streamline procedures. NFA cites Commission Rules under 17 CFR Part 10, which allows for service of documents by fax in enforcement proceedings. In addition, it cites its own rules governing arbitration, compliance and disciplinary cases as allowing service by both fax and e-mail. Thus, NFA asserts, to allow service by fax and e-mail in Part 171 would make the process more efficient.

After reviewing NFA's proposed amended language and its justifications for the proposal, the Commission has decided to adopt NFA's request in its entirety. Amending the 17 CFR 171.9(b) to allow for service by fax and e-mail will(a) enhance the efficiency of proceedings under Part 171; and (b) comport with the various capabilities of today's changing world.

Related Matters

A. No Notice Is Required Under 5 U.S.C. 553

The Commission has determined that this amendment to Part 171 is exempt from the provisions of the Administrative Procedure Act, 5 U.S.C. 553, which generally require notice of proposed rulemaking and provide other opportunities for public participation. However, 5 U.S.C. 553 gives an agency discretion not to provide notice for ''rules of agency organization, procedure, or practice.'' Notice and public procedure are unnecessary in this case. The proposed amendment, if made effective immediately, will actually promote efficiency and facilitate the Commission's core mission. For the above reasons, the notice requirements under 5 U.S.C. 553 are inapplicable.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, requires agencies with rulemaking authority to consider the impact those rules will have on small businesses. With respect to persons seeking Commission reviews of NFA adjudicatory decisions, the amendments will impose no additional regulatory burden. Commission review of NFA disciplinary and membership denial actions has been carried out pursuant to 17 CFR Part 171 since 1990. These amendments to 17 CFR 171.9(b) do not present any significant changes and will in fact ease the regulatory burden by providing more options, greater certainty and predictability concerning manners of service under Part 171. Accordingly, the Acting Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the amendments will not have a significant economic impact on a substantial number of small businesses.

C. Paperwork Reduction Act

The amendments to Part 171 rules do not impose a burden within the meaning and intent of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, *et seq.*

D. Cost-Benefit Analysis

Section 15(a) of the Commodity Exchange Act, 7 U.S.C. 19(a), requires the Commission to consider the costs and benefits of its action before issuing a new regulation. Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission can, in its discretion, give greater weight to any one of the five enumerated areas of concern and can, in its discretion, determine that notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions, or accomplish any of the purposes, of the Commodity Exchange Act.

The amendments to Part 171 will not create any significant change in the Commission's appellate process or impose new burdens or costs thereon. In fact, the amendments should enhance the protection of market participants and the public by making service more certain, faster and cheaper.

After considering these above factors, the Commission has determined to amend Part 171, as set forth below.

List of Subjects in 17 CFR Part 171

Administrative practice and procedure, Commodity exchanges, Commodity futures.

■ In consideration of the following, and pursuant to authority contained in the Commodity Exchange Act, the Commission hereby amends chapter I of title 17 of the Code of Federal Regulations to read as follows:

PART 171–RULES RELATING TO REVIEW OF NATIONAL FUTURES ASSOCIATION DECISIONS IN DISCIPLINARY, MEMBERSHIP DENIAL, REGISTRATION AND MEMBER RESPONSIBILITY ACTIONS

■ 1. The authority citation for Part 171 continues to read as follows:

Authority: 7 U.S.C. 4a, 12a, and 21.

■ 2. Section 171.9 is amended by revising paragraph (b) to read as follows:

§ 171.9 Service

* * * * *

(b) *Manner of Service:* Service may be made by personal delivery (effective upon receipt), mail (effective upon deposit), facsimile (effective upon receipt) or electronic mail (effective upon receipt). When service is effected by mail, the time within which the person served may respond thereto shall be increased by five days. Parties who consent to accepting service of documents by electronic means in the underlying NFA action also consent to accepting service by the same means in proceedings under this Part 171.

* * * * *

Issued in Washington, DC on the 26th of July 2007, by the Commission.

Eileen A. Donovan,

Acting Secretary of the Commission.

[FR Doc. E7–14922 Filed 8–1–07; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 33

[Docket No. PL07–1–000]

FPA Section 203 Supplemental Policy Statement

Issued July 20, 2007.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Policy statement.

SUMMARY: The Federal Energy Regulatory Commission is providing guidance regarding future implementation of section 203 of the Federal Power Act. In the Supplemental Policy Statement the Commission adopts policies and provides clarifications intended to continue the encouragement of beneficial utility industry investment while also providing for effective customer protections, including working in a complementary fashion with the states in protecting customers.

DATES: *Effective Date:* This Supplemental Policy Statement is effective July 20, 2007.

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SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

FPA Section 203 Supplemental Policy Statement

1. The Commission is issuing this Policy Statement as a supplement to the Commission's rulemakings issued in 2006 to implement provisions of the Energy Policy Act of 2005 [1] and also as a supplement to its 1996 Merger Policy Statement.[2] The 2006 rulemakings addressed amendments to the Commission's corporate review authority under section 203 of the Federal Power Act (FPA),[3] the repeal of the Public Utility Holding Company Act of 1935 [4] and the enactment of the Public Utility Holding Company Act of 2005.[5] Based on our experience in implementing the new laws thus far, and on the two technical conferences in which industry participants and state commissioners provided input on key issues, including the protection of captive customers against inappropriate cross-subsidization and the need to provide sufficient flexibility to encourage industry investment that benefits customers, the Commission finds that it is appropriate to provide guidance in this Policy Statement regarding future implementation of section 203. We clarify that this Policy Statement supplements, and does not replace, any part of the Commission's 1996 Merger Policy Statement.

2. This Policy Statement is one of three actions being taken based on the Commission's experience implementing amended FPA section 203 and PUHCA 2005, as well as the record from the Commission's December 7, 2006 and March 8, 2007 technical conferences regarding section 203 and PUHCA 2005. In addition, in separate orders, the Commission is concurrently issuing a Notice of Proposed Rulemaking proposing to grant a limited blanket authorization for certain dispositions of jurisdictional facilities under FPA section 203(a)(1) [6] and a Notice of Proposed Rulemaking proposing to codify restrictions on affiliate transactions between franchised public utilities with captive customers and their market-regulated power sales affiliates or non-utility affiliates.[7]

I. Background

3. In 1996, the Commission issued the 1996 Merger Policy Statement updating and clarifying the Commission's procedures, criteria and policies concerning public utility mergers under section 203 of the FPA.[8] The purpose of the 1996 Merger Policy Statement was to ensure that mergers are consistent with the public interest and to provide greater certainty and expedition in the Commission's analysis of merger applications. The 1996 Merger Policy Statement refined and modified the Commission's merger policy ''in light of dramatic and continuing changes in the electric power industry and corresponding changes in the regulation of that industry.'' [9]

4. In the 1996 Merger Policy Statement, the Commission set out the three factors it generally considers when analyzing whether a proposed section 203 transaction [10] is consistent with the public interest: effect on competition, effect on rates, and effect on regulation. In 2000, the Commission issued the Filing Requirements Rule,[11] which updated the filing requirements under 18 CFR Part 33 of the Commission's regulations for section 203 applications. Among other things, the Filing Requirements Rule codified the Commission's screening approach to quickly identify mergers that may raise horizontal competitive concerns, provided specific filing requirements consistent with Appendix A of the 1996 Merger Policy Statement, established guidelines for vertical competitive analysis, and set forth filing requirements for mergers that potentially raise vertical market power concerns. The revised filing requirements are in effect today, as recently modified (discussed below), and they assist the Commission in determining whether section 203 transactions are consistent with the public interest, provide more certainty to applicants regarding what showings must be made to satisfy the Commission's concerns under section 203, and expedite the Commission's review of such applications.

5. The scope of the Commission's section 203 review was expanded by EPAct 2005. Among other things, amended section 203: (1) Expands the Commission's review authority to include authority over certain holding company mergers and acquisitions, as well as certain public utility acquisitions of generating facilities; (2) requires that, prior to approving a disposition under section 203, the Commission must determine that the transaction would not result in inappropriate cross-subsidization of non-utility affiliates or encumbrance of utility assets; [12] and (3) imposes statutory deadlines for acting on

[1] Pub. L. 109–58, 119 Stat. 594 (2005) (EPAct 2005).

[2] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement,* Order No. 592, 61 FR 68595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996) (1996 Merger Policy Statement), *reconsideration denied,* Order No. 592–A, 62 FR 33341 (June 19, 1997), 79 FERC ¶ 61,321 (1997).

[3] 16 U.S.C. 824b (2000), amended by EPAct 2005, Pub. L. No. 109–58, 1289, 119 Stat. 594, 982–83 (2005). *See also Transactions Subject to FPA section 203,* Order No. 669, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g,* Order No. 669–A, 71 FR 28422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214, order on reh'g, Order No. 669–B, 71 FR 42579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

[4] 16 U.S.C. 79a *et seq.* (PUHCA 1935).

[5] EPAct 2005, Pub. L. 109–58, 1261, *et seq.,* 119 Stat. 594, 972–78 (PUHCA 2005). *See also Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005,* Order No. 667, 70 FR 75592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g,* Order No. 667–A, 71 FR 28446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213, *order on reh'g,* Order No. 667–B, 71 FR 42750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g,* Order No. 667–C, 72 FR 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007).

