

120 FERC ¶ 61,189
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.

Ecofin Holdings Limited	Docket Nos. EC07-97-000
Ecofin Limited	EC07-97-001
Ecofin, Inc.	EC07-97-002
Ecofin Fund Management Limited	
Ecofin General Partner Limited	
Ecofin North American General Partner Limited	
Ecofin Water & Power Opportunities plc	
Ecofin Global Utilities Hedge Fund Limited	
Ecofin Global Utilities Hedge Fund LP	
Ecofin Global Utilities Master Fund Limited	
Ecofin Special Situations Utilities Fund Ltd	
Ecofin Special Situations Utilities Fund LP	
Ecofin Special Situations Utilities Master Fund Ltd	
Ecofin North American Utilities Hedge Fund Limited	
Ecofin North American Utilities Hedge Fund, L.P.	
Ecofin North American Utilities Master Fund Limited	
HFR HE Ecofin Master Trust	

ORDER GRANTING BLANKET AUTHORIZATION UNDER SECTION 203 OF THE
FEDERAL POWER ACT AND INTERPRETING REGULATIONS

(Issued August 28, 2007)

1. On May 24, 2007, as amended on June 28, 2007 and July 31, 2007,¹ and supplemented on July 19, 2007, Ecofin Holdings Limited (Ecofin) filed an application requesting blanket authorizations under section 203 of the Federal Power Act (FPA)² for

¹ These filings are referred to as the May 24 Application, June 28 Application and July 31 Application, respectively, and as the Application, collectively.

² 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAAct 2005).

two categories of acquisitions and dispositions of securities described below. Ecofin makes this request on behalf of itself and Ecofin Limited; Ecofin, Inc.; Ecofin Fund Management Limited, Ecofin General Partner Limited and Ecofin North American General Partner Limited (the Investment Management Subsidiaries); Ecofin Water & Power Opportunities plc, Ecofin Global Utilities Hedge Fund Limited, Ecofin Global Utilities Hedge Fund LP, Ecofin Global Utilities Master Fund Limited, Ecofin Special Situations Utilities Fund Ltd, Ecofin Special Situations Utilities Fund LP, Ecofin Special Situations Utilities Master Fund Ltd, Ecofin North American Utilities Hedge Fund Limited, Ecofin North American Utilities Hedge Fund, L.P. and Ecofin North American Utilities Master Fund Limited (the Applicant Funds); and HFR HE Ecofin Master Trust (HFR HE) (collectively, Applicants). In this order, the Commission grants the request for blanket authorizations under sections 203(a)(1) and 203(a)(2) for a period of three years (subject to renewal) for one category of transactions (involving acquisitions and dispositions of certain U.S. electric utility company securities) and explains why the other category of transactions (involving acquisitions of certain foreign utility company securities) is covered by an existing blanket authorization under section 203(a)(2) set forth in the Commission's regulations, which obviates the need to act on the Applicants' request for an alternative authorization.

I. Background

A. Description of Applicants

1. Ecofin

2. Ecofin states that it is an investment management firm that, through the Investment Management Subsidiaries, manages the Applicant Funds, HFR HE and certain private investment accounts (collectively, HFR HE and such accounts are the Investment Accounts). Ecofin functions solely as the parent of the Investment Management Subsidiaries. Ecofin does not participate in the investment decisions of the Investment Management Subsidiaries and is not a party to any of the investment management agreements between the Investment Management Subsidiaries and the Applicant Funds or the owners of the Investment Accounts. Ecofin states that the following entities own 10 percent or more of its voting securities: The Astro 2004 Trust, The JH Murray Family Trust and the Ecofin International Pension Plan as Trustee for Vincent Barnouin (collectively, Major Owners).

2. Investment Management Subsidiaries

3. Ecofin states that its principal operating company, Ecofin Limited, is an English company which is authorized and regulated by the U.K. Financial Services Authority and is registered with the Securities and Exchange Commission (SEC) as an investment

adviser under the Investment Advisers Act of 1940 (Investment Advisers Act). Ecofin Limited buys and sells voting securities and exercises voting rights on behalf of the Applicant Funds and Investment Accounts. Ecofin, Inc., a Delaware corporation and wholly-owned subsidiary of Ecofin Limited, provides fund management services to Ecofin Limited with respect to investments in U.S. companies. Ecofin Fund Management Limited (Ecofin Management) provides investor relations and marketing services and some back office functions to Ecofin Limited, and also holds founder shares in certain of the Applicant Funds.³ Ecofin General Partner Limited is the general partner of Ecofin Special Situations Utilities Fund L.P. and Ecofin Global Utilities Hedge Fund L.P., which are described below. Ecofin North American General Partner Limited is the general partner of Ecofin North American Utilities Hedge Fund, L.P.

3. Applicant Funds and Investment Accounts

4. Ecofin Water & Power Opportunities plc (Ecofin WP) is an authorized U.K. investment trust and a closed-end fund listed on the London Stock Exchange. It invests in the equity or equity-related securities of companies in the water, electric power and gas distribution industries, principally in the United Kingdom, Europe, North America and other OECD countries.

5. Ecofin Global Utilities Hedge Fund Limited (Ecofin Global Ltd), Ecofin Global Utilities Hedge Fund LP (Ecofin Global LP) and Ecofin Global Utilities Master Fund Limited (Ecofin Global Master) (collectively the Ecofin Global Funds) are organized in a master/feeder structure. For tax reasons U.S. taxable investors who desire to invest in the Ecofin Global Funds are permitted to make their investment under this structure only through Ecofin Global LP. Non-U.S. investors and non-taxable U.S. investors in the Ecofin Global Funds are required to make their investment through Ecofin Global Ltd. The prospectuses of Ecofin Global LP and Ecofin Global Ltd both require that each fund's assets be invested entirely in Ecofin Global Master. Investment in Ecofin Global Master by each feeder fund is through multiple share classes.

