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ENERGY ALERT

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FERC Could Require Prior Approval for Purchase of Interconnection Assets

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On October 13, 2011, the staff of the Federal Energy Regulatory Commission ("FERC"), using its authority to act on behalf of the agency in routine, non-contested cases, issued an order that raises concerns regarding the application of the $10 million threshold that was established in the Energy Policy Act of 2005 ("EPAct 2005") for transactions that require FERC approval under Section 203 of the Federal Power Act ("FPA").[1] Under Section 203(a)(1), a FERC-regulated "public utility," including companies that own utility-scale wind, solar, and other renewable as well as conventional generation projects, must obtain prior FERC approval of transactions involving: (1) the sale or lease of the public utility's interconnection facilities, including the sale of an undivided interest in the facilities (2) the merger or consolidation of its interconnection facilities with those of another, (3) the acquisition of a security of another public utility, or (4) the acquisition of an existing generation facility.

Regarding the first two types of transactions, Section 203(a)(1) specifically provides that FERC approval is required before a public utility may:

> (A) sell, lease, or otherwise dispose of the whole of its [facilities, including interconnection facilities] subject to the jurisdiction of the [FERC], or any part thereof of a value in excess of $10,000,000;
>
> (B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever

Prior to being amended in 2005, Section 203(a)(1) applied to all transactions in which the value of the facilities exceeded $50,000. This low transactional threshold resulted in what Congress concluded was unnecessary time and effort by utilities and FERC staff to process applications for inconsequential transactions, as part of its 2005 amendments to the FPA, Congress raised the threshold from $50,000 to $10 million. Based on the intent of EPAct 2005 to raise the threshold for transactions triggering FERC approval and references to a $10 million threshold throughout Section 203(a)(1), industry participants have interpreted that section such that all four types of transactions listed above require FERC approval only if the transaction is valued at more than $10 million, including the second type of transactions listed -- mergers and consolidations of facilities. This interpretation makes sense because Section 203(a)(1)(B), addressing mergers and consolidations of facilities, does not include a separate definition of the facilities covered, but instead refers to "such" facilities. The word "such," as used here, logically refers to the facilities defined in Section 203(a)(1)(A), which include only those assets valued in excess of

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[1] *See ITC Great Plains, LLC*, 137 FERC ¶ 62,037 (2011) ("*ITC Great Plains Order*").

$10 million. (Indeed, not to so interpret this language would attach no meaning to the word "such," an approach which violates the principle of statutory interpretation that every word must be presumed to have been used for a purpose.)

However, FERC staff reached the opposite conclusion in the *ITC Great Plains Order*. In that case, ITC Great Plains, a FERC-jurisdictional public utility, had acquired substation assets – which are classified as "transmission facilities" subject to Section 203 -- with a value of less than $10 million from Mid-Kansas Energy Cooperative. FERC staff determined that ITC Great Plains should have obtained FERC approval prior to acquiring the assets because the transaction was a "merger or consolidation" of facilities under Section 203(a)(1)(B). According to FERC staff's interpretation, even though the value of the affected assets was less than $10 million, Section 203 approval was required because Section 203(a)(1)(B) does not separately include the $10 million threshold requirement, and therefore it does not apply.

FERC staff's interpretation of Section 203(a)(1)(B) is troublesome in that it (i) considers a public utility's acquisition of interconnection facilities to be a "merger or consolidation," and (ii) disregards the $10 million cap established by EPAct 2005. Unlike an order issued by the FERC Commissioners, an order can be issued by FERC staff only where a case is uncontested. Further, orders issued by FERC staff do not establish binding precedent for participants or FERC in future proceedings. Nevertheless, because the ITC Great Plains Order reflects the views of the expert staff on which the Commissioners rely, it does have weight. As a practical matter, that FERC staff construes Section 203 as applying to transactions involving assets with a value of less than $10 million means that companies engaging in such transactions may be forced to spend time and resources to obtain FERC approval out of an abundance of caution, since a finding that they failed to obtain a required federal approval would violate representations and covenants that the parties have obtained all necessary governmental approvals. In addition, as noted below, it means that companies failing to obtain pre-approval risk being deemed to have violated the FPA.

We note that Order No. 669, which was issued by the FERC, as opposed to FERC staff, and which therefore does constitute binding legal precedent, does contain language that could be read as supporting FERC staff's interpretation of how the $10 million threshold should be applied. In that order, FERC denied a request to modify the language of FERC's regulations to restate the $10 million threshold in the provision addressing mergers and consolidations of facilities. FERC stated that, because Section 203(a)(1)(B) did not restate the $10 million threshold, Congress did not adopt a monetary threshold for mergers and consolidations of facilities.[2]

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[2] *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315, at P 32 (2005).