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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 2 and 33

(Docket No. RM05-34-002; Order No. 669-B)

Transactions Subject to FPA Section 203

(Issued July 20, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing of Order No. 669-A.

SUMMARY: The Federal Energy Regulatory Commission (Commission) affirms, with certain clarifications, its determinations in Order Nos. 669 and 669-A. Order Nos. 669 and 669-A revised 18 CFR section 2.26 and 18 CFR Part 33 to implement amended section 203 of the Federal Power Act.

DATES: This order on rehearing will be effective on [Insert date 30 days after the date of publication in **FEDERAL REGISTER**].

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeem G. Kelly.

Transactions Subject to FPA Section 203

Docket No. RM05-34-002

ORDER NO. 669-B

ORDER ON REHEARING AND CLARIFICATION

(Issued July 20, 2006)

1. In this order we affirm, with certain clarifications, the determinations made in Order Nos. 669¹ and 669-A.²

I. Introduction

2. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005)³ was signed into law. Section 1289 (Merger Review Reform) of Title XII, Subtitle G (Market

¹ Transactions Subject to FPA Section 203, Order No. 669, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005). On January 10, 2006, the Commission issued an errata notice to Order No. 669 revising parts of the regulatory text to conform to the version of the order that was issued in the Federal Register. Transactions Subject to FPA Section 203, Docket No. RM05-34-000 (Jan. 10, 2006) (unpublished errata notice).

² Transactions Subject to FPA Section 203, Order No. 669-A, Order on Rehearing, 71 FR 28422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214 (2006).

³ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

Transparency, Enforcement, and Consumer Protection),⁴ of EPCA 2005 amends section 203 of the Federal Power Act (FPA).⁵

3. On October 3, 2005, the Commission issued a notice of proposed rulemaking (NOPR) requesting comment on its proposal to amend its regulations to implement amended section 203.⁶ On December 23, 2005, the Commission issued a final rule (Order No. 669) adopting certain modifications to 18 CFR 2.26 and 18 CFR Part 33 to implement amended section 203.⁷ Generally, Order No. 669:

- (1) Established regulations implementing amended section 203;
- (2) Granted blanket authorizations, in some instances with conditions, for certain types of transactions, including acquisitions of foreign utilities by holding companies, intra-holding company system financing and cash management arrangements, certain internal corporate reorganizations, and certain acquisitions of securities of transmitting utilities and electric utility companies;
- (3) Defined terms, including “electric utility company,” “holding company,” and “non-utility associate company;”
- (4) Defined “existing generation facility;”
- (5) Adopted rules on the determination of “value” as it applies to various section 203 transactions;

⁴ EPCA 2005 at 1281 *et seq.*

⁵ 16 U.S.C. 824b (2000).

⁶ Transactions Subject to FPA Section 203, 70 FR 58636 (Oct. 7, 2005), FERC Stats. & Regs. ¶ 32,589 (2005).

⁷ A full background to Order Nos. 669 and 669-A is set forth in detail in those orders and will not be repeated in full here.

(6) Set forth a section 203 applicant's obligation to demonstrate that a proposed transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company; and

(7) Provided for expeditious consideration of completed applications for the approval of transactions that are not contested, do not involve mergers, and are consistent with Commission precedent.

4. In Order No. 669, the Commission also announced that, at a technical conference on the Public Utility Holding Company Act of 2005 (PUHCA 2005),⁸ to be held within the next year,⁹ we would reevaluate certain issues raised in this proceeding. These issues include whether the blanket authorizations granted in Order No. 669 should be revised, and whether additional protection against cross-subsidization and pledges or encumbrances of utility assets is needed.¹⁰ Order No. 669 became effective on February 8, 2006.

⁸ EPart 2005 at 1261 et seq. 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) (PUHCA 2005 Final Rule), order on reh'g, Order No. 667-A, 71 FR 28446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213 (2006) (PUHCA 2005 Order on Rehearing), reh'g pending.

⁹ PUHCA 2005 Final Rule at P 17. The Commission stated that we intend to hold a technical conference no later than one year after PUHCA 2005 became effective to evaluate whether additional exemptions, different reporting requirements, or other regulatory actions need to be considered. The PUHCA 2005 Final Rule took effect on February 8, 2006.

¹⁰ Order No. 669 at P 4.

5. On April 24, 2006, the Commission issued an order on rehearing (Order No. 669-A), reaffirming in part and granting rehearing in part of Order No. 669. Order No. 669-A addressed certain inconsistencies between Order No. 669 and the PUHCA 2005 Final Rule, expanded the focus on protection of captive customers, revised certain blanket authorizations, and provided new blanket authorizations. Among its holdings, the Commission:

(1) affirmed its determination that persons that own only Exempt Wholesale Generators (EWGs), Qualifying Facilities (QFs), or Foreign Utility Companies (FUCOs) are holding companies subject to section 203(a)(2);

(2) found that while EWGs, QFs and FUCOs are “electric utility companies” for purposes of PUHCA and for purposes of section 203, persons that are holding companies solely by virtue of owning EWGs, QFs or FUCOs should be granted a new blanket authorization to acquire additional EWGs, QFs and FUCOs without Commission pre-approval under section 203(a)(2);

(3) modified the regulatory text to clarify that public utilities have blanket authorization under section 203(a)(1) to acquire securities of other public utilities in the context of intra-system cash management transactions, subject to protections against cross-subsidization and encumbrances of utility assets;

(4) modified the regulatory text to provide, similar to the previously granted blanket authorization under section 203(a)(2) for certain holding company transactions involving internal corporate reorganizations, a blanket authorization under section 203(a)(1) for internal corporate reorganizations within the holding company, as long as the restructuring does not result in the reorganization of a traditional public utility that has captive customers or that owns or provides transmission service over Commission-jurisdictional transmission facilities;

(5) granted additional blanket authorizations to certain holding companies and their subsidiaries regulated by the Bank Holding Company Act of 1956¹¹ to acquire securities in the normal course of business, as a fiduciary, for derivatives hedging purposes incidental to the business of banking, as collateral for a loan or other limited purposes, but subject to certain restrictions and reporting requirements; and

(6) established a blanket authorization for certain acquisitions of utility securities for purposes of underwriting and hedging transactions, but subject to conditions and reporting requirements.

