

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. RM09-16-000

**Comments of the  
Electricity Consumers Resource Council  
(ELCON)**

The Electricity Consumers Resource Council (ELCON) appreciates the opportunity to comment on the January 21, 2010 Notice of Proposed Rulemaking (the NOPR), which proposes to grant certain additional blanket authorizations under Section 203 of the Federal Power Act and to correspondingly amend the regulations relating to “affiliates” under Section 205 of the Federal Power Act. The proposed changes necessitate a careful balancing between, on the one hand, the desirability of increased access to credit and investment generally, which could potentially increase the supply of generation and thereby enhance reliability and lower costs, and on the other hand, the need to protect against the undue concentration of market power and improper affiliate transactions, which are the critical underpinnings of Section 203 and “just and reasonable” rates.

ELCON would prefer that FERC devote its limited resources to tasks more essential to the effective functioning of the electricity markets. However, should FERC proceed to a final rule in this matter, ELCON urges the Commission to adopt stringent criteria, such as those set out in the NOPR, to ensure that investors in utilities cannot exercise market power or diminish competition.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. Most ELCON members have facilities in multiple wholesale electric markets. As operators of hundreds of major facilities and major consumers of electricity, ELCON members are significantly impacted by any changes under Sections 203 and 205 of the Federal Power Act that could have the effect of reducing competition in the electricity markets.

### **ELCON Comments**

The NOPR would grant a blanket authorization under Section 203 of the Federal Power Act for certain acquisitions of 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility holding company, and a corresponding waiver relating to the definition of “affiliate” under Section 205 of the Federal Power Act. The blanket authorization and waiver would be conditioned on the acquiring entity’s entry of an affirmation certifying that the acquisition was not for the purpose or with the effect of changing or influencing control of the public utility. The affirmation would only establish a rebuttal presumption, would have to be renewed quarterly and

would require the acquiring entity to certify that it does not take certain actions that would unduly influence the management of the utility, interfere with the operations of the utility's facilities, or request or receive non-public information.

ELCON urges FERC to exercise caution in amending the regulations under Sections 203 and 205. Certainly there is a potential benefit from the elimination of unnecessary regulatory barriers to the making of needed investment in generation and transmission infrastructure. However, the guiding purpose of the Federal Power Act is to achieve "just and reasonable" rates by, among other things, preventing the accumulation of either horizontal or vertical market power and improper affiliate transactions.

ELCON notes that Commission staff held a workshop on the subject leading to the NOPR on December 3, 2008. At the conference and in post-conference comments, significant concerns about market power and affiliate transaction issues were raised by commenters such as the American Public Power Association, the National Rural Electric Cooperative Association, the Transmission Access Policy Group, the Federal Trade Commission (FTC), and the American Antitrust Institute. ELCON shares those concerns, and in particular urges renewed focus on the comments of the FTC, which addressed the incentive effects associated with partial acquisitions even where they do not exhibit traditional indicia of "control," including influence on the competitive incentives of the acquiring and acquired firms and potential opportunities and incentives for firms to share information that facilitates collusion. ELCON also agrees with those commenters who opposed reliance on a Schedule 13G filing with the

Securities and Exchange Commission (SEC) as the sole basis for a finding that an acquiring entity does not exercise control over a facility, as such filings are not sufficiently specific to provide the information necessary for purposes of Section 203. Schedule 13G filings are made for a wholly different regulatory purpose – protection of the securities markets and investors – under a different federal statute.

Laudably, the NOPR does not rely on the filing of a Schedule 13G with the SEC. Nonetheless, ELCON remains unconvinced that the changes proposed in the NOPR are necessary. The NOPR does not clearly establish a need for the proposed changes, aside from citing to a now-dated petition filed by the Electric Power Supply Association (EPSA). The Section 203 process is not overly burdensome and time consuming, and many financial investors (including those referenced in the EPSA petition) have obtained the authority that they require via the current procedures.<sup>1</sup> There are more significant priorities demanding the attention of the Commission’s limited resources, and the potential risks of market power and affiliate transactions dictate that the Commission should not choose this course lightly.

