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## FERC Adopts Regulations Implementing \$10 Million Threshold for Review of Public Utility Mergers and Consolidations

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*Although Order No. 855 establishes a \$10 million threshold for mergers and consolidations requiring FERC authorization, public utilities should be prepared to file a notification with FERC for proposed acquisitions involving jurisdictional facilities valued over one million dollars. Moreover, FERC has clarified that its jurisdiction extends to the acquisition of non-public utility facilities if such facilities will be subject to FERC jurisdiction after the transaction is consummated.*

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On February 21, 2019, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a final rule implementing statutory amendments to section 203(a)(1)(B) of the Federal Power Act (“FPA”) (“Order No. 855”).<sup>1</sup> Order No. 855 revises Part 33 of FERC’s regulations to establish a \$10 million threshold for mergers and consolidations requiring FERC review and approval. The Commission is also implementing a notification requirement for merger and consolidation transactions that do not require Commission approval under the newly-amended regulations but that involve the acquisition of facilities valued over one million dollars. The amended regulations take effect on March 28, 2019.

### BACKGROUND

In 2018, Congress enacted “An Act to amend section 203 of the Federal Power Act,” which establishes a \$10 million threshold for transactions subject to Commission review and authorization under FPA section 203(a)(1)(B) (the “Act”).<sup>2</sup> The Act also directs FERC to implement a notification

requirement for transactions for which (i) the facilities, or any part thereof, to be acquired are of a value in excess of \$1,000,000; and (ii) the public utility is not required to secure a Commission order under FPA section 203(a)(1)(B). Finally, the Act requires the Commission to submit a report to Congress within two years of the Act’s enactment to assess the effects of the statutory amendments, taking into account information collected through the new notification requirements. On November 15, 2018, the Commission released a Notice of Proposed Rulemaking (“NOPR”) proposing revisions to Part 33 of its regulations to conform with the statutory amendments to FPA section 203(a)(1)(B).<sup>3</sup>

### \$10 MILLION THRESHOLD

Noting support from commenters with respect to the \$10 million threshold, Order No. 855 amends section 33.1(a)(1)(ii) of FERC’s regulations as proposed in the NOPR. As amended, Part 33(a)(1)(ii) now applies to a public utility seeking to:

[m]erge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of \$10 million, by any means whatsoever.<sup>4</sup>

## NOTIFICATION REQUIREMENT

Order No. 855 adds a new section 33.12 to FERC's regulations that will require a public utility to provide a notification to the Commission no later than 30 days after a merger or consolidation transaction's consummation if "(1) [t]he facilities, or any part thereof, to be acquired are of a value in excess of \$1 million; and (2) [s]uch public utility is not required to secure an order of the Commission under section 203(a)(1)(B)."<sup>5</sup>

The notification must provide the following information:

1. Exact name of public utility and principal business address;
2. A narrative description of the transaction, including:
  - (i) Identity of all parties involved in the transactions, whether such parties are affiliates, and all jurisdictional facilities associated with or affected by the transaction;
  - (ii) The location of such jurisdictional facilities involved in the transaction;
  - (iii) The date on which the transaction was consummated;
  - (iv) The consideration for the transaction; and
  - (v) The effect of the transaction on the ownership and control of such jurisdictional facilities.

The Commission reiterates that each notification filing should be submitted in the first docket for section 203 filings for each fiscal year (e.g., filings made in fiscal year 2019 would be filed in Docket No. EC19-1-000). The Commission

further notes that the filings may be submitted in any format accepted in FERC's eLibrary.

Order No. 855 clarifies that these notifications are information filings upon which the Commission does not intend to act. Additionally, the notification filings do not require service under Rule 2010 of FERC's rules of practice and procedure. The Commission also confirms that it will provide for notice and comment on its report regarding the effects of amended section 203(a)(1)(B) before submitting the report to Congress.

## JURISDICTIONAL FINDINGS

The Commission disagrees with comments to the NOPR suggesting that the amended statutory language precludes FERC review of a public utility's acquisition of facilities from a non-public utility. Rather, the Commission reiterates that the Act's amendments to FPA section 203(a)(1)(B) do not remove the Commission's jurisdiction to review transactions valued over \$10 million involving a public utility's acquisition of facilities from a non-public utility if those facilities will be subject to the Commission's jurisdiction after the transaction's consummation. According to the Commission, the addition of the phrase "subject to the jurisdiction of the Commission" with respect to facilities subject to FPA section 203 merely codifies a D.C. Circuit decision that held the Commission has no jurisdiction over the acquisition of non-jurisdictional facilities even when owned by a public utility.

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1. *Implementation of Amended Section 203(a)(1)(B) of the Federal Power Act*, Final Rule, 166 FERC ¶ 61,120 (2019).
2. An Act to amend section 203 of the Federal Power Act, Pub. L. No. 115-247, 132 Stat. 3152. The Energy Policy Act of 2005, Public Law 109-58, had amended Section 203 to add a \$10 million threshold for review of three of the four types of transactions specified therein. However, the \$10 million threshold was not specified for mergers or consolidations in Section 203(a)(1)(B). FERC's position had been that, because Congress had not specified a monetary threshold in Section 203(a)(1)(B), no such threshold could be implied for review of mergers or consolidations. Order No. 699, *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 at P 32 (2005).
3. *Implementation of Amended Section 203(a)(1)(B) of the Federal Power Act*, Notice of Proposed Rulemaking, 165 FERC ¶ 61,091 (2018).
4. Order No. 855 at PP 5, 7.
5. *Id.* at P 8.