[6] *Blanket Authorization Under FPA Section 203,* 120 FERC ¶ 61,062 (2007) (issued in Docket No. RM07–21–000) (Blanket Authorization NOPR).

[7] *Cross-Subsidization Restrictions on Affiliate Transactions,* 120 FERC ¶ 61,061(2007) (issued in Docket No. RM07–15–000) (Affiliate Transactions NOPR).

[8] *Supra* note 2.

[9] 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at 30,110.

[10] Although the Commission applies these factors to all section 203 transactions, not just mergers, the filing requirements and the level of detail required may differ. 1996 Merger Policy Statement, FERC States & Regs. ¶ 31,044, at 30,113 n.7. *See also* 18 CFR 2.26 (codifying the 1996 Merger Policy Statement).

[11] *Revised Filing Requirements Under Part 33 of the Commission's Regulations,* Order No. 642, 65 FR 70984 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000) (Filing Requirements Rule), *order on reh'g,* Order No. 642–A, 66 FR 16121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001) (*codified* at 18 CFR Part 33).

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

mergers and other jurisdictional transactions.

6. Through the Order No. 669 rulemaking proceeding, the Commission promulgated regulations adopting certain modifications to 18 CFR 2.26 and Part 33 to implement amended section 203. The Commission also provided blanket authorizations for certain transactions subject to section 203. These blanket authorizations were crafted to ensure that there is no harm to captive utility customers, but sought to accommodate investments in the electric utility industry by facilitating market liquidity. Some commenters in the rulemaking proceeding urged the Commission to grant additional blanket authorizations. Other commenters argued that the Commission should adopt additional generic rules to guard against inappropriate cross-subsidization associated with the mergers. Certain commenters argued that the Commission should modify its competitive analysis for mergers, which has been in place for 10 years. The Commission stated that it would reevaluate these and other issues at a future technical conference on the Commission's section 203 regulations as well as certain issues raised in the Order No. 667 rulemaking proceeding implementing PUHCA 2005.

7. On December 7, 2006, the Commission held a technical conference (December 7 Technical Conference) to discuss several of the issues that arose in the Order No. 667 and Order No. 669 rulemaking proceedings. The December 7 Technical Conference discussed a range of topics. The first panel discussed whether there are additional actions, under the FPA or the Natural Gas Act (NGA), that the Commission should take to supplement the protections against cross-subsidization that were implemented in the Order No. 667 and Order No. 669 rulemaking proceedings. The second panel discussed whether, and if so how, the Commission should modify its Cash Management Rule [13] in light of PUHCA 2005, and whether the Commission should codify specific safeguards that must be adopted for cash management programs and money pool agreements and transactions. The third panel discussed whether modifications to the specific exemptions, waivers and blanket authorizations set forth in the Order No. 667 and Order No. 669 rulemaking proceedings are warranted. Post-technical conference comments were accepted.

8. On March 8, 2007, the Commission held a second technical conference (March 8 Technical Conference) to discuss whether the Commission's section 203 policy should be revised and, in particular, whether the Commission's Appendix A merger analysis is sufficient to identify market power concerns in today's electric industry market environment. The first panel discussed whether the Appendix A analysis is appropriate to analyze a merger's effect on competition, given the changes that have occurred in the industry (*e.g.,* the development of Regional Transmission Organizations (RTOs)) and statutory changes (*e.g.,* as a result of the repeal of PUHCA 1935 and new authorities given to the Commission in EPAct 2005). The second panel assessed the factors the Commission uses in reviewing mergers and the coordination between the Commission and other agencies (including state commissions) with merger review responsibility.

II. Discussion

9. Based on the Commission's experiences thus far in implementing amended section 203, the input received through the Order No. 669 rulemaking proceeding, and the comments received in response to the December 7 and March 8 Technical Conferences, the Commission finds that additional clarification and guidance regarding our section 203 policy are warranted. The Commission will provide certain clarifications and guidance concerning: (1) The information that must be filed as part of section 203 applications for transactions that do not raise cross-subsidization concerns; (2) the types of applicant commitments and ring-fencing measures that, if offered, might address cross-subsidization concerns; [14] (3) the scope of blanket authorizations under sections 203(a)(1) and 203(a)(2); (4) what constitutes a disposition of control of jurisdictional facilities for purposes of section 203; and (5) the Commission's Appendix A analysis.

10. We note that amended section 203 and PUHCA 2005 did not become effective until February 2006. The Commission thus has had only 18 months' experience under the new laws. Therefore, we will continue to monitor the issues that arise under section 203, including cross-subsidization issues, and re-evaluate our regulatory approach as appropriate. The Commission's goals are to provide sufficient flexibility to adopt customer protections as needed, work in a complementary fashion with the states in protecting customers, appropriately address the need for regulatory certainty with respect to jurisdictional transactions, and address ways to allow beneficial utility industry investment that does not harm captive customers.[15]

A. The Commission's Cross-Subsidization Concerns and Exhibit M Requirements

11. At the December 7 Technical Conference, a number of commenters asserted that a vast majority of section 203 transactions pose no threat of cross-subsidization but nonetheless, the Commission's regulations require applicants to provide ''an explanation, with appropriate evidentiary support for such explanation * * * of how applicants are providing assurance * * * that the proposed transaction will not result in, at the time of the transaction or in the future, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company * * *.'' [16]

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

[14] When ''cross-subsidization'' occurs, some of the costs of dealings between affiliated regulated and unregulated companies are borne by the regulated utility affiliate. The costs might be passed on to captive customers through the rates of the regulated affiliate. ''Ring-fencing'' employs various techniques to separate and protect the financial assets and ratings of the regulated utility from the business risks of other members of the holding company family, including bankruptcy of the parent or its affiliates. These techniques could preclude some types of transactions that involve cross-subsidization.

[15] As indicated below, the Commission does not propose actions on all of the issues raised by commenters. For example, the Commission is not proposing changes to its regulations that would require: (1) Codification of specific requirements for cash management programs and money pool agreements; (2) codification of additional information reporting requirements (through section 203 applications or through routine reporting requirements); or (3) additional, generic actions pursuant to the Commission's NGA authority. Based on the types of filings made since Order Nos. 667 and 669 became effective and the comments raised at the technical conferences, we do not believe further actions on these particular issues are warranted at this time. Moreover, we note that certain commenters recommended that the Commission provide a list on its website of all jurisdictional public utilities (including qualifying facilities and exempt wholesale generators), foreign utility companies, transmitting utilities, electric utilities, electric utility companies, and holding companies (as those terms are defined under EPAct 2005 and PUHCA 2005) for use by market participants in their regulatory compliance monitoring efforts and as they consider whether to acquire or hold the securities of companies, the acquisition or holding of which might or might not be subject to FPA section 203 or PUHCA 2005. While the Commission declines to rule on this issue in the context of a policy statement, it will explore the feasibility of making some of this information publicly available on its website.

[16] The explanation, to be provided as Exhibit M to a section 203 application, includes:

Continued

12. Several commenters argued that it is not clear how to provide the explanation required under Exhibit M for transactions in which cross-subsidization is not possible, is precluded by existing safeguards or is reduced to a very low possibility. Thus, they urged the Commission to establish criteria to identify ''safe harbors'' or classes of transactions that clearly do not raise cross-subsidization concerns. They contended that such an approach will enhance regulatory certainty by letting parties know up front that with these types of transactions, there is no risk of additional restrictions being imposed by the Commission.

13. The Commission's focus generally has been on preventing a transfer of benefits from a public utility's captive customers to shareholders of the public utility's holding company due to an intra-system transaction that involves electric power or energy, generation facilities, or non-power goods and services.[17] Concerns arise in a number of circumstances, including where a market-regulated affiliate (*e.g.,* a power seller with market-based rates) or a non-utility affiliate provides power or goods and services to a franchised public utility with captive customers, as well as the circumstance in which the franchised public utility with captive customers provides power or non-power goods and services to the market-regulated or non-utility affiliate. For instance, a franchised public utility with captive customers may purchase power from its marketing affiliate at a price above market or sell power to its marketing affiliate at below-market prices, thus transferring benefits from customers to shareholders of the holding company. Further, customers may be harmed if the franchised public utility purchases non-power goods and services from an affiliate at above-market prices or sells non-power goods and services to an affiliate at less than market value and seeks to recover the overcharges or the undercharges through rates for service to captive customers.[18] Concerns may also arise with respect to intra-corporate financing transactions that may encumber franchised public utility assets in favor of a market-regulated or non-utility affiliate. The Commission's regulatory concern with this particular form of cross-subsidization is with the potential adverse impact of the internal finance transaction on the rates of a franchised public utility with captive customers.

1. ''Safe Harbors'' for Meeting Exhibit M Requirements for Certain Transactions

14. Since the February 2006 effective date of the FPA section 203 amendments, the Commission has gained sufficient experience in implementing the cross-subsidization provision of FPA section 203(a)(4) to provide policy guidance on the cross-subsidization demonstration required by Exhibit M. As described above, there are many instances where cross-subsidization can occur, but our focus is on the specific requirements under section 203(a)(4) and the Order No. 669 rulemaking proceeding—inappropriate cross-subsidization of non-utility or market-regulated affiliates or the pledge or encumbrance of utility assets for the benefit of an associate company. The concern arises in a corporate structure that has at least one franchised public utility with captive customers and one or more non-utility affiliates or market-regulated utility affiliates (*i.e.,* utilities regulated on a market rather than a cost basis). These types of relationships provide opportunities for cross-subsidization in routine transactions between affiliates in addition to more significant transactions such as transfers of utility assets, encumbrance of utility assets, new affiliate contracts, and issuance of securities by affiliates (that usually receive more public scrutiny or regulatory attention).