6. Ecofin Special Situations Utilities Fund Ltd (Ecofin Special Ltd), Ecofin Special Situations Utilities Fund LP (Ecofin Special LP) and Ecofin Special Situations Utilities Master Fund Ltd (Ecofin Special Master) (collectively the Ecofin Special Funds) are organized in a master/feeder structure substantially identical to and for the same reason as the Ecofin Global Funds. The prospectuses of Ecofin Special Ltd and Ecofin Special LP

³ Applicants state that founder shares do not have any economic value but confer exclusive authority for voting on certain administrative matters such as amending the authorized amount of share capital or changing the name of the fund.

require all of their assets to be invested in Ecofin Special Master. Ecofin Special Master is a long/short hedge fund that invests principally in special situations involving the equity and equity-related securities of utility companies, principally in Europe and the United States. Ecofin Special Ltd and Ecofin Special Master are incorporated in the Cayman Islands. Ecofin Special LP is a Delaware limited partnership. The Ecofin Special Funds invest in the equity and equity-related securities of utility companies in the United Kingdom, Europe and North America and, to a lesser extent, in other countries and markets. The Ecofin Special Funds may also invest, to a lesser extent, in the securities of utility-related companies and companies involved in other infrastructure industries.

7. Ecofin North American Utilities Hedge Fund Limited (Ecofin North American Ltd), Ecofin North American Utilities Hedge Fund, L.P. (Ecofin North American LP) and Ecofin North American Utilities Master Fund Limited (Ecofin North American Master) (collectively, the Ecofin North American Funds) are funds currently in the process of formation and subscription that will be organized in a master/feeder structure substantially identical to and for the same reason as the Ecofin Global Funds. The prospectuses of Ecofin North American Ltd. and Ecofin North American LP will require all of their assets to be invested in Ecofin North American Master. The Ecofin North American Funds will invest in the equity and equity-related securities of North American utility and utility-related companies and, to a lesser extent, utility and utility-related companies in other countries and markets with significant activities in North America. The Ecofin North American Funds may also invest, to a limited extent, in special situations involving utility and utility-related companies.

8. Applicants state that Ecofin and Ecofin Limited currently are holding companies for purposes of FPA section 203(a)(2) by virtue of directly and indirectly exercising voting rights with respect to the holdings by the Applicant Funds and the Investment Accounts of 16 percent of the voting securities of Airtricity Holdings Limited (Airtricity), a developer, owner and operator of windpower generating projects. Airtricity is itself a holding company by virtue of owning a number of foreign and U.S. electric utility companies, but has obtained foreign utility company (FUCO) or exempt wholesale generator (EWG) status for all such entities. With the exception of their holdings in Airtricity, the Applicant Funds and the Investment Accounts do not directly or indirectly own more than five percent of the voting securities of any public utility or U.S. electric utility company.

B. Request for Blanket Authorization

9. Applicants seek blanket authorizations under sections 203(a)(1)⁴ and/or 203(a)(2) for the purchase and sale of utility securities. First, Applicants seek conditional blanket authorizations⁵ under sections 203(a)(1) and 203(a)(2) for the Investment Management Subsidiaries to acquire, in limited amounts, on behalf of the Applicant Funds and the Investment Accounts (and for the Applicant Funds and Investment Accounts to continue to hold) the voting securities of any public utility, electric utility company, transmitting utility, or holding company in a holding company system that includes an electric utility company or transmitting utility whose voting securities are traded on the New York Stock Exchange, the American Stock Exchange or the NASDAQ, including entities whose stock is traded in the form of American Depositary Receipts (U.S. Traded Utilities). Applicants also seek authorization for the U.S. Traded Utilities or holders of U.S. Traded Utility voting securities to sell such securities to the Investment Management Subsidiaries acting on behalf of the Applicant Funds and the Investment Accounts. Applicants seek these conditional blanket authorizations for a period of three years.

10. Second, Applicants seek blanket authorization under section 203(a)(2) for the acquisition of the voting securities of any electric utility company or holding company in a holding company system that includes an electric utility company or transmitting utility that:

- (i) derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale within the United States; (ii) owns or operates, directly or indirectly, facilities for the generation, transmission or distribution of electric energy for sale that are not located in any state and are not directly or indirectly

⁴ Section 203(a)(1) applies to dispositions of jurisdictional facilities by public utilities. Applicants state that “[w]hile these public utilities cannot as a practical matter be individually identified at this time, they can effectively be considered applicants for purposes of this Application.” Application at 1-2, n.1.

⁵ Section 203(a)(2) requires prior Commission authorization for holding companies to acquire certain securities with values in excess of \$10 million of transmitting utilities, electric utility companies or holding companies containing such entities. Applicants seek blanket authorizations subject to the same conditions as set forth in *Capital Research and Management Company*, 116 FERC ¶ 61,267 (2006) (*CRMC*).

interconnected to the generation, transmission or distribution facilities located in any state; (iii) is not otherwise a public utility company operating in the U.S.; and (iv) is not otherwise a U.S. Traded Utility (Foreign Utilities).⁶

11. Applicants request blanket authorization under section 203(a)(2) for the Investment Management Subsidiaries to acquire on behalf of the Applicant Funds and the Investment Accounts (and the Applicant Funds and Investment Accounts to hold) the voting securities of any Foreign Utility. Applicants seek these blanket authorizations (i) in unlimited amounts and subject to less restrictive conditions than those proposed with respect to U.S. Traded Utilities; and (ii) for an unlimited period of time.⁷

12. Applicants state that the acquisitions for which they seek blanket authorizations may not in all cases require Commission approval under FPA section 203. Nevertheless, without asking the Commission to resolve any threshold issues, Applicants request such authorizations from the Commission as are necessary to consummate the transactions contemplated by their Application.⁸

13. Applicants seek the requested authorizations subject to the following conditions:

- (i) All acquisitions of U.S. Traded Utility and Foreign Utility securities made by the Investment Management Subsidiaries shall be made in a fiduciary capacity on behalf of the Applicant Funds and the Investment Accounts, and the Investment Management Subsidiaries shall make no acquisitions for their own account pursuant to the authorizations requested in the Application.
- (ii) Ecofin Global Master, Ecofin Special Master, Ecofin North American Master and Ecofin WP shall each be permitted to acquire less than 10 percent of the outstanding voting securities of any U.S. Traded Utility. However, no Applicant Fund shall acquire 10 percent or more of the outstanding voting securities of any U.S. Traded Utility. No individual Investment Account shall hold five

⁶ Application at 3.

⁷ Application at 4.

⁸ *Id.* at 5 (citing *Ocean State Power*, 47 FERC ¶ 61,321, at 62,130 (1989)).

percent or more of the outstanding voting securities of any U.S. Traded Utility.

