

Impact of the New Trump Administration on Laws Affecting Mergers and Acquisitions

Impact of Potential Regulatory Changes
at FERC

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What is the Federal Energy Regulatory Commission?

- an independent agency that regulates the interstate transmission of electricity, natural gas, and oil
- FERC also reviews proposals to build liquefied natural gas (LNG) terminals and interstate natural gas pipelines as well as licensing hydropower projects
 - Note: FERC has no jurisdiction over siting and construction of oil pipelines such as Keystone XL or Dakota Access
- composed of up to five commissioners who are appointed by the President with the advice and consent of the Senate
- commissioners serve five-year terms, and have an equal vote on regulatory matters (although Chairman sets agenda)
- as an independent agency, FERC decisions may be challenged in court, but are not reviewed by any other executive department or legislative body

Current FERC Commissioners

- **Chairman** Norman C. Bay, Democrat, term expires 6/30/18
 - Some speculation he could step down if additional Commissioners are confirmed and a new chairman selected
- **Commissioner** Cheryl A. LaFleur, Democrat, term expires 6/30/19
- **Commissioner** Colette D. Honorable, Democrat, term expires 6/30/17
- Two empty seats on Commission
- No more than three Commissioners can be from same political party
- Incoming administration would typically name a new Chairman immediately (no Senate confirmation required), but with no Republicans on Commission, unlikely to see any change until first Trump nomination is made and confirmed

Section 203 of the FPA

- Section 203 empowers FERC with authority to regulate sales, leases and other dispositions of control over electric utilities and their facilities subject to its jurisdiction
 - Extends in certain situations to the acquisition of electric utility securities
- FERC’s jurisdiction generally attaches to “public utilities”:
 - Entities involved in the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce
 - Utilities and utility facilities located in Alaska, Hawaii and most of Texas fall outside this jurisdiction
- The majority of publicly-traded electric utility securities in the United States involve public utilities engaged in either wholesale power sales or the transmission of electric energy
- FERC has no comparable authority with respect to the natural gas industry

Regulatory Requirements of Section 203

- Requires advance FERC approval of:
 1. Any sale, lease, or other disposition of the whole of a public utility's facilities subject to jurisdiction under the FPA or any part thereof of a value in excess of \$10,000,000
 2. Any merger or consolidation, directly or indirectly, of a public utility's jurisdictional facilities with the facilities of any other person
 3. Any purchase or acquisition by a public utility of any security valued in excess of \$10,000,000 of any other public utility
 4. Any purchase or acquisition by a public utility of an existing generation facility that both has a value in excess of \$10,000,000 and that is used for interstate wholesale sales subject to FERC's jurisdiction

Regulatory Requirements of Section 203

- FERC also requires advance approval over certain utility asset and securities acquisitions by “holding companies” in a holding company system that includes either a “transmitting utility” or an “electric utility”
 - Not to be confused with provisions under the now-repealed Public Utility Holding Company Act of 1935
- These definitions are broader than the definition of “public utility”
- Because FERC’s definition of affiliation and control for determination of holding company status is based on 10% voting control, a financial entity can become a “holding company” merely by owning 10% or more of the outstanding voting securities of an electric utility, a transmitting utility, or a parent holding company of either class of company
- This regulation can apply to investment companies and advisors

FERC Approval: Decision Criteria

- Must be in the public interest
- Must not result in cross-subsidization of a non-utility associate company
- In evaluating the public interest, FERC considers three factors:
 1. The effect on competition
 - Horizontal Market Power
 - Vertical Market Power
 - Transmission Service
 2. The effect on rates
 - FERC examines rate effects on existing wholesale customers
 3. The effect on regulation
 - No gaps created between state and federal regulation

Utility M&A Following PUHCA Repeal

- The Public Utility Holding Company Act of 1935 (PUHCA) created a powerful disincentive to mergers and acquisitions in the electric industry
- Congress repealed and replaced PUHCA in 2005
- Many expected rapid increase in M&A activity
 - Didn't happen
 - But, with electric demand stagnant, more utilities are looking to acquisitions for growth
 - 2015 and 2016 were each record years for utility M&A activity
 - FERC has not impeded this growth
 - Regulatory barriers remain at the state level

FERC's Recent Activity Under Section 203

- FERC has not taken an activist role with respect to its authority under Section 203
- Virtually all proposed transactions have been approved by FERC during Chairman Bay's tenure (and during tenures of prior Obama appointees)
- Most major utility mergers that failed in recent years were scuttled by state commissions, not by FERC
- The current FERC Commissioners voted for every major merger or acquisition during their tenures at FERC, so it is unlikely that a change at FERC to replace Chairman Bay or add new Republican appointees will result in significant change in FERC policy toward M&A activity
- FERC recently utilized, for the first time, a more stringent test for measuring market power effects of a proposed transaction (in Dynegy-Engie acquisition), requiring divestiture of some assets

Changes for FERC Led by Trump Appointees

- While there are likely to be changes in several areas of FERC regulation under the Trump administration, treatment of applications for electric M&A transactions is unlikely to be one of them
 - Note that even the Exelon-Constellation and Duke-Progress orders, which required divestitures of some assets, were approved with support of Republican commissioners
- FERC is unlikely to adopt a rule formalizing the new market-power screen utilized in the Dynegy-Engie transaction
- Among other changes, FERC under Trump can be expected to:
 - Reduce enforcement activity
 - Reduce incentives favoring renewable resources



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