UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act	Docket No. RM09-16-000

COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

The Transmission Access Policy Study Group ("TAPS") submits the following comments in response to the Commission's January 21, 2010, Notice of Proposed Rulemaking ("NOPR") in the above-captioned proceeding.[1] The NOPR responds to the Electric Power Supply Association's ("EPSA") proposal that the filing of a Securities and Exchange Commission ("SEC") Schedule 13G certification of "passive investor" status should serve as dispositive evidence of the investor's lack of control over or affiliation with a public utility with respect to "transactions subject to the Commission's jurisdiction under sections 203 and 205 of the FPA." NOPR P 4 (footnote omitted).

The NOPR focus on issues of utility control and affiliation with respect to ownership interests of 10 to (just less than) 20 percent of a utility's outstanding voting stock. Under the existing regulatory regime, the Commission presumes that an entity controls or is affiliated with a public utility when it acquires more than 10 percent of the utility's outstanding voting stock. The Commission addresses on a case-by-case basis any claim of lack of control where an acquisition will result in the ownership of 10

[1] Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, 130 F.E.R.C. ¶ 61,046 (2010), 75 Fed. Reg. 4498 (Jan. 28, 2010).

percent or more of the utility's voting stock. EPSA sought clarifying "guidance"[2] that would increase the current 10 percent threshold of presumptive non-control and non-affiliation to 20 percent where the investor filed an SEC Schedule 13G and thereby certified that it was a passive investor and its investment was not for the purpose of, and did not have the effect of conferring control.

Rather than reject EPSA's proposal outright, the Commission proposes its own new form, Form 519-C (otherwise referred to as an "Affirmation") that would permit an investor to certify to FERC its status as a passive investor in circumstances where a transaction would result in the investor acquiring between 10 percent and less than 20 percent of the outstanding voting securities of a public utility. The proposed Affirmation mandates disclosures and certifications that are a marked improvement over SEC Schedule 13G for purposes of Commission regulation. That said, the Affirmation is a behavioral, and not a structural safeguard: the certifying party pledges to engage or not engage in certain conduct in exchange for significant regulatory benefits that would otherwise not obtain, *i.e.*, the preauthorization of the disposition of utility securities and the avoidance of affiliation and the filing of a notice of change of status for market rate authorization purposes. Further, the proposed regulation does not prevent an investor from changing its mind and abandoning the commitments in its Affirmation right after receipt of those regulatory benefits, although the NOPR suggests that a Section 203 filing may be required in that instance and the investor should be bound by his commitments during the pendency of the Section 203 proceeding.

[2] NOPR P 4.

TAPS commends the Commission for not adopting EPSA's proposal. However, the Commission's proposed Affirmation, like all behavioral safeguards, raises concerns as to policing and enforcement. TAPS recommends that that Commission adhere to the current structural safeguard of presuming control and affiliation where an entity acquires more than 10 percent of a public utility's voting stock. To the extent that the Commission goes forward with the proposed Affirmation, certain improvements are warranted in order to address issues of oversight and enforcement and to protect against a gaming of the system. In particular, TAPS recommends:

- When an investor chooses to no longer abide by the commitments set forth in the Affirmation it should:

  i) be required to file immediately a public notice of its proposed change of status with FERC. If an investor wishes to no longer comply with terms of the Affirmation, the investor should be required to immediately file its change in intent publicly with FERC. Public notice should not await a Section 203 filing. FERC and the public should immediately be made aware of the investor's changed intent and that declared change in intent should trigger other important safeguards.

  ii) simultaneously place its voting securities in a trust that prevents the voting of those securities during the pendency of a Section 203 proceeding. There must be more than promise-based safeguards once an investor changes its intent and no longer desires to be bound by its Affirmation. Simultaneous with providing public notice the investor should be required to transfer its securities into a trust that will hold the securities and preclude the investor from exercising any voting or other rights with respect to the securities during the pendency of a Commission proceeding under Section 203 to determine the investor's authority to retain the securities. The investor would be free to sell the trust securities but not take any other action with respect to the securities during the pendency of the proceeding.