- (iii) Ecofin Global Master, Ecofin Global Ltd, Ecofin Special Master, Ecofin Special Ltd, Ecofin North American Master and Ecofin North American Ltd shall all maintain the independence of their boards of directors. Ecofin Global Ltd and Ecofin Global LP shall not be permitted to acquire the voting securities of U.S. Traded Utilities or Foreign Utilities pursuant to the authorizations requested in the Application and shall continue to invest all of their assets in Ecofin Global Master. Ecofin Special Ltd and Ecofin Special LP shall not be permitted to acquire the voting securities of U.S. Traded Utilities or Foreign Utilities pursuant to the authorizations requested in the Application and shall continue to invest all of their assets in Ecofin Special Master. Ecofin North American Ltd and Ecofin North American LP shall not be permitted to acquire the voting securities of U.S. Traded Utilities or Foreign Utilities pursuant to the authorizations requested in the Application and shall continue to invest all of their assets in Ecofin North American Master.
- (iv) The Applicant Funds and Investment Accounts shall not collectively own (and therefore the Investment Management Subsidiaries shall not beneficially own for purposes of the Securities Exchange Act of 1934 (1934 Act)⁹) more than 20 percent of the outstanding voting securities of any U.S. Traded Utility. In addition, the Major Owners shall consolidate their personal holdings of U.S. Traded Utilities with those of Ecofin and the Investment Management Subsidiaries for Schedule 13 reporting purposes. Any holdings by the Major Owners for their personal accounts of the voting securities of a U.S. Traded Utility shall count toward the 20 percent ceiling on beneficial ownership such entity's voting securities by the Investment Management Subsidiaries.
- (v) With respect to all beneficial ownership of U.S. Traded Utility voting securities in reportable amounts under section 13 of the 1934 Act (*i.e.*, more than five percent of any class of voting security), the Investment Management Subsidiaries (with respect to the Applicant Funds and the Investment Accounts) shall make all required reports

⁹ 15 U.S.C. § 78a *et seq.* (2000).

under Schedule 13G and shall continuously maintain their eligibility to file Schedule 13G with respect to all such holdings. This condition is to ensure both that the Investment Management Subsidiaries cannot exercise control over U.S. Traded Utilities and that there cannot be cross subsidies between U.S. Traded Utilities and Foreign Utilities in which the Applicant Funds and the Investment Accounts hold interests.

- (vi) Without specific Commission approval, the Investment Management Subsidiaries shall not acquire on behalf of the Applicant Funds or the Investment Accounts five percent or more of the voting securities of any public utility that (a) has captive customers or that owns or provides transmission service over jurisdictional transmission facilities and (b) is *not* otherwise a U.S. Traded Utility or a subsidiary of a U.S. Traded Utility.
- (vii) To the extent required under 18 C.F.R. § 33.1(c)(4), at the time the Investment Management Subsidiaries and/or an Applicant Fund files a Schedule 13G with the SEC in connection with the acquisition of U.S. Traded Utility securities it will file a copy of such schedule with the Commission.
- (viii) The Investment Management Subsidiaries shall make a filing within 30 days of the end of each calendar year quarter. Such filings shall list holdings by the Applicant Funds and the Investment Accounts on an aggregate basis as of the end of such quarter of the voting securities of all Foreign Utilities stated in terms of the numbers of shares held and as a percentage of the outstanding shares of any such companies.¹⁰

14. Applicants submit that these conditions will effectively prevent Ecofin, the Major Owners, the Investment Management Subsidiaries, the Applicant Funds and the owners of the Investment Accounts from controlling any U.S. Traded Utilities or causing any cross-subsidy between Foreign Utilities and traditional U.S. public utilities within the scope of the Commission's concern under section 203.

¹⁰ *Id.* at 36-39.

15. Applicants state that the blanket authorizations they seek are “made necessary by the practical circumstances of Ecofin’s businesses.”¹¹ Applicants state that the types of securities purchases by the Investment Management Subsidiaries are time-sensitive. Applicants assert that “[b]ecause of the way that the Investment Management Subsidiaries operate, advance, transaction-specific section 203 authorization for the acquisition of utility securities is not feasible. As a practical matter, for most transactions that require prior approval under FPA section 203, the Investment Management Subsidiaries will not be able to invest except pursuant to advance blanket authorizations. Without such authorizations a source of investment capital will effectively be withdrawn from the market.”¹² Applicants state that the factual situation and need for the blanket authorizations requested with respect to the U.S. Traded Utilities are substantially the same as those presented in *CRMC*.

16. Specifically, Applicants request blanket authorization to purchase less than 10 percent of the voting securities of a single U.S. Traded Utility on behalf of each group of Applicant Funds (*i.e.* the Ecofin Global Funds, the Ecofin Special Funds, the Ecofin North American Funds, and Ecofin WP). Applicants state that because the portfolio managers of the Investment Management Subsidiaries buy and sell such securities on behalf of the Applicant Funds and the Investment Accounts on a constant basis, they would like to be able to purchase less than 10 percent of the securities to maximize shareholder returns. Further, Applicants state that portfolio managers frequently manage money for more than one Applicant Fund and Investment Account and may desire to purchase the same security for more than one of these entities. Thus, Applicants also request authorization to allow the Applicant Funds and Investment Accounts collectively to own less than 20 percent of the voting securities of any one U.S. Traded Utility.¹³

17. Applicants also assert that Commission approval is consistent with congressional intent in repealing the Public Utility Holding Company Act of 1935 (PUHCA 1935), which they state was to remove barriers to investment of capital in the utility industry and to provide the industry with access to new capital to finance future growth. Applicants contend that under PUHCA 1935, the proposed transactions would at least in part have been prohibited or required registration. For example, Applicants contend that under PUHCA 1935, Ecofin Limited would have been prohibited from exercising voting rights for more than 10 percent of the securities of two different electric utility companies

¹¹ *Id.* at 14.

