

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

**Control and Affiliation for Purposes )  
of the Commission’s 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. PL09-3-000**

**RESPONSE TO COMMENTS OF  
THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),<sup>1</sup> the Electric Power Supply Association (“EPSA”)<sup>2</sup> hereby responds to the comments submitted by the American Antitrust Institute (“AAI”)<sup>3</sup> and jointly by the American Public Power Association (“APPA”) and the National Rural Electric Cooperative Association (“NRECA”)<sup>4</sup> following the December 3, 2008 workshop in the above-captioned

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<sup>1</sup> 18 C.F.R. § 385.213 (2008).

<sup>2</sup> 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.

<sup>3</sup> See Comments Of The American Antitrust Institute, Docket No. PL09-3-000 (filed Jan. 16, 2009) (“AAI Comments”).

<sup>4</sup> See Comments Of The American Public Power Association And The National Rural Electric Cooperative Association, Docket No. PL09-3-000 (filed Jan. 16, 2009) (“APPA/NRECA Comments”).

proceeding (the “December 3 Workshop”),<sup>5</sup> which addressed a number of matters in connection with EPSA’s petition for guidance<sup>6</sup> regarding “control” and “affiliation” for purposes of Sections 203 and 205 of the Federal Power Act (the “FPA”).<sup>7</sup> Although the Commission’s notice requesting post-workshop comments did not expressly provide for reply comments,<sup>8</sup> EPSA is filing this brief response in order to address certain misconceptions about the Petition reflected in some of the initial post-workshop comments.

## I. BACKGROUND

In the Petition, EPSA seeks 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 FPA and the requirements of Section 203 of the FPA and the Commission’s regulations thereunder. Specifically, 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 SEC Schedule 13G,<sup>9</sup> certifying that the investment is not for the purpose of controlling the company, will not be deemed to

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<sup>5</sup> See Notice Of Workshop, Docket No. PL09-3-000 (Nov. 12, 2008) (“November 12 Notice”).

<sup>6</sup> See Petition Of The Electric Power Supply Association For Guidance Regarding “Control” And “Affiliation,” Docket No. EL08-87-000 (Sept. 2, 2008) (the “Petition”). See also Notice Redocketing Proceeding, Docket Nos. EL08-87-000 and PL09-3-000 (finding that the Petition, which was filed in Docket No. EL08-87-000, “raises issues of generic implication to the electric utility industry, and thus should have been assigned a PL docket prefix ....”).

<sup>7</sup> 16 U.S.C. §§ 824b, 824d (2000 & Supp. V 2005).

<sup>8</sup> See Notice Inviting Post-Workshop Comments, Docket No. PL09-3-000 (Dec. 12, 2008) (“December 12 Notice”).

<sup>9</sup> 17 C.F.R. § 240.13d-1(c) (2008).

convey “control” or to result in “affiliation” for MBR or FPA Section 203 purposes. Second, EPISA urges the Commission to confirm that findings that a given entity does not “control” a publicly-held company made in the FPA Section 203 setting apply equally to it and its subsidiaries with MBR authorization in the MBR setting. Third, EPISA requests that the Commission confirm 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 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.

In the November 12 Notice, the Commission announced that its Staff would convene the December 3 Workshop to consider issues raised in the Petition. At the December 3 Workshop, Commission Staff and interested parties, including EPISA and certain EPISA members, explored a number of questions arising out of the Petition, with a particular focus on EPISA’s SEC Schedule 13G proposal and the Commission’s responsibilities under Section 203 of the FPA.

In the December 12 Notice, the Commission invited “written comments from workshop participants on any of the matters discussed at the workshop, including recommendations on actions the Commission can take to resolve any of the issues discussed.”<sup>10</sup>

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<sup>10</sup> December 12 Notice at 1.

## II. ANSWER

EPSA appreciates the opportunity to participate in the December 3 Workshop and supports the Commission's decision to request post-workshop comments. EPSA did not itself file initial post-workshop comments. EPSA continues to believe that the guidance requested in the Petition is reasonable and workable, and that the record provides a more than adequate basis for providing such guidance. If the Commission decides to provide the guidance requested in the Petition subject to additional reporting or other requirements, EPSA respectfully requests that, before doing so, the Commission provide notice and an opportunity for interested parties to comment on any additional requirements it may propose to adopt.

