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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 33

[Docket No. RM07-21-001; Order No. 708-A]

BLANKET AUTHORIZATION UNDER FPA SECTION 203

(Issued July 17, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission (Commission) affirms its determinations in part and grants rehearing in part of Order No. 708. Order No. 708 amended the Commission's regulations to establish blanket authorizations under section 203 of the Federal Power Act to facilitate investment in the electric industry and, at the same time, ensure that public utility customers are adequately protected from any adverse effects of such transactions.

EFFECTIVE DATE: This order on rehearing will become effective [Insert Date 30 days after publication in the **FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Blanket Authorization Under FPA Section 203

Docket No. RM07-21-001

ORDER ON REHEARING

ORDER NO. 708-A

(Issued July 17, 2008)

1. This order addresses requests for rehearing and clarification of Order No. 708.¹ That order amended Commission regulations pursuant to section 203 of the Federal Power Act (FPA) to provide for additional blanket authorizations under FPA section 203(a)(1).² This order on rehearing affirms the five categories of blanket authorizations set forth in Order No. 708 with certain modifications, and, as discussed below, grants, in part, and denies, in part, the requests for rehearing.

¹ Blanket Authorization Under FPA Section 203, Order No. 708, 73 FR 11003 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,265 (2008).

² 16 U.S.C. 824b(a)(1).

I. Background

2. Based on comments to the Blanket Authorization Notice of Proposed Rulemaking,³ the Commission in Order No. 708 established five blanket authorizations to facilitate investment in the electric utility industry and, at the same time, ensure that public utility customers are adequately protected from any adverse effects of such transactions. First, a public utility was granted a blanket authorization under FPA section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization under 18 CFR 33.1(c)(2)(ii) if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility.⁴ Second, a public utility was granted a blanket authorization under FPA section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization under 18 CFR 33.1(c)(8)⁵ if, after the transfer, the holding company and any of its associate or affiliate companies, in the aggregate, will own less than 10 percent of the outstanding voting interests of such public utility.⁶ Third, a public utility was granted a blanket authorization under FPA section 203(a)(1) to transfer its outstanding voting securities to

³ Blanket Authorization Under FPA Section 203, 72 FR 41640 (July 31, 2007), FERC Stats. & Regs. ¶ 32,619 (2007) (Blanket Authorization NOPR).

⁴ Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 19 and 18 CFR 33.1(c)(12)).

⁵ These holding companies' ownership of utilities includes only exempt wholesale generators (EWGs), foreign utility companies (FUCOs), and qualifying facilities (QFs).

⁶ Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 40.

any holding company granted blanket authorization in 18 CFR 33.1(c)(9).⁷ Fourth, a public utility was granted blanket authorization under FPA section 203(a)(1) to transfer its outstanding voting securities to any holding company granted a blanket authorization in 18 CFR 33.1(c)(10).⁸

3. Fifth, a public utility was granted a blanket authorization under FPA section 203(a)(1) for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, the contract does not convey control over the operation of a generation or transmission facility, the parties to the transaction are neither affiliates nor associate companies, and the acquirer is a public utility.⁹ In addition, Order No. 708 clarified certain aspects of existing blanket authorizations and clarified the terms “affiliate” and “captive customers.”

⁷ Id. P 43. These holding companies are regulated by the Board of Governors of the Federal Reserve Bank or by the Comptroller of the Currency.

⁸ Id. P 45. This authorization applies, in certain circumstances, to holding companies conducting underwriting activities or engaging in hedging transactions, generally limited to a 10 percent voting interest.

⁹ Id. P 51-53 and 18 CFR 33.1(c)(16).

II. Requests for Rehearing

4. Order No. 708 was published in the Federal Register on February 29, 2008.¹⁰

Timely requests for rehearing were filed by the American Public Power Association and the National Rural Electric Cooperative Association (APPA/NRECA), the Financial Institutions Energy Group (Financial Group), and the Electric Power Supply Association (EPSA). The Edison Electric Institute (EEI) filed a timely request for rehearing and clarification.