¹² *Id.*

¹³ *Id.* at 15.

located in geographically separate parts of the United States. In that situation, Ecofin Limited would have been a holding company but would have been unable to satisfy the integration standards of PUHCA 1935. Applicants argue that with the repeal of PUHCA 1935, the integration standards and other restrictions no longer apply and granting the blanket authorizations would be in fulfillment of the congressional intent underlying such repeal.¹⁴

18. Applicants state that all of the voting securities of U.S. Traded Utilities would be held for investment purposes either by the Applicant Funds or in the Investment Accounts. Applicants note that each of the funds that would own U.S. Traded Utility voting securities has an independent board of directors. Applicants assert that they have separate protections for Investment Accounts because they are not legal entities and therefore do not have boards of directors. Applicants state that Ecofin and the Investment Management Subsidiaries do not trade for their own account, none of the Applicants will own any jurisdictional facilities, and that none of the Applicants have affiliates active in power trading or marketing in U.S. markets.¹⁵

19. Applicants state that they meet the conditions to demonstrate an inability to exercise control of the utilities in which they invest. First, they commit to file and remain eligible to file Schedule 13G under the 1934 Act with respect to jurisdictional acquisitions of U.S. Traded Utility voting securities and will file copies of such filings with the Commission pursuant to 18 C.F.R. § 33.1(c)(4). Second, they state that those Applicant Funds that will hold the voting securities of U.S. Traded Utilities as well as three feeder funds will have independent boards of directors. Third, Ecofin Limited, as a registered investment adviser will be subject to periodic audit by the SEC concerning its compliance with the Investment Advisers Act.¹⁶ Applicants assert that they have provided sufficient multiple layers of protection for the Commission to conclude that they

¹⁴ *Id.* 16-17.

¹⁵ *Id.* at 19-20.

¹⁶ The SEC's examination staff conducts examinations of registered advisers to determine: 1) if advisers are conducting their activities in accordance with the law and disclosures made to clients; and 2) whether they have adequate systems and procedures in place to ensure that their operations are in compliance with the law. *Id.* at 23, referencing n. 21.

will not be able to exercise control of U.S. Traded Utilities as a result of acquisitions of voting securities on behalf of the Applicant Funds.¹⁷

20. Applicants state that the Major Owners will not be able to control U.S. Traded Utilities whose voting securities are purchased by the Investment Management Subsidiaries pursuant to the requested authorizations. Applicants state that Ecofin, the parent holding company, is not functionally separated from the Investment Management Subsidiaries, and the Major Owners have sufficient ownership of Ecofin to assume that they have indirect control over the Investment Management Subsidiaries.¹⁸ Applicants state that in these circumstances the question arises whether Schedule 13G and other conditions adopted from *CRMC* are sufficient to ensure that the Major Owners would not be able to exercise control over U.S. Traded Utilities. To address this concern, the Major Owners commit to report their holdings of voting securities of U.S. Traded Utilities for Schedule 13G compliance purposes on a consolidated basis with Ecofin and the Investment Management Subsidiaries, regardless of whether they are legally required to do so.¹⁹ In addition, Applicants propose, as a condition of the requested blanket authorization, that any holdings of U.S. Traded Utility voting securities by the Major Owners for their personal accounts count towards the 20 percent ceiling on the ownership of the voting securities of any one U.S. Traded Utility as provided for in the application. Thus, Applicants state that any acquisition of U.S. Traded Utility voting securities by the Major Owners for their personal accounts must either be in non-jurisdictional amounts or have separate Commission authorization under section 203.²⁰

21. Applicants state that the owners of the Investment Accounts will not be able to control U.S. Traded Utilities whose voting securities are purchased by the Investment Management Subsidiaries pursuant to the requested authorizations. Applicants state that because there is not an investment need to acquire large amounts of U.S. Traded Utility voting securities on behalf of the Individual Investment Accounts, Applicants only ask for blanket authorization to acquire less than five percent of such securities. Applicants state that acquisition of five percent of a U.S. Traded Utility security is not jurisdictional

¹⁷ *Id.* at 24.

¹⁸ *Id.* Applicants note that in *CRMC*, the parent holding company of the investment management companies that received blanket authorization was functionally separated from those companies for Schedule 13G reporting purposes.

¹⁹ *Id.* at 26.

²⁰ *Id.* at 27.

under section 203, but if the voting rights of such securities were aggregated with other voting rights held by the Investment Management Subsidiaries, they might be able to exercise control over a U.S. Traded Utility. Therefore, Applicants propose, as a condition of the requested blanket authorization, that the holdings of U.S. Traded Utility voting securities in an Investment Account count towards the 20 percent ceiling on holdings of such U.S. Traded Utility voting securities as provided for in the application.²¹

II. Notice of Filing and Responsive Pleadings

22. Notice of Applicants' May 24 Application was published in the *Federal Register*, 72 Fed. Reg. 31,312 (2007), with comments, protests or interventions due on or before June 14, 2007. None were filed.

23. Notice of Applicants' June 28 Application was published in the *Federal Register*, 72 Fed. Reg. 38,071 (2007), with comments, protests or interventions due on or before July 12, 2007. None were filed.

24. Notice of Applicants' July 31 Application was published in the *Federal Register*, 72 Fed. Reg. 44,839 (2007), with comments, protests or interventions due on or before August 10, 2007. None were filed.

III. Discussion

A. Standard of Review Under Section 203

25. Section 203(a)(1) requires a public utility to obtain prior authorization for a disposition of its jurisdictional facilities effected through a direct sale of its assets or a change in control over jurisdictional facilities resulting from a disposition or acquisition of securities. Section 203(a)(2) requires prior Commission authorization for holding companies to acquire certain securities with values in excess of \$10 million of transmitting utilities, electric utility companies or holding companies containing such entities.

26. Section 203(a)(4) requires the Commission to approve a transaction if the Commission makes two determinations. First, the Commission must determine that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and

²¹ *Id.* at 28.

(3) the effect on regulation.²² Second, the Commission must determine that the 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, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”²³ The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²⁴

B. U.S. Traded Utilities

1. Blanket Authorization Under Section 203(a)(1)

27. Applicants seek blanket authorization under section 203(a)(1) for the U.S. Traded Utilities or holders of U.S. Traded Utility voting securities to sell less than 10 percent of their securities to the Investment Management Subsidiaries acting on behalf of the Applicant Funds and the Investment Accounts. Essentially, Applicants request blanket authority under section 203(a)(1) on behalf of unknown public utilities for Investment Management Subsidiaries’ securities acquisitions, to the extent that such acquisitions could be deemed to accomplish a disposition of jurisdictional facilities.²⁵

²² See *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶ 61,321 (1997); See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

²³ 16 U.S.C. § 824b(a)(4) (as amended by EPAct 2005).

²⁴ 18 C.F.R. § 33.2 (2007).