EPSA is filing this response in order to clarify the record by addressing certain misconceptions in the post-workshop comments filed by AAI, APPA, and NRECA.<sup>11</sup> At the same time, EPSA notes and appreciates that APPA and NRECA have acknowledged that, consistent with the guidance sought in Part III.B of the Petition, a finding of no control or affiliation in the Section 203 context should convey to the MBR context as well.<sup>12</sup> This symmetry is an important aspect of EPSA's petition and will bring needed clarity to MBR sellers.

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<sup>11</sup> The Transmission Access Policy Study Group ("TAPS") did not participate in the December 3 Workshop, but filed post-workshop comments that incorporate by reference TAPS's September 13, 2008 protest to the Petition, see Motion To Intervene And Protest Of The Transmission Access Policy Study Group, Docket No. EL08-87-000 (filed Sept. 30, 2008) (the "TAPS Protest"), and the APPA/NRECA Comments. See Post-Workshop Comments Of The Transmission Access Policy Study Group, Docket No. PL09-3-000 (filed Jan. 16, 2009). EPSA previously filed an answer that responded to the TAPS Protest, see Motion For Leave To Answer And Answer Of The Electric Power Supply Association, Docket No. EL08-87-000 (filed Oct. 15, 2008), and addresses relevant aspects of the APPA/NRECA Comments by this response. Consequently, it will not burden the record by responding separately to TAPS.

<sup>12</sup> See APPA/NRECA Comments at 19-20.

**A. The Petition Seeks Targeted Guidance On Discrete Issues Affecting Investment And Compliance With The Commission's Requirements.**

EPSA is concerned that AAI, APPA, NRECA, and others have overstated the breadth of the guidance sought in the Petition, and have misperceived the Petition as a hasty reaction to current difficulties in the financial markets. In point of fact, the Petition represents a narrowly-targeted response, developed prior to the onset of the current financial crisis after extensive discussion with and among EPSA's members and others, to MBR and FPA Section 203 compliance issues that have arisen out of passive investments in publicly-held companies that have prompted any number of filings "out of an abundance of caution" and engendered considerable uncertainty on the part of regulated companies. The only relationship between the Petition and the current credit crunch is that removing unnecessary regulatory obstacles to investment, like those addressed in the Petition, becomes all the more important when investment dollars become more scarce.

That regulatory uncertainty and delay can impede investment is patently obvious, and none of AAI, APPA, NRECA, or the other participants has offered evidence to the contrary. Moreover, in suggesting that it is EPSA's burden to provide evidence that the current requirements are deterring investment, APPA and NRECA are, in effect, asking that EPSA prove a negative, *i.e.*, that prior approval requirements have deterred investments that have not happened and therefore have not been made public.

More expeditious processing of FPA Section 203 applications does not solve the problem. The problem is not that the Commission is failing to process FPA Section 203 applications expeditiously enough. In fact, the Commission and Commission Staff do an outstanding job of expeditiously processing FPA Section 203 applications that do not

present competitive issues and of taking applicants' transaction-specific timing needs into account. Instead, the central concern is that the need, or lack of clarity about the need, to obtain prior FPA Section 203 approval for certain transactions which pose *no* concerns about control introduces delay and regulatory uncertainty that negatively impacts investment.

**B. The Guidance Requested In The Petition Would Not Weaken The Commission's Enforcement Of Its Competition Policies.**

AAI and APPA/NRECA erroneously suggest that the guidance requested in the Petition for certain investments subject to SEC Schedule 13G filings would weaken the Commission's enforcement of its competition policies.<sup>13</sup> These suggestions miss the point that the requested guidance would only affect investments that, by definition, do not involve control over public utilities or their jurisdictional assets. The Commission can and regularly does provide guidance of the kind requested in the Petition. Doing so does not weaken the Commission's enforcement of its competition policies in the slightest, but instead serves to remove unnecessary obstacles to investment and allows the Commission to focus its limited resources on transactions that may present genuine competitive concerns. EPSA has been and remains an ardent supporter of robust, fair and transparent competition, and, by facilitating investment and allowing the Commission better to focus its resources, the Petition would further that goal.