15. Where these affiliate relationships do not exist, that is, where a transaction involves only market-regulated and/or non-utility affiliated entities or is a bona fide, arm's-length, bargained-for exchange, then the transaction is not likely to result in inappropriate cross-subsidization and the detailed explanation and evidentiary support required by Exhibit M may not be warranted.

16. Accordingly, for purposes of compliance with Exhibit M, the Commission will recognize three classes of transactions that are unlikely to raise the cross-subsidization concerns described in the Order No. 669 rulemaking proceeding. These, in effect, are ''safe harbors'' for meeting the section 203 cross-subsidization demonstration, absent concerns identified by the Commission or evidence from interveners that there is a cross-subsidy problem based on the particular circumstances presented.

17. The first class of transactions includes those transactions where the applicant shows that a franchised public utility with captive customers is not involved. If no captive customers are involved, then there is no potential for harm to customers. Therefore, compliance with Exhibit M could be a showing that no franchised public utility with captive customers[19] is involved in the transaction.

18. The second class of transactions includes those transactions that are subject to review by a state commission. The Commission, in the context of specific mergers or other corporate transactions, intends to defer to state commissions where the state adopts or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization or the encumbrance of utility assets for the benefit of the ''unregulated'' affiliates. Therefore, compliance with Exhibit M could be satisfied with a showing that the proposed transaction complies with specific state regulatory protections against inappropriate cross-subsidization by captive customers. If a state does not have the authority to impose cross-subsidization protections, however, the transaction would not qualify for this safe harbor.

19. The third class of transactions are those involving only non-affiliates. Where a franchised public utility transacts only with nonaffiliated entities, the potential for inappropriate cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company

''Disclosure of existing pledges and/or encumbrances of utility assets; and a detailed showing that the transaction will not result in: any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act; or if no such assurance can be provided, an explanation of how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.'' 18 CFR 33.2(j)(1)–(2).

[17] Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 147.

[18] *Transactions Subject to FPA Section 203,* 70 FR 58636 (Oct. 7, 2005) FERC Stats. & Regs. ¶ 32,589 at P 47 (2005. In the concurrent Affiliate Transactions NOPR, *supra* note 7, the Commission is proposing to extend the affiliate abuse restrictions to apply to all franchised public utilities with captive customers and their market-regulated power sales affiliates and non-utility affiliates.

[19] The Commission has defined ''captive customers,'' for purposes of FPA section 203, to mean ''any wholesale or retaile electric energy customers served under cost-based regulation.'' 18 CFR 33.1(b)(5).

generally is not present. Therefore, compliance with Exhibit M could be satisfied with a showing that a public utility transacts only with nonaffiliated entities. This category includes a transfer of assets between a public utility and non-affiliates, but does not include mergers with, or acquisitions of, public utilities.

20. After review of a section 203 application relying on any of these ''safe harbors,'' if the Commission finds that the applicant has failed to make a sufficient showing that it meets the criteria described above, then the application will be deemed to be deficient and a new Exhibit M will be required.

2. Other Means of Addressing Cross-Subsidization Concerns

21. Intra-corporate financing transactions may raise cross-subsidization concerns if the assets of a franchised public utility with captive customers are used to finance its market-regulated utility affiliates or non-utility affiliates or their activities. In the December 7 Technical Conference, several commenters noted that their states had implemented ring-fencing measures to mitigate potential risks of cross-subsidization but that many states had not. These commenters suggested that the Commission implement safeguards to mitigate risks in the absence of state regulation (although not necessarily on a generic basis, relying on the states where the state has already taken such measures). Most commenters urged the Commission to continue to review whether potential mergers required additional protections on a case-by-case basis. Representatives of the state commissions, including the Oregon Public Utility Commission, Wisconsin Public Service Commission and Missouri Public Service Commission, recommended that the Commission only act where there is a demonstrable gap in state authority. None supported adoption of federal, mandatory ring-fencing conditions. Some commenters did not oppose the establishment of guidelines on the kinds of protections that might be appropriate in different cases.[20]

22. American Public Power Association and the National Rural Electric Cooperative Association argued that the Commission adopt regulations with minimum cross-subsidization safeguards that would apply in all cases, and also provide an exhaustive menu of additional cross-subsidization safeguards, including ring-fencing measures, that applicants might propose or that the Commission might impose in appropriate cases. They proposed that the Commission codify its code of conduct requirements in the regulations and that these restrictions be made applicable to all traditional public utilities and their unregulated affiliates.

23. The Commission agrees that it is appropriate to codify in our regulations code of conduct affiliate restrictions to prevent cross-subsidization involving power and non-power goods and services transactions and to make those prophylactic restrictions applicable to all traditional (franchised) public utilities (not just public utilities seeking section 203 approval) and their transactions with power sellers as well as non-utility affiliates. Accordingly, contemporaneous with this Policy Statement, we are instituting a Notice of Proposed Rulemaking to do this. However, with respect to additional restrictions that may be appropriate for section 203 applicants, such as ring-fencing restrictions, the Commission does not believe it is necessary or appropriate to mandate generic one-size-fits-all protections for all section 203 applicants. Rather, the Commission will examine the facts and circumstances of each transaction and determine on a case-by-case basis whether additional protections against inappropriate cross-subsidization or encumbrances of utility assets are necessary. As noted above, part of our approach will involve review of whether state commissions have authority to impose cross-subsidy protections or have in place such protections. The Commission, as a general matter, intends to defer to state-adopted protections unless they can be shown to be inadequate to protect wholesale customers. This deference is appropriate because retail customers typically represent the vast majority of load served by a franchised public utility, and ring-fencing measures typically affect the entire corporation, thereby protecting both retail and wholesale customers. If it can be shown, however, that these measures are inadequate to protect wholesale customers in a given case, the Commission may adopt supplemental protections as appropriate. Finally, we emphasize that, consistent with section 203 and the Commission's regulations, all section 203 applicants must demonstrate that a proposed transaction will not result in inappropriate cross-subsidization of non-utility associate companies or the inappropriate pledge or encumbrance of utility assets for the benefit of an associate company, either through meeting one of the safe harbor demonstrations, proposing its own ring-fencing or other protections to prevent cross-subsidization, or demonstrating that there are no potential cross-subsidy issues associated with the proposed transaction.

24. With respect to guidance to applicants that do not make the ''safe harbor'' demonstration or do not demonstrate that cross-subsidy issues are not present, one way to make the demonstration required by Exhibit M would be to propose ring-fencing measures. For example, a ring-fencing structure related to internal corporate financings, *i.e.,* money pool or cash management transactions, could include some or all of the following elements depending on the circumstances: (1) The holding company participates in the money pool as a lender only and it does not borrow from the subsidiaries with captive customers; (2) where the holding company system includes more than one public utility, the money pool for subsidiaries with captive customers is separate from the money pool for all other subsidiaries; (3) all money pool transactions are short-term (one year or less), and payable on demand to the public utility; (4) the interest rate formula is set according to a known index and recognizes that internal and external funds may be loaned into the money pool; (5) loan transactions are made pro rata from those offering funds on the date of the transactions; (6) the formula for distributing interest income realized from the money pool to money pool members is publicly disclosed; and (7) the money pool administrator is required to maintain records of daily money pool transactions for examination by the Commission by transaction date, lender, borrower, amount, and interest rate(s).[21] We clarify that the forms of ring-fencing protections listed herein are simply examples of protections that the Commission would consider in evaluating proposed ring-fencing measures. Appropriate ring-fencing measures will depend on the facts presented and the specifics of an applicant's corporate structure and must be evaluated on a case-by-case basis. Further, as noted earlier, to the extent a state commission imposes specific ring-fencing measures, the Commission will defer to those measures absent evidence

[20] *See, e.g.,* Comments of Clifford M. Naeve, December 7 Technical Conference, Tr. 91–92; Comments of Joseph G. Sauvage, December 7 Technical Conference, Tr. 56–58.

[21] These ring-fencing measures are among those requirements typically approved by the Securities and Exchange Commission (SEC) and/or adopted by state commissions.

that additional measures are needed to protect wholesale customers.

25. The Commission also notes that if it approves a transaction under section 203 (with or without ring-fencing measures), the Commission retains authority under section 203(b) to later impose additional cross-subsidy protections or modify any previously approved measures. Further, irrespective of any link to the section 203 transaction, the Commission retains ongoing authority under section 206 of the FPA [22] to modify rates, contracts and practices that may result in inappropriate cross-subsidization or encumbrances of utility assets (and, if appropriate, to require new practices).

3. Future Case-Specific Informational Filings

26. Given that the Commission often issues its order in a section 203 proceeding before the state proceedings are completed, the Commission may grant authorization under section 203 before the relevant state commission issues an order specifying any state-required cross-subsidy or ring fencing protections. In such circumstances, as appropriate, the Commission in the context of individual section 203 authorizations will require applicants to file with the Commission a copy of any subsequent state orders. Such copy would be filed in the Commission's section 203 proceeding docket as an informational filing, and the applicant would also provide copies to the intervenors in the Commission's section 203 proceedings.