  iii) automatically be presumed to be an affiliate of the utility during the pendency of the Section 203 proceeding. Once the investor declares its intent to exercise active control over the affairs of the utility, the affiliate restrictions should automatically apply to all new interactions between the parties and the utility should be required to file a notice of change in status and include the investor and the investor's affiliates in its market power analysis.

  and iv) file a Section 203 application as soon as practicable and agree to be bound by its commitments during the pendency of the Section 203 proceeding. This

later point is the Commission's own suggestion. (Hereafter the "Suggestion" or the "Commission's Suggestion") The investor should not be able to engage in conduct contrary to its filed certifications and avoid being held accountable based upon a claimed change of intent not disclosed to FERC and the public at large and without being released from its certifications by FERC (assuming it continues to own 10 percent or more of the utility's voting stock).

- The Affirmation should include an express certification by the reporting investor that in filing the Affirmation with the Commission the reporting investor understands and agrees that it is acting pursuant to Commission rule and order and is subject to FERC's investigatory and enforcement authority in circumstances of alleged and actual non-compliance. There must be no room for argument concerning FERC's authority to investigate and sanction non-compliance with the required certifications. This is not a situation where FERC is seeking to involve itself in the internal affairs of corporate behavior, but instead a situation where the investor has made behavioral commitments to the Commission in exchange for avoiding regulatory requirements that would otherwise obtain.

- The Commission should require an initial one-year period of required compliance with the Affirmation certifications. The Commission should require any investor submitting an Affirmation to commit to abide by the certified terms of conduct for a minimum period of one-year after such Affirmation, assuming the investor continues to own between 10 and less than 20 percent of the outstanding voting securities of a public utility. An investor should not be able to game the system by reaping the regulatory advantages associated with the filing of an Affirmation and then disavow its representations shortly thereafter.

INTEREST OF TAPS AND COMMUNICATIONS

TAPS is an informal association of transmission-dependent utilities in more than 33 states, promoting open and non-discriminatory transmission access.[3] TAPS members have a vital interest in the proper competitive functioning of wholesale power markets including the prevention of the exercise of market power in wholesale energy and capacity markets and abuse of utility affiliate relationships. TAPS members have long

[3] TAPS is chaired by Roy Thilly, CEO of WPPI Energy. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

been concerned about structural changes in the electric industries that could adversely affect competition, rates or regulation, or could expose consumers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates and mergers. TAPS intervened and filed comments in opposition to EPSA's SEC Schedule 13G-based proposal in Docket No. EL08-87-000.[4] TAPS also submitted supplemental post-workshop comments and continued to object to EPSA's proposal.[5] The Commission stated, in the NOPR that its proposed Affirmation is intended to "help address … concerns raised by … TAPS." NOPR P 20.

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I. BACKGROUND

EPSA claims that the Commission's current approach of presuming control and affiliation in circumstances where an investor owns between 10 and less than 20 percent

[4] Motion to Intervene and protest of Transmission Access Policy Study Group, Sept. 30, 2008, *available at* eLibrary Accession No. 20080930-5090.

[5] The Commission re-designated EPSA's proposal to Docket No. PL09-3-000. TAPS filed its Post-Workshop Comments in that docket on January 16, 2009. *Available at* eLibrary Accession No. 20090116-5034.

of a utility's voting stock "threaten[s] to discourage investment in energy infrastructure and also create compliance issues for competitive power supply companies with market-based rates." *Id*. P 5. EPSA sought a blanket authorization for passive investors. In particular, EPSA:

> requested that, where an investor directly or indirectly acquires 10 percent or more but less than 20 percent of a public utility's outstanding voting securities and is eligible to file a statement of beneficial ownership with the … [SEC] on SEC Schedule 13G, such investment would not be deemed to result in a disposition of the public utility's jurisdictional facilities under section 203(a)(1) of the FPA or to result in affiliation with the public utility for purposes of the Commission's market-based rate requirements under section 205 of the FPA.

Id. P 4 (footnote omitted).

