

Supporting Statement for
**FERC-519C, “Affirmation in Support of Exemption from
Affiliation Requirements”** As proposed in Docket No. RM09-16-000

(Notice of Proposed Rulemaking Issued January 21, 2010)

The Federal Energy Regulatory Commission (Commission) (FERC) is submitting for OMB review and approval a Notice of Proposed Rulemaking that contains a new information collection requirement: **FERC-519C “Affirmation in Support of Exemption from Affirmation Requirements”**. The Commission proposes to amend its regulations to provide greater certainty concerning transactions in which a holding company acquires voting securities of a public utility. Specifically, the Commission proposes to amend Part 33 of its regulations to grant a blanket authorization under section 203(a)(2) of the Federal Power Act (FPA), as well as a parallel blanket authorization under section 203(a)(1), for acquisitions of 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or holding company, where the acquiring company files a statement certifying that such securities were not acquired and are not held for the purpose or with the effect of changing or influencing the control of the public utility and such acquiring company complies with certain conditions designed to limit its ability to exercise control (as documented in an Affirmation in Support of Exemption from Affiliation Requirements (Affirmation)/FERC-519C). This will be a voluntary submission.

As Affirmations are a new area and maybe subject to further changes, we wish to designate the affirmation reporting requirements as a separate information collection in order that the remaining Part 33 requirements do not need to be revisited when a final rule affecting affirmations is issued. We estimate that the annual reporting-burden related to the subject NOPR will be 42 hours.

Background

On August 8, 2005, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) was signed in to law. Section 1289 (Merger Review Reform) of Title XII, Subtitle G (Market Transparency, Enforcement and Consumer Protection) of EAct 2005 amended section 203 of the Federal Power Act and directed FERC 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:

- increased the value threshold for certain transactions subject to section 203 from \$50, 000 to \$10 million;
- 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 \$10 million;
- limits FERC’s review of a public utility’s acquisition of securities of another public utility to actions greater than \$10 million; and
- requires that FERC when reviewing a proposed section 203 transaction, examine cross-subsidization and pledges or encumbrances of utility assets.

Section 203 of the FPA, as amended by the Energy Policy Act of 2005, requires Commission authorization for mergers, and dispositions and acquisitions involving electric generation and transmission companies and their holding companies. The Energy Policy Act of 2005 expanded the Commission's authority over corporate transactions and granted the Commission new regulatory tools to strengthen its ability to prevent the exercise of market power. The Commission has implemented rules under section 203 to help prevent the accumulation of either horizontal or vertical market power, while at the same time eliminating unnecessary regulatory barriers to the making of needed investment in generation and transmission infrastructure. These rules are complemented by the rules the Commission has implemented under its market-based rate program under section 205 to prevent the exercise of market power in wholesale energy and capacity markets.¹

The Commission has granted both on a generic basis and on a case-by-case basis, blanket authorizations under section 203 where the Commission has determined that transactions that fall within certain parameters would be consistent with the public interest and would not result in inappropriate cross-subsidization.² While these blanket authorizations have facilitated transactions under section 203, the Commission must also consider the effect of transactions under the market-based rate program under section 205. The Commission has codified its rules under the market-based rate program.³ Under these rules, among other things, a market-based rate seller must demonstrate that neither it nor its affiliates have market power in the relevant geographic market. In this regard, the acquisition or disposition of public utility securities under blanket section 203 authorization may raise questions as to whether the energy assets that are directly or indirectly owned by an investor should be attributed to the public utility whose securities are acquired by the investor for purposes of the public utility's market power analysis under the market based rate program.

Section 203(a)(4) provides that after notice and an opportunity for hearing, FERC is to approve the proposed disposition, consolidation, acquisition, or change in control if FERC finds that the transaction will be consistent with the public interest. However, a new requirement was

1 Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 FR 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, clarified, 121 FERC ¶ 61,260 (2007), order on reh'g, Order No. 697-A, 73 FR 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, order on reh'g and clarification, 124 FERC ¶ 61,055 (2008), order on reh'g and clarification, Order No. 697-B, 73 FR 79,610 (Dec. 30, 2008), 125 FERC ¶ 61,326 (2008), order on reh'g, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009).

