DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2 and 33

[Docket No. RM05–34–000]

Transactions Subject to FPA Section 203

Issued October 3, 2005.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to Subtitle G (Market Transparency, Enforcement, and Consumer Protection), section 1289 (Merger Review Reform), of Title XII (Electricity Modernization Act of 2005), of the Energy Policy Act of 2005 (EPAct 2005), Pub. L. 109–58, 119 Stat. 594 (2005), the Federal Energy Regulatory Commission (Commission) is proposing rules and amendments to the Commission's regulations to implement amended section 203 of the Federal Power Act (FPA). The Commission seeks public comment on the rules and amended regulations proposed herein.

EFFECTIVE DATE: Comments are due November 7, 2005.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

Sarah McWane (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8372.

Phillip Nicholson (Technical Information), Office of Markets, Tariffs and Rates—West, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8240.

Jan Macpherson (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8921.

James Akers (Technical Information), Office of Markets, Tariffs and Rates—West, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8101.

SUPPLEMENTARY INFORMATION:

I. Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005) [1] was signed into law. Section 1289 (Merger Review Reform) of Title XII, Subtitle G (Market Transparency, Enforcement, and Consumer Protection),[2] of EPAct 2005 amends section 203 of the Federal Power Act (FPA) [3] and directs the Federal Energy Regulatory Commission (Commission) to adopt, by rule, procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions under section 203 of the FPA. Amended section 203 also: (1) Increases (from $50,000 to $10 million) the value threshold for certain transactions subject to section 203; (2) extends the scope of section 203 to include transactions involving certain transfers of generation facilities and certain holding companies' acquisitions with a value in excess of $10 million; (3) limits the Commission's review of a public utility's acquisition of securities of another public utility to transactions greater than $10 million; and (4) requires that the Commission, when reviewing a proposed section 203 transaction, examine cross-subsidization and pledges or encumbrances of utility assets. The Commission proposes rules and amendments to the Commission's regulations to implement amended section 203.[4]

2. The Commission intends to issue a final rule within six months after EPAct 2005's enactment to coincide with the date on which amended section 203 of the FPA takes effect, February 8, 2006. The Commission seeks public comment on the rules proposed herein.

II. Background

A. Commission Merger Policy Before Effective Date of Amended FPA Section 203

1. Section 203 of the FPA

3. Section 203 of the FPA currently provides that Commission authorization is required for various types of dispositions and acquisitions of jurisdictional facilities, such as public utility mergers and consolidations. Specifically, section 203(a) of the FPA states:

> No public utility shall 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 $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.
>
> The Commission shall approve such transactions if they are consistent with the public interest.

2. The Commission's Merger Policy Statement

4. In 1996, the Commission issued the Merger Policy Statement [5] updating and clarifying the Commission's procedures, criteria, and policies concerning public utility mergers in light of dramatic and continuing changes in the electric power industry and the regulation of that industry. The purpose of the Merger Policy Statement was to ensure that mergers are consistent with the public interest and to provide greater certainty and expedition in the Commission's analysis of merger applications.

5. The Merger Policy Statement sets out three factors the Commission generally considers when analyzing whether a proposed section 203 transaction is consistent with the public interest: effect on competition; effect on rates; and effect on regulation.[6]

6. With respect to the effect on competition, the Merger Policy Statement adopts the Department of Justice (DOJ)/Federal Trade Commission (FTC) 1992 Horizontal Merger Guidelines (Guidelines) [7] as the analytical framework for examining horizontal market power concerns. The Merger Policy Statement also uses an analytical screen (Appendix A analysis) that is intended to allow early identification of transactions that clearly do not raise competitive concerns. As

[1] Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 594 (2005).

[2] EPAct 2005 §§ 1281 *et seq.*

[3] 16 U.S.C. 824b (2000).

[4] As noted below, EPAct 2005's amendments to FPA section 203 will not take effect until February 3, 2006. We will generally refer to EPAct 2005's amended section 203 of the FPA as ''amended section 203.'' All other references to FPA section 203 are as it currently exists.

[5] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement,* Order No. 592, 61 FR 68,595 (Dec. 30, 1996), FERC Stats. and Regs. ¶ 31,044 (1996), *reconsideration denied,* Order No. 592–A, 62 FR 33,340 (June 19, 1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement).

[6] Although the Commission applies these factors to all section 203 transactions, not just mergers, the filing requirements and the level of detail required may differ. *Id.* at ¶ 30,113 n.7. *See also* 18 CFR 2.26 (2005) (which codifies the Merger Policy Statement).

[7] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 57 FR 41,552 (1992), revised, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 8, 1997).

part of the screen analysis, applicants must define the relevant products sold by the merging entities, identify the customers and potential suppliers in the geographic markets that are likely to be affected by the proposed transaction, and measure the concentration in those markets.[8] Using the delivered price test to identify alternative competing suppliers, the concentration of potential suppliers included in the defined market is then measured by the Herfindahl-Hirschman Index (HHI) and used as a screen to determine which transactions may raise market power concerns.

7. The Commission stated in the Merger Policy Statement that it will examine the second factor, the effect on rates, by focusing on customer protections designed to insulate consumers from any harm resulting from the transaction. We directed applicants to attempt to negotiate such measures with their customers before filing their applications.[9]

8. The Merger Policy Statement set forth a third factor for examination, the effect on regulation. This includes both state regulation and the Commission's regulation, including any potential shift in regulation from the Commission to the Securities and Exchange Commission (SEC) due to a transaction creating a registered public utility holding company under the Public Utility Holding Company Act of 1935 (PUHCA 1935).[10] The Merger Policy Statement explained that, unless applicants commit themselves to abide by this Commission's policies with regard to affiliate transactions involving non-power goods and services, we will set the issue of the effect on regulation for hearing.[11] With respect to a transaction's effect on state regulation, where the state commissions have authority to act on the transaction, the Commission stated that it intends to rely on them to exercise their authority to protect state interests.

3. The Filing Requirements Rule and Revised Filing Requirements Under 18 CFR Part 33 of the Commission's Regulations

9. The Commission later issued the Filing Requirements Rule,[12] a final rule updating the filing requirements under 18 CFR Part 33 of the Commission's regulations for section 203 applications. The Filing Requirements Rule implements the Merger Policy Statement and provides detailed guidance to applicants for preparing applications. The revised filing requirements were also designed to assist the Commission in determining whether section 203 transactions are consistent with the public interest, to provide more certainty, and to expedite the Commission's handling of such applications.

10. The Filing Requirements Rule codifies the Commission's screening approach, provides specific filing requirements consistent with Appendix A of the Commission's Merger Policy Statement, establishes guidelines for vertical competitive analysis, and sets forth filing requirements for mergers that may raise vertical market power concerns. It also streamlined the rules, eliminated unnecessary Part 33 filing requirements, and reduced the information burden for transactions that raise no competitive concerns.