TAPS opposed and continues to oppose EPSA's proposed substitution of a single factor – the filing of an SEC Schedule 13G – for the Commission's existing approach to assessing control and affiliation where more than 10% of the voting securities are held by one entity. *See* Orders 669, 669-A, and 669-B (granting blanket authorization for holding company to purchase *less than 10 percent* of the outstanding voting securities of a public utility or FPA Section 203(a)(2)-covered holding company conditioned on filing with the Commission SEC Schedule 13G);[6] Order 697-A (ownership of 10 percent or more of

[6] Transactions Subject to FPA Section 203, Order No. 669, 71 Fed. Reg. 1348, 1365 (Jan. 6, 2006), [2001-2005 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,200, P 145 ("Order 669"), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422, 28,434-35 (May 16, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,214, PP 99, 103 ("Order 669-A"), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,225, *corrected*, 71 Fed. Reg. 45,736 (Aug. 10, 2006).

jurisdictional voting securities gives rise to affiliation).[7] As regards EPSA's compliance concern, TAPS does "not object to clarification that the Commission only requires market-based sellers to analyze and report on affiliates that are known or should be known with reasonable diligence."[8]

With significant and important differences the Commission advances regulatory changes in the direction of EPSA's investor-commitment based proposal. Rather than rely on SEC Schedule 13G as EPSA advocated, the Commission proposes its own new form of behavioral certification that establishes a rebuttable presumption of an investor's non-control status in circumstances where the investor owns between 10 and less than 20 percent of the outstanding voting securities of a public utility. Similar to an SEC Schedule 13G , proposed FERC Form 519-C is a certification "that the securities referred to in the filing were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer." NOPR P 36. However, the proposed FERC Affirmation is intended to be "tailored to provide … information and to impose restrictions on certain activities to better meet the requirements of the FPA and Commission policy." *Id.* P 20.

Under the Commission's proposal, the filing of an Affirmation would automatically give rise to substantial regulatory benefits. It would preauthorize a public

[7] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,268 ("Order 697-A"), *clarified*, 124 FERC ¶ 61,055 (2008), on *reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,285 ("Order 697-B"), *on reh'g and clarification*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), III F.E.R.C. Stat. & Regs. ¶ 31,291, *corrected*, 128 F.E.R.C. ¶ 61,014 (2009) ("Order 697-C"), *clarified*, Order No. 697-D, 130 F.E.R.C. ¶ 61,206 (2010), *petition for review filed sub nom. Mont. Consumer Counsel v. FERC*, No. 08-71827 (9th Cir. filed May 1, 2008), 18 C.F.R. § 35.36(a)(9)(1).

[8] Post-Workshop Comments of the Transmission Access Policy Study Group at 4.

utility to dispose of its voting securities to a holding company that would not, as a result of the transaction, own more than 20 percent of the utilities' outstanding voting securities. *Id.* P 34. In addition, "a public utility subject to the Affirmation in Part 33 would not be required to file a notice of change in status or include the investor or the investor's other affiliates in its market power analysis, and would not be subject to the affiliate transaction rules for transactions with the investor or the investor's other affiliates." *Id.* P 59.

In their current form, under the proposed revised regulations and accompanying Form 519-C, a certifying investor can apparently disclaim his intent to be bound and thereafter engage in any of the acts he had previously agreed to not undertake without notice of his change of intent to FERC or the public. This would seem to be an enormous loophole and an invitation to gaming. It is important to distinguish between the proposed regulations as set out in the NOPR and the regulations as they would be modified pursuant to the Commission's Suggestion. The Commission's Suggestion is that in circumstances where an investor no longer wishes to comply with the commitments made in the Affirmation, the investor: i) must file an application under Section 203 to request authorization to retain the securities; and ii) the investor cannot acquire additional voting securities and must continue to abide by the commitments during the pendency of the proceeding. But even more changes are needed. The Commission's Suggestion is an important but limited and not adequate safeguard given the heightened problem of policing compliance on the part of an investor who seeks to exercise active control over the affairs of the utility.