2 See Transactions Subject to Federal Power Act Section 203, Order No. 669, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), order on reh'g, Order No. 669-A, 71 FR 28,422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214 (2006), order on reh'g, Order No. 669-B, 71 FR 42,579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006). See also Goldman Sachs Group, 121 FERC ¶ 61,059 (2007), clarified, 122 FERC ¶ 61,005 (2008) (Goldman Sachs); Capital Research & Mgmt. Co., 116 FERC ¶ 61,267 (2006) (Capital Research).

3 See Order No. 697, 72 FR 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 1078-1105; Order No. 697-A, 73 FR 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, at P 527-533.

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imposed on the Commission, namely that it 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 the cross-subsidization, pledge, or encumbrance is consistent with the public interest.

Section 203(a) (5) was a new requirement that directed FERC by rulemaking to adopt procedures for expeditious application of dispositions, consolidations, or acquisitions. FERC issued Order No. 669 to identify all types of transactions, or specify the criteria for transactions that meet the criteria establish in paragraph 4 of section 1289. FERC must provide expedited review of all transactions and grant or deny approval of the application 180 days after the application is filed. If the Commission cannot make a determination within 180 days, the application is considered to be approved unless FERC can find, based on good cause, that further consideration is required to determine if the application meets the standards of paragraph (4). If such a situation exists, then FERC is to issue a tolling order which is to last no longer than 180 days, and at the end of the additional period, FERC is to grant or deny the application.⁴

Section 203(a)(6) was also a new section that provides for the terms “associate company”, “holding company” and “holding company system” as defined in the Public Utility Holding Company Act of 2005.⁵

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On January 21, 2008, the Commission issued in Docket No. RM09-16-000, a Notice of Proposed Rulemaking in accordance with section 203 of the Federal Power Act (FPA) to amend Parts 33 and 35 of its regulations. In the NOPR, the Commission is proposing a new blanket authorization under section 203(a)(2) of the FPA, in Part 33 of its regulations, that would allow a holding company to acquire 10 percent or more, but less than 20 percent, of a public utility’s or holding company’s outstanding voting securities, provided that the investor files an Affirmation with the Commission in the form of the proposed FERC-519C. The Affirmation is intended to serve a similar purpose as a Securities and Exchange Commission (SEC) Schedule 13G filing (in that it records the investor’s certification of non-control intent) but has also been tailored to the requirements of the FPA and Commission policy. In particular, the investor would commit to specific restrictions on its actions and to ongoing reporting obligations. The investor would file the Affirmation within 10 days following the acquisition.

The Commission also proposes to amend the definition of “affiliate” in section 35.36(a) (9) of its market-based rate program regulations.⁶ (See also 1902-0096, FERC-516) As

⁴ See Paragraph no. 4, EPAAct 2005 §1289, Pub. L. No. 109-58, 119 Stat. 594 (2005).

⁵ EPAAct 2005 § 1261 *et. seq.*

⁶ As discussed below, the Commission also proposes to amend the definition of “affiliate” for purposes of Subpart H,

proposed to be amended, an “affiliate” of a specified company would mean “any person that controls, is controlled by, or is under common control with, such specified company.” Currently, the Commission’s regulations create a rebuttable presumption that a person that owns less than 10 percent of the outstanding voting securities of a public utility lacks control of that public utility.⁷ The Commission proposes to amend its regulations under Part 33 to provide that in any case in which 10 percent or more but less than 20 percent of the outstanding voting securities of a public utility are owned, the public utility would be exempt from certain restrictions applicable to affiliates if the acquiring person has filed an Affirmation and continues to comply with all of the other conditions and reporting obligations set forth therein. Thus, the market-based rate filing requirements, including the filing of a notice of change in status, would not be triggered. The Affirmation would allow the Commission to monitor and sanction entities that violate it.

If an investor who is a public utility holding company desires to acquire 20 percent or more of the outstanding voting securities of a public utility, or an interest of 10 percent or more, but less than 20 percent that is not the subject of an Affirmation, then the investor would be required to file a stand-alone application under section 203(a)(2) (FERC-519, 1902-0082), unless the investor qualifies for one of the other blanket authorizations provided for in the regulations.