If the Commission determines that there is a sufficient need for regulatory action, however, ELCON believes that the affirmation and other conditions as set out on the NOPR may achieve a balance between the competing objectives. In any final rule, the Commission at a minimum should retain each of these features, and not dilute

---

<sup>1</sup> See, e.g., *Horizon Asset Management, Inc.*, 125 FERC 61,209 (2008); *Harbinger Capital Partners Master Fund I, Ltd*, 125 FERC 61,145 (2008); *Entegra Power Group LLC*, 125 FERC 61,143 (2008); *Goldman Sachs Group, Inc.*, 121 FERC 61,059 (2007); *Morgan Stanley*, 121 FERC 61,060 (2007); *Capital Research and Management Co.*, 116 FERC 61,267 (2006).

them, as they are essential to providing the disclosure and accountability necessary to ensure that holdings of between 10 and 20 percent do not establish a potential for control under the terms of a particular transaction. In particular, the following aspects of the NOPR are of critical importance and must be retained:

1. The affirmation to be required of acquiring entities seeking to acquire up to 20 percent of the voting securities of a utility would only create a rebuttable presumption for purposes of Section 203 that an investor has not obtained control over the public utility. The Commission, stakeholders or public should have the opportunity at any time to initiate a proceeding seeking to rebut that presumption.
2. In addition to an initial submission, the affirmation would have to be renewed quarterly. This requirement ensures investor awareness of its obligations and enables appropriate regulatory oversight in the event of any changes.
3. The affirmation would require specific information about the investment, including the number of shares of the voting security (and the percent of total shares outstanding) held in the public utility, the name and location of any other public utility that is an affiliate of the investor, and a description and location of inputs to power production owned or controlled by the investor or any affiliate thereof. This disclosure is essential to oversight by the Commission, stakeholders and public. There is nothing extraordinary about what the Commission has proposed, as it is similar to the information required to be included in Section 203 applications.
4. The affirmation would require certifications that the acquisition was not for the purpose or with the effect of controlling a utility and that the investor will not: (i) seek or accept a board seat or serve in any management capacity; (ii) request or receive non-public information; (iii) solicit or participate in the solicitation of proxies; or (iv) seek to influence the management or conduct of day to day operations. Each of these certifications is essential to establishing that an investor does not seek to exercise control and should be retained. In this regard, ELCON notes that they are very similar to the information conditions that FERC established in orders approving specific investments of 10 percent or more under Section 203.

In addition, FERC should clarify that the affirmations may not be claimed as confidential. Public accessibility to all of the required information is essential to oversight of the process by stakeholders and the public and is warranted by the centrality of the lack of market power to the functioning of the electricity markets and “just and reasonable” rates. If an investor cannot commit to transparency as a prerequisite to the extraordinary access to a blanket authorization, it can follow the normal Section 203 application and review and approval process, which involves public notice and comment and which is not overly burdensome.

For the foregoing reasons, should FERC proceed to issue a final rule, it should at a minimum retain the process requiring the investor to file, initially and in each quarter, on a public basis, an affirmation containing each of the pieces of information and certifications as set out in the NOPR.

NOTICES AND COMMUNICATIONS

Notices and communications with regard to these proceedings should be

addressed to:

John P. Hughes  
Vice President, Technical Affairs  
ELECTRICITY CONSUMERS RESOURCE  
COUNCIL  
1111 Nineteenth Street, NW, Suite 700  
Washington, DC 20036  
Email: [jhughes@elcon.org](mailto:jhughes@elcon.org)  
Phone: (202) 682-1390

W. Richard Bidstrup  
CLEARY GOTTLIEB STEEN &  
HAMILTON LLP  
2000 Pennsylvania Avenue, NW, Suite 900  
Washington, DC 20006  
Email: [rbidstrup@cgsh.com](mailto:rbidstrup@cgsh.com)  
Phone: (202) 974-1500

Respectfully submitted,

/s/ W. RICHARD BIDSTRUP  
W. Richard Bidstrup  
CLEARY GOTTLIEB STEEN & HAMILTON LLP  
2000 Pennsylvania Avenue, N.W.  
Washington D.C. 20006  
*Counsel for ELCON*

Dated: March 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.:            March 29, 2010

/s/ W. RICHARD BIDSTRUP  
W. Richard Bidstrup