5. As discussed below, parties seek rehearing and/or clarification with respect to:

(1) extending the blanket authorization under 18 CFR 33.1(c)(12) to cover public utility dispositions, not just to certain holding companies but also to non-holding companies;

(2) the blanket authorization in 18 CFR 33.1(c)(16) pertaining to the transfer of jurisdictional contracts; (3) the definition and/or scope of hedging activities permitted

under 18 CFR 33.1(c)(10); (4) the determination in Order No. 708 not to impose additional reporting requirements related to the new blanket authorizations; and

(5) clarification of the existing blanket authorization under 18 CFR 33.1(6) (authorization of internal reorganization not affecting a traditional public utility) identified in the

Supplemental Policy Statement.¹¹

¹⁰ Supra note 1.

¹¹ FPA Section 203 Supplemental Policy Statement, 72 FR 42277 (August 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007), order on clarification and reconsideration, 122 FERC ¶ 61,157 (2008) (Supplemental Policy Statement).

III. Discussion

A. Whether to Extend the Blanket Authorization in 18 CFR 33.1(c)(12) to Non-Holding Companies

6. In Order No. 708, the Commission adopted the proposed blanket authorization from the Blanket Authorization NOPR without modification.¹² In order to prevent public utilities from transferring less than 10 percent of their voting securities in successive transfers, the Commission retained the “in aggregate” limitation contained in 18 CFR 33.1(c)(12). In addition, the Commission rejected requests to extend the blanket authorization to “any person.” The Commission stated that these requests would expand the blanket authorization proposed in the Blanket Authorization NOPR beyond its original intent. The Commission also noted that if it were to expand the blanket authorization to “any person,” it would need to establish appropriate reporting requirements so that the Commission could monitor transfers to non-holding companies.¹³

¹² Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 19. 18 CFR 33.1(c)(12) states that a public utility will be granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to any holding company granted blanket authorizations in 18 CFR 33.1(c)(2)(ii) of this section if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of the public utility.

¹³ Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 20.

Requests for Rehearing

7. Financial Group requests rehearing of the Commission's decision declining to extend the blanket certificate to cover public utility dispositions to non-holding companies under 18 CFR 33.1(c)(12), subject to the same "in aggregate" limitations imposed on transfers to holding companies. Financial Group argues that the distinction between holding companies and non-holding companies is immaterial since the same benefits of reducing regulatory burdens and encouraging investment that accrue when applying this blanket to distributions to a holding company also will occur if the blanket is applied to distributions to a non-holding company. Financial Group reasons that it is the nature of the interest being disposed -- less than 10 percent of the voting securities being held in the aggregate -- and not whether the acquirer is a holding company that determines whether the disposition conveys control.

8. Financial Group argues that the concern underlying the Commission's refusal to extend the blanket certificate to cover public utility dispositions to non-holding companies could be addressed without the need for issuing such blanket authorizations on a case-by-case basis. Financial Group proposes reporting requirements for transactions involving non-holding companies that it says should be at least as helpful to the Commission as the preexisting reporting requirements applicable to holding companies.¹⁴

¹⁴ Financial Group proposes that within a specified time following consummation of the transaction (e.g., 30 days), the following information be reported: (1) names of all parties to the transaction; (2) identification of both the pre-transaction and post-transaction voting security holdings (and the percentage ownership) in the public utility
(continued)

In addition, Financial Group argues that this expansion of the blanket certificate is not beyond the scope of the Blanket Authorization NOPR.

Commission Determination

9. As a preliminary matter, and upon further consideration, we do not consider Financial Group's request to be beyond the scope of the Blanket Authorization NOPR. In general, the Commission is permitted to learn from comments submitted during its rulemaking process.¹⁵ In the Blanket Authorization NOPR, the Commission sought comments on proposals to reduce regulatory burdens and encourage investment under FPA section 203 while simultaneously protecting the public interest. Financial Group's proposal to extend the proposed blanket authorization under 18 CFR 33.1(c)(12) to cover "any person" rather than just certain holding companies is a variation of the originally proposed regulation, and therefore, is a logical outgrowth of the Blanket Authorization

held by the acquirer and its associates or affiliate companies; (3) the date the transaction was consummated; (4) identification of any public utility or holding company affiliates of the parties to the transaction; and (5) (if the Commission has particular concerns as to whether such a transaction would result in cross-subsidization) the same type of statement currently required under 18 CFR 33.2(j)(1), which describes Exhibit M to an FPA section 203 filing.