B. Blanket Authorizations Under Sections 203(a)(1) and 203(a)(2) and Clarifications Regarding Jurisdictional Transactions

27. Through the Order No. 669 rulemaking proceeding, the Commission granted certain blanket authorizations on a generic basis under section 203.[23] Participants at the December 7 Technical Conference addressed whether additional blanket authorizations were warranted. Specifically, commenters discussed under what circumstances the Commission should grant a blanket authorization under section 203(a)(1) (which applies to public utilities' dispositions of jurisdictional facilities) to parallel the Order No. 669 blanket authorizations under section 203(a)(2) (which, among other things, applies to holding companies' acquisitions of securities of public utilities with jurisdictional facilities). The section 203 blanket authorizations under Order No. 669 allow a holding company to acquire the 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, after the acquisition, the holding company will own less than 10 percent of the outstanding voting securities. What most commenters seek is a parallel blanket authorization under section 203(a)(1) for the public utilities in such transactions to ''dispose'' of their facilities to the holding company, *i.e.,* a blanket authorization for transactions that (1) involve or permit transfers (dispositions) of up to 10 percent of a public utility's voting stock, or (2) involve a transfer of up to 10 percent of the voting stock of a holding company that directly or indirectly owns or controls a public utility. Alternatively, they seek clarification that certain transactions are not jurisdictional.

28. Several commenters supported modification of the rules to grant such a parallel blanket authorization under 203(a)(1). In addition, Mirant Corporation (Mirant) argued that section 203(a)(1) should not apply at all to stock transactions in the secondary market involving the corporate parent. Mirant maintained that if the Commission continues to apply section 203(a)(1) to equity transfers of upstream ownership interests in public utilities that result in either a direct or indirect change in control over the underlying public utility, there would be a substantial and unnecessary overlap between sections 203(a)(1) and 203(a)(2). The Goldman Sachs Group, Inc. (Goldman) added that financial investors need certainty on whether particular transactions in the secondary market would require prior Commission approval under section 203(a)(1). Goldman also argued for a blanket authorization under section 203(a)(2) for the acquisition of voting securities by firms acting in a fiduciary capacity.

29. Edison Electric Institute (EEI) argued for a blanket authorization for internal corporate reorganizations under both sections 203(a)(1) and 203(a)(2) for transfer of assets from one non-traditional utility subsidiary, such as an exempt wholesale generator, to another non-traditional utility subsidiary.

30. The Financial Institutions Energy Group (FIEG) [24] requested that the Commission clarify that transactions that do not affect control do not, in fact, require approval under section 203(a)(1). Alternatively, FIEG argued that there are several types of transactions under which no change of control is involved and, therefore, the Commission should provide blanket authorizations under both section 203(a)(1) and section 203(a)(2). FIEG asserted that such transactions include: (1) Acquisitions of voting securities that would give the acquiring entity less than 10 percent ownership of outstanding voting securities; (2) acquisitions of up to 20 percent of the voting interests in a public utility where the acquirer is eligible to file with the SEC a Schedule 13G demonstrating no intent to exercise control over the entity whose securities are being acquired; (3) acquisitions involving securities held for lending, hedging, underwriting and/or fiduciary purposes. FIEG also argued that a blanket authorization should be granted for transactions in which a public utility or a holding company is acquiring or assigning a jurisdictional contract where the acquirer does not have captive customers and the contract does not convey control over the operation of a generation or transmission facility.

31. In support of its requests for clarification and expanded blanket authorizations, FIEG states that shares and other interests in public utilities are bought, sold and traded on a regular basis and that an active market for a public utility's shares is important to its ability to raise capital. FIEG explains that if a passive or non-controlling investor must seek prior Commission approval for transactions, the trading process is slowed, resulting in a less efficient market for the company's shares. According to FIEG, such inefficiencies chill participation in the industry and reduce needed market liquidity.

32. Several commenters also urged the Commission to provide greater clarity on what constitutes a passive investment for which no Commission authorization is required under section 203(a)(1).

33. The Commission agrees that greater industry investment and market liquidity are important goals. However, blanket authorizations under section 203 cannot be granted lightly, particularly generic authorizations. Because it is an *ex ante* determination as to the appropriateness of a category

[22] 16 U.S.C. 824e.

[23] 18 CFR 33.1(c)

[24] Members of FIEG include: Bank of America, N.A, Barclays Bank PLC, Bear Energy LP, Citigroup Energy Inc., Credit Suisse Energy LLC (a subsidiary of Credit Suisse), Deutche Bank AG, J. Aron & Company (a subsidiary of The Goldman Sachs Group), JPMorgan Chase & Co., Lehman Brothers Commodity Services Inc. (a subsidiary of Lehman Brothers Holding Inc.), Merrill Lynch Commodities, Inc., Morgan Stanley Capital Group Inc., Société Générale, and UBS Energy LLC (a subsidiary of UBS AG).

of transactions under section 203 and a counterparty is not yet identified, a blanket authorization can be granted only when the Commission can be assured that the statutory standards will be met, including ensuring that the interests of captive customers are safeguarded and that public utility assets are protected under all circumstances. It is under this paradigm that we provide the following guidance with respect to the section 203 blanket authorizations.

34. First, we will grant in part and deny in part requests for blanket authorizations under section 203(a)(1) to parallel those previously granted under section 203(a)(2). The Commission recognizes that, in some circumstances, the lack of a blanket authorization under section 203(a)(1) can lessen the practical effectiveness of the blanket authorizations previously granted under section 203(a)(2). Accordingly, in a Notice of Proposed Rulemaking issued contemporaneous with this Policy Statement, the Commission is proposing a limited blanket authorization under section 203(a)(1) under which a public utility would be ''pre-authorized'' to dispose of less than 10 percent of its securities to a public utility holding company but only if, after the disposition, the holding company and any associate or affiliated company in aggregate will own less than 10 percent of that public utility.[25] The Commission believes that this narrow blanket authorization will provide appropriate relief to investors and at the same time ensure that utility assets and captive customers are protected.

35. The Commission will continue to consider broader requests for blanket authorizations under section 203(a)(1) on a *case-specific* basis,[26] taking into account all other authorizations that have been granted and whether those authorizations, in conjunction with a blanket authorization under section 203(a)(1), would raise concerns. While the Commission, as discussed above, has determined that additional generic blanket authorizations for public utilities' dispositions of jurisdictional assets are not warranted at this time (other than the blanket authorizations discussed in the accompanying NOPR), we expect that in many circumstances individual blanket authorizations can be granted. Such an individual, situation-specific, *ex ante* blanket authorization will provide some of the certainty that is sought by the industry and investors. At the same time, this approach will allow the Commission to assess specific circumstances, to place time limits on blanket authorizations if appropriate (subject to possible renewal), to monitor industry activity, and to adapt the use of blanket authorizations over time as we gain further experience with financial institution investments in particular. Further, we do not rule out the possibility that groups of similarly situated holding companies, such as financial institutions, can make joint filings seeking common blanket authorizations under section 203(a)(1) or section 203(a)(2); however, they would need to clearly demonstrate on the record that there would be no adverse impact on captive customers or the public interest if the authorizations were granted.

36. In response to requests that the Commission clarify that secondary market transactions involving public utilities do not require approval under section 203(a)(1)(A) (which provides that a public utility may not sell, lease ''or otherwise dispose'' of the whole of its jurisdictional facilities or any part hereof without prior Commission approval), we so clarify. Secondary market transactions, for purposes of this discussion, are purchases or sales of the securities of a public utility or its upstream holding company by a third-party investor. Thus, such transactions do not include the securities' initial issuance or reacquisition by the issuer. Thousands of shares of the stock of a public utility or public utility holding company may be traded on a daily basis by non-public utility third parties, particularly if the stock is widely held and publicly traded. As noted by Mirant, EEI and members of FIEG in their comments, neither a public utility holding company nor a public utility subsidiary of the holding company are themselves parties to these transactions and they cannot know in advance what trading will occur or whether direct or indirect ''control'' over the public utility is being acquired. It would be virtually impossible in such circumstances for the public utility or holding company to know what is occurring before the fact and we do not interpret section 203(a)(1)(A) to be triggered for these secondary trades. Accordingly, neither public utilities nor public utility holding companies have an obligation to seek approval of a ''disposition'' of public utility jurisdictional facilities for such trades.[27]

37. In addition, we clarify that transactions that do not transfer control of a public utility do not fall within the ''or otherwise dispose'' language of section 203(a)(1)(A) and thus do not require approval under section 203(a)(1)(A) (assuming there is no sale or lease of the facilities). As indicated in our discussion of what constitutes a disposition of control for purposes of the Commission's section 203 analysis,[28] while the Commission cannot make an *ex ante* determination regarding what is control for purposes of the Commission's section 203 analysis absent facts of a specific case, the Commission is setting forth herein certain guidelines regarding what has been deemed to be (or not to be) control. This clarification addresses many of the concerns raised by commenters regarding acquisitions involving securities held for lending, hedging, underwriting and/or fiduciary purposes. If such transactions do not result in a transfer of control and there is no sale or lease of the facilities taking place, then section 203(a)(1)(A) is not triggered. This should assist applicants in determining the need for prior authorization under section 203.