11. In the Filing Requirements Rule, the Commission explained that for certain transactions, abbreviated filing requirements are appropriate because it is relatively easy to determine that they will not harm competition and, thus, a full-fledged screen or vertical competitive analysis is not required. The Commission does not require the full Appendix A analysis screen if: (1) The applicant demonstrates that the merging entities do not operate in the same geographic markets, or if they do, that the extent of such overlapping operation is *de minimis*; and (2) no intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other.[13] Furthermore, the Commission stated that it will not require section 203 applicants to provide an Appendix A analysis if: (1) The application is a regional transmission organization (RTO) filing that directly responds to the Commission's RTO rule; [14] (2) the transaction is simply an internal corporate reorganization; or (3) the transaction only involves a disposition of transmission facilities.[15]

12. The Commission also stated in the Filing Requirements Rule that, as announced in the Merger Policy Statement, it intended to continue processing section 203 applications expeditiously, with a goal of issuing an initial order for most mergers within 150 days of a completed application.[16] Further, the Commission stated that it intended to continue processing uncontested non-merger applications within 60 days of filing and protested non-merger applications within 90 days of filing.[17]

B. Section 203 as Amended by EPAct 2005

13. EPAct 2005 revises section 203(a) of the FPA as follows:

14. Amended section 203(a)(1) states that no public utility shall, without first having secured an order of the Commission authorizing it to do so: (A) 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 million; (B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever; (C) purchase, acquire, or take any security with a value in excess of $10 million of any other public utility; or (D) purchase, lease, or otherwise acquire an existing generation facility: (i) that has a value in excess of $10 million; and (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

15. Section 203(a)(2) adds the entirely new requirement that 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 million of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility

[8] Merger Policy Statement at ¶ 30,119–20.

[9] *See id.* at ¶ 30,121–24.

[10] 15 U.S.C. 79a *et seq.* (2000).

[11] Merger Policy Statement at ¶ 30,125; *see* also Atlantic City Electric Company and Delmarva Power & Light Company, 80 FERC ¶ 61,126 at 61,412, order denying reh'g, 81 FERC ¶ 61,173 (1997).

[12] *Revised Filing Requirements Under Part 33 of the Commission's Regulations,* Order No. 642, 65 FR 70,983 (Nov. 28, 2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g,* Order No. 642-A, 66 FR 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001) (codified at 18 CFR Part 33 (2005) (Filing Requirements Rule)).

[13] Filing Requirements Rule at ¶ 31,902 and ¶ 31,907. It also provides that an applicant will not be required to file additional information regarding the vertical aspects of a proposed merger if it shows that the merger does not impair competition in ''downstream'' electricity markets and involves an input supplier (the ''upstream'' merging firm) that sells: (1) An input that is used to produce a *de minimis* amount of the relevant product; or (2) no product into the downstream electricity geographic market. Id. At ¶ 31,903.

[14] *Regional Transmission Organizations,* Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,108 (1999), *order on reh'g,* Order No. 2000–A, 65 FR 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington* v. *FERC,* 272 F.3d 607 (D.C. Cir. 2001).

[15] Filing Requirements Rule at ¶ 31,902. The Commission clarified that, if it later determined that a filing raised competitive issues, the Commission would evaluate those issues and direct the applicant to submit any data needed to satisfy the Commission's concerns. *Id.* at n.79.

[16] *Id.* at ¶ 31,873.

[17] *Id.* at ¶ 31,876.

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 million without Commission authorization.

16. Like the existing section 203(a), amended section 203(a)(3) provides that upon receipt of an application for such approval, the Commission shall give reasonable notice in writing to the Governor and state commission of each of the states in which the physical property affected is situated, and to such other persons as it may deem advisable.

17. Amended section 203(a)(4) states that after notice and opportunity for hearing the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control if it finds that the transaction will be consistent with the public interest, but also adds the entirely new requirement that the Commission must find 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, unless that cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

18. Section 203(a)(5) adds the entirely new requirement that the Commission shall:

> By rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. The Commission shall grant or deny any other application for approval of a transaction not later than 180 days after the application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of paragraph (4) and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

19. Section 203(a)(6), which is also new, provides that for purposes of this subsection, the terms ''associate company,'' ''holding company,'' and ''holding company system'' have the meaning given those terms in the Public Utility Holding Company Act of 2005 (PUHCA 2005).[18]

20. Section 1289(b) provides that the amendments made by this section shall take effect six months after the date of enactment of EPAct 2005.

21. Section 1289(c) provides that the amendments made by subsection (a) shall not apply to any section 203 application that was filed on or before the date of enactment of EPAct 2005.

22. Section 203(b) of the FPA remains unchanged.[19]

III. Discussion

23. The Commission proposes to revise 18 CFR Part 33 (Application for Acquisition, Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility) and 18 CFR 2.26 (Policies concerning review of applications under section 203) to implement amended section 203 of the FPA.

A. Proposal To Amend 18 CFR Part 33

1. Part 33—Title

24. Currently, 18 CFR Part 33 is titled ''Application for Acquisition, Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility.'' The Commission proposes to revise the title of 18 CFR part 33 to read as follows: ''Applications Under Federal Power Act Section 203.''

2. Applicability and Definitions—18 CFR 33.1

25. Proposed section 33.1(a) is intended to clarify what transactions are subject to amended section 203 of the FPA and Part 33 as a result of amended sections 203(a)(1)(A)–(D) and (a)(2) of the FPA.[20] Proposed new subsection 33.1(b) would define certain new terms in amended section 203 that are not defined in EPAct 2005.

a. ''Value''

26. Proposed subsection 33.1(b) would define ''value.'' Currently, subsection 33.1(b) defines ''[v]alue in excess of $50,000'' as ''the original cost undepreciated as defined in the Commission's Uniform System of Accounts prescribed for public utilities and licensees in part 101 of this chapter.''

27. Before EPAct 2005, the question of what ''value'' means was not particularly significant for determining section 203 applicability, since most transactions involving the transfer of jurisdictional facilities clearly met the relatively low $50,000 threshold regardless of how ''value'' was defined. Most transactions involving the transfer of physical jurisdictional facilities (usually transmission) were clearly subject to section 203 simply because the ''original cost undepreciated'' of almost any transmission facility exceeded the relatively low $50,000 threshold set forth in FPA section 203(a). However, with the higher $10 million threshold, the question of how to define ''value'' may become significant for determining whether section 203 applies to certain transactions involving jurisdictional facilities (either physical or paper),[21] generation facilities, securities, individual companies or holding companies.

28. As relevant here, we believe that ''value'' can be viewed in two broad ways: Original/accounting cost value and market value. Original cost undepreciated is the amount actually paid for installing an original plant and equipment and additions thereto. A market value approach, on the other hand, bases value on the probable or expected future earnings or profits over the life of the asset. Different potential buyers of the asset will, of course, place different valuations on an asset, depending on their estimates of future expected profitability and their cost of capital.

29. As discussed below, the Commission proposes to generally rely on a ''market value'' approach for determining whether asset transfers are jurisdictional under section 203, with the exception of transfers of wholesale contracts. We invite comment on whether the ''market value'' concept or other alternative concepts are appropriate. We also invite comment and suggestions on measures of market value or other measures of value.