6. The Commission on rehearing also added several important customer protection changes, including clarifying that “captive customers” include wholesale and retail electric energy customers served under cost-based regulation with respect to exemptions, and providing that certain blanket authorizations do not apply if a public utility owns or provides transmission service over Commission-jurisdictional transmission facilities. Regarding blanket authorization for holding companies to acquire securities of intrastate-only, local distribution-only and/or retail-only utilities, if there is any public utility within the holding company with captive customers or that owns or provides transmission service over jurisdictional facilities, Order No. 669-A also included a new condition that such company report the acquisition to the Commission, including any state actions or conditions related to the transaction, and provide an explanation of why the transaction does not result in cross-subsidization.

¹¹ 12 U.S.C. 1843 (2000).

7. With respect to all section 203 transactions that do not receive a blanket authorization, the Commission on rehearing added to the regulatory text a specific requirement that an applicant disclose existing pledges and/or encumbrances of utility assets and provide four specific detailed showings that the proposed transaction will not result in cross-subsidization or pledges or encumbrances of utility assets or, if assurances cannot be provided that cross-subsidization, pledges or encumbrances will not occur, an explanation of how such cross-subsidization, pledge or encumbrance will be consistent with the public interest.

8. The Commission also reiterated that it will hold a technical conference this year to reevaluate numerous issues raised in both this proceeding and the PUHCA 2005 rulemaking proceeding. In Order No. 669-A, the Commission committed to consider additional issues raised in this proceeding, including whether the Commission should codify specific safeguards that must be adopted for money pool transactions, and whether our current merger policy should be revised.¹²

9. Order No. 669-A became effective on June 15, 2006. The aspects of Order No. 669-A for which requests for rehearing and clarification were filed are described in more detail below.¹³

¹² Order No. 669-A at P 91, 162.

¹³ The entities that filed requests for rehearing and/or clarification are listed in an appendix to this order.

II. Discussion

10. The requests for rehearing and/or clarification collectively address five categories of issues discussed in Order No. 669-A. As discussed below, we deny rehearing, and grant in part and deny in part requests for clarification on each of these issues.

A. **18 CFR Section 33.1(b)(4) – Definition of “Electric Utility Company” and 18 CFR Section 33.1(c)(1)(i) and (ii) – Blanket Authorizations for Intrastate Commerce and Local Distribution**

11. Section 203(a)(2) provides:

No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, 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, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

12. The definition of the term “electric utility company” is important because it affects whether an entity is a holding company subject to section 203(a)(2). In Order Nos. 669 and 669-A, the Commission concluded that the most reasonable interpretation of the term, as used in amended section 203(a)(2), is the definition in PUHCA 2005 – “any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale.”¹⁴ The definition thus is broader than the

¹⁴ EAct 2005 at 1262(5).

definition of “public utility” under the FPA; it is not limited to entities that engage in wholesale or interstate transactions.

13. However, while Order Nos. 669 and 669-A found that it was not reasonable to interpret section 203(a)(2) as being limited solely to holding company acquisitions and mergers involving utilities making wholesale sales or providing transmission in interstate commerce, the Commission concluded that there would be no benefit from the Commission’s case-by-case evaluation of certain transactions under section 203(a)(2).¹⁵ The Commission explained that our core jurisdiction under Part II of the FPA continues to be transmission and sales for resale of electric energy in interstate commerce. Accordingly, we concluded that it is consistent with the public interest to grant blanket authorizations for the following: (1) section 203(a)(2) purchases or acquisitions by holding companies of companies that own, operate, or control only facilities used solely for transmission or sales of electric energy in intrastate commerce; and (2) section 203(a)(2) purchases or acquisitions by holding companies of only facilities used solely for local distribution and/or sales at retail regulated by a state commission.¹⁶

¹⁵ An acquisition or merger involving “any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale” is not on its face limited to interstate facilities. Order No. 669 at P 55 n.51; Order No. 669-A at P 56 n.56.

¹⁶ Order No. 669 at P 56; Order No. 669-A at P 62-63.

14. In Order No. 669-A, the Commission clarified that it was not asserting jurisdiction over intrastate facilities, local distribution facilities, or retail-only companies under the blanket authorizations. Rather, it was asserting jurisdiction over holding company acquisitions of such companies or facilities for the purpose of ensuring that interstate interests are not adversely affected. The Commission also stated that it would eliminate these blanket authorizations if necessary to protect customers.¹⁷

1. Requests for Rehearing and Clarification

15. NARUC reiterates the arguments raised in its initial comments and request for rehearing of Order No. 669, asserting that Congress did not intend for the term “electric utility company,” as used in PUHCA 2005, to be incorporated into the Commission’s regulations implementing FPA section 203. First, NARUC argues that this interpretation violates the fundamental rule of statutory construction, expressio unius est exclusio alterius (express mention of one thing implies the exclusion of another). NARUC argues that the absence of an explicit expansion of the Commission’s jurisdiction over entities in the PUHCA 2005 definition of “electric utility company” “fatally undermines” the Commission’s justification of the result reached on rehearing.¹⁸ Second, NARUC argues that adoption of the term “electric utility company” improperly extends the Commission’s authority under amended section 203 to include facilities used for the transmission or

¹⁷ Order No. 669-A at P 63.