II. COMMENTS

A. Behavioral Safeguards are Unlikely to be Effective

Importantly, TAPS fails to see that investment in energy infrastructure is suffering as a result of the current regulatory regimen. The NOPR, and EPSA's petition, fail to identify a single instance where the existing case-by-case regulatory approach to utility acquisitions resulting in a more than 10 percent stock ownership interest has thwarted or deterred a proposed investment in energy infrastructure.

TAPS remains skeptical of behavioral safeguards and would encourage the Commission not to go forward with its proposed new reliance upon investor certifications in circumstances where a transaction will result in the investor owning between 10 and less than 20 percent of a public utility. Any entity that owns between 10 to 20 percent of the voting securities of a public utility will necessarily be one of only a small number of major shareholders, and may in fact be the major shareholder because the remaining voting stock is diluted into many smaller ownership shares held by numerous other investors. The Hart-Scott-Rodino ("HSR") Act limits the HSR's passive investment exception to merger review filings under the statute to acquisitions that will result in ownership of ten percent or less of the entity's outstanding voting stock.[9] Thus, with the exception of acquisitions resulting in exactly a 10 percent ownership share, the Commission's passive investor exception falls wholly outside the limits of acquisitions exempt from HSR review. A passive investor exception for acquisitions of just under 20

[9] Proposed acquisitions of voting securities are exempt from HSR review where the acquisitions are "solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer." 15 U.S.C. § 18a(c)(9).

percent is at the very margin of what the SEC permits under SEC Schedule 13G. As the Commission itself explains in the NOPR:

> The 20 percent limit on the acquisition of voting securities reflects the SEC's view that 'it would be unusual for an investor to be able to make the necessary certification of a passive investment purpose when beneficial ownership approaches 20 percent,' where the investor is not subject to other limitations.

NOPR P 4 n.6.

An exclusive focus on voting share interests, coupled with behavioral safeguards, exposes captive customers and the marketplace to risks they would otherwise not face under the current regimen of structural safeguards and meaningful case-by-case determinations. TAPS shares the Federal Trade Commission's ("FTC") previously articulated concern that "ownership share alone is not dispositive as to whether one firm has control or influence over another."[10] Last year, the Maryland Public Service Commission ("MPSC") investigated Electricite de France's ("EDF") proposed 49.99% acquisition of Constellation Energy Inc.'s nuclear generating assets. The MPSC determined that as a result of the transaction EDF would have veto rights over the distribution of dividends out of the new nuclear generation joint venture with Constellation and as a result would have substantial influence over Constellation's business decisions as a whole, including with respect to its wholly-owned distribution

[10] Comments of the Federal Trade Commission at 7, filed April 29, 2009 in FERC Docket PL09-3-000.

utility, Baltimore Gas and Electric Company ("BGE").[11] EDF proposed a variety of behavioral safeguards akin to those set forth in proposed Form 519-C such as restrictions on EDF's obtaining non-public information concerning BGE. The MPSC found the proposed behavioral safeguards inadequate. "[E]ven assuming that the EDF director [on the Constellation board] could cleanly be cordoned off from information and discussions relating directly to BGE, we are not convinced that the separation would totally mitigate the forms of influence that inform our ruling here."[12] In conditionally approving the proposed acquisition (which was then consummated), the MPSC mandated significant structural safeguards.[13]

TAPS sees no reason to depart from FERC's existing approach and safeguards. The after-the-fact punishment of investors who violate behavioral commitments does nothing to remedy the harm they cause to customers and the market.

Thus, TAPS would not recommend any fix to a regulatory approach that is not broken. If the Commission goes forward with its behavior-based approach it should add

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[11] The "financial interdependence between [Constellation] and BGE matters for substantial influence purposes because the proposed transaction gives EDF the power to block [the nuclear joint venture] from distributing dividends to its parents." *In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Company*, Order No. 82719, Case No. 9173, at 29 (Md. Pub. Serv. Comm'n June 11, 2009), *available at:* http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9100-9199\9173\\100.pdf.

[12] *Id.* at 34.