²⁵ It is not clear that all of these transactions would be jurisdictional under section 203(a)(1). The Commission stated in its recently issued Supplemental Policy Statement (which was issued after this application was filed) that it would presume that dispositions of less than 10 percent of a public utility’s securities would not constitute a change in control if (1) after the transfer, the acquirer and its affiliates and associate companies, directly or indirectly, in aggregate will own less than 10 percent of such public utility, and (2) the facts and circumstances do not indicate that such companies would be able to

(continued)

28. The Commission grants Applicants' request for blanket authority under section 203(a)(1) to permit the U.S. Traded Utilities or holders of the U.S. Traded Utility voting securities to sell such securities to the Investment Management Subsidiaries acting on behalf of the Applicant Funds and the Investment Accounts, without the need for the U.S. Traded Utilities or holders of the U.S. Traded Utilities to file with the Commission under section 203(a)(1), for a period of three years and subject to the conditions set forth in this order.

a. Effect on Competition

i. Applicants' Analysis

29. Applicants state that, under the conditions set forth in the Application, the Investment Management subsidiaries, the Applicant Funds, and the Investment Accounts will be expressly limited from purchasing or holding securities for the purpose of exercising control or management of the U.S. Traded Utilities in which investment will be made. Thus, the transaction will not result in the exercise of control over utilities either directly or indirectly.²⁶

ii. Commission Determination

30. As discussed below, with respect to the request for section 203(a)(2) blanket authorization, Applicants have demonstrated that any U.S. Traded Utility security held by the Investment Management Subsidiaries, the Applicants Funds, and Investment Accounts would be held for investment, not control, purposes. Therefore the proposed transactions will not adversely affect competition.

b. Effect on Rates

i. Applicants' Analysis

31. Applicants state that the proposed transactions will have no adverse effect on rates because the U.S. Traded Utilities in which the Investment Management Subsidiaries seek

directly or indirectly exercise a controlling influence over the management or policies of the public utility. *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 57 (2007). Applicants ask for the blanket authorization under section 203(a)(1) to avoid the need for a prior section 203 filing on behalf of a public utility for those investments where (arguably) a change of control could take place.

²⁶ Application at 40.

to invest will be selling electricity or providing transmission services either at market-based or at cost-based rates. Applicants further state that because the acquisitions of U.S. Traded Utilities will be made in the public markets, they will not be able to affect the development of cost-based rates.²⁷

ii. Commission Determination

32. Applicants have shown that nothing in the Application indicates that rates to customers will increase as a result of the proposed transactions. For this reason, we find that the proposed transactions will have no adverse effect on rates. To the extent the acquisitions of securities involve U.S. public utilities, their rates will be regulated by the Commission on a cost or market basis.

c. Effect on Regulation

i. Applicants' Analysis

33. Applicants argue that the proposed transactions will have no impact on regulation because they will not involve any changes in control. Applicants further assert that the acquisition of U.S. Traded Utility securities by the Investment Management Subsidiaries on behalf of the Applicant Funds or Investment Accounts will not result in any change in activities or corporate structure of such utilities that might affect their jurisdictional status under either federal or state law. Applicants argue that the proposed authorizations with respect to U.S. Traded Utilities will have no effect on the regulation of such utilities either by the Commission or by state regulatory authorities.²⁸

ii. Commission Determination

34. The Commission finds that neither state nor federal regulation would be impaired by the proposed transaction.

d. Effect on Cross-Subsidization

i. Applicants' Analysis

35. Applicants state that the proposed authorizations with respect to U.S. Traded Utilities will not result in cross-subsidization of a non-utility associate company or the

²⁷ *Id.* at 41.

²⁸ *Id.* at 42.

pledge or encumbrance of utility assets for the benefit of an associate company. Applicants state that because they will not be able to control any U.S. Traded Utilities, “they will have no ability to improperly cause or direct such utilities in which they have an interest to cross-subsidize their non-utility associate companies or to pledge or encumber their assets.”²⁹

ii. Commission Determination

36. We find that Applicants have provided adequate assurance that the transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

2. Blanket Authorization Under Section 203(a)(2)

37. Applicants seek blanket authorization under section 203(a)(2) to acquire U.S. Traded Utility securities, subject to certain conditions set forth in the Application.

38. The Commission grants Applicants’ request for blanket authority under section 203(a)(2) to acquire U.S. Traded Utility securities for a period of three years, subject to certain conditions set forth in this order.

a. Effect on Competition

i. Applicants’ Analysis

39. Applicants assert that the proposed authorizations with respect to U.S. Traded Utilities will have no adverse effect on competition. Applicants argue that in order for that to occur, the Investment Management Subsidiaries, the Applicant Funds or owners of the Investment Accounts would have to acquire some form of control over a U.S. Traded Utility. According to Applicants, because the proposed conditions will not permit the purchase or holding of securities for exercising control or management of U.S. Traded Utilities, the proposed transactions will not convey any ability to control U.S. generation or transmission facilities, directly or indirectly.³⁰

²⁹ *Id.* at 42.

³⁰ *Id.* at 40.

ii. Commission Determination

40. Applicants maintain that a requirement for the Investment Management Subsidiaries to seek transaction-specific section 203 approval before investing would make those investments impractical, and that, therefore, blanket authorizations are needed. Applicants seek blanket authorization to make greater investments in public utilities in order to pursue changing investment strategies and for portfolio diversification purposes. Under any strategy, in order to take full advantage in the market, positions (both acquisitions and dispositions) in equities must be made quickly. Applicants also maintain that their proposal is consistent with the intent of Congress in repealing PUHCA 1935 to remove barriers to investment of capital in the utility industry and provide the industry access to new capital to finance future growth. We agree with Applicants that blanket authorizations are appropriate to allow these types of utility investments on a timely basis and that transactions are consistent with general Congressional intent in repealing PUHCA 1935, so long as there is no harm to U.S. utility customers. As discussed below, we find that Applicants have provided sufficient protections to assure that these transactions are consistent with the public interest.

41. Applicants have provided sufficient multiple layers of protection for the Commission to conclude that the Investment Management Subsidiaries will not be able to exercise control of U.S. Traded Utilities as a result of acquisitions of voting securities of utilities on behalf of the Applicant Funds. Applicants' proposal for authorization to acquire less than 10 percent of the voting securities of a single U.S. Traded Utility coupled with ownership of less than 20 percent in the aggregate of such securities will foster greater investment in public utility equities. Applicants further commit that any holdings of U.S. Traded Utility voting securities by the Major Owners and the Investment Accounts will count towards the 20 percent ceiling as provided for in the application. These and other proposed conditions will ensure that the Investment Management Subsidiaries, the Applicant Funds and Investment Accounts cannot exercise control over any utility. However, with respect to the quarterly reports, Applicants shall file reports listing the holdings of the U.S. Traded Utility securities by the entity authorized to hold such securities (on an unconsolidated basis) stated in terms of number of shares held and as a percentage of the outstanding shares.