A. Justification

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

The Commission is obligated by statute to regulate key economic aspects of the electric, natural gas and oil industries. The law requires the Commission’s economic regulatory activity because the transmission of electricity, natural gas, and oil has often been a natural monopoly. In enacting Part II of the Federal Power Act (FPA) in 1935, one of the primary Congressional goals was to protect electric ratepayers from abuses of market power. To accomplish this goal, Congress directed the FERC to oversee sales for resale and transmission service provided by public utilities in interstate commerce. Under Section 203 of the FPA, the FERC must review proposed mergers, acquisitions and dispositions of jurisdictional facilities by public utilities, if the value of facilities exceeded \$50,000, (*now \$10 million for certain transactions as a result of passage of EAct 2005*) and must approve such transactions if they are consistent with the public interest. Today, one of FERC’s overarching goals is to promote competition in wholesale power markets, having determined that effective competition, as opposed to traditional forms of price regulation, can best protect the interests of ratepayers. Market power, however, can be

Cross-subsidization Restrictions on Affiliation Transactions.
7 18 CFR 35.36(a)(9)(v) (2009).

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exercised to the detriment of effective competition and exercise of market power in bulk power markets.

Market power can be created or enhanced by mergers. Mergers can eliminate a competitor from the market and concentrate control of generating assets. Mergers can also enhance vertical market power, by giving the merged company a new or increased ability or incentive to restrict inputs to power production. The Commission considers market power issues in reviewing applications for mergers or other jurisdictional acquisitions or dispositions of assets. If a merger will create market power or enhance the applicant's market power significantly, mitigation of these effects is required in order to ensure that the merger is consistent with the public interest.

As noted above, Section 203 of the FPA provides that FERC approval is required for transactions in which a public utility disposes of jurisdictional facilities, merges such facilities with facilities owned by another person, or acquires the securities of another public utility. Under the statute, FERC must find that the proposed transaction will be consistent with the public interest. The filing requirements under review define the terms of information necessary to investigate the possible impact of the proposed transaction on public interest.

The basis for current practices with respect to Section 203 applications is Federal Power Commission Opinion No. 507 issued in the 1966 Commonwealth Edison Company, proceeding, 36 FPC 907. In that proceeding FERC set forth the criteria to be applied when determining whether the proposed transaction is consistent with the public interest.

As noted above, EPAct 2005 revised section 203(a) by amending section 203(a)(1) and directed that no public utility can sell, lease or otherwise dispose of all of its facilities subject to FERC jurisdiction or any part that has a value in excess of \$10 million without FERC issuing an order authorizing such activity. In addition public utilities cannot merge or consolidate, directly or indirectly, these facilities with those of another entity without FERC authorization for purchasing, acquiring, taking any security with a value in excess of \$10 million of any other public utility. Lastly, public utilities cannot purchase, lease or otherwise acquire an existing generation facility if it has a (a) a value in excess of \$10 million; and (b) is used for interstate wholesale sales over which FERC has jurisdiction for ratemaking purposes with FERC authorization.

On September 2, 2008, the Electric Power Supply Association (EPSA) filed a petition requesting guidance regarding concepts of control and affiliation as they relate to transactions subject to the Commission's jurisdiction under sections 203 and 205 of the FPA. Specifically, EPSA requested that, where an investor directly or indirectly acquires 10 percent or more but less than 20 percent of a public utility's outstanding voting securities and is eligible to file a

statement of beneficial ownership with the Securities and Exchange Commission (SEC) on SEC Schedule 13G,⁸ such investment would not be deemed to require authorization under section 203 of the FPA or to result in affiliation with the public utility for purposes of the Commission's market-based rate requirements under section 205 of the FPA.

EPSA stated that a number of recent transactions involving investments in publicly-held competitive power supply companies bring to light concerns about when an investment will result in affiliation. EPSA asserts that these concerns threaten to discourage investment in energy infrastructure and also create compliance issues for competitive power supply companies with market-based rates.

In addition, EPSA stated that secondary market transactions in publicly-traded securities can result in situations that could be deemed to result in a transaction subject to Commission authorization under section 203 or affiliation for market-based rate purposes. EPSA explained that such transactions can subject a public utility to potential compliance issues under sections 203 and 205 of the FPA since they take place without the knowledge of the affected public utility. EPSA's discussion of affiliation for market-based rate purposes is based on the definition of an "affiliate" set forth in Order No. 697-A. That definition has been superseded by the definition adopted in Order No. 697-B, although the changes do not fundamentally alter the issues that EPSA describes. The current definition provides that an affiliate of a specified company is (i) any person that has a 10 percent or greater voting security interest in the specified company; (ii) any company that the specified company has a 10 percent or greater voting interest in; (iii) any person that is under common control with the specified company; or (iv) any person or class of persons that the Commission determines, after notice and opportunity for a hearing, it is necessary or appropriate to treat as an affiliate of the specified company either to promote the public interest or to protect investors and consumers.

