if the investor had already obtained FPA Section 203 approval, either on a blanket or case-specific basis, that would apply if it became ineligible to file on Schedule 13G or exceeded the 20 percent ownership threshold described herein. In addition, as noted above, MBR subsidiaries of a publicly-held company would not be required to obtain authorization under Section 203(a)(1) in such circumstances by virtue of the guidance previously provided with respect to secondary market transactions. See *supra* n.30.

company and its subsidiaries with MBR authorization, on the one hand, and other entities in which the investor has interests, on the other hand.

The Commission has made, or has been asked to make, “no control” findings in various proceedings involving requests for case-specific and blanket authorizations under FPA Section 203. For example, the Commission has granted blanket authorizations to investors under Section 203(a)(2) of the FPA based on a finding that “the proposed transactions will not result in a change in control of a public utility or jurisdictional facilities, or the sale, lease or merger of a public utility or jurisdictional facilities.”⁷¹ Similarly, the Commission has dismissed requests for blanket authorization under FPA Section 203(a)(1) where it found that the proposed transactions will not result in a change in control of a public utility.⁷² Elsewhere, the Commission has been asked to find that transactions will not convey control in case-specific FPA Section 203 proceedings.⁷³

In both the FPA Section 203 and MBR settings, the Commission’s “control” analysis focuses on the same question of whether one entity has the ability to direct or control the day-to-day wholesale power sale activities of another entity.⁷⁴ Accordingly, “no control” findings made in an FPA Section 203 proceeding ought to apply equally in MBR proceedings involving the affected public utility subsidiaries. Nonetheless, there

⁷¹ *Morgan Stanley*, 121 FERC ¶ 61,060 at P 34 (2007) (“*Morgan Stanley*”). See also *Legg Mason, Inc.*, 121 FERC ¶ 61,061 (2007); *Goldman Sachs Group, Inc.*, 121 FERC ¶ 61,059 (2007), order on clarification, 122 FERC ¶ 61,005 (2008); *Capital Research & Mgmt. Co., et al.*, 116 FERC ¶ 61,267 (2006).

⁷² *Morgan Stanley* at P 34.

⁷³ See EC08-59 Application at 13 (asserting that Harbinger’s proposed acquisition of 10-25 percent of Mirant’s common stock “presents no horizontal market power concerns because [Harbinger] will not have any ability to control Mirant”).

⁷⁴ See *Supplemental Policy Statement* at P 54.

continues to be lingering uncertainty on that point.⁷⁵ Eliminating that uncertainty by clarifying that “no control” findings made in the FPA Section 203 context carry over to the MBR context would provide needed reassurance to affected entities and would save the Commission and parties the time and resources associated with having to litigate these issues in individual Section 203 proceedings.

C. The Commission Should Clarify That Knowledge Of, And Control Over, The Other Investments Of An Investor In A Publicly-Held Company Will Not Be Imputed To MBR Subsidiaries

In Order No. 652, the Commission stated that the change in status reporting requirement “extend[s] only to changes in circumstances within the knowledge and control of the applicant.”⁷⁶ EPSA asks that the Commission clarify that MBR entities are not required to identify or to consider in MBR filings or notices of change in status filings the generation, transmission or inputs to generation owned or controlled by upstream investors in the MBR entities’ publicly held parent company.⁷⁷

Investments by entities upstream of a publicly-held company involving entities not otherwise related to the publicly-held company are not within the knowledge and control of the publicly-held company’s subsidiaries with MBR authorization and should not be considered reportable changes in status. Likewise, the generation or inputs to generation owned or controlled by the other entities should not be required to be included in future market power analyses. In the example provided above in Part II.B, for instance, if B is a publicly-held company, B1 and B2 cannot reasonably be regarded

⁷⁵ See, e.g., EC08-59 Protest.

⁷⁶ Order No. 652 at P 27.

⁷⁷ To be clear, the requested guidance on this point would apply regardless of whether the investor was filing on Schedule 13G or any “no control” findings had been made in an FPA Section 203 proceeding.

as having knowledge of, and control over, Y's investment in C, irrespective of the level of Y's ownership of B's stock. From the perspective of B1 and B2, Y's investment in C is little different from the examples of circumstances outside an MBR seller's knowledge and control provided in Order No. 652, namely "action[s] taken by [] competitor[s] (such as a decision to retire a generation unit or take transmission capacity out of service) or natural events (such as hydro-year, higher wind generation or load disruptions due to adverse weather conditions)."⁷⁸

As the Commission recognized in the *Supplemental Policy Statement*, the trading in publicly-traded securities is so active that it is "virtually impossible" for the publicly-held issuer of such securities to know in advance about acquisitions of its own securities.⁷⁹ That problem is even more acute where an investor's acquisitions of **other entities'** securities are involved, because the publicly-held company will not even receive after-the-fact notice through service of any Schedule 13D or 13G filing associated with such a purchase.⁸⁰ As a practical matter, a publicly-held company has no means of requiring that its shareholders provide it with information regarding its shareholders' other investments, much less of preventing its shareholders from engaging in transactions of which the publicly-held company may disapprove.⁸¹

⁷⁸ Order No. 652 at P 27.

⁷⁹ *Supplemental Policy Statement* at P 36.

⁸⁰ In the example provided above in Part II.B, assuming that C was a publicly-held company, Y would be required to serve C with a copy of any Schedule 13D or 13G filing relating to its investment in C, see 17 C.F.R. § 240.13d-7 (2008), but would have no obligation to serve B with a copy of such filing.

⁸¹ In particular, publicly-held companies generally lack any meaningful ability to impose transfer restrictions or informational requirements relating to regulatory matters on their shareholders. Indeed, such provisions are, to EPSA's knowledge, unheard of in the publicly-held setting.

Importantly, Order No. 652 emphasized that an event is a reportable change in status only if it was within the MBR seller's "knowledge **and** control."⁸² MBR subsidiaries of publicly-traded companies lack knowledge of their investors' activities, *i.e.*, they have no ability to obtain complete, accurate and timely information of a given activity, notwithstanding the fact that they may, from time to time, become aware of the investment activities of its upstream owners (*e.g.*, through media reports). Accordingly, EPSA submits that investments by a publicly-held company's investors in unrelated entities should not be reportable even where the publicly-held company may, from time to time, have actual or constructive knowledge, because, as is often the case with respect to actions taken by competitors and natural events, the company still lacks **control** even if it has **knowledge**.


⁸² Order No. 652 at P 27 (emphasis added).

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA respectfully requests that the Commission grant the guidance requested above with respect to when investments in publicly-held companies will be deemed to convey "control" or to result in "affiliation" for MBR and FPA Section 203 purposes.

Respectfully submitted,

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On behalf of the
Electric Power Supply Association

Dated: September 2, 2008

Form of Notice

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Electric Power Supply Association

Docket No. EL08-____-000

NOTICE OF PETITION

(September ____, 2008)

Take notice that on September 2, 2008, the Electric Power Supply Association filed a petition pursuant to Rule 207 of the Commission's Rules of Practice and Procedure (18 CFR 385.207) requesting guidance with respect to the question of when investments in publicly-held companies will be deemed to convey "control" or to result in "affiliation" for purposes of the Commission's market-based rate requirements under Section 205 of the Federal Power Act (16 USC § 824d) and the requirements of Section 203 of the Federal Power Act (16 USC § 824b) and the Commission's regulations thereunder.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Motions to intervene and protests must be served on the petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, D.C. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose
Secretary