[13] These included substantial capital infusions into BGE and the ring-fencing of the utility to safeguard BGE and its ratepayers from the substantial influence EDF would gain over Constellation's affairs as a result of the transaction and the particular risk of capital diversion from BGE. *In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Company*, Order No. 82986, Case No. 9173 Phase II (Md. Pub. Serv. Comm'n Oct. 30, 2009), *available at:* http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9100-9199\9173\\218.pdf.

further safeguards and requirements beyond those proposed in the NOPR as discussed below.

B. The Commission Should Adopt and Strengthen its Suggestion of Continued Behavioral Safeguards To Protect Against Abuses Where An Investor Declares His Intent To No Longer Abide By the Commitments

The Commission has sought "comments on the procedures that should be in place to protect consumers and the marketplace if an investor, having filed an Affirmation, no longer can comply, or wishes not to comply, with the commitments made in the Affirmation." NOPR P 41. As a threshold matter, TAPS fails to see why there should be any circumstance where an investor claiming passive investment status should thereafter involuntarily find itself in a position where it "no longer can comply." *Id.* No one, *e.g.*, has a board of director seat involuntarily forced upon them. This would appear to be a false dilemma. The meaningful consideration, which the Commission flags, is a change in investor intent. The Commission's proposed approach is its Suggestion to modify the NOPR's proposed regulations and require that "the investor may file an application under section 203 to request authorization to retain the securities" and "[d]uring the pendency of [the] proceeding, the investor may not acquire any additional voting securities of the public utility and must continue to comply with all of the commitments made in the Affirmation." *Id.*

The Commission's Suggestion is a necessary additional safeguard but it does not go far enough. It is not appropriate to rely upon behavioral safeguards and the investor's continued good conduct where the investor has declared its intent to be active in the affairs of a public utility or FPA Section 203(a)(2)-covered holding company. In such

circumstances the opportunity for mischief – and the exercise of control – is great, notwithstanding the investor's promise to abide by its commitments.

1. An Investor Who No Longer Wishes To Be Bound by the Commitments in Its Affirmation Should Immediately File Publicly At FERC Its Change of Intent.

As noted above, the Commission suggests that an investor be required to make a Section 203 filing and to continue to be bound by its commitments during the pendency of the Section 203 proceeding in circumstances where the investor no longer wishes to be bound by its Affirmation. TAPS agrees with the Commission's Suggestion as an additional minimum necessary safeguard that should be implemented in any final Affirmation-based rule. There is, however, no good reason why the investor's public declaration of its changed intent should await, and depend upon, the filing of a Section 203 application. The investor should be required to file immediately a simple public notice with FERC of its changed intent and desire to no longer be bound by its Affirmation. TAPS recommends the creation of a separate "change in intent" form that would be a counterpart to Form 519-C. There should be no gap between the point in time when an investor changes its intent and when the Commission and the public have notice of that fact. The public filing of the investor's notice of change in intent would be accompanied by simultaneous restrictions intended to prevent the now non-passive investor from voting its utility securities and immediately subjecting the investor and the utility to the Commission's affiliate regulations.

2. Voting Securities Should Be Placed In Trust During the Pendency of the Section 203 Proceeding

Under the Commission's Suggestion the investor who declares its change in intent is required to abide by its commitments during the pendency of a Section 203 proceeding.

TAPS agrees that the investor should be bound by his commitments during the pendency of the proceeding, but this measure, by itself, places too much strain on promise-based safeguards in circumstances where the investor has announced its intent to exercise active control in the utility's affairs. Special structural safeguards are necessary to prevent the investor (or his affiliates) from voting its utility securities following its declared change of intent and during the pendency of the Section 203 proceeding.