EPSA stated that a number of concerns arise if one strictly applies a 10 percent or greater voting security interest test to determine affiliation. An upstream owner with a 10 percent or greater voting interest in one public utility can acquire a 10 percent or greater voting interest in a

⁸ As relevant here, a Schedule 13G is filed with the SEC pursuant to section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (2000) (1934 Act), and the SEC's rules thereunder, by any person (referred to here as a "passive investor") when such person has acquired beneficial ownership of more than five percent but less than 20 percent of the outstanding voting equity securities of a company that are registered under section 12 of and the 1934 Act and such person certifies that it has not acquired, and does not hold, such securities for the purpose of or with the effect of changing or influencing the control of the issuer. The 20 percent limit on the acquisition of voting securities reflects the SEC's view that "it would be unusual for an investor to be able to make the necessary certification of a passive investment purpose when beneficial ownership approaches 20 percent," where the investor is not subject to other limitations. Amendments to Beneficial Ownership Reporting Requirements, File No. S7-16-96, 1998 SEC LEXIS 63, at * 17 n. 20 (Jan. 12, 1998). EPSA appears to have adopted the 20 percent limitation based on its desire to use the filing of Schedule 13G as dispositive of an investor's non-control status.

second unaffiliated public utility and thereby create a new affiliate relationship between the two public utilities. EPSA stated that this could trigger a need for section 203 filings by the acquirer and the second public utility, or only the acquiring company if the securities are acquired on the secondary market.

In addition, the transaction could trigger a market-based rate change in status reporting requirement for both the first and second public utilities and their existing affiliates. This requirement could exist even though the affected public utilities are not aware that the new affiliate relations had been created. EPSA claims that the public utilities would thus not be in a position to make a change in status filing, even though failure to make a necessary filing could result in revocation of market-based rate authority and/or the imposition of penalties. EPSA stated that the consequences could be even more serious if any of the entities involved is a traditional public utility with captive customers. Where a public utility with market-based rate authority is selling to a traditional public utility with captive customers and subsequently becomes affiliated with the traditional public utility as the result of investment by a common owner, the market-based rate seller would become subject to the Commission's affiliate sales restrictions, even though it was unaware of the new affiliate relationship.

To address its concerns, EPSA requested that the Commission make several basic findings. First, EPSA requested that the Commission state that no control or affiliation exists for market-based rate or section 203 purposes where an investor holds less than 20 percent of a public utility's outstanding voting securities and files a Schedule 13G with the SEC. Second, EPSA requested a finding that where an investor meets these requirements and thus is deemed not to control the public utility or be an affiliate of it: (1) the public utility need not make a change in status filing in instances where it has market-based rate authorization; (2) subsequent market power analyses submitted in connection with either market-based rate authorizations or section 203 applications need not include generation and inputs owned or controlled by other entities in which the investor holds an interest; and (3) affiliate sales restrictions will not apply to transactions between a publicly-held company and its subsidiaries with market-based rate authorization, on the one hand, and other entities in which the investor has interests, on the other.

2. INFORMATION TO BE USED AND THE CONSEQUENCES OF NOT COLLECTING THE INFORMATION

Since 1935, the Commission has regulated certain electric utility activities under the Federal Power Act (FPA). Under FPA sections 205 and 206, FERC oversees the rates, terms and conditions of sales for resale of electric energy and transmission service in interstate commerce by public utilities. The Commission must ensure that those rates, terms and

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conditions are just and reasonable, and not unduly discriminatory or preferential. Under FPA section 203, the Commission reviews mergers and other asset transfers involving public utilities.

The information contained in FERC-519, the parent information collection, enables the FERC to exercise its authority for public utility disposition, merger, consolidation of facilities, purchase or acquisition oversight and enforcement responsibilities in accordance with the FPA as referenced above. Without this information, FERC would be unable to employ examine and approve or modify these actions. The FERC may employ enforcement proceedings when violations occur.

The requisite information includes descriptions of corporate attributes of the party or parties to the proposed transaction (a sale, lease, or other disposition, merger, or consolidation of facilities, or purchase of other acquisition of the securities of a public utility and the facilities or other property involved in the transaction), statements as to the effect of the transaction or current contracts, and the applicant's showing that the transaction will be consistent with the public interest.

