UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transactions Subject to FPA Section 203	Docket No. RM05-34-000

REQUEST FOR REHEARING OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON),
AMERICAN IRON AND STEEL INSTITUTE (AISI), AND
AMERICAN CHEMISTRY COUNCIL (ACC)

The Electricity Consumers Council (ELCON), the American Iron and Steel Institute, (AISI), and the American Chemistry Council (ACC) seek rehearing of FERC's final rule, Order No. 669 in Docket RM05-34, issued December 23, 2005.

Statement Of Issues /Specification Of Error

Industrial Consumers commend many parts of the new rule and in particular FERC's emphasis on risks of cross-subsidization. However, Industrial Consumers submit that the Commission has departed from its statutory mandate in its decision to require pre acquisition approval of utility interests by companies that qualify as "holding companies" solely by virtue of their ownership interests in qualifying cogeneration facilities or qualifying small power production facilities ("QFs") and exempt wholesale generators ("EWGs"). FERC should also give a blanket authorization from Section 203 to owners of QFs and EWGs, at a minimum with respect to on site generation.

Introduction

Section 203(a)(2) of the Energy Policy Act of 2005 ("EPAct 2005") adds a new requirement that no holding company in a holding company system that includes a transmitting utility or an electric utility shall acquire securities with a value of $10 million or merge with another utility or holding company without FERC approval.[1]

As enacted by Section 1289 of EPAct 2005, Section 203(a)(2) imposes pre-acquisition pre-approval requirements on entities that are "holding companies" in a "holding company system that includes a transmitting utility or an electric utility." The definition of "holding company" is now being applied to companies who are only holding companies because they own 10 percent or more of the outstanding voting securities of EWGs and QFs.

As FERC is well aware, all QFs were exempt from status as an "electric utility company" under Section 210(f) of the Public Utility Holding Company Act of 1935 ("PUHCA 1935") and FERC's implementing rules. 18 C.F.R. §292.601. EWGs were exempted, by Section 32(e) from classification as an "electric utility company" and a "public-utility company" under PUHCA 1935. As a consequence, a company that owned or controlled 10 percent or more of the outstanding voting securities of a QF or EWG did not, by virtue of such ownership, become a "holding company" under PUHCA 1935.

Under Order 669, all companies classified as holding companies, even if they are only holding companies by virtue of QF and EWG ownership, must seek pre-acquisition approval of any acquisition of any equity or debt with a value in excess of $10 million of any publicly-traded

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[1] (2) 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 $ 10,000,000 of, 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 $ 10,000,000 without first having secured an order of the Commission authorizing it to do so.

electric utility company or gas utility company, QF, EWG, or of a parent company of any QF or EWG.

As Industrial Consumers' comments in this docket pointed out, application of Section 203(a)(2) pre-acquisition approval requirements to holding companies by virtue of their interests in EWGs and QFs would impose serious unintended consequences on Industrial Consumers especially with regards to customer generation. ELCON requested that FERC provide that those industrial consumers and other entities whose on-site generation investment meets the statutory definition of EWGs or QFs should not be treated as "holding companies" for purposes of the Section 203 acquisition approval requirement.

The final rule grants blanket authorizations for certain types of transactions,[2] but declines to exclude from the scope of amended Section 203(a)(2) acquisitions of utility interests by companies that have holding company status solely by virtue of QF, EWG or Foreign Utility Company ("FUCO") ownership. The Commission reasons that by statute, a "holding company" is an owner of an "electric utility company" and decides that this term should in turn be defined by reference to PUHCA to include any company that "owns or operates facilities used for the generation, transmission or distribution of electric energy for sale." FERC declines however to adopt the PUHCA 1935 exclusion of QFs and EWGs from the definition of electric utility company for purposes of its amended Section 203 authority and thus declines to exclude transactions involving EWGs and QFs from pre acquisition review.