At least in AAI's case, the suggestion that the guidance requested in the Petition would undermine the Commission's enforcement of its competition policies appears to flow naturally from a fundamentally flawed understanding of the Commission's policies and precedent. AAI is simply wrong in asserting that "nowhere in its current approach

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<sup>13</sup> See AAI Comments at 7-13; APPA/NRECA Comments at 2-3.

to section 203 applications does the Commission apply a bright-line test of the type proposed by EPSA.”<sup>14</sup> In fact, the Commission has drawn any number of bright lines around classes of transactions that do not present competitive issues requiring case-specific FPA Section 203 filings and approvals. For example, the Commission adopted a presumption that, absent special circumstances, a transfer of less than 10 percent interest in a public utility will not be considered a transfer of control requiring prior Commission FPA Section 203 approval if, after the transaction, the acquiror and its affiliates own less than 10 percent of such public utility.<sup>15</sup> In addition, the Commission has adopted “blanket authorizations” for sixteen types of transactions in Section 33.1(c) of its regulations.<sup>16</sup> Through the 10 percent presumption and blanket authorizations, the Commission has drawn bright lines around types of transactions involving direct and indirect changes in ownership that do not require separate applications for FPA Section 203 approval. AAI’s position is, therefore, based on a faulty predicate.

APPA and NRECA likewise appear confused about the nature of the guidance requested in the Petition when they characterize EPSA as seeking “generic, pre-granted blanket authorization” for any “transfers of up to 20 percent of the voting securities of any public utility to any **purportedly** passive investor.”<sup>17</sup> Over and above the fact that EPSA is seeking policy guidance, rather than a blanket authorization, this assertion falsely implies that EPSA is proposing that any person that simply claims to be a

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<sup>14</sup> AAI Comments at 11.

<sup>15</sup> See *Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 57 (2007), *on clarification & reconsideration*, 122 FERC ¶ 61,157 (2008).

<sup>16</sup> 18 C.F.R. § 33.1(c)(1)-(16) (2008).

<sup>17</sup> APPA/NRECA Comments at 3 (emphasis added).

passive investor, with nothing more, should be authorized to acquire an up to 20 percent interest in a public utility.

Instead, the guidance that EPSA seeks would expressly apply only to persons that have filed an SEC Schedule 13G in which they would **attest**, subject to severe civil and criminal penalties for any false or misleading statements, to the fact that they **actually are passive investors**.<sup>18</sup> Indeed, “Passive Investors” is exactly what the SEC has termed, for purposes of its rule amending beneficial ownership requirements, persons filing on SEC Schedule 13G pursuant to Section 240.13d-1(c) of its regulations,<sup>19</sup> and it extended its Schedule 13G regime to such persons in recognition of the fact that the prior “scheme imposed unnecessary disclosure requirements on persons whose acquisitions **do not affect** the **control** of the issuers.”<sup>20</sup>

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<sup>18</sup> See Petition at 21-22. In this regard, EPSA emphasizes that the guidance requested in the Petition is limited to investors that are eligible to file on SEC Schedule 13G as “Passive Investors” and “Qualified Institutional Investors,” and does not extend to “Exempt Investors,” who are not required to certify that they lack a control purpose. See Petition at 14 n.34. Certain post-workshop comments filed in support of the Petition do not mention this limitation. See, e.g., Comments Of The Financial Institutions Energy Group, Docket No. PL09-3-000 (filed Jan. 16, 2009). EPSA wishes to avoid any appearance or implication that it seeks, or has acquiesced to the requests of others, to broaden the scope of the guidance requested in the Petition to extend to Exempt Investors.