38. With respect to the request for a generic blanket authorization for internal corporate reorganizations under both sections 203(a)(1) and 203(a)(2) for the transfer of assets from one non-traditional utility subsidiary[29] to another non-traditional utility subsidiary, the Commission cannot be certain of the impact of such transactions on utility affiliates on a generic basis and, therefore, will not grant a blanket authorization at this time. The Commission will consider case-specific blanket authorizations (with appropriate reporting requirements) on a case-by-case basis.

39. The Commission also denies the request for a generic blanket authorization under section 203(a)(2) for non-bank fiduciaries subject to the jurisdiction of the SEC. The Commission finds that we need further experience in this area before granting a blanket authorization on a generic basis. However, the Commission is willing to consider such requests on a holding company-specific basis or from similarly situated holding companies, such as similarly situated financial institutions. Any such applications would need to demonstrate in sufficient

[25] Blanket Authorization NOPR, *supra* note 6.

[26] Order No. 669–A, FERC Stats. & Regs. ¶ 31,214 at P 103; Order No. 669–B, FERC Stats. & Regs. ¶ 31,225 at P 43.

[27] If the acquirer of securities in the secondary market is a public utility holding company, however, it may have an obligation to file for approval under section 203(a)(2). If the acquirer is another public utility, it may also have to file under section 203(a)(1)(C) (no public utility may purchase securities of another public utility if over $10 million in value).

[28] *See infra* section II.C.

[29] For example, power marketers, exempt wholesale generators, or qualifying facilities.

detail that applicants would not be able to control public utilities and that there would be no adverse impact on captive customers or the public interest if the authorizations were granted. As discussed above with respect to section 203(a)(1) authorizations, this type of approach would allow the Commission to assess specific circumstances, to place time limits on blanket authorizations if appropriate (subject to possible renewal), to monitor industry activity, and to adapt the use of blanket authorizations over time as we gain further experience.

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

41. We also decline to grant a generic blanket authorization under sections 203(a)(1) and 203(a)(2) for acquisitions of up to 20 percent of the voting interests in a public utility where the acquirer is eligible to file with the SEC a Schedule 13G, which demonstrates no intent to exercise control over the entity whose securities are being acquired. While the Commission may consider eligibility to file a Schedule 13G with the SEC as part of an indication that an entity will not be able to assert control over a public utility, the Commission will not accept Schedule 13G eligibility as a definitive statement regarding control. The Commission will consider Schedule 13G eligibility as one factor in the analysis of whether an entity can assert control over a public utility.[30]

[30] *See, e.g., Capital Research and Management Company,* 116 FERC ¶ 61,267 (2006).

C. Disposition of ''Control'' of Jurisdictional Facilities

42. Several commenters have asked the Commission to provide guidance on what constitutes a disposition of ''control'' of jurisdictional facilities under section 203. Most recently, this request is being pressed by the investment community, which seeks further clarification regarding the scope of the Commission's regulatory authority, and greater regulatory certainty as to when section 203 review is required.

43. We will provide guidance here, but emphasize that the determination of whether there is a disposition of control must be based on all circumstances. In other words, the decision must be made on a fact-specific basis. As discussed further below, while our case law under section 201 provides guidance on the factors that may result in control, no single factor or factors necessarily results in control. The electric industry remains a dynamic, developing industry, and no bright-line standard will encompass all relevant factors and possibilities that may occur now or in the future.[31]

44. We note that much of the Commission's precedent in this area was developed based on concerns that there could be a jurisdictional void if the Commission did not interpret broadly what constitutes a disposition of ''control'' of public utility facilities under FPA section 203. The Commission was particularly concerned about the creation of holding companies and holding company acquisitions that could result in an indirect change of control of the jurisdictional facilities of public utilities, without Commission review. In EPAct 2005, however, Congress has filled any jurisdictional void involving public utility holding companies by amending section 203 to specifically give the Commission authority over certain holding company acquisitions and mergers involving FPA public utilities. Thus, the Commission's pre-EPAct 2005 precedent should be read with this context in mind.

1. Precedent Discussing Dispositions of Control

45. Section 203 requires prior Commission approval if a public utility seeks to sell, lease, or otherwise dispose of jurisdictional facilities. As previously noted, the Commission has interpreted the ''or otherwise dispose'' language of section 203(a)(1) to include transfers of ''control'' of jurisdictional facilities. Additionally, prior Commission approval is required for any public utility that seeks to directly or indirectly merge or consolidate the whole of its jurisdictional facilities, or any part thereof, with the facilities of another person, ''by any means whatsoever.'' [32] As interpreted by the Commission, the requirement to obtain the Commission's approval under the ''merge or consolidate'' clause depends on whether the public utility's facilities are subject to the jurisdiction of the Commission and whether the transaction directly or indirectly would result in a change of ''control'' of the facilities.[33]

46. In *Enova Corporation*, the Commission explained that the purpose of section 203 is to provide a mechanism for maintaining oversight of the facilities of public utilities and to prevent transfers of control over those facilities that would harm consumers or that would inhibit the Commission's ability to secure the maintenance of adequate service and the coordination in the public interest of jurisdictional facilities.[34] The Commission determined that it cannot definitively identify every combination of entities or disposition of assets that may trigger jurisdiction under section 203, since it cannot anticipate every type of restructuring that might occur. The Commission stressed that its concern was with changes in control, including direct or indirect mergers that affect jurisdictional facilities. It said that it must be flexible in responding to industry restructuring if it is to discharge its statutory responsibility ''to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission.'' [35]

47. Noting in *Enova* that the FPA did not provide definitions for the terms ''dispose'' or ''control,'' the Commission stated that those terms should not be read narrowly because to do so would result in a jurisdictional void in which certain types of corporate transactions could escape Commission oversight. While section 203 applies to changes or transfers in the proprietary interests of

[31] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 FR 39903 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 174 (2007) (Market-Based Rate Final Rule).

[32] While the section 203(a)(1) requirements for obtaining Commission authorization do not use the word ''control'' in the statutory text, section 203(a)(4) provides that the Commission must approve a proposed ''disposition, consolidation, acquisition, or *change in control*'' (emphasis added) if the statutory criteria are met.

[33] *PDI Stoneman, Inc.*, 104 FERC ¶ 61,270, at P 13 (2003) (*PDI Stoneman*).

[34] *Enova Corporation*, 79 FERC ¶ 61,107, at 61,489 (1997) (*Enova*) (*citing* pre-EPAct 2005 section 203(b)).

[35] *Id.* at 61,496.

a public utility,[36] not all transactions under section 203 involve a change in control of a public utility. If no change in control results from the transaction, it is not likely to adversely affect competition, rates or regulation, or result in cross-subsidization.

48. Our guidance concerning what constitutes a disposition of control of jurisdictional facilities for purposes of section 203 requires a discussion of what constitutes control of a public utility since a public utility is a person that owns or operates jurisdictional facilities. In *Enova*, the Commission cited the definition of control that has been in its accounting regulations since 1937. Under that definition, control means:

> the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, associated companies, contract or any other direct or indirect means.[37]

49. The Commission has also discussed certain elements of control in cases concerning whether an entity is a public utility under section 201.[38] In those cases, the Commission linked ''decision-making'' and ''dominion and control'' in determining whether an entity is a ''public utility.'' The Commission also noted that the reference to ''operates [jurisdictional] facilities'' in the definition of public utility in section 201(e) of the FPA refers ''to the person who has control and decision-making authority concerning the operation of facilities.''[39]

50. In a case in which the Commission disclaimed jurisdiction under section 201(e) over financial institutions that took title to facilities as part of a leveraged lease transaction, the Commission based its decision that the lessor/owner was not a public utility under section 201 on the following factors (which it found in a previous but analogous situation): (1) The financial institutions that held legal title were not operating the facilities; (2) none of the parties taking title to the facilities were in the business of producing or selling electric power; and (3) all had a principal business other than that of a public utility.[40] As part of its finding that the lessor/owner did not operate the facility, the Commission interpreted the word ''operates'' as referring to the person who has control and decision-making authority concerning the operation of the facility, *i.e.*, *not* a person who merely performs specific services that are ordered and directed by another party.

51. We note that ''control'' has been found even where that control is not absolute or unfettered. In a case involving a complex holding company corporate structure, the Commission deemed an investment adviser subsidiary to be a public utility because of its participation in wholesale transactions. The Commission found that the investment adviser had control over the wholesale contracts to be executed under the power marketer's market-based rate schedule because the combination of the following three factors translated into control: (1) The sole discretion to enter into contracts; (2) the exclusive ownership of the intellectual property on which contracts will be based; and (3) the intention that the investment adviser will recommend the contracts into which the power marketer subsidiary would enter.[41]

52. The Commission cited its decisions in *Bechtel* and *Shaw* as providing guidance on whether a nominal manager of a generating company actually exercised sufficient control to be deemed the operator and, hence, a public utility.[42] Based in part on those cases, in *Beck*, the Commission found that a manager was a controlling entity where he: (1) Effectively governed the physical operation of the jurisdictional facility; and (2) effectively served as the decision-maker in the sales of wholesale power. While the application in that case described a series of companies, at least five contracts (all of which either directly affected or were negotiated by the manager), and a trustee in addition to the manager, the Commission concluded that the manager was the controlling entity because he had the substantive decision-making authority regarding the jurisdictional assets, the market-based rate tariff and a full requirements purchase agreement. The Commission made this finding even though some of the manager's actions were subject to the approval of the trustee in certain circumstances, *e.g.*, if the transaction exceeded $1 million in value.