30. With respect to transactions involving the transfer of physical facilities, such as an existing generation facility or a transmission facility, which

---

[18] EPAct 2005 § 1261 *et seq.*

[19] Section 203(b) states:

> The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

[20] Because proposed section 33.1(a) is almost identical to amended sections 203(a)(1)(A)–(D) and (a)(2), which are summarized in section II.B. above and set forth in the proposed regulatory text, we will not recite that text here.

[21] We note that the $10 million value threshold that is to be applied to the transfer of jurisdictional facilities under amended section 203(a)(1)(A), similar to the prior $50,000 threshold under section 203(a), is important for determining whether the transfer of part of a public utility's jurisdictional facilities is subject to section 203. The transfer of all of a public utility's jurisdictional facilities, regardless of value, is subject to amended section 203, as it was with section 203.

is addressed by amended subsections 203(a)(1)(A) and (D), the use of ''original cost undepreciated'' could lead to a different jurisdictional determination for facilities of equal size. For example, two generation units of the same size and type, but of substantially different ages, would likely have different values based on ''original cost undepreciated.'' The transfer of the newer generation unit could be deemed jurisdictional because its original construction cost exceeded $10 million, while the transfer of the older unit might not be jurisdictional because its original construction cost was less than $10 million. Thus, although the effects on markets of the transfer of both generation units could be the same, under the existing regulations the Commission would be prevented from evaluating the public interest implications of the transfer of the older unit.[22] Therefore, the Commission proposes that ''value,'' as applied to transmission facilities and existing generation facilities, be defined as the market value of such facilities. We recognize, however, that the determination of the market value for transmission facilities can be difficult in some instances and thus propose that, in the absence of a readily ascertainable market value, original cost undepreciated would be used. We seek comment on whether this measure of ''value'' of transmission and generation facilities, or some other measure, should be used, for transactions between non-affiliates and between affiliates. For transactions involving transfers of facilities between non-affiliates, the Commission believes that market value will, in most circumstances, be reflected in the transaction price. However, for a transaction between affiliates, it cannot be readily assumed that the market value will be reflected in the transaction price, since the buyer and seller do not bargain at arms' length. A possible alternative measure is original cost undepreciated. Therefore, the Commission seeks comments on these or other possible alternatives for defining value for transactions between affiliates.

31. With respect to paper jurisdictional facilities (usually wholesale contracts), Commission precedent does not address how the value of a wholesale contract should be determined for purposes of determining whether section 203 applies.[23] Rather, it appears to have been assumed, by applicants and the Commission alike, that the value of a wholesale contract, however measured, would exceed $50,000. However, with the increase in the value threshold to $10 million in amended section 203, the ''value'' of a wholesale contract may become significant.

32. For example, a wholesale contract may have a total revenue stream that exceeds $10 million, but with profits of much less than $10 million. A market value approach would involve basing ''value'' on the price or consideration paid for the contract, which, as with any other asset, would depend on the valuation of expected profits over the remaining life of the contract. Alternatively, the significance of a wholesale contract in terms of its effect on the market may be better reflected by defining ''value'' as total expected contract revenues over the remaining life of the contract. Total revenues are directly related to the quantity of power and energy delivered under the contract, which contributes to total market supply.[24] It may also be appropriate to factor into this determination the value of options that might affect the price and any rights to extend the contract or change the quantities sold. At this juncture, however, we propose that for purposes of determining the applicability of amended section 203 and Part 33 to a given transaction, the value of any wholesale contract included in the transaction would be based on total expected contract revenues over the remaining life of the contract. We seek comment on whether this measure of ''value'' of wholesale power sales contracts, a market value measure, or some other measure, should be used.

33. In addition, existing section 203 requires prior Commission approval for a public utility to acquire any security of another public utility, regardless of the value of the security. Thus, up to this point there was no need to define ''value'' for security acquisitions in Part 33. Amended sections 203(a)(1)(C) and (a)(2), however, state that the securities must have a value in excess of $10 million. The Commission proposes to define ''value'' of a security as the market price at the time the security is acquired. For transactions between non-affiliated companies, we will rebuttably presume that the market value is the agreed-upon transaction price. We seek comment on whether this measure of ''value'' of securities, or some other measure, should be used. We also seek comment on how to determine value for security transactions involving affiliates if the securities are not widely traded. For example, should the Commission consider using the *Edgar* standard [25] of review when determining value in affiliate transactions? While this valuation method would not require a direct solicitation, the Commission seeks comments as to whether we should give particular weight to evidence of non-affiliate transactions involving either non-affiliated buyers or sellers of securities of similarly situated utilities or assets.

34. The Commission proposes to define ''value'' with respect to a merger or consolidation 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 million, as used in amended section 203(a)(2), as ''market value.'' As noted above, we would expect that in most circumstances ''market value'' will be reflected in the transaction price for transactions between non-affiliates. We seek comment on whether this measure of ''value'' or some other measure should be used in these circumstances.

35. Further, given the increased significance of valuation of a transaction under amended section 203, we solicit comment on whether the Commission's existing record keeping and reporting requirements, outside the section 203 context, provide an adequate basis for monitoring jurisdictional entities' determinations of when a section 203 application is required.[26] For example,

[22] Admittedly, this example addresses transfers of relatively small generation or transmission facilities. Even at a historical cost of $101 per kilowatt, the original cost of a 100 megawatt plant would exceed $10 million and thus the transfer would be jurisdictional.

[23] In *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 at 62,405 (1993), the Commission merely noted, without discussion, that the value of the wholesale contract must exceed $50,000 for the transfer to be subject to section 203 of the FPA. *See also Ocean State Power*, 38 FERC ¶ 61,140 (1987).

[24] We note that for purposes of determining destination markets to be used in the Appendix A analysis, Part 33 requires applicants to identify individual wholesale customers based on sales. 18 CFR 33.3(c)(2).

[25] *Boston Edison Company Re: Edgar Electric Energy Company*, 55 FERC ¶ 61,382 (1991) (*Edgar*). The *Edgar* standard of review is designed to prevent affiliate abuse and to ensure prices that are consistent with competitive outcomes. The *Edgar* decision outlined three methods by which a buyer could demonstrate that the transaction was free from potential affiliate abuse. First, the buyer can present evidence of direct head-to-head competition either through a formal solicitation or an informal negotiation process. Second, the buyer can present evidence of the prices that non-affiliated buyers were willing to pay for similar services to the proposed affiliate sale. Third, the buyer can present benchmark evidence showing the terms, prices and conditions of sales of similar services made by non-affiliated sellers in the relevant market. *Id.* at 62,168–69.

[26] However, we note that EPAct 2005 §§ 1284(d) and (e) expand the Commission's criminal and civil penalty authority, which will discourage

Continued

do FERC Form 1s or Order No. 652 [27] market-based rate change in status reports provide sufficient information to monitor compliance with section 203?

b. ''Existing Generation Facility''

36. Proposed subsection 33.1(b) also defines the term ''existing generation facility.'' Amended section 203(a)(1)(D) provides that the acquisition of ''an existing generation facility'' with a value in excess of $10 million ''that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes'' is now subject to section 203 of the FPA.

