

157 FERC ¶ 61,064
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 33 and 35

[Docket Nos. RM09-16-000 and PL09-3-000]

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

(Issued October 28, 2016)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Withdrawal of Notice of Proposed Rulemaking and Termination of
Rulemaking Proceeding.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is
withdrawing a notice of proposed rulemaking, which proposed to amend its regulations
pursuant to sections 203 and 205 of the Federal Power Act to grant blanket authorizations
to acquire 10 percent or more, but less than 20 percent of the outstanding voting
securities of a public utility or holding company under section 203 and amend the
definitions of “affiliate” in subpart H and subpart I of part 35 of the Commission’s
regulations. The Commission is also terminating the proceeding on the Electric Power
Supply Association’s petition requesting guidance in Docket No. PL09-3-000.

EFFECTIVE DATE: The notice of proposed rulemaking published on January 28, 2010,
is withdrawn as of **[insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act Docket Nos. RM09-16-000

Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act PL09-3-000

WITHDRAWAL OF NOTICE OF PROPOSED RULEMAKING AND
TERMINATION OF RULEMAKING PROCEEDING

(Issued October 28, 2016)

1. On January 21, 2010, the Commission issued a Notice of Proposed Rulemaking (NOPR) in this proceeding.¹ For the reasons set forth below, we are exercising our discretion to withdraw the NOPR and terminate this rulemaking proceeding.

I. Background

2. On September 2, 2008, the Electric Power Supply Association (EPSA) filed a petition requesting guidance regarding concepts of control and affiliation as they relate to

¹ *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, FERC Stats. & Regs. ¶ 32,650 (2010) (NOPR).

Commission-jurisdictional transactions under sections 203 and 205 of the Federal Power Act (FPA).² EPSA specifically requested that, where an investor directly or indirectly acquires 10 percent or more but less than 20 percent of a public utility's outstanding voting securities and is eligible to file a statement of beneficial ownership with the Securities and Exchange Commission (SEC) on SEC Schedule 13G,³ such investment would not be deemed to result in a disposition of the public utility's jurisdictional facilities under FPA section 203(a)(1) or to result in affiliation with the public utility for purposes of the Commission's market-based rate requirements under FPA section 205.

3. Commission staff held a workshop to address the issues raised by EPSA in its request. Comments were submitted in response to the workshop. In the course of considering the comments submitted and the discussions at the workshop, the

² Electric Power Supply Association, Petition for Guidance Regarding "Control" and "Affiliation", Docket No. EL08-87-000 (filed Sept. 2, 2008) (Petition). The petition was originally docketed in Docket No. EL08-87-000 but was subsequently redocketed in Docket No. PL09-3-000. *Elec. Power Supply Ass'n*, Notice Redocketing Proceeding, Docket Nos. EL08-87-000 and PL09-3-000 (Nov. 5, 2008).

³ Schedule 13G is filed with the SEC pursuant to section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (1934 Act), and the SEC's rules thereunder, by any person when such person has acquired beneficial ownership of more than five percent but less than 20 percent of the outstanding voting equity securities of a company that are registered under section 12 of and the 1934 Act and such person certifies that it has not acquired, and does not hold, such securities for the purpose of or with the effect of changing or influencing the control of the issuer. Amendments to Beneficial Ownership Reporting Requirements, File No. S7-16-96, 1998 SEC LEXIS 63, at * 17 n. 20 (Jan. 12, 1998).

Commission determined that the issues may call for more formal treatment and issued the NOPR in light of the comments and discussions.

4. In the NOPR, in connection with EPSA's proposal to rely on the filing of SEC Schedule 13G to demonstrate conclusively that an investor will not control the public utility in which it has invested, the Commission stated that while it has relied on these filings, in conjunction with other conditions and reporting requirements in the past for various purposes, it believed the Commission could better fulfill its statutory responsibilities if it did not rely exclusively on the Schedule 13G. The Commission stated that the primary regulatory purpose behind the beneficial ownership disclosure requirements under section 13(d) of the 1934 Act is to provide companies and their shareholders with information about large accumulations of a company's stock and that the requirements of section 13(d) do not bar an investor from acquiring control of a company, which is of utmost importance to this Commission.⁴

5. With these concerns in mind, the Commission provided an alternative proposal in the NOPR. The Commission first proposed to amend part 33 of its regulations to grant a blanket authorization under section 203(a)(2) of the FPA, as well as a parallel blanket authorization under section 203(a)(1), for acquisitions of 10 percent or more, but less than 20 percent of the outstanding voting securities of a public utility or holding company, where the acquiring company files a statement certifying that such securities

⁴ See NOPR, FERC Stats. & Regs. ¶ 32,650 at P 35.

were not acquired and not held for the purpose or with the effect of changing or influencing the control of the public utility and such acquiring company complies with certain conditions designed to limit its ability to exercise control (Affirmation). Under the proposed amendment to part 33, a public utility whose voting securities are acquired, directly or indirectly, in any such transaction would be exempt from the requirements of an “affiliate” in part 35. The Commission also proposed to amend subpart H and subpart I of part 35 of the Commission’s regulations to define an “affiliate” of a specified company as any person that controls, is controlled by, or is under common control with such specified company.

6. The Commission received several comments in response to the proposal in the NOPR. A number of commenters raised concerns about the scope of the proposal, including the content of the proposed Affirmation and the commitments that the Commission proposed an acquiring company would need to agree to. Commenters also raised concerns regarding implementation of the proposal.

II. Discussion

7. Upon further consideration and after review of the comments received in response to the NOPR, we will withdraw the NOPR and terminate this proceeding. We also terminate the proceeding on EPSA’s Petition requesting guidance in Docket No. PL09-3-000.

8. As noted above, in the course of considering the discussions at the workshop to address the issues raised by EPSA in its Petition and the comments received following the workshop, the Commission determined that the issues may call for more formal

treatment and issued the NOPR. We appreciate the feedback that the Commission received in response to the NOPR. As previously indicated, the comments submitted raised concerns regarding the scope and implementation of the proposal. Having considered these comments, we are persuaded to not seek to adopt the Affirmation and blanket authorization that the Commission originally proposed.

9. As a result, we withdraw the NOPR and terminate this rulemaking proceeding. We also terminate the proceeding on EPSA's Petition requesting guidance in Docket No. PL09-3-000.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.