<sup>19</sup> See 17 C.F.R. § 240.13d-1(c) (2008). See also *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538, 63 Fed. Reg. 2,854, 2,854 n.9 (Jan. 16, 1998) (“*Beneficial Ownership Reporting*”). As noted above, the Petition also seeks similar guidance with respect to a subset of what the SEC calls “Qualified Institutional Investors,” see *Beneficial Ownership Reporting* at 2,854 n.7 (defining the term “Qualified Institutional Investor”), namely, Qualified Institutional Investors who own interests of less than 20 percent. See Petition at 12-15. While a similar 20 percent limitation is imposed on Passive Investors by the SEC’s regulations, see 17 C.F.R. § 240.13d-1(c)(3) (2008), the SEC did not consider such a limitation necessary for Qualified Institutional Investors who acquire securities in the ordinary course of business. See *Beneficial Ownership Reporting* at 2,856.

<sup>20</sup> *Beneficial Ownership Reporting* at 2,854.

**C. The Same Commenters Have Failed To Raise Any Plausible Arguments That The Investments In Question In Fact Transfer Control.**

AAI, APPA and NRECA urge the Commission to reject EPSA's request for guidance regarding "control" based on the purported differences in the purposes underlying the securities laws and the FPA.<sup>21</sup> First, the fact that the SEC's concept of "control" was developed to "protect securities markets and . . . shareholders, not wholesale power markets and electricity consumers,"<sup>22</sup> is a distinction without a difference in this context, because that concept of "control" is more than broad enough to capture FERC's concept of "control."<sup>23</sup> Notably, in urging the Commission to replace its long-standing competition analysis with the approach employed by the antitrust agencies, AAI implicitly concedes that it is appropriate for the Commission to draw on regulatory schemes established by other agencies pursuant to statutes with different purposes than the FPA, while failing to provide any principled rationale why the wholesale adoption of the antitrust agencies' competition analysis would be appropriate but consideration of the SEC's similar, and broader, concept of control would not be. Moreover, the Commission has found it appropriate, in well-defined circumstances, to rely on the fact that an investor is subject to regulation by another federal agency, which prevents the investor from exercising control over a public utility, in determining whether

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<sup>21</sup> See APPA/NRECA Comments at 12-15; AAI Comments at 7-9.

<sup>22</sup> APPA/NRECA Comments at 4.

<sup>23</sup> See Petition at 16-20.

a proposed transaction satisfies the requirements of FPA Section 203,<sup>24</sup> and AAI has provided no justification for the Commission not to follow this practice here.

Second, nowhere in their prior protests or in their most recent comments have these commenters or other opponents of the guidance requested by EPSA shown how an investor could exercise “control” in the sense that concerns this Commission and still be eligible to file on SEC Schedule 13G. Instead, these commenters rely on examples of transactions that are clearly outside the scope of guidance requested in the Petition<sup>25</sup> in their attempts to establish that the requested guidance would threaten competition.

Finally, the assertion in the AAI Comments that “Schedule 13G apparently imposes no prohibitions that would preclude an investor from controlling, participating in, or influencing competitive decision-making”<sup>26</sup> is just plain wrong. Its characterization of EPSA’s examples fails to acknowledge that an investor engaging in the activities described in those examples **could not** have filed on SEC Schedule 13G, at least not without subjecting itself to substantial sanctions.

**D. Providing The Requested Guidance Would Not Limit The Commission’s Ability To Enforce FPA Sections 203 and 205.**

Commenters also argue that, by providing the requested guidance, the Commission would be rendered powerless to fulfill its responsibilities under Sections

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<sup>24</sup> See e.g., 18 C.F.R. § 33.1(c)(9) (2008) (blanket authorization for bank holding companies subject regulation by the Board of Governors of the Federal Reserve Bank or Office of the Comptroller of the Currency under the Bank Holding Company Act that hold securities in a fiduciary, for hedging purposes, as loan collateral, or for liquidation purposes). See also *Morgan Stanley*, 121 FERC ¶ 61,060 (2007); *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.*, 116 FERC ¶ 61,267 (2006).

<sup>25</sup> See, e.g., AAI Comments at 6 (discussing a U.S. Department of Justice challenge to the acquisition of a 50 percent interest by an entity that also owned a 50 percent interest in a competitor of the acquisition target).