FERC in response to rapid development of new market institutions is looking at ways to promote competition in regional power markets. It must also ensure that competitive market structures continue to deliver just and reasonable rates. By law, FERC reviews changes in ownership or control of electric power facilities. These reviews become even more important in a more competitive environment. Companies are finding it necessary to repackage their assets by building on their strengths and reducing their vulnerabilities and FERC must ensure that changes in ownerships patterns do not create market power problems.

The proposed Affirmation would create a rebuttable presumption for purposes of section 203 that the investor does not control the public utility where the holding company acquires 10 percent or more, but less than 20 percent of the voting securities of the public utility. Therefore, the Commission believes that the acquisition by the holding company, and the disposition by the public utility, of 10 percent or more, but less than 20 percent of voting securities, with the filing of the Affirmation, will not harm competition, rates, regulation or captive customers.

Further, the Affirmation is a representation by the filer that their investment in the outstanding voting securities of a public utility to falls outside of the definition of affiliate, as used in its regulations under Part 35. Nevertheless, while the affected companies are still considered technically affiliates, under the Commission's proposal, the affected companies would qualify for a waiver of certain regulatory requirements pertaining to an affiliate, specifically, an affiliation with other energy assets for purposes of a market power analysis, the

change in status reporting requirement and the affiliate restrictions under Part 35 of the Commission's regulations.

The Commission also proposes to amend 18 CFR Part 33 to provide a parallel blanket authorization under FPA section 203(a)(1). Under the proposed section 203(a)(1) blanket authorization, a public utility whose outstanding voting securities are acquired in a transaction that falls within the proposed 203(a)(2) blanket authorization would be pre-authorized under 203(a)(1) to dispose of those securities. The Commission believes that these new blanket authorizations, along with the proposed revised definitions of "affiliate" in Part 35, will address EPSA's concerns, while at the same time provide the Commission with a mechanism to ensure that acquisitions are consistent with the public interest under section 203, are subject to effective monitoring, and do not present concerns under the Commission's market-based rate program

This information collection is the minimum necessary to comply with the statutes. The consequences of any failure to collect the specified data would prevent Commission's determination of these jurisdictional corporate activities which may be adverse to the public interest. If this information were not collected, there would be no data available to determine whether violations of the law had occurred and the Commission would not have all of the regulatory mechanisms necessary to ensure customer protection.

3. DESCRIBE ANY CONSIDERATION OF THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN AND THE TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN

In order to increase the efficiency with which it carries out its program responsibilities, the Commission is proposing in the NOPR that applicants voluntarily submit their Affirmation statements electronically via the Commission's eFiling website. The Commission is making this proposal for several reasons. First, for most applicants, the electronic filing process will be faster, easier, less costly and less resource-intensive than hardcopy filing. A respondent filing electronically will receive an acknowledgement that the Commission has received their Affirmation and a docket number for their submittal much more quickly than they would by filing in hardcopy format. Also, electronic filing will allow the Commission to electronically process Affirmations, dramatically reducing required staff resources and human error, and allowing the Commission to identify patterns of reporting errors that would be difficult to detect through manual processing. Finally, electronic filing of Affirmations would facilitate the compilation of the data that could be made available to the public.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE

PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2.

Commission filings and data requirements are periodically reviewed in conjunction with OMB clearance expiration dates. This includes a review of the Commission's regulations and data requirements to identify any duplication. In certain cases, some of the required data in 18 CFR 33.3 is available from other FERC information collections. In these cases, the applicant may request a waiver of the filing requirements which is typically granted.

EPSA recommended that FERC rely on the SEC's sanctions associated with Schedule 13G filings (See 3235-0145, copy attached), and it also recommended the following additional safeguards: (1) as a condition to an investor's reliance on a Schedule 13G filing as the basis for foregoing case-specific approval under section 203(a)(2) for particular investments, the investor would have to file a copy of its Schedule 13G with the Commission within 30 days of filing it with the SEC⁹; and (2) when an investor ceases to meet Schedule 13G eligibility requirements, it must observe the requirements of the SEC's "cooling off period" while awaiting the Commission's section 203 approval, which means that the investor could not acquire additional securities until prior authorization under section 203 is granted and must refrain from voting its securities during this period.