Pursuant to proposed Form 519-C "[n]either the reporting person nor any of its employees, officers or investors shall seek to influence, in any way, by voting shares of the voting securities of the issuer or otherwise, the management or conduct of the day-to-day operations of the issuer."[14] Form 519-C goes on to identify a non-exhaustive list of particular subjects that the reporting person (and other covered persons) cannot seek to influence "by voting … securities." *Id.* The proposed commitment imposes a judgmental barrier as to what are and are not permitted votes. For example, the list of covered subjects does not include the approval of capital expenditures and yet capital expenditures plainly impact "the day-to-day operations of the issuer." Significantly, Form 519-C does not expressly impose a blanket prohibition against the reporting person, *et al*., voting utility securities. While this may be a defensible approach in circumstances where an investor has declared its passive investment status, it is not an adequate safeguard where it has avowed an intent to be active in the affairs of the utility.

TAPS proposes that when an investor wishes to no longer comply with terms of the Affirmation, it must immediately transfer its securities into a trust and simultaneously notify the Commission of its intended change in status. The trust will hold the securities

[14] NOPR, App. A, Form 519-C.

and not exercise any voting or other rights with respect to the securities during the pendency of a Commission proceeding under Section 203 to determine the investor's authority to retain the securities. The investor would be free to sell trust securities but not take any other action with respect to the securities during the pendency of the proceeding. There is no good reason why captive customers and the marketplace should risk having an active investor vote securities in any way that might affect the operations of the public utility during the pendency of a Section 203 proceeding. The Commission may be unable to undo or meaningfully remedy utility actions that result from the improper investor votes that might otherwise occur while the Section 203 review is pending. Placing the "at issue" voting securities in trust serves as a meaningful structural safeguard against such improper conduct.

3. The Reporting Person Should Be Deemed to Be An Affiliate During the Pendency of the Section 203 Proceeding

"The Commission proposes to modify [its affiliate definition] so that an affiliate relationship exists when an investor is able to control a public utility." NOPR P 57. There is no good reason why an investor who owns anywhere between 10 to 19.99 percent of a public utility's voting stock should not be deemed to be an affiliate where the investor has declared its intent to be actively involved in the operations of the utility. Again, it is difficult to remedy problematic transactions after the fact. The reporting person (including any of its employees, officers or directors) should be deemed to be an affiliate during the pendency of the Section 203 proceeding. This is consistent with current FERC "policy that prospective merger partners be treated as affiliates during the pendency of the merger procedures." *Western Resources, Inc.*, 94 F.E.R.C. ¶ 61,050, at

61,246 (2001).[15] Once the investor declares its intent to no longer be bound by its Affirmation, the affiliate restrictions should automatically apply to all new interactions between the parties and the utility should be required to file a notice of change in status and include the investor and the investor's affiliates in its market power analysis.

C. The Affirmation Should Acknowledge FERC's Investigatory and Enforcement Authority In the Event of Non-Compliance

Submissions under proposed Form 519-C "must be verified under oath." NOPR, App. A, Form 519-C. Form 519-C otherwise fails to contain any recitation that the statements and certifications therein are binding or made under penalty of law and subject to FERC's investigatory and enforcement authority. Form 519-C states that it is an "Affirmation in Support of Exemption from Affiliation Requirements." NOPR, App. A, Form 519-C. By filing an Affirmation an investor is obtaining relief from regulatory requirements that would otherwise obtain and is doing so pursuant to FERC rule and order. There should be no possible question as to the scope of FERC's investigatory and enforcement authority over the disclosures and certifications set forth in the Form 519-C. The certifying-investor should acknowledge the gravity of the act of filing, and there should be no leeway for pettifogging disputes as to the reach of FERC's investigatory and enforcement powers in circumstances of alleged and actual non-compliance. Form 519-C should be modified to expressly provide that the reporting investor recognizes that the Affirmation and the certifications therein are made pursuant to FERC rule and order and that any material inaccuracies in the requisite disclosures or failure to abide by the

[15] *See also Id.* at n.16 (citing additional decisions on point); 18 C.F.R. § 358.7 (e)(3) (Standards of Conduct require "transmission provider [to] post information concerning potential merger partners as affiliates").

certifications are subject to FERC 's investigatory and enforcement authority under FPA Sections 307 and 316(A)[16] and other applicable law.