¹⁸ NARUC Rehearing Request at 4-5.

sales of electric energy in intrastate commerce, facilities used for local distribution, and facilities used for making retail sales. NARUC states that such facilities fall under the exclusive jurisdiction of state commissions.¹⁹ Moreover, NARUC asserts that, based on the Commission's overreach in jurisdiction over such entities, the Commission erred in granting a blanket authorization for holding company acquisitions of facilities used solely in intrastate commerce or used solely for local distribution and/or sales at retail regulated by a state commission. NARUC argues that the Commission's justifications for these blanket exemptions are valid, but the Commission's stated rationale provides further evidence that the Commission lacks jurisdiction over such entities.²⁰

2. Commission Determination

16. NARUC's request for rehearing is denied. NARUC's request for rehearing reiterates arguments made in its rehearing request of Order No. 669. The Commission addressed those arguments fully in Order No. 669-A.²¹

17. NARUC also argues that the Commission erred in Order No. 669-A in granting blanket authorizations of holding company acquisitions of facilities that NARUC asserts are outside the Commission's statutory authority. NARUC notes that the Commission gave three reasons for granting these blanket authorizations and argues that these reasons

¹⁹ Id. at 5-6.

²⁰ Id. at 6-7.

²¹ See Order No. 669-A at P 41-54.

actually highlight why the Commission does not have jurisdiction over these matters. As the basis for this error, NARUC repeats the same argument made on rehearing of Order No. 669. The Commission responded fully to that argument as well in Order No. 669-A.²²

B. 18 CFR Section 33.1(c)(7) – Blanket Authorization for Cash Management Programs

18. In Order No. 669, the Commission stated that cash management programs, money pools, and other intra-holding company financing arrangements²³ are a routine and important tool used by many large companies to lower the cost of capital for their regulated subsidiaries and to improve the rate of return the holding company and its subsidiaries can receive on their money.²⁴ The Commission found that it was consistent with the public interest to grant blanket authorization under section 203(a)(2) for holding companies and their subsidiaries to take part in intra-system cash management programs.²⁵

²² See id. P 62-63.

²³ Order No. 669 at P 142; see also Order No. 669-A at P 84 (citing Regulation of Cash Management Practices, Order No. 634, 68 FR 40500 (July 8, 2003), FERC Stats. & Regs. ¶ 31,145 (2003) (Cash Management Rule), Order No. 634-A, 68 FR 61993 (Oct. 31, 2003), FERC Stats. & Regs. ¶ 31,152 (2003) (Cash Management Rule II)).

²⁴ Order No. 669 at P 142.

²⁵ Id.

19. In Order No. 669-A, the Commission granted clarifications regarding this blanket authorization. The Commission clarified that the blanket authorization granted for money pool transactions is intended to authorize “horizontal” transactions between public utility company subsidiaries as well as “downward” loans from the holding company to its public utility company subsidiaries. However, the blanket authorization does not cover acquisitions of securities issued by entities outside the established intra-system cash management program²⁶ or money pool.²⁷

1. Requests for Rehearing and Clarification

20. In the time between the issuance of Order No. 669 and the issuance of Order No. 669-A, several entities sought explicit Commission approvals for certain of their subsidiary-to-subsidary transactions, transactions in their money pools and other such cash management programs. EEI notes that, in several of these cases, the Commission granted such approval, subject to limits and reporting requirements imposed under the authorizations previously issued by the Securities and Exchange Commission (SEC).²⁸ The limits and reporting requirements put in place by the SEC differ from those in Order

²⁶ 18 CFR 33.1(c)(7).

²⁷ Order No. 669-A at P 89.

²⁸ EEI Rehearing Request at 5-6 (citing Exelon Corporation, 114 FERC ¶ 61,116 (2006) (Exelon)). EEI identifies only one of the orders in a group that it calls the “Intervening Orders” – Exelon. Two similar orders, issued the same day, are Entergy Services, Inc., 114 FERC ¶ 61,120 (2006) (Entergy) and National Grid plc and National Grid USA, 114 FERC ¶ 61,115 (2006) (National Grid). The group of three will be referred to as the “Intervening Orders.”

No. 669-A. EEI seeks clarification that the companies with Intervening Orders do not have to comply with the restrictions of their former SEC financing orders, as of the effective date of Order No. 669-A.²⁹

21. Second, EEI notes that the preamble to Order No. 669-A describes the blanket authorization as covering transactions only within a “money pool,”³⁰ while the regulatory text uses the broader term, “intra-system cash management program.”³¹ EEI argues that the Commission should not distinguish between formal money pools and other, less formal intra-system lending arrangements. It asks the Commission to clarify that subsidiary-to-subsidiary loans are authorized as part of cash management programs even if such loans are not under formal money pool arrangements.³²

2. Commission Determination

22. We will grant in part EEI’s request for clarification on the first issue. To the extent companies with Intervening Orders engage in activities within Order No. 669-A’s blanket authorizations, those activities are not subject to the SEC limits and reporting requirements incorporated by the Intervening Orders. However, activities exceeding Order No. 669-A’s blanket authorizations remain subject to the SEC limits and reporting

²⁹ EEI Rehearing Request at 4-8.

³⁰ Id. at 6 (citing Order No. 669-A at P 89).

³¹ Id. (citing 18 CFR 33.1(c)(7)).

³² Id. at 8-9.

requirements incorporated by the Intervening Orders.³³ Activities authorized by the Intervening Orders were conditioned on compliance with the prior SEC limits and reporting requirements. Thus, we will waive those conditions only for activities subsequently authorized generally in Order No. 669-A. Those activities will be subject to the restrictions and requirements of Order No. 669-A, instead of the Intervening Orders.