53. More recently, in the Market-Based Rate Final Rule, in providing guidance on what contractual arrangements convey control over a public utility, we explained that we will consider the totality of circumstances and attach the presumption of control when an entity can affect the ability of capacity to reach the market. We further explained that our guiding principle is that an entity controls the facilities of another when it controls the decision-making over sales of electric energy, including discretion as to how and when power generated by these facilities will be sold.[43]

54. Investments in public utilities that do not convey control may in some cases be considered to be passive investments not subject to section 203(a)(1)(A) (unless there is a sale or lease of the facilities). The Commission has found an investment to be passive if, among other things, (1) the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity;[44] and (2) the acquired interest gives the acquiring entity only limited rights (*e.g.*, veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities);[45] and (3) the acquiring entity has a principal

[36] *See Atlantic City Electric Company* v. *FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002).

[37] *Enova*, 79 FERC at 61,492 (*citing* 18 CFR Part 101, Definitions 5.B). This definition is identical to that found in the current regulations. In addition, for purposes of its Standards of Conduct for Transmission Providers, the Commission states that ''control'' ''includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company.'' 18 CFR 358.3(c).

[38] Section 201(b)(1) describes the activities that are subject to the jurisdiction of the Commission: ''* * * the transmission of electric energy in interstate commerce and * * * the sale of electric energy at wholesale in interstate commerce * * *'' The section further describes the facilities that are jurisdictional: ''The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, * * *'' with certain exceptions not relevant here. In section 201(e), the term ''public utility'' is defined as ''any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of [certain specified FPA sections]).'' 16 U.S.C. 824, *amended by* EPAct 2005, Pub. L. 109–58, 1295.

[39] *Enova*, 79 FERC at 61,492 (citing *Bechtel Power Corp.*, 60 FERC ¶ 61,156 (1992) (*Bechtel Power*)).

[40] *Bechtel Power*, 60 FERC at 61,572 (*citing Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *Public Service Company of New Mexico*, 29 FERC ¶ 61,387 (1984); *United Illuminating Company*, 29 FERC ¶ 61,270 (1984)).

[41] *D.E. Shaw Plasma Power, L.L.C.*, 102 FERC ¶ 61,265, at P 33 (2003) (*Shaw*).

[42] *R.W. Beck Plant Management, Ltd.*, 109 FERC ¶ 61,315 (2004) (*Beck*).

[43] Market-Based Rate Final Rule, FERC Stats. & Regs. ¶ 31,252 at P 176.

[44] *See Milford Power Company, LLC,* 118 FERC ¶ 61,093, at P 35 n.21 (2007).

[45] *See Shaw,* 102 FERC ¶ 61,265 at P 15.

business other than that of producing, selling, or transmitting electric power.[46]

55. We emphasize that the circumstances that convey control in section 203 analysis vary depending on a variety of factors, including the transaction structure, the nature of voting rights and/or contractual rights and obligations conveyed in the transaction. For example, in *PDI Stoneman,* the Commission considered the acquisition of facilities through three transactions, over approximately seven years, in which the applicant's resulting ownership shares at issue at the end of each of the three transactions went from one-third to two-thirds to 100 percent of the voting stock. The applicant claimed that control never vested until the third transaction because of a ''supermajority'' provision in the operating agreement that required approval by 80 percent of the voting stock for a range of decisions, including the sale of electricity from the plant. The Commission focused on the market-based rate schedule and concluded that the first transaction may have transferred control over that jurisdictional asset because, even with one-third of the voting stock, the applicant had the authority to influence all significant decisions, including the sale of power from the plant. Further, the Commission ruled that the material change in the proportion of interests after the second transaction resulted in a change of control.[47]

56. While the purpose of the above discussion is to provide guidance on what, based on past precedent, constitutes a change of control for purposes of section 203, the burden remains upon the entities involved in a proposed transaction to decide whether they need to obtain Commission authorization under section 203 to undertake a proposed transaction.

2. General Guideline Regarding What Is Not a Transfer of Control

57. Based on the industry's need for further guidance on what may or may not constitute a transfer of control of jurisdictional facilities under section 203, and for greater regulatory certainty in undertaking utility investments, the Commission's general policy in future cases will be to presume that a transfer of less than 10 percent of a public utility's holdings is not a transfer of control if: (1) After the transaction, the acquirer and its affiliates and associate companies, directly or indirectly, in aggregate will own less than 10 percent of such public utility; and (2) the facts and circumstances do not indicate that such companies would be able to directly or indirectly exercise a controlling influence over the management or policies of the public utility. The Commission will apply this policy on a case-by-case basis. Further, if holding companies or other acquirers believe that facts and circumstances prevent them from exercising control even if they own 10 percent or more of a public utility, they may seek to make such a demonstration to the Commission.

58. This 10 percent threshold is consistent with the definition of ''holding company'' under section 1262(8)(A) of PUHCA 2005 (at which point a company may be in control of a subsidiary public utility). It is also consistent with the blanket authorization granted under section 203(a)(2) in the Order No. 669 rulemaking proceeding, under which holding companies are pre-authorized to acquire up to 9.99 percent of voting securities of a public utility, as well as the proposed section 203(a)(1) blanket authorization in the contemporaneous Notice of Proposed Rulemaking.[48]

Further, the Commission has employed a rebuttable presumption in the context of its Standards of Conduct for Transmission Providers that ownership of 10 percent or more of voting interests creates a rebuttable presumption of control.[49]

D. The Commission's Appendix A Analysis

1. Appendix A Policy and Case History

59. The 1996 Merger Policy Statement uses an analytical screen (Appendix A analysis) to allow early identification of transactions that clearly do not raise competitive concerns.[50] As discussed below, the Commission does not believe modifications to its Appendix A analysis are warranted at this time. However, the Commission will provide certain clarifications in light of the concerns raised by commenters in the Order No. 669 rulemaking proceeding and the March 8 Technical Conference.

60. In horizontal mergers, if an applicant fails the Competitive Analysis Screen (one piece of the Appendix A analysis), the Commission's analysis focuses on the merger's effect on the merged firm's ability and incentive to withhold output in order to drive up the market price. The ability to withhold output depends on the amount of marginal capacity controlled by the merged firm, and the incentive to do so depends on the amount of infra-marginal capacity that could benefit from higher prices. For example, in a horizontal merger combining a company with significant baseload capacity with a company owning capacity on the margin under many season/load conditions, the theory of competitive harm would be that the combination of the ''ability'' assets with one company's existing ''incentive'' assets would increase the likelihood of the company exercising market power. Proper mitigation would address the harm to competition by reducing the merged firm's ''ability'' assets or its ''incentive'' assets through divestiture or some other method. In *Commonwealth Edison Company,* we discussed both the ability and the incentive of the merged firm to

[46] *See Metropolitan Life Insurance Company,* 113 FERC ¶ 61,300, at P 6 (2005).

[47] *PDI Stoneman,* 104 FERC ¶ 61,270 at P 15–17.

[48] Blanket Authorization NOPR, *supra* note 6. In *The Goldman Sachs Group, Inc.,* 114 FERC ¶ 61,118 (*Goldman*), *order on reh'g,* 115 FERC ¶ 61,303 (2006), the Commission held that, under section 203(a)(2), subsidiaries that are not themselves holding companies are not required to seek authorization from the Commission to purchase, acquire, or take ''covered'' securities. Covered securities relate to (1) acquisitions of securities worth more than $10 million, and (2) acquisitions of securities of a transmitting utility, an electric company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company. The Commission also held that subsidiaries' securities acquisitions are not attributable to the upstream holding company. Thus, the upstream holding company also is not required to seek section 203(a)(2) authorization for its subsidiaries' acquisitions. This does not mean that authorization may not be required under other provisions of section 203. For example, if a non-utility subsidiary acquires securities of a public utility, that public utility must obtain section 203(a)(1)(A) authorization if the transaction results in a transfer of control of facilities valued at more than $10 million. Further, if each of a number of non-utility subsidiaries acquires, for example, up to 9.99 percent of the same public utility (in order to avoid becoming a holding company and/or avoid a transfer of control to a single one of the subsidiaries), it is possible that the public utility disposition of securities to several companies under common control could, taken as a whole, result in a transfer of control. Finally, irrespective of the dollar amount of the transaction, an indirect merger or consolidation could occur and require approval under section 203(a)(1)(B). *Goldman,* 114 FERC ¶ 61,118 at P 13–15. Thus, while the Commission's policy as a general matter will be to presume that a transfer of control is not likely where ownership in a public utility is less than 10 percent, the burden is on the entities to file under section 203 if this threshold is met. The Commission will continue to review the facts and circumstances of transactions on a case-by-case basis.

[49] 18 CFR 358.3(c).

