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Energy Policy Act of 2005 Implications for Utility Mergers and Acquisitions

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*Any opinions expressed in this presentation
are those of the speaker and do not reflect
those of the FERC.*





Energy Policy Act of 2005 (EPAct) Changes With Merger Implications

- PUCHA Reform (not repeal)
- Revised FERC merger and acquisition authority under Section 203 of FPA
- Mandatory reliability standards and enhanced penalty authority
- Transmission rate reform

EPAct continues support for competitive markets



PUCHA 2005 Replaces PUHCA 1935

- Removes integration and geographic regional requirements
- Requires holding companies and their members to maintain books and records and make them available to FERC and states
- Allows FERC review of cost-allocation for non-power goods and services

PUHCA 2005 retains many definitions and exemptions from PUHCA 1935 – such as those for EWGs, QFs and FUHCOs.



M&A Authority – Order 669

- FERC jurisdiction extended to generation only acquisitions and leases
- FERC review limited to transactions worth more than \$10 million (up from \$50,000).
- Commission must determine transactions do not involve cross-subsidization, or pledge or encumbrance of utility assets.
- Commission required to set up expedited processes for merger review.

Goal: Transactions consistent with the public interest that do not impede efficient day-to-day financial utility operations or stifle timely investment in transmission and generation infrastructure.



Definitions Matter

- **Electric utility company:** “any company that owns or operates facilities used for the Generation, Transmission or Distribution of electric energy for sale”. We will look at most transactions.
 - Does not apply to a state, political subdivision, agency, authority or instrumentality of a state, or electric power cooperative (unless buyer is a “private” jurisdictional).
- **Existing generation facility:**
 - operational on or before date transaction closes (includes QF and moth-balled facilities)
 - all plants unless demonstrated that generator used exclusively for retail or intrastate sales.
- **Transaction value greater than \$10 million:**
 - For non-affiliate asset transactions: market value, i.e. transaction price
 - For affiliate asset transactions: original cost undepreciated
 - For non-affiliate contracts: transaction price.
 - For affiliate contracts: contract revenues over life of contract.



Blanket Authorizations

In many cases where the Commission has jurisdiction it provides blanket authorizations for transactions with some conditions:

- Acquisitions of foreign utilities – US holding companies buying outside US – not other way round – as long as no cross-subsidization or pledge or encumbrance
- Intra-holding company system financing and cash management arrangements and some internal corporate reorganizations
- Acquisitions of non-voting securities – this includes debt and could include convertibles, unless these securities confer significant veto or other rights.
- Acquisitions of up to 9.9% of voting securities of transmitting utilities and electric utility companies.
- Acquisitions of companies if target is only to be involved in intrastate commerce, and facilities used solely in local distribution and/or sales at retail regulated by a state commission.
- In rehearing order allow additional blanket authorizations for financial institutions to own voting shares above 9.9% for underwriting, hedging and fiduciary activities



Recent M&A Activity

FERC Approved and Closed: PNM / TNP Enterprises. Duke Energy / Cinergy MidAmerican / PacifiCorp	Approved not yet Closed: Exelon / PSEG	Application Filed: Constellation / FPL
Select Approved and Closed Portfolio acquisitions: NRG / Texas GenCo LS Power / DENA assets US Generating / Reliant Assets	Approved but Failed: KKR / Unisource TPG / Portland General	Announced not yet Filed: National Grid / KeySpan

EPAct does not change way that Commission determines if a merger is in the public interest: we still review potential effect on rates, regulation or competition.