23. EEI's second request for clarification, regarding whether subsidiary-to-subsidiary loans are authorized as part of cash management programs even if such loans are not under formal money pool arrangements, is granted. Order No. 669-A's preamble inadvertently suggested a narrower authorization than its regulatory text. However, the blanket authorization granted under Order No. 669-A for a public utility subsidiary within a holding company system to acquire the security of another public utility within the system (horizontal transactions) specifically depends on the transaction occurring within the system's cash management program, subject to safeguards to prevent cross-subsidization or pledges or encumbrances of utility assets.³⁴ Further, we note that the Commission's Cash Management Rule prescribes certain documentation requirements for entities participating in cash management programs. For example, Cash Management Rule II requires that cash management agreements be filed with the Commission on a

³³ See Exelon, 114 FERC ¶ 61,116 at P 9; Entergy, 114 FERC ¶ 61,120 at P 10; National Grid, 114 FERC ¶ 61,115 at P 10.

³⁴ 18 CFR 33.1(c)(7).

public basis.³⁵ Neither rule prohibits participation by a holding company in a cash management program in which the holding company's Commission-regulated public utility subsidiary also participates, nor do they dictate the content of or terms for participating in a cash management program.³⁶ Both rules, however, were issued under a broad array of statutory authority reaching many Commission-regulated entities, including public utilities under sections 203 and 204 of the FPA, in order to provide greater transparency of cash management activities.³⁷ With this background, we clarify that the blanket authorization in Order No. 669-A applies to activities that are part of cash management programs, even if they are not part of a formal money pool. Finally, we will reevaluate whether any changes need to be made to our Cash Management Rule in the technical conference to be held later this year.

C. Section 33.1(c)(2) – Blanket Authorizations for Purchases of Securities

24. In Order Nos. 669 and 669-A, the Commission provided a blanket authorization under section 203(a)(2) for holding companies to purchase, acquire, or take: (i) any non-voting security (that does not convey sufficient veto rights over management actions so as to convey control) in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric

³⁵ Cash Management Rule II at P 43.

³⁶ Cash Management Rule at P 45; Cash Management Rule II at P 31, 36.

³⁷ Cash Management Rule II at P 19.

utility company; (ii) any voting security in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric utility company if, after the acquisition, the holding company will own less than 10 percent of the outstanding voting securities; or (iii) any security of a subsidiary company within the holding company system.³⁸

25. On rehearing, the Commission declined to extend to public utilities under section 203(a)(1) the blanket authorizations for dispositions of utility securities of less than 10 percent that we granted to public utility holding companies under section 203(a)(2). The Commission decided that it would continue to review dispositions of jurisdictional facilities by public utilities under FPA section 203(a)(1) on a case-by-case basis, finding that “[c]oncerns with control, markets and protection of captive customers or customers receiving transmission service over jurisdictional transmission facilities are closely linked with assets directly controlled by the public utilities.”³⁹

1. Requests for Rehearing and Clarification

26. EEI reiterates arguments, previously denied on rehearing, that the Commission should grant a blanket authorization under section 203(a)(1) for a public utility to dispose of up to 9.99 percent of its voting securities. Such authority, it argues, would parallel the blanket authorization granted in Order No. 669-A for holding companies to acquire up to

³⁸ 18 CFR 33.1(c)(2). See also Order No. 669 at P 144-45; Order No. 669-A at P 97, 101-03.

³⁹ Order No. 669-A at P 103.

9.99 percent of voting securities of a transmitting utility or electric utility company and therefore, would be appropriate. EEI does not formally seek rehearing on this issue and, indeed, a second rehearing on the issue does not lie. However, in light of EEI's concerns that lack of a section 203(a)(1) parallel blanket authorization could thwart investment, we will include this issue in the technical conference to be held within one year of the effective date of amended section 203 and PUHCA 2005. EEI also seeks clarification on transactions that involve securities with a value below \$10 million. EEI does not believe such transactions require authorization under section 203(a)(1) even if 10 percent or more voting securities are involved. It asks the Commission to confirm that the \$10 million threshold is a minimum jurisdictional amount, regardless of the percentage of voting stocks involved.

27. EEI also asks that the Commission clarify that dispositions of less than 10 percent or more of voting securities, and of any amount of non-voting securities, do not require section 203(a)(1) review.⁴⁰

2. Commission Determination

28. The Commission clarifies that, if a section 203(a)(1)(C) transaction involves securities with a value below \$10 million, the transaction does not require authorization under section 203(a)(1)(C) even if 10 percent or more of voting securities are involved. Section 203(a)(1) addresses four types of transactions in separate parts. Under parts (A),

⁴⁰ EEI Rehearing Request at 10-12.

(C) and (D), a value in excess of \$10 million is indeed the threshold below which section 203(a)(1) does not apply, unless a public utility is disposing of the whole of its facilities under section 203(a)(1)(A).⁴¹

29. On the question of the 10 percent limitation, EEI relies on Goldman Sachs⁴² as support for its suggestion that the Commission adopt a jurisdictional threshold of 10 percent of voting securities before a public utility must seek authorization for transactions under section 203(a)(1). As noted, rehearing was already denied on this issue. EEI asks for blanket authorization under section 203(a)(1) for public utilities to engage in transactions involving non-voting securities in any amount. EEI cites to paragraph 15 of Goldman Sachs, but that paragraph does not support EEI's contention. The Commission provided there an example of how a group of non-utility companies under common control might each purchase just under 10 percent of a public utility, but stop at that point in order to avoid becoming holding companies under section 1262(8) of EPCA 2005 and, therefore, potentially subject to section 203(a)(2). The Commission explained that

⁴¹ Section 203(a)(1)(A) provides that no public utility shall, without having secured an order authorizing it to do so: "sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000." Because of the placement of the comma in this sentence, we do not interpret the \$10,000,000 threshold as applying to dispositions of the whole of a utility's jurisdictional facilities.

