CLIENT ALERT

FERC Demands Corporate Tell-All from Section 203 and Market-Based Rate Authority Applicants

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Move over salacious celebrity memoirs. Detailed relationship disclosures are the new normal at the Federal Energy Regulatory Commission ("FERC" or the "Commission") as the Commission ramps up its efforts to learn who calls the shots on behalf of FERC-jurisdictional public utilities and public utility holding companies ("public utility").

Two FERC orders, *ECP ControlCo, LLC*[1] and *VESI 12 LLC*,[2] are just the latest cases to reflect the Commission's increasingly meticulous approach to reviewing corporate structures in applications for approval of proposed dispositions, consolidations, acquisitions, or changes in control pursuant to section 203 of the Federal Power Act ("FPA" and "section 203 authorization") and requests for market-based rate ("MBR") authorization.

Background

FERC must review requests for section 203 and MBR authorization to determine whether granting such requests will be in the public interest. This requires the Commission to assess, among other things, whether approving the request will have an adverse impact on competition. One way that competition may be harmed is if seemingly passive investors are in fact exercising an inordinate amount of influence on a public utility.

Historically, the Commission's assessment was relatively straightforward. The Commission routinely assumed, without further scrutiny, that an investor did not exercise significant control or influence over a public utility if the investor, directly or

1 *ECP ControlCo, LLC*, 186 FERC ¶ 61,164 (2024).

2 *VESI 12 LLC*, 186 FERC ¶ 61,137 (2024).

indirectly, owned, controlled, or held with power to vote, less than 10 percent of outstanding voting securities in that public utility.[3] This created a rebuttable presumption of lack of control, which in turn meant that the investor was not an affiliate of the public utility.

Today, demonstrating that an investor owns, controls, or holds with power to vote, less than 10 percent of outstanding voting securities still "creates a rebuttable presumption of lack of control."[4] However, as recent cases make clear, that presumption has become subject to greater scrutiny.

Why does it matter? The Commission's hard look at corporate structures could have significant consequences for applicants for MBR or section 203 authorization. For example, if an investor is found to be an affiliate of a public utility the investor may become subject to certain regulatory requirements and, to the extent the investor itself has MBR authority, the investor may have its own obligations to make additional MBR filings related to its public utility affiliate. Furthermore, an investor's affiliate status could also increase the burden on its public utility affiliate by triggering a number of additional filing requirements, including change-in-status filings, updates to its asset appendix and ultimate upstream affiliate information filed in FERC's relational database, and updates to its horizontal and vertical market power analyses.[5]

For example, last year in *Mankato Energy Center, LLC*, *et al.,* the Commission determined that J.P. Morgan Investment, Inc. ("J.P. Morgan") was an affiliate of Mankato Companies and Mankato Companies' upstream owner in the course of reviewing Mankato Companies' MBR filing.[6] The Commission thus required "Mankato Companies to file a new notice of change in status that include[d] updated asset appendix information to reflect affiliation with J.P. Morgan and its affiliates, and updated horizontal and vertical market power analysis with their affiliates' generation and transmission assets, and inputs to electric power production[.]"[7]

Recent Developments

On March 1, 2024, the Commission took the unusual step of *denying* ECP ControlCo, LLC's ("ECP") request for authorization, pursuant to section 203(a)(1) of the FPA, to dispose of jurisdictional facilities. The Commission held, without

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3 Hugh E. Hilliard & Caileen Kateri Gamache, *FERC, May I Now?*, 44 Energy L.J. 159, at 175 & n.78 (2023) (citing *FPA Section 203, Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), 120 FERC ¶ 61,060, at P 37 (2007), 72 Fed. Reg. 42,277, *clarified*, 122 FERC ¶ 61,157, at P 4 (2008)).

4 *See* 18 C.F.R. 36.35(a)(9).

5 The implications are discussed at length in Willkie's 2022 client alert, *Recent FERC Decisions Have Widespread Regulatory Implications for Public Utilities and Investors*, available here.

6 *Mankato Energy Center, LLC, et al.*, 184 FERC ¶ 61,170, at P 2 (2023).

7 *Id.*

prejudice, that ECP and its public utility subsidiaries (collectively, "ECP") had failed to show that the proposed transaction would not have an adverse effect on competition.[8]

ECP had requested authorization for Bridgepoint OP LP (or its designee) to acquire a 19.9 percent interest and certain board appointment and removal rights in ECP.[9] Bridgepoint OP LP is an asset management company organized under the laws of England and Wales.[10] Blue Owl, a publicly traded alternative investment asset manager and Cayman Islands exempted limited partnership, owns approximately 15 percent of the publicly traded ordinary voting shares of Bridgepoint OP LP.[11]

ECP sought to avoid a scenario in which Blue Owl or its affiliates would be considered upstream affiliate owners of Bridgepoint.[12] Thus, ECP represented that Blue Owl would "irrevocably waive and relinquish the right to vote those Bridgepoint shares they hold cumulatively following the close of the [transaction] in excess of 9.9 percent of all voting shares (Voting Restriction)."[13] ECP sought to keep Blue Owl's voting shares under the 10 percent threshold so as to assert the rebuttable presumption of lack of control.