42. The Commission finds that the Applicants' representations concerning the purpose of the investments, as evidenced by the filing of Schedule 13G, in conjunction with the Applicants' proposed conditions as modified herein, provide sufficient assurance that

control over public utilities cannot be exercised.³¹ Therefore, the Commission finds that the proposed transactions will have no adverse effect on competition.

43. Consistent with their representations, the Investment Management Subsidiaries, and/or the Applicant Funds must file with the Commission contemporaneously with filing at the SEC, in this docket, the Schedule 13G filings made with the SEC that are relevant to the authorizations granted in this order. Any changes in the information provided on the initial Schedule 13G must be reflected in an annual amended filing in this docket, due within 45 days of the end of each calendar year.

b. Effect on Rates

i. Applicants' Analysis

44. Applicants assert that the proposed authorizations with respect to U.S. Traded Utilities will have no adverse effect on the rates of wholesale or retail electric service customers in the United States. Applicants contend that because the Investment Management Subsidiaries, the Applicant Funds and the owners of the Investment Accounts will not acquire control over any U.S. Traded Utility, they will have no role in the setting of rates by such entities. Applicants state that the U.S. Traded Utilities in which Investment Management Subsidiaries seek to invest will be selling electricity or providing transmission services either at market-based or at cost-based rates. Applicants maintain that “because the acquisition of securities by the Investment Management Subsidiaries on behalf of the Applicant Funds and Investment Accounts will not affect market power in any relevant U.S. generation or transmission market, the acquisitions cannot affect the market-based price at which electricity is sold. And because the acquisitions of U.S. Traded Utilities will be made in public markets, there can be no

³¹ The Commission has relied previously on the oversight of a sister federal agency in granting blanket authorizations under section 203 for a utility’s acquisition of securities of another public utility. *UBS AG and Bank of America, N.A.*, 101 FERC ¶ 61,312 (2002), *order on reh’g*, 103 FERC ¶ 61,284, *further order on reh’g*, 105 FERC ¶ 61,078 (2003). A Schedule 13G filer must “acquire such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect” over entities whose securities it holds and is required to file a notification with the SEC of any acquisition of beneficial ownership of five percent or more of a class of equity securities. 17 C.F.R. § 240.13d-1 (2007).

discrete impact on the cost structures of the issuer that might affect the development of cost-based rates.”³²

ii. Commission Determination

45. As noted in the Commission’s *Merger Policy Statement*,³³ the Commission primarily examines a transaction’s effect on rates in order to protect wholesale power and transmission service customers. Nothing in the Application indicates that rates to customers will increase as a result of the proposed transactions. As noted above, to the extent the acquisitions of securities involve U.S. public utilities, their rates will be regulated by the Commission on a cost or market basis. For this reason, we find that the proposed transactions at issue here will have no adverse effect on rates.

c. Effect on Regulation

i. Applicants’ Analysis

46. Applicants assert that the proposed authorizations with respect to U.S. Traded Utilities will have no effect on the regulation of such utilities either by the Commission or by state regulatory authorities. Applicants state that there will be no impact on regulation because the proposed transactions will not involve any changes in control. Applicants further argue that the acquisition of U.S. Traded Utility securities by the Investment Management Subsidiaries on behalf of the Applicant Funds or Investment Accounts will not result in any change in activities or corporate structure of such utilities that might affect their jurisdictional status under either federal or state law.

ii. Commission Determination

47. The Commission finds that neither state nor federal regulation would be impaired by the proposed transaction.

d. Cross-subsidization and Encumbrance of Utility Assets

48. FPA section 203(a)(4) requires that the Commission find that a proposed transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public

³² Application at 41.

³³ *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,126.

interest. Under 18 C.F.R. § 33.2(j), Applicants are required to show how a proposed transaction will not result in: (1) 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; (2) new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) 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 (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

i. Applicants' Analysis

49. Applicants assert that the proposed authorizations with respect to U.S. Traded Utilities 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. Applicants state that because they will not be able to control any U.S. Traded Utility, “they will have no ability to improperly cause or direct such utilities in which they have an interest to cross-subsidize their non-utility associate companies or to pledge or encumber their assets.”³⁴

ii. Commission Determination

50. We find that Applicants have provided adequate assurance that the transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

C. Foreign Utilities

1. Applicants' Analysis

51. Applicants further seek blanket authorization for the acquisition of any amount of the voting securities of privately-held and publicly-traded Foreign Utilities. Applicants interpret section 33.1(c)(5) of the Commission’s regulations to provide a generic blanket

³⁴ Application at 42.

authorization under section 203(a)(2) for a holding company to acquire, without limitation as to amount or other substantive condition,³⁵ “entities that have been certified as foreign utility companies.” Applicants state that this blanket authorization is not workable in their case for three reasons.

52. First, Applicants assert that most (though not all) of the securities acquisitions by the Investment Management Subsidiaries are time-sensitive and would not permit the advance filing of a FUCO self-certification for a Foreign Utility whose securities they acquire. Applicants also assert that filing such a certification prior to the acquisition would “risk alerting the marketplace of their intentions and thus put at risk any pricing advantage they might otherwise have.”³⁶

53. Second, Applicants state that the Investment Management Subsidiaries may not have the right to make FUCO certifications for Foreign Utilities whose voting securities they seek to acquire on behalf of the Applicant Funds and the Investment Accounts. They state that section 366.7 of the Commission’s regulations requires that a FUCO certification be filed by the FUCO itself or its “representative,” and the Investment Management Subsidiaries may or may not properly be regarded as “representatives” of the Foreign Utilities in question.