¹⁵ Daniel Int'l Corp. v. OSHA, 656 F.2d 925, 932 (4th Cir. 1981) (The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated differs from the rule proposed, partly at least in response to submission).

NOPR.¹⁶ Interested parties have had sufficient notice of the type of regulation that the Commission might adopt, and reasonably could have anticipated that other commenters might seek to expand the proposal. Moreover, commenters will have the opportunity for rehearing with respect to any modifications to the originally proposed section 33.1(c)(12).

10. Substantively, the distinction in 18 CFR 33.1(c)(12) between holding companies and non-holding companies is not determinative as to whether a particular transaction is consistent with the public interest, particularly if the “in aggregate” 10 percent limitation is in place to ensure that there is no likely opportunity for a transfer of control of a public utility. Moreover, expanding the 18 CFR 33.1(c)(12) blanket authorization to include non-holding companies would reduce regulatory burdens and encourage investment without causing harm to competition or captive customers. With such an expansion, however, it is important for the Commission and the public to monitor these activities. As the Commission stated in Order No. 708, although there is a presumption that less than 10 percent of a utility’s shares will not result in a change of control, this presumption is rebuttable.¹⁷ In some instances, the transfer of less than 10 percent of voting shares may constitute a transfer of control. Accordingly, we will extend the

¹⁶ See Owner-Operator Independent Drivers Assoc., Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188, 209 (D.C. Cir. 2007) (the object of the logical outgrowth test is one of fair notice).

¹⁷ Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 20.

blanket authorization to “any person,” but we will require additional reporting for non-holding companies such as the requirements proposed by Financial Group.

11. Specifically, the Commission will amend its regulations in 18 CFR 33.1(c)(12) to also authorize a public utility to transfer its outstanding voting securities to any person other than a holding company if, after the transfer, such person and any of its associate or affiliate companies will own less than 10 percent of the outstanding voting interests of such public utility. In addition, the Commission will adopt a reporting requirement for entities that transact under this blanket authorization. In order to properly tailor additional reporting requirements, however, we will issue concurrently with this order a request for supplemental comments that will seek comments on the narrow issue of the scope and form of the reporting requirements under the expanded blanket authorization. The expanded blanket authorization under 18 CFR 33.1(c)(12) will not become effective until a Commission decision on reporting requirements becomes effective. We further note that the Commission retains its jurisdiction under section 203(b) of the FPA to issue further orders as appropriate with respect to transactions authorized under blanket authority.¹⁸

¹⁸ 16 U.S.C. 824b(b).

B. Blanket Authorization for the Transfer of Jurisdictional Contracts under 18 CFR 33.1(c)(16)

1. Order No. 708

12. Order No. 708 extended a blanket authorization under FPA section 203(a)(1) for the acquisition and disposition of jurisdictional contracts where neither the acquirer nor the transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, the contract does not convey control over the operation of a generation or transmission facility, the parties to the transaction are neither associate nor affiliate companies, and the acquirer is a public utility.¹⁹ Based, in part, on the Commission's experience with intra-corporate transfers of jurisdictional contracts and concerns raised in the Blanket Authorization NOPR, Order No. 708 narrowed this blanket authorization somewhat from the proposal in the Blanket Authorization NOPR, to include the phrase "the parties to the transaction are neither associate nor affiliate companies, and the acquirer is a public utility."²⁰ The Commission also stated that this added condition (that parties to the transaction are neither affiliated nor associated companies) helps ensure that the transfer of such contracts would be consistent with the public interest.²¹

¹⁹ 18 CFR 33.1 (c)(16).

²⁰ Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 51.

²¹ Id. P 52.