ECP argued that the Commission should find that the Voting Restriction would be sufficient to avoid affiliate status,[14] relying heavily on *Hartree Partners, LP*, in which the Commission concluded that Oaktree Capital Group ("Oaktree") had successfully "eliminate[d] affiliation between it and Vistra Energy Corporation"[15] through a similar voting arrangement. In that case, Oaktree "relinquished its voting rights with respect to the voting shares held in trust" such that Oaktree would have no entitlement to vote those shares and therefore would not be voting securities.[16] "Oaktree placed its voting shares in Vistra in a voting trust with limited consent and veto rights and the trustee exercised independent voting discretion with respect to the transferred shares of Vistra and was not affiliated with or under the control of the applicants."[17]

The Commission distinguished *Hartree* on the grounds that the applicants in *Hartree* had provided substantially more detailed information about the voting arrangements. First, the Commission reasoned that "Oaktree retained 'limited consent and veto rights' over its entrusted securities of Vistra and provided an extensive description of how the voting trust

8 *ECP ControlCo*, 186 FERC ¶ 61,164 at P 2.
9 *Id.* P 1.
10 *Id.* P 4.
11 *Id.* P 5.
12 *Id.* P 7.
13 *Id.* P 8.
14 *Id.* P 21.
15 *Id.* PP 22-23 (citing *Hartree Partners, LP*, 168 FERC ¶ 61,212 (2019)).
16 *Id.* P 22 (internal citations omitted).
17 *Id.*

corresponded with the Commission's findings regarding passivity in *AES Creative Resources*."[18] In *AES Creative Resources*, the Commission explained that it has distinguished between passive and active investment interests by:

> [d]istinguishing between rights that give an investor the "authority to manage, direct, or control the activities" of a company and rights that give investors "only those limited rights necessary to protect their . . . investments." The former make a security a voting security; the latter make it a non-voting security and thus a passive investment interest. These passive rights have the form of consent or veto rights. . . .[19]

By contrast, ECP made no representations about the rights, if any, that Blue Owl would retain over shares in Bridgepoint subject to the Voting Restriction.[20]

Second, unlike *Hartree*, ECP did not make any representations about what would happen to the shares held by Blue Owl subject to the Voting Restriction.[21] Third, the Commission held that, based on the Voting Restrictions, it appeared that "there will be a complete prohibition on the voting of these shares" and as a matter of basic math, this would "reduce the number of shares in Bridgepoint that are allowed to be voted by all shareholders. As such, even if Blue Owl were to only vote 9.9 percent of the outstanding nominal voting shares, this would amount to a greater than 10 percent holding of voting rights given the reduction in total shares that could be voted . . . ."[22] The Commission made clear that it would not approve ECP's request to dispose of jurisdictional facilities pursuant to section 203 of the FPA without more details about the Voting Restriction and the impact the Voting Restriction would have on the upstream entities' ability to exercise control over FERC-jurisdictional public utilities.

Likewise, in the Commission's recent order approving VESI 12 LLC's request for MBR authorization on February 23, 2024, the Commission clarified its requirements regarding the necessary disclosures an MBR applicant or seller must make if it or its affiliates are publicly traded. The Commission instructed that MBR applicants or sellers "may not simply state that they, or their upstream affiliate(s), are publicly traded. If a publicly traded applicant or seller, or its publicly traded upstream affiliate, has owners that hold 10 percent or more of its outstanding voting securities, or other upstream affiliate(s), then it must include that information in its narrative description of its ownership structure."[23]

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[18] *Id.* P 23 (internal citations omitted).

[19] *AES Creative Resources L.P.*, 129 FERC ¶ 61,239, at P 25 (2009) (quoting *Solios Power LLC*, 114 FERC ¶ 61,161, at PP 9-10 (2006)).

[20] *ECP ControlCo*, 186 FERC ¶ 61,164 at P 23.

[21] *Id.* P 24.

[22] *Id.* P 25.

[23] *VESI 12 LLC*, 186 FERC ¶ 61,137, at P 16 (2024).

Otherwise, according to the Commission, an applicant or seller must state that, "to the best of its knowledge, no owner holds 10 percent or more of outstanding voting securities, or other upstream affiliate(s)."[24]

Takeaways: Less Is NOT More

The Commission's demand for more detailed disclosures about the corporate structures of jurisdictional public utilities has been years in the making. As public utility ownership structures have become more complex—with investments from less traditional sources of capital such as private equity, infrastructure funds, and foreign entities—FERC has responded with an ever-increasing appetite for detailed descriptions of corporate structures in applications for section 203 authorization and MBR authority.