54. Third, Applicants note that the blanket authorization contained in section 33.1(c)(5) of the Commission’s regulations requires that where the holding company availing itself of this authorization, or any of its affiliates, subsidiaries, or associate companies within its holding company system, has captive customers in the United States, or owns or provides transmission service over jurisdictional transmission facilities in the United States, the blanket authorization is conditioned on the submission by the holding company of a verification stating that the proposed transaction will not have an adverse effect on competition, rates, and regulation, and will not result in, at the time of the transaction or in the future, certain adverse effects for traditional public utility associate companies that have captive customers or that provides transmission service over jurisdictional transmission facilities.³⁷ Applicants state that the Investment

³⁵ Applicants note that an acquiring holding company that is affiliated with a utility having captive customers in the U.S. or owning or providing transmission service over transmission facilities in the U.S. must also file a verification with respect to certain cross-subsidy matters and the effect of an acquisition on competition, rates and regulation. *Id.* at 29.

³⁶ *Id.* at 29-30.

³⁷ These additional adverse effects are listed in P 65 below.

Management Subsidiaries would be required to file a notarized verification in advance every time they acquire the securities of a FUCO, which is an additional reason the blanket authorization would be unworkable in their case.

55. Because of these perceived difficulties, Applicants propose what they describe as a “functional equivalent that would substitute for the FUCO certification and verification provisions” of 18 C.F.R. § 33.1(c)(5). This would be a “blanket FUCO determination” under which they would be authorized to acquire, without limitation, the voting securities of Foreign Utilities on behalf of Applicant Funds and the Investment Accounts.³⁸ Applicants argue that in this context, the absence of a FUCO certification or public notice for Foreign Utilities would not create a gap in protection of the public interest.

56. As a condition of the requested authorizations concerning Foreign Utilities, Applicants propose that with respect to the beneficial ownership of U.S. Traded Utility voting securities of more than five percent, the Investment Management Subsidiaries will continue their eligibility to file Schedule 13G and will make such reports. Applicants state that this would ensure for most purposes that the Investment Management Subsidiaries cannot exercise control over traditional U.S. utilities.³⁹ To ensure that they cannot exercise control over traditional U.S. utilities that are not U.S. Traded Utilities or subsidiaries of U.S. Traded Utilities, Applicants propose the further condition that the Investment Management Subsidiaries be prohibited from acquiring five percent or more of the voting securities of any such entity without Commission approval.⁴⁰

57. Finally, Applicants propose that, in order to provide the Commission with information about how the blanket authorizations with respect to Foreign Utilities are being used, they be required to make a filing that lists holdings by the Applicant Funds and the Investment Accounts on an aggregate basis as of the end of such quarter of the

³⁸ “Foreign Utility” (as opposed to the term “foreign utility company” contained in the Commission’s PUHCA 2005 regulations) is a term coined by Applicants and defined by them in their application. Their definition of a “Foreign Utility” tracks the definition of a FUCO found in section 366.1 of the Commission’s regulations, but it applies to a more restricted group of entities because it excludes (i) foreign entities that also happen to be U.S. Traded Utilities and (ii) foreign entities that are directly or indirectly interconnected to the U.S. grid. Application at 31.

³⁹ *Id.* at 34.

⁴⁰ *Id.* Applicants state that they are not sure that any such entities exist, but they propose this condition to deal with the possibility if it arises.

voting securities of all Foreign Utilities stated in terms of the numbers of shares held and as a percentage of the outstanding shares of any such companies. Applicants propose that such lists be provided within 30 days of the end of each calendar year quarter.

2. Commission Determination

58. As discussed below, Applicants have misinterpreted the Commission's regulations under section 33.1(c)(5). The blanket authorization is available to them for the types of foreign utility company acquisitions they propose. However, we recognize that the time sensitive nature of Applicants' planned investments would preclude filing verifications in the manner specified in section 33.1(c)(5) of the Commission's regulations, which means that the blanket authorization would be of limited use to the Applicants as a practical matter. We therefore will authorize Applicants to make alternative verification filings that will be deemed to satisfy our regulations in their case and under the circumstances described in the Application.

59. We begin with a point of clarification. The blanket authorization under FPA section 203(a)(2) set forth in section 33.1(c)(5) of our regulations, which allows certain public utility holding companies to acquire securities of foreign utility companies subject to certain restrictions to protect captive customers of U.S. public utilities, does not require prior self-certification or Commission certification of those companies as FUCOs pursuant to the Commission's PUHCA 2005 regulations. If the Commission were to interpret the blanket authorization as requiring such certifications, it would defeat the very purpose of the authorization, which is to permit holding companies to participate in timely investment opportunities in foreign countries as long as there is assurance that U.S. captive customers are not subsidizing or otherwise being harmed by such activities. As the Commission noted in Order No. 669, Congress did not intend that section 203(a)(2) impede foreign investment, particularly where no U.S. captive customers could be affected.⁴¹ The blanket authorization was intended to allow holding companies to participate in foreign investments without any advance Commission approvals, including any FUCO certification.

60. Applicants therefore are incorrect when they state that the blanket authorization applies only to acquisitions of "entities that have been certified as foreign utility companies." Section 33.1(c)(5) of the Commission's regulations makes no reference to FUCO certifications, and nothing in that provision suggests that a FUCO certification is necessary to qualify for the blanket authorization. Applicants correctly note that the Commission's section 203 regulations define a foreign utility company as having the

⁴¹ Order No. 669 at P 47, 51.

meaning given that term in PUHCA 2005. That statute in turn defines a foreign utility company as having the meaning given to that term in section 33 of PUHCA 1935. However, in interpreting this provision, the Commission did not include a certification of FUCO status as an element of the definition of a FUCO contained in its PUHCA regulations.⁴²

61. In addition, the Commission initially did not propose that there be any process under PUHCA 2005 for certifying that a company meets the definition of a foreign utility company and thus qualifies for FUCO “status.” However, in response to numerous comments in favor of a certification process, the Commission concluded in Order No. 667 that it would “allow” persons to obtain FUCO status even though it did not interpret the statute to require such a process.⁴³ A key reason for this was that prospective holding

⁴² PUHCA 1935 defined the term “foreign utility company” at section 33(a)(3). The language of section 33(a)(3)(A) has been incorporated into section 366.1 of the Commission’s regulations and thus represents the definition of a FUCO for purposes of those regulations. Section 33(a)(3)(A) of PUHCA 1935 defines a FUCO as a company that owns or operates facilities that are not located in any State and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, if such company (i) derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, within the United States; and (ii) neither the company nor any of its subsidiary companies is a public utility company operating in the United States. PUHCA 1935 also included at section 33(a)(3)(B) an additional element of its definition of a FUCO. That element specified that in addition to possessing the characteristics described in section 366.1 of the Commission’s regulations, a company is (was) a foreign utility company when it “provides notice to the Commission [i.e., the SEC] that such company is a foreign utility company.” However, because EAct 2005 eliminated the previous SEC role with respect to FUCOs and provided no requirement for certification of FUCOs by the Commission, in adopting its PUHCA 2005 regulations, the Commission did not adopt language analogous to that found in section 33(a)(3)(B) of PUHCA 1935. As it noted, among other things, “[t]here is nothing in PUHCA 2005 . . . that prescribes, or even addresses the procedures for obtaining . . . FUCO status.” Order No. 667-A at P 55.