Under section 13(d)(1) of the 1934 Act and the SEC's rules,¹⁰ any person who acquires beneficial ownership of more than five percent of any voting equity security of a class that is registered under section 12 of the 1934 Act (which would include securities that are listed for trading on a national securities exchange) must, within 10 days of such acquisition, file a statement on SEC Schedule 13D with the SEC containing information about the acquiring person and the amount of securities acquired, the source of the funds used to complete the acquisition, whether the purpose for the acquisition is to acquire control, and whether there are any contracts or understandings with respect to the securities acquired relating to various types of transactions, and such other information as the SEC may by rules and regulations prescribe as necessary and appropriate in the public interest or for the protection of investors. However, as noted above, the SEC's rules allow so-called "passive investors" to instead file a much abbreviated disclosure statement on Schedule 13G.¹¹

9 EPSA notes that there may be circumstances in which an investor is either not subject to section 203(a)(2) (for example, because the investor is not a holding company) or is able to rely on some other blanket authorization under the regulations. In such circumstances, the investor would not need to rely on the filing of Schedule 13G for section 203(a)(2) purposes. Nevertheless, EPSA asserts that the publicly-held company (that is, the utility or its holding company whose securities are acquired) should still be allowed to rely upon the investor's filing of Schedule 13G with the SEC for purposes of control and affiliation determinations.

10 17 CFR 240.13d-1 *et seq.*

11 See 17 CFR 240.13d-1(c). See *also* discussion at n.8.

A “passive investor” filing Schedule 13G certifies only that the securities that are the subject of the filing “were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect.” The SEC defines “control” as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”¹² The Schedule 13G also does not provide information regarding the investor’s other holdings. While the Commission has considered an applicant’s eligibility to file a Schedule 13G with the SEC an indication that the applicant will not be able to assert control over a public utility, the Commission has not accepted Schedule 13G eligibility as a definitive statement regarding control.¹³

In response, the Commission finds that the Schedule 13G does not provide sufficient information to the Commission to monitor markets and protect the public interest, and therefore is proposing adoption of a form better tailored to the Commission’s needs.

The Affirmation, while similar to the Schedule 13G in that it would set forth the investor’s certification of non-control intent, has been tailored to provide additional information and to impose restrictions on certain activities to better meet the requirements of the FPA and Commission policy. In particular, the Affirmation will serve as the source of information that would otherwise be required under Part 33 of the Commission’s regulations in an application under section 203. Further, by filing an Affirmation, the investor would commit to specific restrictions on its actions and to ongoing reporting obligations. The investor would file the Affirmation within 10 days following the acquisition.

5. METHODS USED TO MINIMIZE BURDEN IN COLLECTION OF INFORMATION INVOLVING SMALL ENTITIES

Most filing companies regulated by the Commission do not fall within the Small Business Administration’s (SBA) size standard for a small entity.¹⁴ Additionally, the majority of holding companies that would be filing an Affirmation would also not fall within the SBA size standard. In keeping with the provisions of the Regulatory Flexibility Act, the Commission has considered regulatory alternatives and this proposed rule provides for a blanket authorization under section 203 that would provide for an exemption from certain filing requirements under

¹² 17 CFR 240.12b-2.

¹³ FPA Section 203 Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253, at P 41.

¹⁴ 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 632. Section 3 of the Small Business Act defines a “small-business concern” as a business which is independently owned and operated and which is not dominant in its field of operation.

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Part 35 of the Commission's regulations. These blanket authorizations will provide regulatory relief to the respondents.

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY

Section 203 of the FPA requires a filing every time a public utility disposes of jurisdictional facilities, merges such facilities, or acquires the securities of another public utility. If the collection were conducted less frequently, the Commission would be unable to perform its mandated oversight and review responsibilities with respect to facilities, mergers and securities transactions under Section 203 of the FPA. Since the Affirmation is voluntary for holding companies that wish to avoid the filing a complete application of approval under section 203(a)(2) of the FPA, the Commission believes the preparation of the Affirmation will consume less time than preparation of an application for approval under section 203(a)(2).

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

There are no special circumstances requiring the collection of information to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5.

8. DESCRIBE EFFORTS TO CONSULT OUTSIDE THE AGENCY: SUMMARIZE PUBLIC COMMENTS AND THE AGENCY'S RESPONSE TO THESE COMMENTS

The Commission's procedures require that the rulemaking notice be published in The Federal Register, thereby allowing all public utilities, state commissions, federal agencies, and other interested parties an opportunity to submit comments, or suggestions concerning the proposal. The rulemaking procedures also allow for public conferences to be held as required. Comments were due 30 days from publication in the Federal Register.