The Commission's increasingly demanding disclosure requirements may very well have spurred the precipitous jump in the number of deficiency letters issued in response to requests for MBR authorization. During calendar years 2017 through 2020, FERC issued, on average, just seven deficiency letters per year in response to MBR authorization requests. But from 2021 through 2023, the average number of deficiency letters per year jumped to 17. In the first two and a half months of 2024 alone, FERC has already issued seven deficiency letters in response to requests for MBR authorization.

According to FERC Commissioner Mark C. Christie, "it simply is no longer a credible assertion that investment managers … are always or should be assumed to be merely passive investors. These investment managers … wield significant financial power by virtue of their investments."[25]

Indeed, *VESI 12* and *ECP ControlCo* are just the latest indicators that the days of a lighter touch review of investor relationships to public utilities are behind us. In 2022, the Commission issued decisions in *TransAlta Energy Mktg. (U.S.), Inc.* and *Evergy Kans. Central, Inc.*, in which the Commission held that investors with the ability to assign non-independent members to the board of a FERC-jurisdictional utility would be considered by the Commission to be affiliates with the ability to exercise control over that utility even if the investors did not own, hold or control 10 percent or more of voting securities in the utility.[26] (An in-depth discussion of the *TransAlta* and *Evergy* orders can be found in our 2022 client alert, *Recent FERC Decisions Have Widespread Regulatory Implications for Public Utilities and Investors*, available here.)

On February 5, 2024, MBR applicant MS Solar 5 highlighted the confusion and uncertainty that the Commission's increasingly demanding disclosure requirements have wrought. After MS Solar 5 filed an MBR application, Commission

[24] *Id.*

[25] *Federal Power Act Section 203 Blanket Authorizations for Investment Companies*, 185 FERC ¶ 61,192 (2023) (Christie, Comm'r, concurring at P 2) ("Notice of Inquiry").

[26] *Evergy Kans. Central, Inc.*, 181 FERC ¶ 61,044 (2022), *order on reh'g Evergy Kan. Cent., Inc.*, 184 FERC ¶ 61,003 (2023); *TransAlta Energy Mktg. (U.S.), Inc.*, 181 FERC ¶ 61,055 (2022).

staff reached out to MS Solar 5 to request that MS Solar 5 supplement its petition with information about certain board members' "involve[ment] in the energy industry"[27] and to ask that MS Solar 5 provide "all energy industry board positions" held by those board members.[28] Commission staff, in discussions with MS Solar 5, "advised that the Commission has not defined 'energy industry' and that they are not able to provide any additional guidance regarding what it means to be 'involved' in the energy industry other than affiliation."[29]

Strikingly, MS Solar 5 stated that while Commission staff directed MS Solar 5 "to supplement its Petition to provide additional information, . . . staff is unable, given the lack of clear Commission guidance, to explain what additional information is required."[30] MS Solar 5 further contended:

> If the Commission wants to require that every applicant for market-based rate authority disclose whether its ultimate upstream affiliates hold any positions on the board of directors of any other company in the "energy industry," then we respectfully recommend that this be done through notice and comment rulemaking. Putting staff in the awkward position of requiring supplemental filings to provide undefined information and thereby potentially jeopardizing project development and the production of energy is not a permissible (or much appreciated) method of changing the law.[31]

The Commission subsequently granted MS Solar 5's request for MBR authority without further guidance on the information required.[32]

Notably, in December 2023, FERC issued a Notice of Inquiry into whether the Commission should revise its policy on providing blanket authorizations for investment companies under section 203(a)(2) of the FPA.[33] The Commission sought comment on "what constitutes control of a public utility in evaluating holding companies, including investment companies' requests for blanket authorization and what factors it should consider when evaluating control over public utilities as part of a request for blanket authorization."[34] But the road from Notice of Inquiry to meaningful change is often long and filled with detours. It remains to be seen whether the Notice of Inquiry will lead to any significant rulemakings or changes in policy.

In the meantime, the Commission continues to provide piecemeal guidance on its evolving disclosure requirements, which has put the onus on the regulated community to stay informed about—and even anticipate—FERC's increasingly

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27 *MS Solar 5, LLC*, Supplement to Petition, Docket No. ER24-619-000, at 2 (filed Feb. 5, 2024).

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* at 5.

32 *MS Solar 5, LLC*, Docket No. ER24-619-000 (Feb. 14, 2024) (delegated order).

33 Notice of Inquiry, 185 FERC ¶ 61,192.

34 *Id.* (Comments to the Notice of Inquiry are due March 26, 2024; reply comments are due April 25, 2024.)

demanding disclosure requirements. As *ECP ControlCo*, *VESI 12*, *MS Solar 5*, *TransAlta*, and *Evergy* have demonstrated, applicants risk being caught short by the Commission's evolving standards. On the other hand, taking the kitchen-sink approach and sharing too much information with the Commission could be burdensome and reveal commercially sensitive information. Certainly, as filings for section 203 authorization and MBR authority become more demanding, applicants would be well-served by checking with counsel to ensure that filings meet the Commission's disclosure requirements.

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