Requests for Rehearing

13. APPA/NRECA argues that the Commission has not shown how this blanket authorization is consistent with the public interest. If the blanket authorization is not retracted, APPA/NRECA asks the Commission to narrow its scope by excluding contracts in which a load-serving entity (LSE) is the purchaser and does not consent to the subject transfer. It contends that the existing authorization creates a situation in which public power utilities, cooperatives and other LSEs might have their contract sold without their consent and without specific Commission approval. It claims that these LSEs rely on these contracts for reliable power and the blanket authorization would allow for the transfer of the contract from a well-established marketer or generator with whom the LSE originally contracted to an entity with less assurance of its ability to perform. In addition, APPA/NRECA additionally argues that the Commission's reasoning in dismissing the same argument in Order No. 708 is flawed.

14. Further, APPA/NRECA claims that this blanket authorization itself could undermine LSEs' bargaining power and their ability to enforce their contractual rights. It notes that many standard power contracts contain "boilerplate" language that requires a buyer's consent for the transfer of a contract not to be "unreasonably withheld." It argues that if the Commission grants this blanket authorization on the basis that it is consistent with the public interest, sellers could then argue that it is unreasonable for a buyer to withhold its consent for a given transfer. Thus, APPA/NRECA claims that this blanket authorization could force LSEs to bargain for stronger prohibitions limiting assignment in

their contracts at the likely expense of other contract features and to enforce such language by litigation when necessary.

15. EPSA and EEI request the removal of the clause “the parties to the transaction are neither associate nor affiliate companies” from the blanket authorization granted in 18 CFR 33.1(c)(16). EPSA and EEI state that the clause was added in Order No. 708 without being previously proposed in the Blanket Authorization NOPR or sought by any commenter. In addition, both EPSA and EEI argue that the clause conflicts with the blanket orders that the Commission granted in Order No. 669-A.²² EPSA argues that the clause limits blanket certificate availability to transactions involving only non-affiliated entities, and, therefore, it reverses the blanket certificate for internal reorganizations granted in 18 CFR 33.1(c)(6)²³ without making a finding that Order No. 669-A is no

²² Transactions Subject to FPA Section 203, Order No. 669, 71 FR 1348 (January 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 (2006), order on reh’g, Order No. 669-B, 71 FR 42579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

²³ 18 CFR 33.1(c)(6) states that any public utility or any holding company in a holding company system that includes a transmitting utility or an electric utility will be granted a blanket authorization under sections 203(a)(1) or 203(a)(2) of the FPA, as relevant, for internal corporate reorganizations that do not result in the reorganization of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and that do not present cross-subsidization issues.

longer valid. EEI argues that the clause undercuts the blanket certificate authorizing the transfer of wholesale market-based contracts to other affiliates in 18 CFR 33.1(c)(11).²⁴

16. EPSA also argues that the clause “and the acquirer is a public utility” should be removed. EPSA argues that there is no concern regarding competition or cross-subsidization when one affiliate transfers a wholesale contract to another affiliate, as long as the affiliates involved are not themselves traditional public utilities with captive customers. EPSA also maintains that the clause creates an unnecessary burden on the Commission and unnecessary delay and costs for the applicants.

17. EEI requests that if rehearing is not granted, the Commission specify that 18 CFR 33.1(c)(16) does not override other blanket authorizations or require approval of a transaction if another blanket authorization such as 18 CFR 33.1(c)(11) (authorizing the transfers of wholesale market-based rate contracts to other affiliates) applies.

Commission Determination

18. APPA/NRECA raised no new arguments on rehearing, and its request that the blanket authorization in 18 CFR 33.1(c)(16) be retracted or modified is denied.

²⁴ 18 CFR 33.1(c)(11) states any public utility will be granted a blanket authorization under section 203(a)(1) of the FPA to transfer a wholesale market-based rate contract to any other public utility affiliate that has the same ultimate upstream ownership, provided that neither affiliate is affiliated with a traditional public utility with captive customers.