<sup>26</sup> AAI Comments at 10.

203 and 205 of the FPA.<sup>27</sup> These commenters have not, however, explained how providing the requested ***policy guidance*** would deprive the Commission of its inherent statutory authority to enforce the FPA and to impose the full range of sanctions<sup>28</sup> on any person who abused the guidance.

These same commenters also make the argument that the SEC itself either lacks the ability or the incentive to police SEC Schedule 13G filings and to sanction false or misleading statements made therein.<sup>29</sup> The assertion that an agency would be unwilling to enforce the statutes, and its own regulations thereunder, that it is charged with administering should be rejected out of hand. Moreover, this argument is based on the false premise that the SEC's concept of "control" is somehow narrower than the Commission's concept of "control," an argument that EPSA addressed in detail in the Petition and will not repeat here.<sup>30</sup>

**E. Commenters Seek To Require Market-Based Rate Sellers To Report As Changes In Status Events That Are Beyond Their Knowledge Or Control.**

APPA and NRECA propose to require change in status filings with respect to matters "about which the public utility knows or, with reasonable diligence, should

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<sup>27</sup> See APPA/NRECA Comments at 16-19.

<sup>28</sup> These sanctions include civil penalties of up to \$1,000,000 per day per violation, criminal fines of up to \$1,000,000 per violation, imprisonment for up to five years, revocation of market-based rate authority, as well as equitable and injunctive relief. See 16 U.S.C. §§ 825m, 825o, and 825o-1 (2000 & Supp. V 2005).

<sup>29</sup> See APPA/NRECA Comments at 16-19.

<sup>30</sup> See Petition at 16-20. To the extent the Commission shared APPA's and NRECA's concerns, which EPSA believes are unfounded, in this regard, one option would be for the Commission to consider adopting its own analogue to Schedule 13G, as suggested by Calpine Corporation. See Calpine Comments at 4-6.

know.”<sup>31</sup> As such, they seek to require market-based rate sellers to report as a change in status events that are beyond their knowledge or control, in clear contradiction of the Commission’s guidance in Order No. 652.<sup>32</sup> This is not, as commenters claim, a “workable standard.”<sup>33</sup> If one were to apply the APPA/NRECA standard generally, MBR sellers would regularly need to report precisely the sorts of events that Order No. 652 identified as non-reportable, such as “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).”<sup>34</sup>

The solution proposed by APPA and NRECA is really no solution at all, as it is unclear what APPA and NRECA believe would constitute such “reasonable” due diligence. The impracticality of market-based rate sellers’ obtaining accurate and timely information regarding investors upstream of publicly-held companies and the companies in which those investors own interests is one of the principal reasons that EPSA filed the Petition in the first instance. Thousands of a publicly-traded company’s shares may be traded daily in secondary market transactions to which the company is not a party.<sup>35</sup> No amount of “reasonable” due diligence would permit a market-based rate seller to identify all of the shareholders of its publicly-held parent company on a daily basis, much less to accurately and timely identify all of these shareholders’ affiliates and

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<sup>31</sup> APPA/NRECA Comments at 20-22.

<sup>32</sup> See *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 (“Order No. 652”), *on reh’g*, 111 FERC ¶ 61,413 (2005).

<sup>33</sup> APPA/NRECA Comments at 22.

<sup>34</sup> Order No. 652 at P 27.

<sup>35</sup> See *FPA Supplemental Policy Statement*, FERC Stats & Regs, ¶ 31,253 at P 36 (2007).

subsidiaries and their respective interests in generation facilities or inputs to electric power production. While it may be true that, occasionally, anecdotal information is reported in the trade press regarding such upstream investors, that information is not necessarily accurate or timely. The notion that public utilities can rely on such incidental reports to obtain accurate and timely information regarding such investors, and their affiliates and the companies in which they invest, is wholly illusory. The same is true for the notion that simply monitoring the public posting of regulatory filings, which are not required to be officially served on the public utility, constitutes accurate and sufficient knowledge to underpin related filings to FERC. Accordingly, the Commission should reject the proposal in the APPA/NRECA Comments and grant the relief requested in the Petition.



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