[2] Blanket authorizations include: (i) acquisitions by holding companies of non-voting securities, and of voting securities if, after the acquisition, the holding company owns less than 10 percent of the outstanding voting securities; (ii) acquisitions of any security of a subsidiary in a holding company system and certain other internal corporate reorganizations; (iii) transactions relating to facilities used solely for transmission or sales in intrastate commerce (ERCOT, Alaska and Hawaii) or for local distribution or retail sales regulated by a state commission; (iv) intra-holding company system financing and cash management arrangements; and (v) acquisitions of FUCOs, subject to certain conditions.

While FERC acknowledges that QFs (in contrast to EWGs) are exempt from FPA Section 203, FERC concludes that acquisition of securities of a QF by a holding company should trigger Section 203 review. FERC asserts that the blanket authorizations granted for holding company acquisitions of non-voting securities and up to 9.9% of voting securities in electric utility companies will address concerns that FERC has expanded its jurisdiction over QFs and EWGs. In fact the 10% blanket authorization does not mitigate the concerns of Industrial Consumers.

A. Burden On Customer Generation

The result of this pre acquisition approval requirement will be to impose a new regulatory hurdle that has not previously applied to QFs and customer generation, and to greatly increase the universe of companies who will need to apply for FERC pre approval in mergers and other acquisitions never before subject to FERC scrutiny. FERC would thereby expand the scope of pre acquisition review absent a Congressional intent to broaden the scope of FERC oversight over QF or EWG transfers.

Customer generation serves an essential function in providing on-site steam and/or power to industrial facilities, provides increased efficiency in locating generation near load and generating dual fuel output (thermal and electrical), and provides a basis for the nation's industrial entities to control costs in process and manufacturing enterprises which is beneficial to the nation's economy. Thus customer generation should not be discouraged or hindered, but instead should be fostered, by FERC initiatives. Industrial Consumers own customer generation that has appropriately been excluded from FERC's PUHCA final rule (Order 667) which gives blanket authorization from books and records requirements to customer generation (automatically below 100 MW). Customer generation should similarly receive blanket

authorization with respect to the Section 203 review. Indeed, PURPA established the basis for cogeneration facilities and other qualifying facilities, which is the ultimate form of demand response as the industrial entity generally bears all or a large part of the financial risk of these investments. The purpose of cogeneration facilities and other on-site generation is to serve the host industrial facility with steam and power. Rules which impede the efficient, independent response of industrial consumers to install cogeneration facilities should be avoided.

Some ELCON members and other industrial consumers qualify as "public utility" power marketers. Any legitimate concern that about generation concentration has already been addressed via FERC's change in status rules (18 C.F.R. § 35.27(c)) that require that power marketers immediately report change in generation status as a condition of their approval to charge market based rates.

B. Congress Did Not Intend That FERC Require Pre-Approval of Transactions by QF/EWG-Only Holding Companies

There is no indication that Congress intended to apply Section 203(a)(2) to QFs and EWGs. The evident intent of EPAct 2005 was to repeal PUHCA 1935 and transfer to FERC two authorities previously administered by the SEC from which EWGs were exempted: (i)—books and records authority; and (ii) authority over the class of public utility holding company dispositions. In transferring such authority to FERC, Congress addressed three issues: a) to raise the minimum threshold of subject transactions to $10 million, b) to grant FERC explicit statutory authority to approve holding company acquisitions and mergers, and c) to require that FERC approve a public utility's purchase or sale of significant existing generation assets. Nothing in the legislative history suggests an intent that ownership of QFs and EWGs should be subject to FERC's amended authority under amended Section 203 to approve mergers between utilities and utility holding companies.

FERC's imposition of new burdens on owners of QFs and EWGs not associated with transmission-owning utilities misinterprets Congressional intent in EPAct 2005.

1. <u>There Is No Indication That Congress Intended to Subject QFs to a Pre-Approval Requirement</u>

QFs are not treated as electric utility companies under PUHCA 1935 nor are QFs electric utilities under pre-existing FERC FPA regulations. QFs are currently exempt from the requirement to seek prior FERC approval for acquisitions under FPA Section 203 under 18 C.F.R. §292.601(c). Order 669 would for the first time require FERC approval of acquisitions or mergers involving QFs or their owners.