37. The Commission proposes to define ''existing generation facility'' for section 203 purposes as a generation facility that is operational at the time the transaction is consummated. If such a generation facility is intended to be used in whole or in part for wholesale sales in interstate commerce by a public utility, it is subject to our jurisdiction for ratemaking purposes and thus covered under amended section 203(a)(1)(D). Although the statutory provision refers to a facility that ''is'' used for wholesale sales (and over which the Commission has jurisdiction for ratemaking purposes), we believe a reasonable interpretation is that the provision would apply to newly constructed facilities that have already been energized at the time the transaction is consummated and are intended to be used in whole or in part for wholesale sales in interstate commerce by public utilities. We also note that if it can be demonstrated that a facility is used exclusively for retail sales, then amended section 203(a)(1)(D) is not triggered. We seek comment on the definition of the term ''existing generation facility.'' We seek comment on whether ''at the time the section 203 transaction is consummated'' is the correct point in time for determining whether a facility is an ''existing'' facility.

c. ''Associate Company,'' ''Holding Company,'' ''Holding Company System,'' ''Transmitting Utility,'' and ''Electric Utility Company''

38. The term ''transmitting utility'' is already defined in amended section 3 of the FPA [28] as ''an entity (including an entity described in section 201(f)) that owns, operates, or controls facilities used for the transmission of electric energy—(A) in interstate commerce; (B) for the sale of electric energy at wholesale.'' [29]

39. Amended section 203(a)(6) states that the terms ''associate company,'' ''holding company,'' and ''holding company system'' shall have the meaning given those terms in PUHCA 2005.[30]

40. We note that amended section 203(a)(2) refers to the term ''electric utility company,'' but provides no definition of that term. However, ''electric utility company'' is a PUHCA term and we believe that the most reasonable interpretation, especially in light of amended section 203(a)(6), is that it has the same meaning as used in PUHCA 2005, which is any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale.[31] We seek comments on this proposed definition.

d. ''Non-Utility Associate Company''

41. Amended section 203(a)(4) adds the new requirement that before we can approve a proposed section 203 transaction, the Commission must find that the transaction will not result in cross-subsidization of a non-utility associate company or a 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 interest. However, because EPAct 2005 provides no definition of the term ''non-utility associate company,'' proposed subsection 33.1(b) would define this term.

42. PUHCA 2005, Subtitle F of EPAct 2005, defines an ''associate company'' of a company as any company in the same holding company system with such company, but does not define ''non-utility associate company.'' [32] A reasonable interpretation, as explained below, is that Congress was concerned about the potential that customers of ''regulated'' public utilities (persons that own or operate facilities used for wholesale sales or transmission in interstate commerce) would inappropriately subsidize ''unregulated'' associate companies [33] in the same holding company system, whether the associate companies were in energy or non-energy businesses. Such cross-subsidization can harm not only customers of the regulated public utility but it can also harm competition by giving ''unregulated'' sellers a competitive advantage. Similarly, Congress was concerned that regulated public utility assets not be inappropriately pledged or used to support non-regulated associate companies, to the harm of customers of the regulated public utility.

43. Historically, the Commission has used the term ''non-utility'' in more than one context and with more than one meaning. In the context of considering cross-subsidization concerns arising from the formation of holding companies, ''non-utility operations'' has been used to refer to the operation of businesses completely uninvolved in any aspect of the generation, transmission, distribution, or sale of electricity.[34] An example would be an associate company that engages in real estate development or residential construction. In the context of considering cross-subsidization or affiliate abuse concerns associated with power transactions between public utility affiliates, the Commission has differentiated between utility activities and non-utility activities according to whether they were being conducted by a public utility with captive wholesale or retail customers served under cost-based rates (sometimes described as a ''traditional public utility''). In this context, the Commission has sometimes referred to a power marketer (a public utility authorized to charge market-based rates but without captive customers) affiliate of a traditional public utility as a non-utility affiliate.[35]

44. To provide the broadest cross-subsidization protection, the Commission proposes to interpret the term ''non-utility associate company'' to mean any associate company in a holding company system other than a public utility or electric utility company that has wholesale or retail customers served under cost-based regulation. Therefore, a non-utility associate company would include, for example, a power marketer, a generator that does not have captive customers, a gas marketer, a fuel supply company or a company that provides inputs to power production, or a company that is involved in business activities not related to the generation, transmission,

noncompliance with the requirements of FPA section 203.

[27] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 FR 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

[28] 16 U.S.C. 796 (2000).

[29] EPAct 2005 § 1291.

[30] *Id.* at § 1262.

[31] *Id.* at § 1262(5).

[32] *Id.* at § 1262.

[33] ''Unregulated'' companies, as the term is used herein, would include those that have no rate regulation oversight (*e.g.*, real estate businesses) as well as those that are regulated on a market rate basis (*e.g.*, wholesale sellers granted market-based rate authority by the Commission).

[34] *See Central Illinois Public Service Company,* 42 FERC ¶ 61,073 at 61,328 (1988); *Boston Edison Company and BEC Energy,* 80 FERC ¶ 61,274 at 61,994 (1997).

[35] *See Sierra Pacific Power Company,* 95 FERC ¶ 61,193 at 61,678–79 (2001) (*Sierra Pacific*).

distribution, or sale of electricity.[36] We seek comment on whether this definition is appropriate or whether the Commission should use a narrower definition, *e.g.*, one which defines a ''non-utility associate company'' as a company that is in a business not related to generation, transmission, distribution, or sale of electricity.

3. Contents of Application—General Information Requirements Regarding Cross-Subsidization—18 CFR 33.2(j)

45. Proposed new subsection 33.2(j) would implement section 203(a)(4) by requiring applicants to include in their section 203 applications an explanation of how applicants are providing assurance that the 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, with appropriate evidentiary support for such explanation; or, if no such assurance can be provided, an explanation of how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest. This explanation will be Exhibit M to the applicant's application. The Commission seeks comment on what evidence parties should be required to submit to support any explanation offered under this subsection.

46. EPAct 2005 provides no guidance on how the Commission, when reviewing section 203 applications, should determine whether or not a proposed transaction will result in cross-subsidization or a pledge or encumbrance of utility assets for the benefit of an associate company. The Commission has sought to guard against potential cross-subsidization and affiliate abuse when it reviews applications for cost-based or market-based rate authority under section 205 of the FPA [37] or dispositions of jurisdictional facilities under section 203 involving public utilities with captive customers or their affiliates.[38] The Commission also has in place cash management rules to monitor proprietary capital ratios and money lending or other financial arrangements that can harm regulated companies.[39] In light of the Congress' clear directive in EPAct 2005 that the Commission make findings regarding cross-subsidization and the pledge or encumbrance of utility assets in the context of a section 203 application, we seek comment, as discussed below, on what additional safeguards or conditions may need to be placed on section 203 transactions.

