Akin®

FERC Holds Certain Passive Equity Interests in Public Utilities Are "Non-Voting Securities" for Purposes of Section 203 of the Federal Power Act

Oct 4, 2017

Reading Time : **3 min**

By: Scott Daniel Johnson

FERC's decision reduces regulatory uncertainty regarding the need for Section 203 authorization from FERC for passive investment transactions and relieves parties to such transactions and FERC staff of significant burdens associated with preparing and processing precautionary Section 203 applications for such transactions. It also should streamline the process for closing such investments and reduce the number of related, post-closing, "change-in-status" filings under Section 205, further reducing administrative burdens on regulated entities, their upstream owners and FERC staff.

Section 203(a)(1) requires prior (i.e., pre-closing) FERC authorization for a public utility—such as an entity with market-based rate authority—to transfer control over all or any portion of its FERC-jurisdictional facilities with a value of more than $10 million. Similarly, Section 203(a)(2) requires prior FERC authorization for certain "holding companies" to acquire securities worth more than $10 million of certain types of companies. While FERC's regulations include blanket authorizations under Section 203 for some transactions, there is no blanket authorization under Section 203(a)(1) for a transfer of passive, non-managing equity interests in a public utility, despite (1) FERC precedent disclaiming jurisdiction over transfers of interests with very limited veto or consent rights (because such transactions would not result in a change of control) and (2) blanket authorizations under Section 203(a)(2) for certain such transactions.

FERC had previously held that certain passive equity interests in public utilities are not "voting securities" for purposes of determining affiliation between parties under Section 205 of the

FPA. Until now, however, FERC had never expressly extended that holding to Section 203—including its blanket authorizations under Section 203—leaving some "tax equity" and other passive investment transaction parties uncertain of the need for FERC authorization for their transactions. In addition, while FERC previously provided some guidance on passive investments that do not trigger Section 203(a)(1), it also warned that "the circumstances that convey control . . . vary depending on a variety of factors" and that "the burden remains upon the entities involved . . . to decide whether they need to obtain Commission authorization under section 203 to undertake a proposed transaction."[4] As a result, parties to passive investment transactions for which no blanket authorization squarely applied often requested FERC authorization under Section 203 on a precautionary basis to obtain any authorization that might be deemed necessary.

FERC has now provided, as Petitioners requested, "clear and explicit precedent upon which public utilities, public utility holding companies, and investors may rely in order to discontinue the practice of submitting Section 203 applications 'out of an abundance of caution' for the issuance and transfer of the[] types of non-managing, equity interests in public utilities" that FERC addressed in prior cases addressing its passivity analysis. The resulting reduction in burdens on market participants and their owners, as well as on FERC staff, in connection with avoided precautionary Section 203 applications and related, post-closing notices of changes in status should be significant and should reduce passive investment transaction costs and regulatory risk.

However, parties developing tax equity or similar passive investment structures and operating agreements for their investment vehicles should continue to take care to make sure that the rights of the entities intended to be passive in those arrangements are consistent with those of the investors deemed to be passive under FERC's passivity analysis—i.e., limited to those rights necessary to protect their investments. In this regard, FERC cautioned that, "[t]o the extent a future tax equity investor is considering whether securities with characteristics that vary from those presented in [FERC's passivity analysis] constitute non-voting securities, it remains the investor's responsibility to make a determination as to whether prior Commission approval for transactions involving such securities is necessary."[5]

[1] JPM Capital Corporation; Bankers Commercial Corporation; Enel Green Power North America, Inc.; Firstar Development, LLC; State Street Bank and Trust Company; BAL Investment & Advisory, Inc.; Wells Fargo Bank, N.A.; and FTP Power LLC.

[2] *Ad Hoc Renewable Energy Fin. Grp.*, 161 FERC ¶ 61,010 (2017) ("October 4 Order").

[3] 18 C.F.R. § 33.1(c)(2)(i) (2017) ("Any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to purchase, acquire, or take . . . [a]ny non-voting security (that does not convey sufficient veto rights over management actions so as to convey control) in 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").

[4] *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at PP 55-56 (2007) ("Supplemental Policy Statement"), *clarified*, 122 FERC ¶ 61,157 (2008).

[5] October 4 Order n.30 (citing Supplemental Policy Statement at P 54).

Categories

Energy Regulation, Markets & Enforcement | Lobbying & Public Policy | Power

other associated entities under which the Akin Gump network operates worldwide, please see our Legal Notices page.