[50] As part of the screen analysis, applicants must define the relevant products sold by the merging entities, identify the customers and potential suppliers in the geographic markets that are likely to be affected by the proposed transaction, and measure the concentration in those markets. Using the Delivered Price Test to identify alternative competing suppliers, the concentration of potential suppliers included in the defined market is then measured by the Herfindahl-Hirschman Index (HHI) and used as a screen to determine which transactions clearly do not raise market power concerns. 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119–20.

withhold output. We found that despite screen failures, the merger would not harm competition in the relevant wholesale markets and therefore did not require any mitigation:

> An examination of market supply conditions shows three reasons why a profitable withholding strategy by ComEd would be unlikely: (a) For most hours during the year, the supply curve is relatively flat, so withholding capacity would not significantly raise the market price; (b) for those hours during which it could successfully raise the market price, ComEd would have to forgo sales from its low-cost nuclear capacity; and (c) ComEd's only generation is nuclear which is difficult to ramp down or up so as to withhold output during the most profitable time periods.[51]

61. The Commission also examines the possibility of competitive harm in vertical mergers. In the first stage of the analysis, the Commission requires applicants to calculate the post-merger concentration in both the upstream and downstream markets to determine whether the upstream and downstream markets are highly concentrated, because highly concentrated upstream and downstream markets are necessary, but not sufficient, conditions for a vertical foreclosure strategy to be effective. If both of those necessary conditions are present, then the second stage of the analysis focuses on whether the merger creates or enhances the ability or incentive of the merged firm to exercise vertical market power through vertical foreclosure or raising rivals' costs.[52]

62. For example, in *AEP/CSW,* the Commission found—without relying solely on changes in HHI statistics—that the merger of two vertically integrated utilities with both transmission and generation assets would harm competition by enhancing the ability and incentive for the merged firm to use control of its transmission assets to frustrate competitors' access to relevant markets. The Commission therefore required that AEP turn over control of its transmission facilities to a Commission-approved Regional Transmission Operator and, in the interim, be subject to market monitoring by an independent entity and have an independent entity calculate and post the available transfer capacity on AEP's transmission system.[53]

63. We will continue to analyze mergers (both horizontal and vertical) and other section 203 applications by focusing on a transaction's effect on the company's ability and incentive to exercise market power, and thus harm competition. We expect applicants and intervenors to frame their arguments in this manner.

2. Issues Raised at the March 8 Technical Conference

a. The Role of HHIs in the Appendix A Analysis

64. Some commenters argued that the Commission was overly focused on the HHI statistic, which measures concentration, and asked that the Commission look at competitive effects of section 203 transactions that are not apparent from the assessment of concentration.[54]

65. In fact, as noted above, the Commission does look beyond the change in HHI in its analysis of the effect on competition in both horizontal and vertical mergers. The change in HHI serves as a screen to identify those transactions that could potentially harm competition. If the screen is failed, then, as discussed in paragraph 59 above, the Commission examines the factors that could affect competition in the relevant market. Specifically, in these circumstances the Commission typically considers a case-specific theory of competitive harm, which includes, but is not limited to, an analysis of the merged firm's ability and incentive to withhold output in order to drive up prices. Again, and as noted above, the Commission has discussed its consideration of such factors in cases such as *Commonwealth Edison Company.* Further, the Filing Requirements Rule requires applicants failing the screen to address market conditions beyond the change in HHI:

> The facts of each case (*e.g.*, market conditions, such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved) determine whether the merger would harm competition. When there is a screen failure, applicants must provide evidence of relevant market conditions that indicate a lack of a competitive problem or they should propose mitigation.[55]

Moreover, even where an applicant passes the HHI screen, the Commission also considers intervenor theories of competitive harm.

b. Commission-Developed Computer Simulation Model

66. Some commenters stated that the Commission should develop and internally run its own computer simulation model, similar to what is done by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC). Dr. Frankena asserted that using a computer simulation model would be more reliable than our alleged practice of relying exclusively on applicants to perform the current Appendix A analysis. Mr. Hegedus advocated the use of regional models in concert with the process the Commission proposed in the market-based rate rulemaking proceeding and other proceedings involving market power issues. Dr. Moss suggested using an in-house model in a more limited way, as a consistency check on submissions rather than as a formal evaluative tool. Dr. Neifer stated that models are among the many types of evidence the DOJ considers in evaluating a merger. For example, the DOJ uses simple models that evaluate the costs and benefits of the merger as well as more complex ones that model a firm's decision to operate a generating unit in the markets at issue.

67. Other commenters argued that the costs for the Commission to develop and run its own computer simulation model would exceed any related benefits. Mr. Baliff argued that it would be difficult to use any model unless it were generally accepted, well known, and accessible to all so that applicants could know whether their proposed transactions passed muster. In addition, different models focus on different decisions—bidding decisions, supply decisions, pricing decisions—and some or all of these may be relevant. Mr. Hegedus argued that the Commission should develop regional models to analyze mergers based on the information available from its analyses of market-based rate authorizations and through its Office of Enforcement.

68. We will not develop and run our own computer simulation model in lieu of or in addition to the Delivered Price Test model that we already require applicants to perform as part of the Competitive Analysis Screen. While advocates of computer simulation models believe that such models would more accurately analyze the effect on competition, and some believe they will allow better coordination with other Commission programs involving market

[51] *Commonwealth Edison Company,* 91 FERC ¶ 61,036, at 61,133 n.42 (2000).

[52] *See* Filing Requirements Rule, FERC Stats. & Regs. ¶ 31,111 at 31,910–11.

[53] *American Electric Power Company and Central and Southwest Corporation,* Opinion No. 442, 90 FERC ¶ 61,242, at 61,788–90 (*AEP/CSW*), *order on reh'g,* Opinion No. 442–A, 91 FERC ¶ 61,129 (2000), *appeal denied sub nom., Wabash Valley Power Association, Inc.* v. *FERC,* 268 F.3d 1105 (D.C. Cir. 2001).

[54] *See, e.g.,* Comments of Darren Bush, March 8 Technical Conference, Tr. 23; Comments of Mark Hegedus, March 8 Technical conference, Tr. 94–95; Comments of Diana Moss, March 8 Technical Conference, Tr. 101; Comments of Mark J. Niefer, March 8 Technical Conference, Tr. 108.

[55] Filing Requirements Rule, FERC Stats. & Regs. ¶ 31, 111 at 31, 897.

power issues, these advocates have not demonstrated how the Commission's use of an internal model would have altered any Commission determinations on previous section 203 applications. While the benefits of a Commission-internal computer simulation model have not been well-defined or quantified, we believe that the costs of such a modeling requirement in time and resources to applicants, intervenors, and Commission staff would be likely to exceed any benefits.

69. It also should be emphasized that those who advocate use of an internal modeling overlook important differences between Commission proceedings under section 203 and the processes used by the DOJ and the FTC to review mergers and acquisitions. The Commission's process of reviewing mergers and acquisitions under section 203 is a public one. An application is filed publicly, all interested parties have the ability to comment, and the Commission decides the case based on the public record. Our Appendix A analysis facilitates this public process by requiring the submission of a transparent market power study, using standardized assumptions and criteria, that is available for review and comment by all interested parties, including state commissions and customers, and, importantly, can be replicated by them in the limited time period available for public comment. Similarly, when mitigation measures are necessary in Commission proceedings, they are based on the public record and available for comment by all interested parties.

70. By contrast, the DOJ and the FTC use largely informal and non-public processes for reviewing transactions subject to their jurisdiction. Their meetings with applicants are not noticed to the public and are less formal in nature. This provides the DOJ and the FTC greater flexibility to use, among other things, internal modeling tools that may not be easily replicated or other methodological approaches that are stylized to an individual case. In DOJ and FTC proceedings, staff and applicants can engage in extensive informal communications to discuss and address data, methodological and other disputes that are associated with these more stylized approaches. Similarly, when mitigation is required, staff and applicants can design such mitigation measures in a non-public manner. In sum, these more informal processes, while entirely appropriate in the context of DOJ and FTC review of mergers and transactions, simply cannot be replicated by the Commission given the due process and other considerations relevant in proceedings under section 203 of the FPA.

71. We also note that some commenters urging the Commission to develop and run its own internal computer simulation model are mistakenly assuming that the current process is flawed because applicants can file merger impact studies using their own methodologies and assumptions. On the contrary, in the 1996 Merger Policy Statement, in the Filing Requirements Rule and in many subsequent orders interpreting those issuances, the Commission has carefully set forth the requirements of how the Commission's adopted study methodology, the Delivered Price Test, must be performed and what assumptions the Commission will accept as reasonable. If applicants fail to perform the studies according to the Commission's prescribed methodology, or their studies are based on faulty assumptions or use questionable data inputs, then those studies are required to be amended or supplemented with additional data.[56] In some cases the Commission has required that new studies be conducted which conform to the Commission's standards. Thus, contrary to the view of some commenters, neither the Commission nor intervenors are disadvantaged by our current policy of requiring applicants to perform the merger impact studies, nor is the Commission subject to manipulation by applicants who can allegedly game the studies to their own benefit. Studies which do not conform to the Commission's explicit requirements are either rejected or required to be revised until they do conform, and intervenors have opportunity in every merger proceeding to inform the Commission if they believe that something in the applicant's study is amiss.