On December 3, 2008, Commission staff held a workshop to address the issues raised by EPSA. Additional comments were submitted on January 16, 2009, and EPSA filed a subsequent response on February 2, 2009.¹⁵

Calpine Corporation and Tenaska Energy, Inc. (Calpine), Mirant Corporation (Mirant), the Edison Electric Institute (EEI), and several other commenters generally supported EPSA's

¹⁵ The petition was originally docketed as EL08-87-000 and was subsequently redocketed as PL09-3-000.

proposal. The Financial Institutions Energy Group (FIEG) and Harbinger Management Corporation (on behalf of certain affiliated investment funds) (Harbinger) contend that the absence of a Schedule 13G filing with the SEC does not necessarily indicate the existence of a control relationship. They also asserted that the SEC's definition of control is broader than the Commission's view of control, which they contend is limited to matters involving the ability of capacity to reach the market and the decision-making over sales of electric energy.

American Public Power Association (APPA) and National Rural Electric Cooperative Association (NRECA) did not oppose EPSA's request that a determination of "no control" under section 203 also apply under the market-based rate program under section 205. But they, as well as Transmission Access Policy Study Group (TAPS) and American Antitrust Institute (AAI), oppose reliance on a Schedule 13G filing as the sole basis for finding that the investor does not control a utility in which it has invested. Instead, at the workshop APPA and NRECA recommended that the Commission create its own form to evaluate whether an investor has acquired control over a public utility.

AAI raised concerns about an investor with a partial interest in rival generating assets, which could diminish competition and lead to a common owner serving as a conduit for commercially sensitive information between rivals. AAI contends that the Department of Justice and the FTC consider these issues of "cross-ownership" and that this Commission should consider these issues, as well. The FTC also encouraged the Commission to consider issues associated with an investor's partial ownership of multiple utilities and the investor's related incentives to compete less vigorously, collude to avoid price wars, and share commercially sensitive information.

Commission's Response

The Commission proposes to amend 18 CFR Part 33 (Applications Under Federal Power Act Section 203) to provide a new blanket authorization under section 203(a)(2) for a holding company to acquire 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility, provided that the holding company files an Affirmation, in the form prescribed in the Commission's regulations, within 10 days of the acquisition of such voting securities. The Affirmation would create a rebuttable presumption for purposes of section 203 that the investor does not control the public utility where the holding company acquires 10 percent or more, but less than 20 percent of the voting securities of the public utility. Therefore, the Commission believes that the acquisition by the holding company, and the disposition by the public utility, of 10 percent or more, but less than 20 percent of voting securities, with the filing of the Affirmation, will not harm competition, rates, regulation or captive customers. However, as explained above, the Affirmation is a representation by the filer and does not operate as a conclusive finding that the investor does not control the public utility, which the Commission

finds would be necessary for an ownership interest of 10 percent or more, and less than 20 percent, of the outstanding voting securities of a public utility to fall outside of the definition of affiliate. Thus, while the affected companies are still considered technically affiliates, the affected companies would qualify for a waiver of the regulatory requirements pertaining to affiliated companies.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to respondents in the requirements contained in the proposed rule.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

The Commission generally does not consider the data filed in Section 203 filings to be confidential. However, the Commission realizes the commercial sensitivity of specific information and the harm that may come to applicants by the potential disclosures to competitors. Applicants are free to claim confidentiality for this information under the Commission's regulations. (18 CFR 388.112) Recognizing the sensitivity of particular information, the Commission will presume that the information falls within exemption from public disclosure under the Freedom of Information Act for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." (18 CFR 388.107(d)) If parties seek access to the information, and the Commission determines that limited disclosure is necessary to satisfy the due process rights of intervenors to challenge relevant evidence relied upon by applicants, then the Commission will allow access to parties' attorneys and experts only under the terms of appropriate protective order.

11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE

There are no questions of a sensitive nature associated with the information collection the Supplemental Final Rule on rehearing.