⁴² EEI Rehearing Request at 10 (citing The Goldman Sachs Group, Inc., 114 FERC ¶ 61,118, at P 15 (Goldman Sachs), order on reh'g, 115 FERC ¶ 61,303 (2006)).

authorization for such transactions may nevertheless require approval under other provisions of section 203, and specifically mentioned sections 203(a)(1)(A) and (B). This was not a suggestion that acquisitions of voting securities in an amount less than 10 percent or that acquisitions of non-voting securities in any amount cannot trigger the requirement for prior authorization by the Commission. Accordingly, EEI's request for clarification on this issue is denied.

D. 18 CFR Section 33.1(c)(8) – Blanket Authorization for a Holding Company Owning Only EWGs, QFs or FUCOs To Acquire Additional EWGs, QFs or FUCOs

30. In Order No. 669, the Commission rejected requests that we determine that only companies that own traditional utilities, not those that own solely FUCOs, EWGs and/or QFs, are “holding companies” under amended section 203.⁴³ The Commission noted that “holding company” in PUHCA 2005 means “any company that directly or indirectly owns, controls, or holds, with the power to vote, 10 percent or more of the outstanding voting securities of a public utility company or of a holding company of any public utility company;...”⁴⁴ PUHCA 2005 defines “public-utility company” to include an “electric utility company.”⁴⁵

⁴³ Order No. 669 at P 70.

⁴⁴ Id. (citing EAct 2005 at 1262(8)).

⁴⁵ EAct 2005 at 1262(14).

31. The Commission found that while Congress expressly excluded from the definition of holding company certain banks and other institutions, it did not similarly exclude from the definition of holding company entities that only own QFs, EWGs or FUCOs. Rather, section 1266(a) of PUHCA 2005 specifically directs the Commission to exempt QF/EWG/FUCO holding companies from the federal access to books and records provision; thus, the very language of the provision recognizes that such entities are holding companies. It directs the Commission to issue a final rule to exempt “any person that is a holding company, solely with respect to one or more [QFs, EWGs, or FUCOs].” Therefore, consistent with the concurrent determination in the PUHCA 2005 rehearing order, the Commission concluded that companies that acquire 10 percent or more of an EWG, FUCO or QF are holding companies as that term is used in PUHCA 2005 as well as FPA section 203(a)(2).⁴⁶

32. However, to ensure that investment in the electric industry is not hampered and that encouragement of QFs is not undermined, the Commission granted a blanket authorization under FPA section 203(a)(2) for holding companies that own or control only EWGs, QFs or FUCOs to acquire the securities of additional EWGs, FUCOs or QFs.⁴⁷

⁴⁶ Order No. 669-A at P 49-51.

⁴⁷ Id. at P 52; 18 CFR 33.1(c)(8).

1. Requests for Rehearing and Clarification

33. TAPSG states that the Commission erred in creating a new blanket authorization under section 203(a)(2) for holding companies that own or control only EWGs, QFs, or FUCOs to acquire the securities of additional EWGs, QFs, or FUCOs.⁴⁸ TAPSG asserts that the blanket authorization overlooks Congressional concern about the competitive effects of transfers of generation facilities and creates confusion that would discourage, rather than encourage, new investment. It contends that a holding company's acquisition of additional EWGs and QFs in the same geographic market could raise competitive concerns, particularly if the holding company owns other EWGs or QFs in the same geographic market that is a load pocket. TAPSG also argues that the confusion created by the blanket authorization under section 203(a)(2), in conjunction with section 203(a)(1) review of certain EWG and QF transactions, will create uncertainty that could chill, rather than encourage investment. TAPSG further argues that, if the Commission does not rescind the blanket authorization in 18 CFR section 33.1(c)(8), it should clarify which transactions remain subject to section 203(a)(1) review.

34. In this regard, TAPSG and APPA/NRECA ask the Commission to affirm the conclusion in Order No. 669 that a holding company's acquisition of securities of an EWG that is a public utility, by which the holding company acquires control of the EWG, is a disposition of jurisdictional assets by the EWG and requires a filing with

⁴⁸ TAPSG Rehearing Request at 2-5.

Commission under FPA section 203(a)(1) by the EWG.⁴⁹ APPA/NRECA argue that this clarification is important because a single holding company could gain market power by acquiring a number of EWGs in a relevant geographic market.

35. TAPSG and APPA/NRECA request clarification that the blanket authorization does not override the Commission's conclusion regarding the scope of section 203(a)(1)(D), concerning the acquisition of an existing generation facility with a value of \$10 million that is used for interstate wholesale sales and over which the Commission has jurisdiction, and that if a public utility acquires an existing generation facility used for Commission-jurisdictional sales, whether a QF or any other type of generation facility, the transaction is subject to section 203 review. TAPSG argues that the plain language of section 203(a)(1)(D) requires the review of acquisitions of generators, such as EWGs.⁵⁰

36. Moreover, TAPSG requests that the Commission clarify that a transaction will trigger section 203(a)(1)(D) review when a holding company that controls an EWG that is a public utility acquires another EWG or QF. They maintain that this is required by Enova Corporation and Pacific Enterprises (Enova).⁵¹ In addition, TAPSG argues that

⁴⁹ Id. at 5-6 (citing Order No. 669 at P 60 n.55); APPA/NRECA Rehearing Request at 9-12 (same).

⁵⁰ TAPSG Rehearing Request at 6-7 (citing Order No. 669 at P 87); APPA/NRECA Rehearing Request at 11-12.

