

Insights

INVESTOR TO AFFILIATE: RECENT FERC DECISIONS HOLD THAT APPOINTMENT OF NON-INDEPENDENT BOARD MEMBERS CAN CONSTITUTE CONTROL

Oct 28, 2022

SUMMARY

Two recent FERC decisions hold that appointment of an investor's own officers or directors, or other appointee accountable to the investor, to the board of a public utility or holding company that owns public utilities will require prior Commission approval under Federal Power Act (FPA) section 203(a) (1)(A) and may also create affiliation between the investor and the public utility or holding company. While the Commission spoke in terms of prospective application of the prior approval requirement, its holdings may result in affiliations that necessitate MBR Change in Status filings, MBR Relational Database updates, or other corrective actions.

Building on analysis in its 2021 *Public Citizen, Inc. v. Centerpoint Energy, Inc.* opinion,^[1] the Federal Energy Regulatory Commission (FERC or Commission) recently issued two decisions^[2] analyzing whether investments that were under 10% of outstanding shares, but were paired with appointment of directors that were accountable to the investors, constitute a change in control within the meaning of the Federal Power Act:

"Going forward, appointment of an investor's own officers or directors, or other appointee accountable to the investor, to the board of a public utility or holding company that owns public utilities will require prior Commission approval under Federal Power Act (FPA) section 203(a)(1) (A)."^[3]

In addition to requiring prior approval, such officer and director appointments may also create affiliation,^[4] and therefore carry implications regarding affiliate restrictions, Market Based Rate (MBR) Authority change in status reporting, and maintenance of up-to-date information in FERC's Order No. 860 Relational Database.

BCLP Insight: public utilities and public utility holding companies should review their Board rosters to determine whether there have been changes in control or affiliations that may require corrective filings or self-reporting to the Office of Enforcement. Although the Commission speaks in terms of prospective application, affiliation carries ongoing obligations.

For investors in public utilities and public utility holding companies, under Evergy and Transalta, placement of non-independent directors likely constitutes a change of control requiring prior approval under FPA section 203(a)(1)(A).

Compliance with the Commission's affiliate rules is already a frequent examination focus of the Office of Enforcement's Division of Audits and Accounting (DAA). Because this is an important policy change with a relatively clear framework regarding compliance, DAA may further emphasize this audit scope area in the future.

IMPLICATIONS OF CONTROL AND AFFILIATION

FERC's regulatory regime includes various restrictions and procedural requirements relating to changes in control of jurisdictional assets and entities. These include the obligation to obtain prior approval for certain transactions that result in a change in control,^[5] potential reporting requirements relating to new affiliations,^[6] and resulting restrictions on activity and information sharing between affiliates.^[7]

The Commission's regulations at 18 C.F.R. identify various circumstances that constitute affiliation.^[8] According to *Transalta* and *Evergy*, placement of an officer or director of an investor (or an affiliate of the investor) on a public utility or public utility holding company's board of directors constitutes affiliation as well.^[9]

FPA SECTION 203 PRIOR APPROVAL REQUIREMENTS

Section 203 of the Federal Power Act requires prior Commission authorization for certain transactions, including the sale, lease, or other disposition of jurisdictional assets, including any portion thereof valued at more than \$10 million.^[10]

Generally, acquisition by an investor of less than 10% of total outstanding voting securities is entitled to a rebuttable presumption of no control and, consequently, does not come within the "other disposition" language of Section 203.^[11] Per *Transalta* and *Evergy* however, control may exist where such ownership is accompanied by appointment of board members. Specifically, the control and flow of information encompassed in investor placement of non-independent board members on the board of a public utility or public utility holding company constitutes an "other disposition" under section 203(a)(1)(A), thus necessitating prior Commission authorization.^[12]

BCLP Insight: Director appointments that create affiliation in light of Evergy and Transalta but occurred without prior authorization may warrant corrective filings and/or self-report to FERC's Office of Enforcement.