12. ESTIMATED BURDEN COLLECTION OF INFORMATION

The Commission estimates there will be 10 initial filers each filing an average of 1.2 Affirmations annually with an estimated time of response of 3.5 hours, for a total of 42 hours. The Commission further estimates that there will be 40 annual updates to the initial filings with an estimated time of response of 1 hour each, for a total of 40 hours. The filing of the Affirmation would create a total reporting burden of 82 hours annually. Since the Affirmation is

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voluntary for holding companies that wish to avoid the filing a complete application of approval under section 203(a)(2) of the FPA, the Commission believes the preparation of the Affirmation will consume less time than preparation of an application for approval under section 203(a)(2).

Data Collection FERC-519	Number of Respondents	Number of Responses	Hours Per Response	Total
Reporting	10	1.2	6.83	82
Totals	10	1.2	6.83	82

Data Requirement (FERC-519C)

**Current OMB
Proposed**

**Inventory
Proposed in
NOPR**

Estimated number of respondents:	0	10
Estimated number of responses(per respondent)	0	1
Estimated number of responses per year:	0	10
Estimated number of hours per response:	0	6.833
Total estimated burden hours:	0	82

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

The Commission estimates the following costs:

The Commission has projected the average annualized cost of all respondents to be the following: 82 hours (reporting) @ \$250 per hour = \$20,500 for respondents. No capital costs are to be incurred by respondents. This estimate is based on the hourly rate for a portfolio manager reviewing the transactions and filing the information with the Commission. This estimate was based on a portfolio manager compensated at market rates.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT:

(a) Forms Clearance Review \$ 1,580

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(b) Analysis of Data (.25FTE)	\$ 33,390
Year of Operation	\$ 34,970

The estimate of the cost to the Federal Government is based on salaries for professional and clerical support, as well as direct and indirect overhead costs. An “FTE” is a “Full Time Equivalent” employee that works the equivalent of 2,080 hours per year.

Salary represents the allocated cost per electric program employee at the Commission based on its appropriated budget for fiscal year 2009. The \$133,561 “salary” represents the average annual salary of actual costs for staff responsible for processing Section 203 filings.

15. REASONS FOR CHANGES IN BURDEN INCLUDING THE NEED FOR ANY INCREASE

FERC proposes to amend its regulations to provide greater certainty with respect to certain transactions in which a holding company acquires voting securities of a public utility. Specifically, the Commission proposes to amend Part 33 of its regulations to grant a blanket authorization under section 203(a)(2) of the Federal Power Act (FPA), as well as a parallel blanket authorization under section 203(a)(1), for acquisitions of 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or holding company, where the acquiring company files a statement certifying that such securities were not acquired and are not held for the purpose or with the effect of changing or influencing the control of the public utility and such acquiring company complies with certain conditions designed to limit its ability to exercise control (all as set forth in an Affirmation in Support of Exemption from Affiliation Requirements on FERC Form 519-C (Affirmation)). The Commission also proposes to amend Subpart H and Subpart I of Part 35 of the Commission regulations to define an “affiliate” of a specified company as any person that controls, is controlled by, or is under common control with such specified company. A public utility in respect of which an Affirmation has been filed would be exempt from certain requirements of an affiliate for purposes of the Commission’s market-based rate program, but only with respect to current or subsequent affiliation(s) that result from the transaction that is the subject of such Affirmation and only for so long as the information contained in the Affirmation (as modified through subsequent quarterly updates) is true, complete and correct.

The proposed Affirmation would create a rebuttable presumption for purposes of section 203 that the investor does not control the public utility whose voting securities it has acquired. The Affirmation is a representation by the filer and does not operate as a conclusive finding that the investor does not control the public utility, which the Commission finds would be necessary for an ownership interest of 10 percent or more, and less than 20 percent, of the outstanding

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voting securities of a public utility to fall outside of the definition of affiliate, as used in its regulations under Part 35.

(See reasons for change in Background section above),

16. TIME SCHEDULE FOR PUBLICATION OF DATA

Schedule for Data Collection and Analysis

Filing	10 days following an acquisition file the FERC-519C
Initial Commission Order	60 days

17. DISPLAY OF EXPIRATION DATE

After OMB has reviewed and approved FERC-519C, the Commission will update the cover page to include the OMB control number and expiration date on the form. The instructions include a disclaimer that respondents will not be subject to a penalty if a valid OMB control number is not displayed on the FERC-519C and a request for a response to the burden hours to either FERC or OMB.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

There is an exception to the Paperwork Reduction Act statement. The Commission will not be using statistical survey methodology for these information collections.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not Applicable. Statistical methods are not employed for these data collections.