⁴³ *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs.

¶ 31,197 at P 26-27 (2005), *order on reh’g*, Order No. 667-A, FERC Stats. & Regs.

¶ 31,213, *order on reh’g*, Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 (2006), *order*

(continued)

companies that would own only EWGs, FUCOs and qualifying facilities wished to acquire formal confirmation of EWG or FUCO status so that they could be assured that they would qualify for the statutory exemption from the Commission's access to their books and records under PUHCA 2005 that applies to holding companies of this type.⁴⁴

62. Thus, although the Commission's PUHCA 2005 regulations do not state that entities meeting the definition of EWG or FUCO must obtain formal EWG or FUCO "status,"⁴⁵ the Commission provided that a self-certification process, as well as the option of a formal declaratory order, would be available for purposes of confirming the availability of the section 1266 exemption. In doing so, the Commission stated that "the self-certification procedure established herein, along with the continued availability of Commission determinations of EWG and FUCO status, ensures that the EWG and FUCO exemptions [from PUHCA 2005] will continue to be available to any persons who satisfy the statutory criteria."⁴⁶

63. Accordingly, the procedures for obtaining FUCO status were developed for the purpose of assuring holding companies they qualify for exemptions from PUHCA 2005 access to books and records requirements, not for the purpose of determining who qualifies for a blanket authorization under FPA section 203.

64. We thus clarify that a FUCO certification filing under section 366.7 of our regulations is not a precondition to eligibility for the blanket authorization set forth in section 33.1(c)(5). However, we caution that to the extent Ecofin or another holding

on reh'g, Order No. 667-C, 118 FERC ¶ 61,133 (2007). We noted that the comments received on this topic focused more on EWG certification than FUCO certification. However, in our view, on the issue of whether certification is needed or allowed, PUHCA 2005 warrants similar treatment for EWGs and FUCOs.

⁴⁴ Section 1266 of EPAct 2005 exempts from the requirements of section 1264 of that statute (which provides for Federal access to holding company system books and records) "any person that is a holding company, solely with respect to one or more" EWGs, QFs or FUCOs.

⁴⁵ In fact, the EWG and FUCO regulations found in section 366.7 of the Commission's regulations purposefully speak in permissive rather than mandatory terms by stating that companies "may" file a notice of self-certification or a request for Commission determination.

⁴⁶ Order No. 667 at P 228.

company elects not to obtain a formal certification of FUCO status through either a self-certification or a Commission declaratory order, it bears responsibility for complying with, and the consequences of not complying with, the definition of “foreign utility company” and the section 33.1(c)(5) blanket authorization.

65. Applicants assert that the blanket authorization provided in section 33.1(c)(5) of our regulations would be unworkable in their case because they would be required to file the verification required by that section in advance of each acquisition of FUCO securities. The verification requirement applies to a holding company if it or any of its affiliates, subsidiaries or associate companies within the holding company system has captive customers in the United States or owns or provides transmission service over jurisdictional transmission facilities in the United States. Such holding companies must verify that “the proposed transaction:”

(i) Will not have any adverse effect on competition, rates or regulation, and

(ii) Will not result in, at the time of the transaction or in the future:

(A) Any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company;

(B) Any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company;

(C) Any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or

(D) Any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.

Section 33.1(c)(5) provides that a transaction subject to the above conditions will be deemed approved only upon the filing of the required information.

66. The Commission acknowledges that being required to make this verification prior to a specific acquisition of FUCO securities could, as a practical matter, make it more difficult for Applicants to invest on the most favorable terms and could effectively delay

or preclude Applicants from making the FUCO investments they propose. This would certainly be contrary to the purpose of repealing PUHCA 1935. We therefore will authorize Applicants to make alternative verification filings that in their case will be deemed to satisfy the verification requirement of section 33.1(c)(5) of our regulations.

67. First, within 10 days of the issuance of this order, Applicants must file with the Commission a blanket verification that makes the representations required by section 33.1(c)(5) for all future acquisitions of FUCO securities they make. Second, Applicants will be required to file with the Commission a similar verification 30 days after the end of each quarter that also identifies by name all FUCOs in which they held an interest during the quarter just concluded.

The Commission orders:

(A) The Commission hereby grants Applicants' request for a blanket authorization for the U.S. Traded Utilities or holders of U.S. Traded Utilities voting securities to sell such securities to the Investment Management Subsidiaries on behalf of the Applicant Funds and the Investment Management accounts, for a period of three years, as discussed in the body of the order.

(B) The Commission hereby grants Applicants' request for a blanket authorization to acquire voting securities of U.S. Traded Utilities for a period of three years, as discussed in the body of the order.

(C) The Commission dismisses Applicants' request for a blanket authorization to acquire the securities of Foreign Utilities as unnecessary in light of the clarification of section 33.1(c)(5) of the Commission's regulations set forth in the body of this order.

(D) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(E) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of costs or any valuation of property claimed or asserted.

(F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(G) Applicants shall file with the Commission contemporaneous with filing at the SEC the Schedule 13G filings made with the SEC that are relevant to the

authorizations granted in this order. Any changes in the information provided on the initial Schedule 13G must be reflected in an annual amended filing due within 45 days of the end of each calendar year.

(H) Applicants shall file with the Commission on a quarterly basis, the reports listing the holdings of the U.S. Traded Utility securities by the entity authorized to hold such securities (on an unconsolidated basis) stated in terms of number of shares held and as a percentage of the outstanding shares.

(I) Within 10 days of the issuance of this order, Applicants shall file with the Commission the blanket verification relating to acquisitions of FUCO voting securities discussed in the body of this order. Within 30 days following the end of each quarter, Applicants shall submit a similar verification that also identifies by name all FUCOs in which they held an interest during the quarter just concluded.

(J) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the request and specifying the terms and conditions under which the blanket authorization set forth in section 33.1(c)(5) of the Commission's regulations will be available to them.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.