⁵¹ TAPSG Rehearing Request at 7-8 (citing Enova, 79 FERC ¶ 61,107, at 61,494 (1997)); APPA/NRECA Rehearing Request at 11 (citing Enova, 79 FERC ¶ 61,107 at

under Enova, section 203(a)(1)(D) review is required: (1) for the acquisition of another EWG or QF where the holding company itself is not a public utility but owns or controls a public utility (such as an EWG), and (2) for the acquisition by a holding company that is not a public utility of a holding company that is not itself a public utility but that owns a public utility.⁵²

37. In summary, TAPSG asks the Commission to clarify that the section 203(a)(2) blanket authorization applies only to: (1) “a holding company owning/controlling only EWGs, QFs, or FUCOs that (a) is not a public utility, (b) does not yet own or control a public utility (such as an EWG), and (c) is acquiring its first EWG or QF”; or (2) “a holding company owning/controlling only EWGs, QFs, or FUCOs that acquires a FUCO.”⁵³

38. In comparison, Occidental requests that the Commission clarify (or, in the alternative, grant rehearing) that the section 203(a)(2) blanket authorization in section 33.1(c)(8) applies to an acquisition of securities of holding companies that are holding companies solely with respect to holding EWGs, QFs, or FUCOs.⁵⁴ Occidental argues that it would be inconsistent with the intent of Order No. 669-A for the acquisition of

61,491-94 and Central Vermont Public Service Corporation, 39 FERC ¶ 61,295, at 61,960 (1987)).

⁵² TAPSG Rehearing Request at 8.

⁵³ Id.

⁵⁴ Occidental Rehearing Request at 3-5.

securities of such holding companies not to also be covered by this blanket authorization.⁵⁵ In addition, Occidental argues that it would be arbitrary and capricious to provide blanket authorization for holding companies that own or control only EWGs, QFs, or FUCOs only when they acquire directly the securities of additional EWGs, QFs or FUCOs and not where the acquisition is structured as acquisition of securities of a holding company that holds only EWGs, QFs, or FUCOs. Occidental argues that what it requests would not undermine any Commission policy or efforts to prevent cross-subsidization. Occidental argues that not granting blanket authority for the acquisition of securities of such holding companies will create unnecessary burdens on transactions and discourage investment in the electric industry.

2. Commission Determination

39. We reject TAPSG's request to rescind the blanket authorization in section 33.1(c)(8), granted under section 203(a)(2) for holding companies that own or control only EWGs, QFs, or FUCOs to acquire the securities of additional EWGs, FUCOs, or QFs. The concerns raised in TAPSG's rehearing petition are focused on the competitive effects of generation transfers involving EWGs and QFs if this section 203(a)(2) blanket authorization is retained. As an initial matter (and as discussed further below), we note that this blanket authorization in no way affects any section 203(a)(1) authorizations required by EWGs themselves. The vast majority of EWGs located in the United States

⁵⁵ Id. (citing Order No. 669-A at P 52).

are public utilities and, to the extent such EWGs seek to sell or transfer control of their jurisdictional facilities to a holding company, such EWGs will be subject to a competitive review of the transaction under section 203(a)(1)(A), irrespective of the holding company's blanket exemption.⁵⁶ Thus, TAPSG's concerns that EWG acquisitions will escape competitive review are misplaced.

40. With respect to QFs, many QFs (cogeneration QFs, non-geothermal small power production QFs with capacity of 30 MWs or less, and geothermal small power production) are exempt from section 203 of the FPA and thus are not treated as public utilities subject to section 203(a)(1)(A); thus, unlike the situation with EWGs, if such QFs were to sell or transfer control of their jurisdictional facilities to a holding company, there would be no competitive review by the Commission under section 203(a)(1).⁵⁷ However, what TAPSG ignores is that there was no federal review of such transactions by this

⁵⁶ Further, although most holding companies are not public utilities, to the extent a holding company is also a public utility, a transaction in which it acquired an EWG's or QF's generation facilities (if such facilities are used for jurisdictional wholesale sales) may trigger the requirements of section 203(a)(1)(D).

⁵⁷ However, if a transaction involved a public utility and a QF, section 203 review, including a competitive review, may be required. If a public utility acquires all or part of a QF's jurisdictional facilities, the transaction may be subject to FPA section 203(a)(1)(A). Similarly, if a public utility proposes to merge or consolidate its facilities with those of a QF, the transaction would be subject to section 203(a)(1)(B), which applies when a public utility merges or consolidates its facilities with those of "any other person." "Person" would include a QF. Further, a transaction in which a public utility seeks to acquire a QF's existing generation facility (if the QF facility is used for jurisdictional wholesale sales) may trigger section 203(a)(1)(D).

Commission or by the SEC prior to EAct 2005. QFs were largely exempted from PUHCA 1935 regulation by virtue of the Commission's exemption authority under the Public Utility Regulatory Policies Act of 1978 (PURPA), and companies that owned QFs (or EWGs, for that matter) were not considered holding companies by virtue of owning an EWG or QF under PUHCA 1935. Accordingly, our blanket exemption here does nothing more than maintain the status quo with respect to any regulatory review required of holding company acquisitions of QF facilities.⁵⁸ While we recognize the possibility that market power issues associated with QF ownership could become a concern in the future, even where the ownership is by a holding company that owns only QFs, EWG and FUCOs and there are no captive customers in the entire holding company system, TAPSG has not convinced us that there is a problem to remedy at this time or that our decision in any way undermines Congressional intent. Further, if in the future problems become apparent with respect to holding company acquisitions of QFs, the Commission may revisit the exemption from section 203 provided to QFs under PURPA and/or revisit the section 203(a)(2) blanket authorization at issue here.⁵⁹ We also disagree with TAPSG

⁵⁸ We also have weighed the fact that to require new case-by-case review of holding company acquisitions of QFs could impose a substantial burden on QFs.