19. We found in Order No. 708 that the transfer of a wholesale power contract which does not provide for the transfer of control of generation or transmission cannot affect horizontal or vertical market power. In addition, we note that Order No. 708 added a condition to address, in part, the concerns raised by APPA/NRECA.²⁵ We also found that, with the modification proposed by APPA/NRECA, the transfer of a wholesale power contract from one party that does not have captive customers or own or provide transmission service over jurisdictional transmission facilities, to another party that also does not have captive customers or own or provide transmission service over jurisdictional transmission facilities, cannot affect the rates of captive customers or transmission customers (and therefore has no rate or cross-subsidization impacts). As we reasoned in Order No. 708, in response to the same arguments that APPA/NRECA raises again on rehearing, purchasers can protect their interests by exercising contractual provisions, and, if necessary, by filing an FPA section 206 complaint.²⁶ We note that the issuance of this blanket authorization should not be construed as an expression of opinion by the Commission as to whether it is (or is not) reasonable for an entity to withhold consent as to a particular proposed transfer. Moreover, as we noted in Order No. 708,

²⁵ APPA/NRECA's comments led to adding to the blanket authorization the condition that "...neither the acquirer nor transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities" See Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 48, 51.

²⁶ Id. P 52.

APPA/NRECA's concerns regarding the potential effect of the blanket on the bargaining power of LSEs is a speculative matter.

20. The Commission grants EPSA's and EEI's requests to remove the clause "the parties to the transaction are neither associate nor affiliate companies" from 18 CFR 33.1(c)(16). EPSA and EEI have convincingly explained why the clause is inappropriate. In particular, where neither the acquirer nor the transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, and the contract does not convey control over the operation of a generation or transmission facility, the price of the jurisdictional contract's transfer does not affect the rates of captive customers or transmission customers and therefore has no rate or cross-subsidization impact affecting captive generation customers or transmission customers.

21. EPSA's request to remove from 18 CFR 33.1(c)(16) the clause "and the acquirer is a public utility" is denied. Order No. 708 added this clause because of the possibility of a jurisdictional contract being transferred to a non-jurisdictional entity, in which case the Commission would lose the ability to regulate the contract and parties involved.²⁷ EPSA has presented no reason why the clause is not necessary to prevent that possibility.

²⁷ Id. P 51.

C. Hedging**1. Order No. 708**

22. In Order No. 708, the Commission extended to public utilities a blanket authorization to transfer securities to holding companies that have blanket authorizations to acquire public utility securities under FPA section 203(a)(2) for certain underwriting or hedging purposes.²⁸ In doing so, the Commission observed that the condition for the parallel blanket authorization under FPA section 203(a)(2), limiting the acquiring entity to a voting right of less than 10 percent of the relevant class of securities, should ensure

²⁸ 18 CFR 33.1(c)(15) states that a public utility is granted a blanket authorization under section 203(a)(1) of the FPA to transfer its outstanding voting securities to any holding company granted blanket authorization in 18 CFR 33.1(c)(10). 18 CFR 33.1(c)(10) states that any holding company, or a subsidiary of that company, is granted a blanket authorization under section 203(a)(2) of the FPA to acquire any security of a public utility or a holding company that includes a public utility: (i) for purposes of conducting underwriting activities, subject to the condition that holdings that the holding company or its subsidiary are unable to sell or otherwise dispose of within 45 days are to be treated as holdings as principal and thus subject to a limitation of 10 percent of the stock of any class unless the holding company or its subsidiary has within that period filed an application under section 203 of the FPA to retain the securities and has undertaken not to vote the securities during the pendency of such application; and the parent holding company files with the Commission on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held; (ii) for purposes of engaging in hedging transactions, subject to the condition that if such holdings are 10 percent or more of the voting securities of a given class, the holding company or its subsidiary shall not vote such holdings to the extent that they are 10 percent or more.

that any disposing entity facilitating such transactions does not affect a disposition or change in control of the issuer of the public utility securities.²⁹

Requests for Rehearing

23. APPA/NRECA argues that this blanket authorization is contrary to the law and that the Commission should only allow such transactions on a case-by-case basis, with full disclosure of the specific business arrangements being contemplated. Because the Commission did not define “hedging transaction(s),” APPA/NRECA contends that the Commission cannot reasonably determine that the authorization is consistent with the public interest. It further argues that this blanket authorization, like the parallel blanket authorization under FPA section 203(a)(2), does not assure that the hedging transaction is only incidental to the acquirer’s main business, since the blanket authorization does not require that the hedging transaction relate to the utility, power or energy business. APPA/NRECA believes that ratepayers should not be exposed to the complex and risky transactions sometimes undertaken by financial market participants to the harm of innocent third parties.

Commission Determination

24. While the Commission agrees with APPA/NRECA’s general proposition that electric ratepayers should not be exposed to unnecessary harm caused by risky

²⁹ Order No. 708, FERC Stats & Regs. ¶ 31,265 at P 45 (citing Order No. 669 at P 132).

transactions of financial market participants, we disagree that the blanket authorizations previously granted to holding companies in Order No. 669-A (18 CFR 33.1(c)(10)), or the parallel authorization granted to public utilities in Order No. 708 (18 CFR 33.1(c)(15)), will cause such harm.

25. Nor do we believe that the authorization in Order No. 708 is contrary to law. These authorizations are limited, and any hedging in public utility securities that is within the scope of section 203 is allowed only to the extent that it falls under one of the Commission's blanket authorizations or a specific authorization granted by the Commission on a case-by-case basis. Specifically, an existing condition in 18 CFR 33.1(c)(10)(ii) limits the voting ability of the entity acquiring securities for hedging purposes, so transactions under the new blanket authorizations should not result in a change in control of a public utility. Furthermore, the first part of the blanket authorization, 18 CFR 33.1(c)(10)(i), concerns underwriting and is directed at financial entities such as a bank, investment bank, or broker/dealer that engages in underwriting activities that may involve public utilities, but this authorization also has a 10 percent limitation and is subject to a reporting requirement. It is unlikely that the acquirers in the hedging transactions authorized would be public utilities because most holding companies are not also public utilities as most do not operate jurisdictional facilities. In fact, we are unaware of any public utility with captive customers that engages in hedging

transactions involving the securities of other public utilities.³⁰ Therefore, we believe that the potential for harm to ratepayers of public utilities as a result of the blanket authorization is minimal.

26. In addition, it should be noted that states oversee cost recovery associated with their franchised public utilities' hedging activities involving purchases of power or fuel as part of an overall purchasing strategy in the interests of ratepayers. We think it would be unlikely that a state regulatory body would authorize the recovery from ratepayers of the costs incurred by one public utility to engage in hedging activities concerning the securities of another public utility. We further note that the Commission is not making any finding as to whether the costs associated with such hedging are appropriately recovered in rates.

27. We reject APPA/NRECA's request to deny any blanket authority for hedging transactions. APPA/NRECA's arguments, in large part, are a collateral attack of Order No. 669-A. Order No. 669-A determined that a blanket authorization under FPA section 203(a)(2), involving hedging for holding companies was in the public interest because such a blanket authorization would not give the acquiring entity additional market power or enable it to undermine competition or disadvantage captive customers. The

³⁰ We note that it was the investment firm Morgan Stanley Capital Group, Inc., not a franchised public utility, that requested rehearing of Order No. 669 to request the blanket authorization regarding hedging for a non-bank holding company. See Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 119-120.

Commission agreed that the blanket authority would promote the public interest by bringing more capital investment to the utility industry. The Commission also found that the condition removing the holder's power to vote the securities held for hedging purposes to the extent they are 10 percent or more of the securities in the class outstanding, even though the amount held for hedging is not limited, would address its concerns regarding control.³¹ Subject to certain limitations, Order No. 708 merely granted the mirror image of this blanket for public utilities under FPA section 203(a)(1), in part, because the Commission had already determined in Order No. 669-A that there were adequate controls on these transactions.

28. Further, the Commission will not codify a definition of "hedging" in this proceeding. This decision is based in part on our observation that hedging activities may be accomplished in a variety of ways and defining hedging may inappropriately limit it or may create situations that are inconsistent with usage by other government agencies. In general, hedging is an approach to risk management that uses financial instruments to manage identified risk. We note that various regulators have defined "hedging" and have promulgated rules and policies concerning such activities.³² We will generally follow those principles with respect to the blanket authorizations granted under our rules.

³¹ Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 121, 132.