72. Specifically, merger applicants must submit the model and all of the data inputs necessary for completing the Competitive Analysis Screen in any section 203 Application requiring a complete Appendix A analysis.[57] In those cases, Commission staff reviews the data supplied and runs the applicants' models to check the accuracy of the results and the sensitivity of the results to changes in the underlying assumptions. In addition, the models and input data are available to intervenors in the proceeding, who can also verify the accuracy of the results and perform sensitivity tests.

73. A complete Competitive Screen Analysis submission provides sufficient information to identify those transactions that may harm competition. The data submitted includes a valuable intermediate calculation: A supply curve of all the generators that can possibly serve the area, and whether those generators are dispatched given transmission constraints. Finding the supply curve requires an estimate of suppliers' generation costs, including fuel costs, operation and maintenance costs, heat rates, and emissions costs; competitive market prices; transmission prices; and transmission import constraints.[58] Whether the Commission grants the merger application with or without conditions, rejects it, or sets it for hearing, the Commission can determine whether the application presents any competitive issues because the current Competitive Analysis Screen is sufficiently precise to make such a determination.

74. In summary, there has been no showing that a Commission-internal computer simulation model is needed, both in light of these burdens as well as because the study that the Commission already requires applicants to perform is adequate to measure the potential for competitive harm associated with section 203 dispositions. And, as noted above, the Commission is diligent in ensuring that applicants conduct the Competitive Analysis Screen properly, including using reasonable assumptions and data inputs.

c. Adding Hart-Scott-Rodino Information to the Section 203 Record

75. Some commenters suggested that the Commission require applicants to file all materials submitted to the DOJ and the FTC in their Hart-Scott-Rodino (HSR) filings. Other commenters noted that such a filing would create confidentiality concerns due to the public nature of the Commission's section 203 proceedings. We also share those concerns. Unlike the DOJ and the FTC, who can keep any of the information confidential, our proceedings require a public record, and our decisions must be based on evidence that is available to the parties

[56] For example, in *Entergy Gulf States, Inc.,* Commission Staff was unable to verify the results of applicants' model performing the Competitive Analysis Screen, and sent the applicants a deficiency letter identifying the error in the input data and requiring the applicants to submit the corrected data. *Entergy Gulf States, Inc.,* Docket No. EC07–70–000, at 1 (Apr. 6, 2007) (unpublished deficiency letter).

[57] In cases involving a *de minimis* amount of generation being combined in the relevant geographic market, applicants are not required to perform a complete Appendix A analysis.

[58] *See* 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,130–33 (discussion of the delivered price test).

of record in the proceeding. We permit applicants to request confidentiality for certain documents and file a protective order to allow intervenors to view those documents. However, we cannot maintain the same degree of confidentiality as do the DOJ and the FTC.[59] The HSR filings often contain highly sensitive proprietary documents such as the companies' price forecasts, pricing analyses, and pricing decisions.[60] Access to such valuable commercial information could not only harm the merging companies, it could also harm competition in wholesale electricity markets by facilitating coordination by competitors, who would have a better understanding of each other's pricing strategies and competitive objectives.

d. Alternatives to Trial-Type Hearings

76. Some commenters suggested that the Commission use alternatives to trial-type evidentiary hearing procedures, including technical conferences and paper hearings with limited periods of discovery and additional data requests.

77. Given the statutory deadlines faced by the Commission on section 203 applications,[61] we believe that holding an evidentiary hearing generally will not be feasible, depending on the issues in dispute. Therefore, in cases that present complicated factual disputes, we will consider alternatives such as paper hearings with a limited period of discovery, so that we can develop a complete record.

e. Attribution of Generation Under Contract

78. Some commenters also requested clarification on how generation under contract should be attributed in the analysis of market concentration. Specifically, they asked whether the generation should be attributed to the party with operational control of the generation facility or to the party with the economic interest in the capacity.

79. The determination on whether a long-term generation contract should be attributed to the purchaser of power or the seller depends on the party with operational control, which depends upon the specific contract. Therefore, we have required that applicants file information about whether their long-term generation contracts confer operational control over generation resources to the purchaser. Our practice has been to attribute contracted capacity to the purchaser if such a contract confers operational control over the generation to the purchaser.[62] We will continue this practice, and require applicants to file purchase and sales data, including information on whether the terms and conditions of purchase contracts confer operational control over generation to the purchaser. However, if an applicant fails the Competitive Analysis Screen, we will consider arguments regarding the ability and incentive of the merged firm to exercise market power, and therefore consider the merged firm's contractual positions as well as its physical control of generation.

III. Information Collection Statement

80. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection and data retention requirements imposed by agency rules.[63] In this supplemental policy statement, the Commission is providing guidance regarding future implementation of FPA section 203. The Commission is not imposing any additional information collection requirement upon the public. The Commission is not proposing any changes to its current regulations. Accordingly, there should be no impact on the current reporting burden associated with an individual section 203 application. The Commission also does not expect the total number of section 203 applications to be affected by this Supplemental Policy Statement. However, the Commission will submit for informational purposes only a copy of this Supplemental Policy Statement to OMB.

Burden Estimate: The Public Reporting and records retention burden for section 203 applications is as follows.

Title: FERC–519, ''Application Under the Federal Power Act, Section 203''.

Action: Revised Collection.

OMB Control No.: 1902–0082.

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

Respondents: Businesses or other for profit.

Frequency of Responses: N/A.

Necessity of the Information: This Supplemental Policy Statement provides guidance regarding future implementation of FPA section 203. The Commission is not proposing any changes to its current regulations.

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

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

IV. Environmental Analysis

82. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[64] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[65] The Supplemental Policy Statement is categorically excluded as it addresses actions under section 203.[66] Accordingly, no environmental assessment is necessary and none has been prepared in this Supplemental Policy Statement.

[59] As Mark J. Niefer noted, ''the [Antitrust] Division [of the DOJ] is precluded from sharing much of the information it gathers to analyze a merger'' and ''[e]xcept in very limited circumstances, information provided to the Division * * * may not be disclosed to others without the consent of the producing party.'' Comments of Mark J. Niefer, March 8 Technical Conference, Tr. 106–07.

[60] *See* Federal Trade Commission, Introductory Guide III to the Premerger Notification Program, Model Request for Additional Information and Documentary Material (Second Request) (revised May 2007), available at *http://www.ftc.gov/bc/hsr/introguides/guide3.pdf*.

[61] Under revised section 203, the Commission must act within 180 days of a complete application, and with good cause may extend the deadline another 180 days. If not, the authorization is granted by law.

[62] *See* Filing Requirements Rule, FERC Stats. & Regs. ¶ 31,111 at 31,888.

[63] 5 CFR 1320.

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

[65] 18 CFR 380.4.

[66] *See* 18 CFR 380.4(a)(16).

V. Regulatory Flexibility Act Certification

83. The Regulatory Flexibility Act of 1980 (RFA)[67] requires agencies to prepare certain statements, descriptions and analyses of proposed rules that will have a significant economic impact on a substantial number of small entities.[68] However, the RFA does not define ''significant'' or ''substantial.'' Instead, the RFA leaves it up to an agency to determine the effect of its regulations on small entities.

84. Most filing companies regulated by the Commission do not fall within the RFA's definition of small entity.[69] Further, as noted above, the Supplemental Policy Statement does not propose any changes to the Commission's current regulations under section 203; therefore there is no change in how the Commission's regulations under section 203 affect small entities. Therefore, the Commission certifies that the Supplemental Policy Statement will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required.

VI. Document Availability

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

86. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits of the docket number), in the docket number field.

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

VII. Effective Date and Congressional Notification

88. This Supplemental Policy Statement is effective July 20, 2007. The Commission has determined that, consistent with the discussion above with regard to information collection and the RFA, this policy statement also is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission will submit this Supplemental Policy Statement to both houses of Congress and to the General Accounting Office.

List of Subjects in 18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

By the Commission.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–14956 Filed 8–1–07; 8:45 am]

BILLING CODE 6717–01–P

[67] 5 U.S.C. 601–12.

[68] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal year did not exceed 4 million MWh. 13 CFR 121.201.

[69] 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 632. Section 3 of the Small Business Act defines a ''small-business concern'' as a business which is independently owned and operated and which is not dominant in its field of operation.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

Implantation or Injectable Dosage Form New Animal Drugs; Oxytetracycline Hydrochloride Injection

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an abbreviated new animal drug application (ANADA) filed by Norbrook Laboratories, Ltd. The ANADA provides for use of an oxytetracycline hydrochloride injectable solution in beef cattle, beef calves, nonlactating dairy cattle, and dairy calves for the treatment of various bacterial diseases.

DATES: This rule is effective August 2, 2007.

FOR FURTHER INFORMATION CONTACT: John K. Harshman, Center for Veterinary Medicine (HFV–104), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0169, e-mail: *john.harshman@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Norbrook Laboratories, Ltd., Station Works, Newry BT35 6JP, Northern Ireland, filed ANADA 200–452 that provides for use of OXYTET 10 (oxytetracycline hydrochloride) Injection in beef cattle, beef calves, nonlactating dairy cattle, and dairy calves for the treatment of various bacterial diseases. Norbrook Laboratories, Ltd.'s OXYTET 10 Injection is approved as a generic copy of Boehringer Ingelheim Vetmedica, Inc.'s, MEDAMYCIN Injectable approved under NADA 108–963. The ANADA is approved as of June 27, 2007, and the regulations are amended in 21 CFR 522.1662a to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

FDA has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows: