

October 1, 2018

CONGRESS CLARIFIES STATUTORY THRESHOLDS FOR FERC MERGER APPROVALS

To Our Clients and Friends:

On September 28, 2018, President Trump signed into law amendments to Section 203 of the Federal Power Act that, among other things, narrow the scope of transactions that require prior approval from the Federal Energy Regulatory Commission (“FERC”). The changes become effective on March 27, 2019.

Presently, FERC prior approval is required anytime a public utility or an affiliate of a public utility acquires facilities subject to FERC’s jurisdiction (i.e., it engages in a “utility merger”)—regardless of value. The new law establishes a \$10 million threshold for such transactions and also requires after-the-fact reporting of such transactions involving assets valued between \$1 million and \$10 million.

This amendment fixes inconsistencies in the Federal Power Act and eases significantly the regulatory burden associated with the purchase of smaller and/or lower value, FERC-jurisdictional assets. Under the Energy Policy Act of 2005, Congress eliminated entirely any clear monetary threshold for utility merger approvals while at the same time increasing the threshold from \$50,000 to \$10 million for all other types of sales and purchases requiring FERC approval. Since the statute was silent regarding any sort of *de minimis* threshold utility merger approvals, FERC interpreted its authority to extend to all such mergers regardless of the value of the facilities. This has led to numerous applications to FERC for approval of transactions involving minimally valued assets (some as low as \$1), frustration on the part of some utilities, and some entities incurring fines from the FERC Office of Enforcement due to erroneous reading of a \$10 million threshold into the statute.

The amended Section 203(a)(1) will also significantly ease the regulatory burden associated with the sales of lower value, FERC-jurisdictional assets. Applications to FERC under Section 203 are burdensome to compile and it can often take months before the Commission issues an order on the request. This amendment will help to encourage sales of less valuable FERC-jurisdictional assets while also freeing up the Commission to focus on other matters.

Starting on March 27, 2019, entities wishing to engage in transactions involving FERC-jurisdictional assets of more than \$10 million must continue to request FERC approval for consummating the transaction. Entities wishing to engage in transactions involving FERC-jurisdictional assets between \$1 million and \$10 million do not need to seek FERC pre-approval, and instead must only notify FERC of the transaction within one month of the closing. Transactions involving FERC-jurisdictional assets below the \$1 million threshold do not need to be reported.

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Gibson Dunn's Energy, Regulation and Litigation lawyers are available to assist in addressing any questions you may have regarding the developments discussed above. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or the authors:

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