³² For example, the Commodities Futures Trading Commission, defines bona fide hedging transactions in its regulations. 17 CFR 1.3(z). The Internal Revenue Service defines a qualified hedging transaction in its regulations. 26 CFR 1.988-5. The Financial
(continued)

D. Other**1. Reporting Requirements****Requests for Rehearing**

29. In Order No. 708, the Commission declined to impose additional reporting requirements in connection with the new blanket authorizations.³³ Although the Commission agreed with APPA/NRECA's argument in its comments on the Blanket Authorization NOPR that additional reporting requirements could provide greater efficiency, on balance, the Commission determined that the potential burdens would outweigh any efficiency gains.³⁴ In its comments on rehearing, APPA/NRECA reasserts its request that the Commission require public utilities to report all dispositions of securities undertaken pursuant to a blanket authorization on the ground that the Commission failed to explain why it dismissed its request in Order No. 708.

30. It also asks the Commission to impose a requirement that public utilities certify their continued compliance with any "in aggregate" limitation in light of each new transaction. APPA/NRECA argues that, since the only reporting requirement is under 18 CFR 33.1(c)(2), a transfer of control in a public utility could occur over a series of transactions without the Commission's knowledge. Accordingly, APPA/NRECA asserts

Accounting Standards Board, the New York Mercantile Exchange, and the Chicago Mercantile Exchange all have policies concerning and defining hedging.

³³ Order No. 708, FERC Stats & Regs. ¶ 31,265 at P 33.

³⁴ Id.

that the Commission cannot be sure that it is being provided with all the information necessary to ensure that a transfer of control does not occur.

Commission Determination

31. APPA/NRECA has not presented any convincing reason to impose additional reporting requirements at this time and therefore its request for rehearing is denied. We first point out that APPA/NRECA is incorrect that there are no reporting requirements under 18 CFR 33.1(c)(9) (authorization of certain activities by a company regulated by the Board of Governors of the Federal Reserve Bank or by the Comptroller of the Currency) and 18 CFR 33.1(c)(10) (authorization for a holding company to engage in certain underwriting and hedging activities).³⁵ Further, the Commission does not believe that reports by a company regulated by the Board of Governors of the Federal Reserve Bank or by the Comptroller of the Currency are necessary when securities are held as a fiduciary or as principal for derivatives hedging purposes, since such activities by the holding company are overseen and closely monitored by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency as described in 18 CFR 33.1(c)(9). In addition, holding of shares as collateral for a loan does not change control of a public utility. Although 18 CFR 33.1(c)(10)(ii) does not have an explicit

³⁵ The reporting requirements under 18 CFR 33.1(c)(9)(iv) and 18 CFR 33.1(c)(10)(i) require the parent holding company to file within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding share, irrespective of the capacity in which they were held.

reporting requirement when securities are held for purposes of engaging in hedging transactions, this authorization does limit voting ability of the company acquiring the securities, eliminating the concern over transfer of control over a public utility. The transfer of wholesale contracts under 18 CFR 33.1(c)(16) is subject to section 205 filing requirements, which include, among other things, designation of the jurisdictional entity that will be the supplier under the contract.³⁶

32. APPA/NRECA was correct in stating that 18 CFR 33.1(c)(8) (authorization for a person being a holding company solely with respect to EWGs, FUCOs, or QFs to acquire the securities of additional EWGs, FUCOs, or QFs) does not include a reporting requirement. The parallel authorization to public utilities under 18 CFR 33.1(c)(13), however, limits the acquiring holding company and its affiliates to less than 10 percent of the outstanding voting securities of the public utility. As we stated in Order No. 708, we believe this protection ensures that this blanket authorization is in the public interest.

33. The Commission does not, however, foreclose the possibility of imposing additional reporting requirements in the future, should circumstances change and it become apparent that additional reporting requirements would help us better monitor industry transactions that could adversely affect public utilities or their captive customers or transmission customers. We also note that, as discussed above, the Commission is concurrently issuing a supplemental request for comments on the narrow issue of

³⁶ Order No. 669-A at P 83.

reporting requirements for the extension of 18 CFR 33.1(c)(12) to cover public utility dispositions to non-holding companies.

2. Clarification of the Supplemental Policy Statement

Request for Clarification

34. In the Supplemental Policy Statement,³⁷ the Commission declined to grant a generic blanket authorization for internal corporate reorganizations for the “transfer of assets” from one non-traditional utility subsidiary (for example, power marketer, EWG, or qualifying facility) to another non-traditional utility subsidiary, because the Commission cannot be certain in every situation of the impact of such transactions on utility affiliates.

35. EEI requests that the Commission clarify that the internal corporate reorganization of non-traditional public utilities, such as a merger or consolidation, in which a single entity survives the transaction does not constitute the “transfer of assets” that the Commission has excluded from the blanket authorization. It argues that the Commission made clear in Order No. 669-A that the blanket authorization covers internal corporate reorganizations of non-traditional utilities whether they are accomplished through the acquisition of securities or through a merger or consolidation. It also argues that internal corporate reorganizations of non-traditional utilities in the form of mergers and consolidations will not cause an anticompetitive effect or present cross-subsidization

³⁷ Supplemental Policy Statement at P 38.

issues because, in such transactions, ownership control over the assets will simply go from indirect to direct. EEI also notes that in reorganizations in which only one of the transacting entities survives the transaction, such as a merger or consolidation, ownership of jurisdictional assets by the surviving entity is assumed by law.

36. EEI maintains that the Commission's concern over the transfer of assets in a reorganization applies not to internal corporate reorganizations of non-traditional utilities in the form of mergers and consolidations, but to the contrasting type of reorganization where assets are transferred from one affiliate to another and both legal entities survive the transfer. EEI argues that if 18 CFR 33.1(c)(6) (authorization of internal reorganization not affecting a traditional public utility) were not interpreted so as to authorize the mergers of EWGs and other public utilities that do not have franchised territories simply because jurisdictional assets were transferred by operation of law in such mergers, there would be no practical distinction in the way the two types of reorganizations are treated under the 18 CFR 33.1(c)(6) blanket authorization.

Commission Determination

37. We grant EEI's request for clarification that the blanket authorization in 18 CFR 33.1(c)(6) applies to transactions involving the transfer of assets from one non-traditional utility subsidiary (i.e., a public utility that does not have captive customers and does not own or control transmission facilities) to another non-traditional utility subsidiary when only one of the two non-traditional utility subsidiaries survives the transaction. We find that such a transaction will be consistent with the public interest and not entail cross-

subsidization issues. Such a transaction would have no adverse effect on competition because market power is analyzed by the corporate family on an aggregate basis rather than on an individual corporate subsidiary basis (e.g., the transfer of the ownership of a generator between wholly-owned subsidiaries has no effect on the potential market power of the parent corporation). Such a transaction would also have no adverse effect on rates, regulation, or inappropriate cross-subsidization because the participants in the transaction neither have captive customers nor own or control transmission facilities.

IV. Information Collection Statement

38. The Office of Management and Budget (OMB) regulations require that OMB approve certain information collection requirements imposed by an agency.³⁸ The Final Rule's information collections were approved under OMB control no. 1902-0082. While this rule clarifies aspects of the existing information collection requirements, it does not add to these requirements. Accordingly, a copy of this Final Rule will be sent to OMB for informational purposes only.

V. Document Availability

39. 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 FERC's Home Page

³⁸ 5 CFR 1320.12.

(<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

40. From FERC's Home Page on the Internet, this information is available on 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 this document in the docket number field.

41. User assistance is available for eLibrary and FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email 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.

V. Effective Date

42. These revisions in this order on rehearing are effective [insert date 30 days from publication in **FEDERAL REGISTER**].

List of subjects in 18 CFR part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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

PART 33 – APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

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

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352; Pub. L. No. 109-58, 119 Stat. 594.

2. In 33.1, paragraph (c)(12) is revised and paragraph (c)(16) is added to read as follows:

§ 33.1 Applicability, definitions, and blanket authorizations.

* * * * *

(c) Blanket Authorizations.

* * * * *

(12) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to:

(i) any holding company granted blanket authorizations in paragraph (c)(2)(ii) of this section if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility; or

(ii) any person other than a holding company if, after the transfer, such person and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility.

* * * * *

(16) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, the contract does not convey control over the operation of a generation or transmission facility, and the acquirer is a public utility.