D. The Proposed Affirmation Should Mandate A Minimum Commitment Period To Protect Against Gaming

Under the proposed regulations set forth in the NOPR, an investor could file an Affirmation, avoid any Section 203 review or the filing of a notice of change in status for purposes of market power analysis, and then directly thereafter choose to no longer abide by its commitments. This is a patent invitation to gaming. However, even if the proposed regulations are modified consistent with the Commission's Suggestion the lack of a minimum commitment period creates its own opportunities for gaming. Consistent with the Commission's Suggestion, an investor could file an Affirmation and acquire up to 19.99% of a utility's voting stock, and then a day or a week or a month later declare its change of intent and desire to no longer be bound by the Affirmation. During the interval between filing its Affirmation and declaring its change of intent, the investor (and his officers, directors and employees) would be able to transact and interact with the utility free of the Commission restrictions governing affiliated transactions. The Commission and other affected entities should not be put to the task of investigating and prosecuting bad faith Affirmations masquerading as sudden changes of heart, and going through the procedural steps of addressing and remediating circumstances with respect to completed acquisitions and other post-Affirmation investor-utility transactions. Nor should they be

[16] Section 1284(e) of the Energy Policy Act of 2005 amended section 316A(b) of the FPA, 16 U.S.C. § 825o-1(b), to grant the Commission authority to assess a civil penalty of not more $1,000,000 for each day that a violation of any provision of Part II of the FPA or any provision of any rule or order there under continues.

put to the burden of investigating completed acquisitions where fickle investors soon become unhappy with their passive investment status.

TAPS proposes that Form 519-C be modified to require the certifying investor to abide by the certified terms of conduct for a minimum period of one-year, assuming the investor continues to own between 10 and less than 20 percent of the outstanding voting securities of a public utility. TAPS proposes the minimum commitment period as an additional safeguard intended to work together with its other recommendations. The decision to declare one's status as a passive investor should not be undertaken lightly, and particularly in the circumstances where the investor is contemplating the acquisition of up to 19.99% of the outstanding voting securities of a public utility. The one-year minimum commitment period is sufficiently long to protect against illegitimate (or ill-considered) Affirmations, but should not dissuade any legitimate passive investor from filing an Affirmation and declaring its status as a passive investor. The investor would be free to dispose of its securities or to seek to acquire additional securities consistent with whatever additional regulatory processes that might be triggered by that course of conduct (*e.g.*, the Section 203 inquiry necessary for acquisitions that result in ownership of more than 20 percent of the utility's voting securities).

E. If the Commission Goes Forward with the Affirmation Approach It Should, at a Minimum, Require the Specific Proposed Disclosures and Certifications Set Forth in the NOPR

If the Commission goes forward with the proposed new approach of passive investor certification then it should, at a minimum mandate the specific disclosures and certifications set forth in the NOPR's Form 519-C. In the context of administering HSR merger review, the FTC has addressed "evidence of … intent inconsistent with investment purpose." 43 Fed. Reg. 33,465 (July 31, 1978). The FTC found that:

> These include but are not limited to: (1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.

Id. The specific proposed certifications of proposed FERC Form 519-C compares favorably with the FTC's non-exhaustive list of conduct evidencing an intent inconsistent with passive investment status. Many of the proposed Form 519-C certifications are direct counterparts to the FTC list. Others, such as the proposed certification to not "request or receive disclosure of non-public information, either directly or indirectly, concerning the business or affairs of the issuer" (NOPR, App. A, Form 519-C) are necessary to safeguard against competitive abuses and protect against the exercise of market power or abuse of affiliate relationships. *Cf.* 43 Fed. Reg. 33,465 (July 31, 1978) (identifying a competitor's acquisitions of voting securities as conduct inconsistent with an intent of passive investment).

If the Commission adopts the certification approach it should in no way backtrack on the specifics of proposed Form 519-C and should adopt its Suggestion. The Affirmation and proposed change in regulations should instead be expanded upon to include additional requirements and safeguards as discussed above.

CONCLUSION

If the Commission proceeds with its Affirmation-based proposal, the final rule should be consistent with TAPS' comments.

Respectfully submitted,

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