47. The Commission's primary focus has been to prevent a transfer of benefits from a traditional public utility's captive customers to shareholders of the public utility's holding company due to an intra-system transaction that involves power or energy, generation facilities, or non-power goods and services. Concerns arise both in the circumstance in which an ''unregulated'' affiliate (*e.g.*, a power marketer or non-utility affiliate) provides power or goods and services to a public utility with captive customers, as well as the circumstance in which the public utility with captive customers provides power or goods and services to the ''unregulated'' affiliate. For instance, a traditional public utility with captive customers served at cost-based rates may purchase power from its marketing affiliate at a price above market or sell power to its marketing affiliate at below-market prices, thus transferring benefits from customers to shareholders of the holding company. Customers served at cost-based rates by a traditional public utility may also be harmed if the traditional public utility buys a generation facility from an affiliate at a price greater than market or sells a generation plant to an affiliate at less than cost or market value, whichever is higher. Further, customers may be harmed if the traditional public utility purchases non-power goods and services from an affiliate at above market prices or sells non-power goods and services to an affiliate at less than the higher of cost or market value.[40]

48. The Commission's regulatory tool for protecting against inappropriate cross-subsidization, on an on-going basis, has primarily been its FPA sections 205 and 206 [41] rate authority. This includes: review of just and reasonable rates and prudently incurred costs (*e.g.*, costs of purchasing power or non-power goods and services from an affiliate) for public utilities that sell at cost-based rates; imposing conditions and codes of conduct on market-based rate authorizations for sellers that have, or are affiliated with companies that have, captive customers; and auditing the accounts, books, and records of public utilities to ensure that inappropriate cross-subsidization does not occur.

49. As noted above, the Commission, through its FPA sections 205 and 206 ratemaking authority, already protects in several ways against affiliate abuse in connection with power and energy transactions and non-power transactions between traditional public utilities and their affiliates. The latter affiliates may be affiliated generators or marketers with market-based rates, affiliate companies that provide goods such as fuel or supplies, or service company affiliates that provide services such as accounting or legal services. When we grant market-based rate authority under section 205 of the FPA, the Commission requires that a power marketer not sell power to, or purchase power from, any utility affiliate without prior Commission approval. Another requirement is that sales of non-power goods and services from the traditional public utility to a marketing affiliate occur at the higher of cost or market value and that the traditional public utility's purchases of non-power goods and services from an affiliate (*e.g.*, an affiliate fuel company) occur at market value or less. Under section 205 of the FPA, the Commission also applies the *Edgar* standard to ensure that a traditional public utility's power purchases from an affiliate occur at a just and reasonable rate.[42]

50. In the section 203 context, the Commission currently requires that to gain section 203 approval without a hearing, if the transaction would create a registered holding company under PUHCA 1935, applicants must agree to abide by the Commission's policy on intra-system transactions for non-power goods and services.[43] Further, when a

[36] These are examples only. This list is not intended to be exhaustive.

[37] 16 U.S.C. 824d (2000).

[38] *See e.g., Sierra Pacific,* 95 FERC ¶ 61,193; *Boston Edison Company,* 80 FERC ¶ 61,274 (1997).

[39] *Regulation of Cash Management Practices,* Order No. 634, 68 FR 40,500 (Jul. 8, 2003), III FERC Stats. & Regs. ¶ 31,145 (June 26, 2003), Order No. 634–A, 68 FR 61,993 (Oct. 31, 2003), III FERC Stats. & Regs. ¶ 31,152 (2003) (Cash Management Rule).

[40] We note, however, that in our recently issued notice of proposed rulemaking to implement PUHCA 2005, we have sought comment on whether the Commission should apply the lower of cost or market standard for the provision of non-power goods and services or if we should instead adopt the SEC ''at cost'' standard. *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005,* 112 FERC ¶ 61,300 at P 15 (2005) (PUHCA NOPR).

[41] 16 U.S.C. 824e (2000).

[42] Additionally, issues can arise regarding costs that are allocated among holding company affiliates that all have captive customers. This does not raise the same concerns discussed above regarding the transfer of benefits from captive customers to shareholders. Rather, it raises the issue of one set of captive customers unfairly subsidizing another set of captive customers. The Commission addresses these types of issues in the context of setting cost-based rates under FPA sections 205 and 206. Historically, a related problem occurred when regulated companies traded an asset at inflated prices to the detriment of customers. Modern accounting rules generally prevent this problem.

[43] *Public Service Company of Colorado and Southwestern Public Service Company,* 75 FERC ¶ 61,325 at 62,046 (1996); Merger Policy Statement at ¶ 30,124–25; 18 CFR 2.26(e). However, as is discussed below, with the repeal of the PUHCA

Continued

public utility disposes of its jurisdictional facilities to another company, whether domestic or foreign, the Commission protects public utility customers against inappropriate cross-subsidization by conditioning its authorization on the applicants' acceptance of the Commission's authority, under section 301(c) of the FPA,[44] to review the parent company's books and records as they relate to transactions with or the business of the public utility.[45]

51. Finally, with respect to potential encumbrances or pledges of utility assets, the Commission requires Commission-regulated entities that have not been granted waivers of our accounting and reporting rules to file copies of all cash management arrangements and changes to these arrangements. We also require jurisdictional entities that participate in such programs to calculate their proprietary capital ratios quarterly and to notify the Commission if they fall below 30 percent of total capitalization and provide other detailed information.[46]

52. All of these policies seek to safeguard the interests of captive customers served at cost-based rates and protect regulated public utility assets. However, any merger transaction that creates another affiliate opens the door to possible affiliate abuse or cross-subsidization concerns or pledges or encumbrances of assets. There are various ways we could address these concerns. We note that some state commissions, when reviewing a merger transaction, impose specific conditions designed to protect customers against unfair competitive practices, cross-subsidization, and affiliate abuse.[47] Examples of these conditions include, among other things: Reporting and information access requirements; restrictions on intra-corporate transactions that result in direct charges or cost allocations; a prohibition on the local utility bearing any of the merger acquisition premium, transaction costs, or merger transition costs; measures to protect the utility's financial position; a service quality program, under which the local utility would be subject to revenue requirement reductions if it did not meet certain performance targets established annually; and restrictions on a holding company's access to the local utility's power, natural gas assets, and its individual and aggregated customer information. Given Congress' amendment of section 203, the Commission solicits comments on the adequacy of its present policies preventing affiliate abuse and cross-subsidization, and whether conditions such as those imposed by state commissions may need to be placed on section 203 transactions.[48]

53. We also seek comment on whether additional conditions should be placed on section 203 approvals to ensure that there is no pledge or encumbrance that harms utility customers.[49] Specifically, we seek comment on the types of activities that would typically result in a pledge or encumbrance and the types of pledges and encumbrances that would be consistent with the public interest. We also seek comment on whether the Commission should require that all existing pledges and encumbrances be disclosed in any section 203 application proposing any sort of corporate reorganization.

54. The Commission notes that section 203(a)(4) refers to a pledge or encumbrance of utility assets for the benefit of an ''associate'' company, as opposed to a ''non-utility associate'' company. Since an associate company may either be a utility or non-utility, we interpret this provision to require the Commission to determine whether the transaction will result in the use of utility assets to finance, or serve as collateral for, activities engaged in by an associate company, whether it is a non-utility or a utility.

4. Commission Procedures for Consideration of Applications Under Section 203 of the FPA—18 CFR 33.11

55. Amended section 203(a)(5) of the FPA directs the Commission to adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions under section 203 of the FPA. Section 203(a)(5) also requires the Commission to ''identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in [section 203(a)(4)].''