MARKET-BASED RATE AUTHORIZATION

In order to obtain MBR authorization from the Commission, Sellers must submit an application that includes various information designed to allow FERC to conduct an appropriate market power analysis, and, if market power concerns exist, to determine what mitigation measures are sufficient to address those concerns.^[13] This includes identification of ownership or control of inputs to electric power production by the applicant or affiliates, as well as submission of an asset appendix that identifies all generation assets, long-term firm purchase contracts, transmission assets, and natural gas intrastate pipelines and gas storage facilities owned or controlled by the applicant or any of its affiliates.

After obtaining MBR authorization, MBR entities must report within 30 days any change in status that would reflect a departure from the characteristics the Commission relied upon in granting MBR authority, including certain new affiliations and changes to affiliated asset ownership.^[14]

BCLP Insight: Newly identified affiliations based on the Commission's analysis in Transalta and Evergy may necessitate MBR Change in Status filings, MBR Relational Database updates, and/or self-report to the Commission's Office of Enforcement. Appropriate action will depend on the nature of, and assets owned by, the affiliated entities.

AFFILIATE RESTRICTIONS

In addition to the filing obligations discussed above, MBR entities are subject to various restrictions on activity and information sharing among affiliates.^[15] Among other things, these include restrictions relating to energy and capacity sales, as well as the provision of non-power goods and services.

BCLP Insight: To the extent FERC's opinions in Evergy and Transalta implicate previously unreported or unformalized affiliations, MBR entities should evaluate the relationship and related communication channels with the affiliate(s) and, if appropriate, implement controls to ensure they do not run afoul of the Commission's affiliate restrictions.

^[1] *Public Citizen, Inc. v. Centerpoint Energy, Inc.*, Order Denying Complaint, 174 FERC ¶ 61,101 (2021).

^[2] *Transalta Energy Marketing (U.S.) Inc., et al.*, 181 FERC ¶ 61,055 at ¶ 29 (2022) (Transalta); *Evergy Kansas Central, Inc., et al.*, 181 FERC ¶ 61,044 (2022) (Evergy).

[3] *Transalta* at ¶ 29 (2022). Note that in order to avoid a finding of control, such board appointments should be independent of the investor *and its affiliates*.

[4] *Evergy* at ¶ 45 (2022) (“We will therefore treat that investor as an affiliate of the public utility or public utility holding company to which a non-independent director has been appointed”).

[5] 16 U.S. Code § 824b (2018); 18 C.F.R. § 33.1(a)(i) (2022).

[6] 18 C.F.R. § 35.42(a), Change in status reporting requirement (2022).

[7] 18 C.F.R. § 35.39, Affiliate Restrictions (2022).

[8] 18 C.F.R. § 35.36(a)(9) (2022).

[9] *Transalta* at ¶ 29. According to the Commission, placement of any director that is accountable to the investor or an affiliate creates affiliation with the subject public utility or public utility holding company.

[10] 16 U.S. Code § 824b (2018).

[11] *Transalta* at ¶ 25 (*citing Supplemental Merger Pol’y Statement*, 120 FERC ¶ 61,060 at ¶ 37 (2007)) (“The Commission has stated that transactions that do not transfer control of a public utility or jurisdictional facilities do not fall within the ‘or otherwise dispose’ language of section 203(a)(1)(A) and thus do not require approval under that section.”).

[12] *Id.* at ¶ 29; *Evergy* at ¶ 45.

[13] See generally, Federal Energy Regulatory Commission, *Frequently Asked Questions Market-Based Rates* (updated May 24, 2022) available at <https://www.ferc.gov/power-sales-and-markets/electric-market-based-rates/frequently-asked-questions-faqs-market-based>.

[14] 18 C.F.R. § 35.42(a) (2022).

[15] 18 C.F.R. § 35.39, Affiliate Restrictions (2022).

RELATED PRACTICE AREAS

- Environment
- Energy & Natural Resources
- Regulation, Compliance & Advisory

MEET THE TEAM



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