⁵⁹ We note that in the Commission's recent rulemaking implementing revised section 210(n) of PURPA, the Commission proposed to eliminate certain QF exemptions from FPA sections 205 and 206 and sought comment on whether it should eliminate other exemptions. In the final rule, however, the Commission retained the FPA section 203 exemption. Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 FR 7,852 at P 102 (Feb. 15, 2006), FERC Stats. & Regs. P

that the blanket authority creates any confusion that would discourage investment, and no other commenter argues that this is the case. At this time, we see no added benefit from the Commission's case-by-case evaluation of these transactions under section 203(a)(2).⁶⁰

41. Moreover, TAPSG does not explain why we should limit the applicability of the blanket authority in 18 CFR section 33.1(c)(8) to situations where: (1) the holding company is not and does not own a public utility, and is acquiring its first EWG or QF; or (2) the holding company is acquiring a FUCO. As noted, it is likely that section 203(a)(1) would be triggered in any event for EWGs and, in many instances, QFs. Therefore, TAPSG's request that this restriction be placed on the applicability of the blanket authority is denied.

42. We grant APPA/NRECA's request to clarify that a holding company's acquisition of the securities of an EWG public utility, by which the holding company acquires control of the public utility EWG, may be a jurisdictional disposition of assets by the EWG, which requires approval under section 203(a)(1) even if the holding company has blanket authority under section 203(a)(2). The blanket authority under section 203(a)(2) in no way affects whether separate authorization for a particular transaction is required under section 203(a)(1). We reaffirm the statements made in Order No. 669 regarding

31,203 (2006), order on reh'g, Order No. 671-A, 71 FR 30,585 (May 30, 2006), FERC Stats. & Regs. P 31,219 (2006).

⁶⁰ See Order No. 669 at P 55; Order No. 669-A at P 56, 62.

section 203(a)(1) review regarding EWGs⁶¹ and QFs.⁶² Granting blanket authority in section 33.1(c)(8) under section 203(a)(2) does not affect authorizations required under section 203(a)(1). Thus, TAPSG and APPA/NRECA's requests for clarification to this effect are granted.

⁶¹ Order No. 669 at P 60 n.55 stating:

[A] holding company acquisition of securities of an EWG would in some circumstances trigger section 203 review in any event by virtue of section 203(a)(1). This is because the EWG could well be a public utility and, to the extent the holding company acquired "control" of the EWG, we would construe the EWG to be "disposing" of its jurisdictional facilities and thus required to file for approval under section 203(a). A similar situation involving acquisition of securities of a QF would not trigger section 203 review, since QFs currently are exempted from FPA section 203 filing requirements by the Commission's PURPA regulations.

⁶² Id. P 87 stating:

[I]f a public utility acquires an existing generation facility used for Commission-jurisdictional sales, whether a QF or any other type of generation facility, the transaction is subject to section 203. Although certain QFs themselves are exempted from any filing requirements under section 203 by virtue of our PURPA regulations, this does not mean that public utilities that acquire QFs are exempt. Additionally, there is no limitation in amended section 203(a)(1)(D) on the type of generation facilities that trigger section 203 review, if they are used for interstate wholesale sales and the Commission has jurisdiction over them for ratemaking purposes. Further, even if the Commission had the discretion to exempt QF acquisitions from section 203 review, we do not think it would be necessarily consistent with the public interest to do so in light of EAct 2005's elimination of QF ownership restrictions.

43. We will continue to review dispositions of jurisdictional facilities by public utilities under section 203(a)(1) on a case-by-case basis and we will also review public utility acquisitions of generating facilities under the new section 203(a)(1)(D) on a case-by-case basis.⁶³ TAPSG requests other clarifications interpreting section 203(a)(1) in light of the blanket authority granted in section 33.1(c)(8). In effect, it asks us to modify the section 203(a)(2) blanket authority and we decline to do so. TAPSG's requests for clarification to this effect are denied.

44. Finally, we agree with Occidental that Order No. 669-A should be interpreted to provide blanket authorization for holding companies that own or control only EWGs, QFs, or FUCOs to acquire securities of a holding company that holds only EWGs, QFs, or FUCOs. We do so, however, consistent with our prior holding in Order No. 669 that such acquisitions will trigger review under section 203(a)(1) if the transaction results in a change of control of an EWG that is a public utility owned by the holding company whose securities are being acquired.

E. Section 33.2(j) – General Information Requirements Regarding Cross-Subsidization

45. As modified by Order No. 669-A, section 33.2(j)(1) requires that a section 203 applicant must explain, with appropriate evidentiary support (Exhibit M to the application), how it is assuring that the proposed transaction will not result in cross-

⁶³ Order No. 669-A at P 103.

subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. This explanation must disclose all existing pledges or encumbrances of utility assets and include a detailed showing that the transaction will not result in: (A) transfers 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; (B) new issuances of securities by traditional public utility associate companies that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (C) new pledges or encumbrances 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 (D) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.⁶⁴ Section 33.2(j)(2) states that if no such assurance can be provided, the applicant must explain how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.⁶⁵

⁶⁴ 18 CFR 33.2(j)(1)(i) and (ii).

⁶⁵ Id. at 33.2(j)(2).

1. Requests for Rehearing and Clarification

46. APPA/NRECA argue that the Commission should amend 18 CFR 33.2(j)(1) to require that the explanation in Exhibit M address “how applicants are providing assurance that it is not reasonably foreseeable that the proposed transaction will 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.”⁶⁶ APPA/NRECA argue that the omission of the phrase “at the time of the transaction or in the future” from section 33.2(j)(1), a phrase found in the parallel regulation at section 33.1(c)(5) (the blanket authorization for holding companies that include a transmitting utility or an electric utility to acquire a FUCO), creates conflicting requirements and will “create confusion and invite abuse.”⁶⁷ APPA/NRECA assert that section 33.2(j)(1) is inconsistent with Congressional intent that the Commission have broad authority to ensure that section 203 transactions do not result in cross-subsidization or asset pledges or encumbrances, even after the transaction is consummated, unless the Commission has found that they are consistent with the public interest.