56. Proposed New sections 33.11(a) and (b) would implement amended section 203(a)(5). Specifically, proposed subsection 33.11(a) provides that the Commission will act on completed applications for approval of a transaction (*i.e.*, one that is consistent with the requirements of Part 33), not later than 180 days after the completed application is filed.[50] If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application, as required by amended section 203 of the FPA.

57. Proposed subsection 33.11(b) would provide for the expeditious consideration of completed section 203 applications that are not contested, are not mergers, and are consistent with Commission precedent, because they should typically meet the standards established in section 203(a)(4).

58. We note that, generally, the most critical period of the Commission's review of a particular section 203 application is the time between the end of the notice period and the issuance of a Commission decision (*i.e.*, the review period). The length of the review period needed depends on the complexity of the application, issues raised by any

1935 registered holding companies will no longer exist and there will be no SEC review of non-power goods and services transactions; thus, all intra-system affiliate transactions will be subject to this Commission's review and conditioning if relevant to jurisdictional rates.

[44] 16 U.S.C. 825 (2000).

[45] *New England Power Company*, 87 FERC ¶ 61,287 (1999).

[46] Cash Management Rule at P 9.

[47] *See, e.g., In the Matter of the Application of Enron Corp for an Order Authorizing the Exercise of Influence Over Portland General Electric Company,* Public Utility Commission of Oregon, Order No. 97–196, UM–814 (June 4, 1997); *Joint Petition of Long Island Lighting Company and The Brooklyn Union Gas Company for Authorization under Section 70 of the Public Service Law to Transfer Ownership to an Unregulated Holding Company and Other Related Approvals,* New York Public Service Commission, Case 97–M–0567 (April 14, 1998); *Joint Application of Pacific Enterprises, Enova Corporation, Mineral Energy Company, B Mineral Energy Sub and G Mineral Energy Sub for Approval of a Plan of Merger of Pacific Enterprises and Enova Corporation With and Into B Mineral Energy Sub and G Mineral Energy Sub, the Wholly Owned Subsidiaries of A Newly Created Holding Company, Mineral Energy Company,* 79 CPUC2d 343, D.98–03–073 (March 26, 1998); Standards of Conduct for Distribution Companies and Their Competitive Affiliates, 220 Mass. Code Regs. 12 (2005).

[48] In addition to these types of conditions, the Commission could, depending upon the specific facts presented, consider as a condition of approval of a proposed section 203 transaction that the transaction be structured a different way to avoid inappropriate cross-subsidization.

[49] We note that in our recently issued notice of proposed rulemaking to implement PUHCA 2005, we sought comment on whether the Commission should amend its rules or policies to provide additional protection against inappropriate cross-subsidization or pledges or encumbrances of utility assets, particularly pursuant to our FPA section 205 and 206 ratemaking authority. PUHCA NOPR at P 26.

[50] As set forth in the Merger Policy Statement, a complete application is one that adequately and accurately describes the merger being proposed and that contains all the information necessary to explain how the merger is consistent with the public interest, including an evaluation of the merger's effect on competition, rates, and regulation. Merger Policy Statement at ¶ 30,127. The Commission's review process will begin when the application is deemed to be complete.

protests, Commission staff's analysis, and the need to hold an evidentiary hearing. In the Filing Requirements Rule, we stated that we typically process uncontested non-merger applications within 60 days of the date of filing and protested non-merger applications within 90 days of filing. Since the issuance of that rule, the Commission has met these goals in almost all instances.

59. The Commission cannot provide a comprehensive description of all the classes or types of transactions that will be encompassed in the expedited review category. However, the Commission proposes that the transactions that would generally warrant expedited review include: (1) A disposition of only transmission facilities, particularly those that both before and after the transaction remain under the functional control of a Commission-approved RTO or independent system operator; (2) transfers involving generation facilities of a size that do not require an Appendix A analysis; (3) internal corporate reorganizations that do not present cross-subsidization issues; and (4) the acquisition of a foreign utility company by a holding company with no captive customers in the United States.[51]

60. With respect to the latter category, the acquisition of a foreign utility company by a holding company with no captive customers in the United States, we recognize that amended section 203's requirement for regulatory approval could have the potential to impede or have a chilling effect on investment—particularly if the transaction were subjected to a lengthy regulatory review. Such a transaction would not cause competitive concerns in the United States and, further, there would be no concerns about cross-subsidization that harms captive customers in the United States. In addition, even with respect to the acquisition of a foreign utility company by a holding company with captive customers in the United States, there may be safeguards or conditions that could be adequate in order to expedite approval of such transactions. The Commission does not want to impede investment in the U.S. or abroad and we seek comment on procedures the Commission might adopt, or safeguards it might require, to pre-approve or expedite such transactions while at the same time protecting U.S. captive customers.[52]

61. For the section 203 applications that involve a competitive analysis per the guidelines of the revised filing requirements,[53] or that may raise cross-subsidization issues or other issues, the amount of time needed for review will depend on the complexity of the issues involved. In cases where the Commission decides that a hearing should be held, establishing a specific review period could also be problematic. However, as provided in amended section 203(a)(5), the Commission must grant or deny the application within 360 days of filing.

62. The Commission also proposes to indicate the length of the notice period for various types of filings. In the Filing Requirements Rule, the Commission stated that we will notice section 203 filings that contain either a competitive analysis screen or a vertical competitive analysis (per the requirements of part 33) for 60 days and that we will notice all other section 203 filings, including mergers that do not require a competitive analysis, for less than 60 days.[54] Since the issuance of the Filing Requirements Rule, the Commission has, in almost all instances, met these goals.

63. Occasionally, applicants have sought shortened notice periods, to achieve certain financial or tax objectives or to serve certain business purposes. Most of these applications, particularly those that do not involve a competitive analysis and do not raise other competitive concerns from affiliate transactions, do not require a complex analysis and, thus, they warrant a shortened notice period.

64. Thus, we have continued to apply our notice policy in a way that has allowed us to continue processing section 203 applications quickly and that is consistent with reasonable business goals and purposes. Accordingly, we expect to have a 60-day notice period for section 203 applications that involve, contain, or require a competitive analysis per the revised filing requirements and a 21-day notice period for all other section 203 applications, except, as explained below, certain applications that may raise cross-subsidization concerns. However, we do not propose to formalize this policy by rule, so that we can maintain the flexibility needed to deal with varying circumstances.

65. In determining the length of the notice period, as a matter of policy, the Commission expects to have, in most instances, a notice period between 21 days and 60 days for applications that seek authorization to transfer ownership of a generation plant from one affiliate or associate company to another company within the same corporate structure and for other applications that may raise cross-subsidization or pledge or encumbrance issues. Not included in this category are transactions that merely change upstream ownership interests held by parent companies of public utilities or transactions that do not alter the terms of power supply or power supply costs for captive customers.

B. Summary of the Commission's Proposal To Amend 18 CFR 2.26, the Merger Policy Statement

1. Effect on Regulation—18 CFR 2.26(1)

66. Section 2.26(b) lists the three factors that the Commission will generally consider in determining whether a proposed transaction subject to section 203 is consistent with the public interest. When considering the third factor, a proposed transaction's effect on federal regulation, section 2.26(e)(1) states that ''[w]here the merged entity would be part of a registered public utility holding company, if applicants do not commit in their application to abide by this Commission's policies with regard to affiliate transactions, the Commission will set the issue for a trial-type hearing.''