FERC's proposed rules may discourage investment in QFs, contrary to the evident intent of EPAct 2005. Sections 1251-54 of EPAct 2005 do not alter FERC's statutory objective of continuing to encourage cogeneration. Congress intended to transfer to FERC authority over holding company acquisitions that the SEC had exercised under PUHCA 1935. But the SEC never exercised authority over QF acquisitions and QFs were excluded from the definition of electric utility company under PUHCA 1935 such that their upstream owners were not holding companies. While Congress implemented significant revisions to PURPA in EPAct 2005, it chose to reform this statute -- not to repeal it.

Certainly Congress was aware of the exemption from Section 203 provided to QFs under PURPA as implemented by 18 C.F.R. §292.601, yet, it took no steps to direct FERC to modify its regulations in any way. Had Congress intended to remove the exemption from Section 203, it would have modified 16 U.S.C. §824a-3(e)(1) by limiting the scope of FERC's authority to exempt QFs from the FPA.

2. There Is No Indication that Congress Intended to Impose a Burden on EWG Ownership under EPACT 2005 that Did Not Exist under PUHCA 1935

As to EWGs, FERC justifies its approach by pointing out that EWGs (unlike QFs) are electric utilities under FPA regulation. However, PUHCA 1935 excluded EWGs from the definition of electric utility company and their owners from holding company status. FERC says its hands are tied because Congress enacted a definition of "holding company" in EPAct 2005 that encompasses EWGs. However, Congress certainly did not forget about the special treatment to be accorded EWGs. Section 1645(i) of EPAct 2005 incorporates a definition of EWG that states that the definition has the same meaning as under PUHCA 1935. FERC can continue its prior regime of approving EWG transfers under Section 203 (now (a)(1)) without imposing new burdens by treating EWG owners as holding companies under Section 203(a)(2).

C. Blanket Authorization Is The Appropriate Remedy

FERC may conclude that it is relevant to assessing the market power of a traditional utility holding company (e.g., one that owns transmission wires, or serves captive customers) to ascertain the extent of its generation market power. To achieve such an objective, however, it is not necessary to treat QFs per se as electric utility companies or to impose new regulatory approval costs on QFs, EWGs, and their owners. To the extent that any market-based rate holder has ownership or control of any power generation including QFs or EWGs, or to the extent that any affiliate of a market-based rate holder has ownership or control of power generation including QFs or EWGs, such generation must be reported to FERC in required triennial market power assessments and pursuant to recently implemented rules regarding notice of changes in status of the basis upon which the Commission granted market-based rate authority.

The need to obtain Commission approval for each such transaction and for other investments by virtue of the holding company status due to their ownership of QFs and EWGs would, due to inherent delay, impose a major impediment to financial transactions.

To remedy this situation, it is not necessary that FERC change its conclusion that owners of QFs and EWGs qualify as holding companies. Alternatively, all that is necessary is to provide blanket authorization from Section 203 for companies that are holding companies solely by virtue of QF and EWG ownership.

Description of Industrial Consumers

ELCON is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community and many ELCON members operate PURPA qualifying cogeneration facilities. The member companies of ELCON consume approximately five percent of all electricity in the United States.

The American Iron and Steel Institute (AISI) is the principal trade association of the North American steel industry. Its member companies account for about seventy percent of the new steel production in the United States. The steel industry is one of the most energy-intensive sectors in the United States; the cost of electricity may constitute as much as twenty percent of the manufacturing cost of a steel mill product.

The American Chemistry Council (ACC) is a nonprofit trade association whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals in the United States. The manufacturing processes of many ACC member companies

are highly energy-intensive. In addition, the chemical industry uses a substantial amount of self-generated electricity. Total electricity used by the industry (purchases plus self-generated) represents approximately eighteen percent of industrial electricity consumption in the United States and approximately six percent of national electricity consumption. A number of ACC member companies operate PURPA qualifying cogeneration facilities.

Notices and Communications

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