47. APPA/NRECA also ask that the Commission clarify or amend section 33.2(j) to state that Exhibit M must be verified by a duly authorized corporate official of the holding company under 18 CFR 385.2005 (Subscription and verification).

⁶⁶ APPA/NRECA Rehearing Request at 2 (emphasis in the original).

⁶⁷ Id. at 4.

APPA/NRECA argue this requirement is consistent with section 33.1(c)(5) and the Commission's existing regulations for section 203 applications.⁶⁸

48. Moreover, APPA/NRECA request the Commission clarify that if the Commission later finds that an approved transaction has resulted 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, the Commission may find that such cross-subsidization, pledge, or encumbrance violates the Commission order and the relevant entities can be penalized. APPA/NRECA maintain that this will help to ensure that the holding company and its senior corporate officials are held responsible for the statements made in a section 203 application and to provide them notice of the consequences of a violation.⁶⁹

2. Commission Determination

49. We will grant APPA/NRECA's request in part. The Commission does not accept APPA/NRECA's assertion that section 33.2(j)(1), as revised in Order No. 669-A, creates confusion and invites abuse simply because it contains different requirements than the regulation against which APPA/NRECA chose to compare it or that it is inconsistent with Congressional intent. We agree, however, that adding to the regulations a verification requirement regarding the contents of the application and a requirement for the exercise

⁶⁸ Id. at 6-7.

⁶⁹ Id. at 7-8.

of reasonable foresight in providing the explanation required under Exhibit M will help make the regulation more effective. With respect to reasonable foresight, we will modify the regulatory text of 18 CFR 33.2(j)(1) as follows:

Of how applicants are providing assurance, based on facts and circumstances known to them or that are reasonably foreseeable, 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. . . .

50. These changes will not create an undue burden on the applicants. Our rules already require that the information in the application be verified by one having knowledge of the matters contained in the application and exhibits.⁷⁰

51. In response to APPA/NRECA's request, the Commission clarifies that, if the Commission later finds that an approved transaction has resulted in cross-subsidization or a pledge or encumbrance, the Commission may find that it constitutes a violation of a Commission order and is subject to consequent penalties. Whether particular facts violate a Commission order is a matter for determination in an individual proceeding. If a violation is found, the appropriate remedy or penalty is also a matter properly addressed in that proceeding. Accordingly, a blanket statement in the regulations is not necessary.

⁷⁰ A specific verification requirement applicable to Exhibit M, as requested by APPA/NRECA, is unnecessary since, under section 33.7, the original application, of which Exhibit M is a part, must be "signed by a person or persons having authority with respect thereto and having knowledge of the matters therein set forth, and must be verified under oath."

III. Information Collection Statement

52. The regulations of the Office of Management and Budget (OMB)⁷¹ require that OMB approve certain information requirements imposed by an agency. OMB has approved the information requirements contained in Order Nos. 669 and 669-A. Specifically, OMB approved the following information collection and assigned the corresponding OMB control numbers: “Application under Federal Power Act Section 203” (FERC-519) (1902-0082). This order denies rehearing requests and only clarifies the provisions of Order Nos. 669 and 669-A. This order does not make substantive modifications to the Commission’s information collection requirements and, accordingly, OMB approval for this order is not necessary. However, the Commission will send a copy of this order to OMB for informational purposes.

53. Interested persons may obtain information on the information requirements by contacting the following: The Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426 [Attention: Michael Miller, Office of the Executive Director, ED-34], Phone: (202) 502-8415, Fax: (202) 273-0873, e-mail: michael.miller@ferc.gov.

54. To submit comments concerning the collection(s) of information and provide estimates on the associated burden of these requirements, please send your comments to the contact listed above and to the Office of Management and Budget, Office of

⁷¹ 5 CFR 1320.12 (2005).

Information and Regulatory Affairs, Washington, D.C. 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission], Phone: (202)395-4650. Comments should be e-mailed to oir_submission@omb.eop.gov and reference the OMB Control number listed above.

IV. Document Availability

55. 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 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 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

56. 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 "RM05-34" in the docket number field.

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

V. Effective Date

58. The revisions in this order on rehearing will become effective on [insert 30 days after publication in the **FEDERAL REGISTER**].

List of subjects in 18 CFR Part 2

Administrative practice and procedure, Electric power, Natural gas, Pipelines, Reporting and recordkeeping requirements

List of subjects in 18 CFR Part 33

Electric utilities; Reporting and recordkeeping requirements; Securities

The Commission orders:

Requests for rehearing are hereby denied and requests for clarification are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, under the authority of EAct 2005, the Commission is amending Part 33 of Chapter I, Title 18, Code of Federal Regulations, as set forth:

PART 33 – APPLICATIONS UNDER FEDERAL POWER ACT

SECTION 203.

1. Section 33.2 is revised to read as follows:

§ 33.2. Contents of application – general information requirements.

* * * * *

(j) An explanation, with appropriate evidentiary support for such explanation (to be identified as Exhibit M to this application):

(1) Of how applicants are providing assurance, based on facts and circumstances known to them or that are reasonably foreseeable, that the proposed transaction will not result in, at the time of the transactions 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, including:

* * * * *

APPENDIX A

NOTE: The following Appendix will not be published in the Code of Federal Regulations.

List of Petitioners Requesting Rehearing and/or Clarification

Petitioner Acronyms

<u>Acronym</u>	<u>Name</u>
APPA/NRECA	American Public Power Association and the National Rural Electric Cooperative Association
EEI	Edison Electric Institute
NARUC	National Association of Regulatory Utility Commissioners
Occidental	Occidental Chemical Corporation
TAPSG	Transmission Access Policy Study Group