67. However, because EPAct 2005 repeals PUHCA 1935,[55] activities of registered holding companies that were previously subject to SEC regulation, including intercompany transactions, will no longer be exempt from this Commission's regulation once PUHCA 1935 repeal takes effect on February 8, 2006.[56] In particular, the Commission's conditions and policies under FPA sections 205 and 206 with respect to non-power goods and services transactions between holding company affiliates, discussed previously, can be applied to all public utilities that are members of holding companies.[57] In addition, the Commission will have authority to review allocations of service company costs among members of holding companies that have public utilities with captive customers. There

[51] We note that PUHCA 1935 exempted from its requirements certain acquisitions of foreign utility companies by a holding company with operations in the United States. 15 U.S.C. 33 (2000); 17 CFR 250.57 (2005). However, amended section 203 appears to provide no such exemption.

[52] *See* Senate Floor Statements by Senators Bingaman (D–NM) and Domenici (R–NM), H.R. 6, Energy Policy Act of 2005, Congressional Record at S9359 (July 29, 2005) (discussing concerns regarding Commission approval of certain foreign transactions outside of the United States).

[53] *See* 18 CFR 33.3 and 33.4.

[54] Filing Requirements Rule at ¶ 31,877–78.

[55] EPAct 2005 § 1263.

[56] *See* 17 CFR part 250 (2005).

[57] *Ohio Power Company* v. *FERC,* 954 F.2d 779 (D.C. Cir. 1992), *cert. denied,* 498 U.S. 73 (1992).

is thus no longer a concern about any potential shift in regulation from this Commission to the SEC under the effect of regulation factor, and we propose to delete section 2.26(e)(1) from our consideration of whether a proposed 203 transaction is consistent with the public interest. However, applicants are still required to address whether the transaction will have any other effect on the Commission's regulation.

2. Proposed New 18 CFR 2.26(f)

68. Proposed new subsection 2.26(f) would be added to the Commission's policies and would state that the Commission will also not approve a transaction that will 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 interest.

IV. Information Collection Statement

69. The following collection of information contained in this proposed rule has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995.[58] OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.[59]

70. Comments are solicited on the need for this information, whether the information will have practical utility, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden. The Commission notes that in proposing to modify its current part 33 filing requirements it is carrying out an express statutory mandate set forth in EPAct 2005. The regulations that the Commission proposes should have a minimal impact on the current reporting burden associated with an individual application, as they do not substantially change the filing requirements with which section 203 applicants must currently comply. Further, the Commission does not expect the total number of section 203 applications under amended section 203 to increase substantially. While the proposed rulemaking implements the expanded scope of section 203 to include certain transactions involving existing generation facilities and certain holding company acquisitions, amended section 203 also substantially raises the value threshold to be used in determining whether certain classes of transactions involving the transfer of jurisdictional facilities and acquisition of securities (both of which are already subject to the Commission's section 203 jurisdiction) are subject to section 203. As a result, applications in these latter two classes should decline somewhat.

Title: FERC–519, Applications Under Federal Power Act Section 203.

Action: Proposed Information Collection.

OMB Control No: 1902–0082.

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

Respondents: Businesses or other for profit.

Necessity of the Information: The information collected under the requirements of FERC–519 is used by the Commission to implement section 203 of the Federal Power Act and the Code of Federal Regulations under 18 CFR Part 33 and 18 CFR 2.26. This notice of proposed rulemaking is limited to implementing amended section 203 of the FPA, which directs the Commission to adopt a rule to do so. Further, the proposed rule does not substantially change the current filing requirements or regulations that applicants must comply with for transactions subject to FPA section 203.

Internal Review: The Commission has reviewed these requirements pertaining to the implementation of amended section 203 of the FPA and has determined that the proposed requirements are necessary for the Commission to meet the provisions of the Energy Policy Act of 2005. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the bulk power system.

71. Please send your comments concerning the collection of information and the associated burden estimates to: (1) Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone (202) 502–8415, fax (202) 273–0873, e-mail: *michael.miller@ferc.gov*] and (2) the Office of Management and Budget [Attention: Desk Officer for the Federal Energy Regulatory Commission, fax (202) 395–7285, e-mail *oira_submission@omb.eop.gov*].

V. Environmental Analysis

72. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[60] The Commission concludes that neither an Environmental Assessment or an Environmental Impact Statement is required for this notice of proposed rulemaking under section 380.4(a)(2)(ii) of the Commission regulations, which provides a ''categorical exclusion for rules that do not substantively change the effect of legislation.''[61]

VI. Regulatory Flexibility Act Certification

73. The Regulatory Flexibility Act of 1980 (RFA)[62] requires that a rulemaking contain either a description and analysis of the effect that the proposed rule will have on small entities or a certification that the rule will not have a significant economic impact on a substantial number of small entities. However, the RFA does not define ''significant'' or ''substantial,'' instead leaving it up to an agency to determine the effect of its regulations on small entities.

74. In drafting this rule, the Commission has followed the provisions of both the RFA and the Paperwork Reduction Act to consider the potential effect of the regulations on small businesses and other small entities. Specifically, the RFA directs agencies to consider four regulatory alternatives to be considered in a rulemaking to lessen the effect on small entities: tiering or establishment of different compliance or reporting requirements for small entities; classification, consolidation, clarification or simplification of compliance and reporting requirements; performance rather than design standards; and exemptions.

75. The Commission does not believe that this proposed rule would have a significant economic impact on a substantial number of small entities. As noted above, EPAct 2005 directs the Commission to issue a rule adopting procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisition, under this section. In accordance with this directive, this proposed rule is intended to implement section 203 of the FPA. In particular, the

[58] 44 U.S.C. 3507(d) (2000).

[59] 5 CFR 1320.11 (2005).

[60] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47,897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

[61] 18 CFR 380.4(a)(2)(ii) (2005).

[62] 5 U.S.C. 601–12 (2000).

proposed rule increases the value threshold for filing a section 203 application with the Commission from transactions in excess of $50,000 to transactions in excess of $10 million (under amended section 203 of the FPA). Further, the proposed rule does not substantially change the current requirements and regulations that applicants must comply with for transactions subject to FPA section 203. Accordingly, the Commission certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

VII. Comment Procedures

76. The Commission invites interested persons to submit comments on this notice, or alternative proposals addressing the issues raised by the changes in amended section 203. Comments are due November 7, 2005. Comments must refer to Docket No. RM05–34–000, and must include the commenter's name, the organization they represent, if applicable, and their address. Comments may be filed either in electronic or paper format.

77. Comments may be filed electronically via the eFiling link on the Commission's web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426.

78. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VIII. Document Availability

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

80. 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.

81. User assistance is available for eLibrary and the FERC's Web site 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*).

List of Subjects in 18 CFR Parts 2 and 33

Electric utilities, Reporting and recordkeeping requirements.

By direction of the Commission.

Magalie R. Salas,

Secretary.

In consideration of the foregoing, the Commission proposes to amend Chapter I, Title 18, *Code of Federal Regulations,* as follows:

PART 2—GENERAL POLICY AND INTERPRETATIONS

1. The authority citation for Part 2 is revised to read as follows:

Authority: 5 U.S.C. 601; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 792–825y, 2601–2645; 42 U.S.C. 4321–4361, 7101–7352; Pub. L. 109–58, 119 Stat. 594.

2. Section 2.26 is amended by revising paragraphs (e) and (f) to read as follows:

§ 2.26. Policies concerning review of applications under section 203.

* * * * *

(e) *Effect on regulation.* (1) Where the affected state commissions have authority to act on the transaction, the Commission will not set for hearing whether the transaction would impair effective regulation by the state commissions. The application should state whether the state commissions have this authority.

(2) Where the affected state commissions do not have authority to act on the transaction, the Commission may set for hearing the issue of whether the transaction would impair effective state regulation.

(f) Under section 203(a)(4) of the Federal Power Act (16 U.S.C. 824b), in reviewing a proposed transaction subject to section 203, the Commission will also consider whether the proposed transaction will 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 interest.

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

3. The authority citation for Part 33 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; Pub. L. 109–58, 119 Stat. 594.

4. The heading of Part 33 is revised to read as set forth above.

5. Section 33.1 is revised to read as follows:

§ 33.1 Applicability and definitions.

(a) *Applicability.* (1) The requirements of this part will apply to any public utility seeking authorization under section 203 of the Federal Power Act to:

(i) Dispose by sale, 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 million;

(ii) Merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(iii) Purchase, acquire, or take any security with a value in excess of $10 million of any other public utility; or

(iv) Purchase, lease, or otherwise acquire an existing generation facility:

(A) That has a value in excess of $10 million; and

(B) That is intended to be used in whole or in part for wholesale sales in interstate commerce by a public utility.

(2) The requirements of this part shall also apply to any holding company in a holding company system that includes a transmitting utility or an electric utility if such holding company seeks to purchase, acquire, or take any security with a value in excess of $10 million, 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 million.

(b) *Definitions.* For the purposes of this part, as used in section 203 of the Federal Power Act (16 U.S.C. 824b)—

(1) *Existing generation facility* means a generation facility that is operational at the time the section 203 transaction is consummated.

(2) *Non-utility associate company* means any associate company in a holding company system other than a public utility or electric utility company

that has wholesale or retail customers served under cost-based regulation.

(3) *Value* when applied to:

(i) Transmission facilities, generation facilities, transmitting utilities, electric utility companies, and holding companies, means the market value of the facilities or companies. For transmission facilities, in the absence of a readily ascertainable market value, value means original cost undepreciated;

(ii) Wholesale contracts, means the total expected contract revenues over the remaining life of the contract; and

(iii) Securities, means the market price at the time the security is acquired. For transactions between non-affiliated companies, the Commission will rebuttably presume that the market value is the agreed-upon transaction price.

(4) The terms *associate company, electric utility company, holding company,* and *holding company system* have the meaning given those terms in the Public Utility Holding Company Act of 2005.

6. Section 33.2 is amended to add paragraph (j) to read as follows:

§ 33.2. Contents of application—general information requirements.

* * * * *

(j) An explanation (to be identified as Exhibit M to this application):

(1) Of how applicants are providing assurance that the 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, with appropriate evidentiary support for such explanation; or

(2) If no such assurance can be provided, an explanation of how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

7. Section 33.11 is added to read as follows:

§ 33.11 Commission procedures for the consideration of applications under section 203 of the FPA.

(a) The Commission will act on a completed application for approval of a transaction (*i.e.*, one that is consistent with the requirements of this part) not later than 180 days after the completed application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of section 203(a)(4) of the FPA and issues, by the 180th day, an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

(b) The Commission will provide for the expeditious consideration of completed applications for the approval of transactions that are not contested, do not involve mergers, and are consistent with Commission precedent. The transactions that would generally warrant expedited review include:

(1) A disposition of only transmission facilities, particularly those that both before and after the transaction remain under the functional control of a Commission-approved regional transmission organization or independent system operator;

(2) Transfers involving generation facilities of a size that do not require an Appendix A analysis;

(3) Internal corporate reorganizations that do not present cross-subsidization issues; and

(4) The acquisition of a foreign utility company by a holding company with no captive customers in the United States.

[FR Doc. 05–20311 Filed 10–6–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Prince William Sound 02–011]

RIN 1625–AA87 (Formerly 1625–AA00)

Security Zones; Port Valdez and Valdez Narrows, Valdez, AK

AGENCY: Coast Guard, DHS.

ACTION: Third supplemental notice of proposed rulemaking; request for comments.

SUMMARY: The Coast Guard proposes to establish permanent security zones encompassing the Trans-Alaska Pipeline (TAPS) Valdez Terminal Complex, Valdez, Alaska and TAPS Tank Vessels and a security zone in the Valdez Narrows, Port Valdez, Alaska. These security zones are necessary to protect the TAPS Terminal and vessels from damage or injury from sabotage, destruction or other subversive acts. Entry of vessels into these security zones would be prohibited unless specifically authorized by the Captain of the Port, Prince William Sound, Alaska.

DATES: Comments and related material must reach the Coast Guard on or before November 7, 2005.

ADDRESSES: You may mail comments and related material to U.S. Coast Guard Marine Safety Office, PO Box 486, Valdez, Alaska 99686. Marine Safety Office Valdez, Port Operations Department maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Marine Safety Office Valdez, 105 Clifton, Valdez, AK 99686 between 7:30 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LTJG Duane Lemmon, Port Operations Department, U.S. Coast Guard Marine Safety Office Valdez, Alaska, (907) 835–7218.

SUPPLEMENTARY INFORMATION:

Regulatory History

On November 7, 2001, we published three temporary final rules in the **Federal Register** (66 FR 56208, 56210, 56212) that created security zones effective through June 1, 2002. The section numbers and titles for these zones are—

§ 165.T17–003—Security zone; Trans-Alaska Pipeline Valdez Terminal Complex, Valdez, Alaska;

§ 165.T17–004—Security zone; Port Valdez, and

§ 165.T17–005—Security zones; Captain of the Port Zone, Prince William Sound, Alaska.

Then on June 4, 2002, we published a temporary final rule (67 FR 38389) that established security zones to replace these security zones. That rule issued in April 2002, which expired July 30, 2002, created temporary § 165.T17–009, entitled ''Port Valdez and Valdez Narrows, Valdez, Alaska—security zone''.

Then on July 31, 2002, we published a temporary final rule (67 FR 49582) that established security zones to extend the temporary security zones that would have expired. This extension was to allow for the completion of a notice-and-comment rulemaking to create permanent security zones to replace the temporary zones.

On October 23, 2002, we published a notice of proposed rulemaking (NPRM) that sought public comment on establishing permanent security zones similar to the temporary security zones (67 FR 65074). The comment period for that NPRM ended December 23, 2002. Although no comments were received that would result in changes to the proposed rule an administrative omission was found that resulted in the