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FERC Expands Definition of Affiliate Relationship

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Divina Li and Chris Zentz

On October 20, 2022, the Federal Energy Regulatory Commission (FERC) issued two orders expanding its definition of an "affiliate" under FERC regulations when it clarified that placing non-independent officers or directors on the board of directors of a utility or its holding company—regardless of whether the ownership stake is 10% or more of the utility or its holding company—qualifies the entity placing those directors as an affiliate of the public utility. These orders have ramifications for transactions involving entities with market-based rate authority and those requiring Federal Power Act Section 203 filings.

Under FERC's regulations (see 18 CFR 35.36(a)(9)) and prior precedent, FERC examines companies' affiliate relationships as part of its market-based rate rules and in FERC-regulated transactions under Section 203 of the Federal Power Act. Within FERC's regulatory framework, the Commission has a bright line rule that an entity with a 10 percent share of ownership, control or the power to vote of a utility or holding company is an "affiliate." Where an entity is below the 10 percent ownership, control or voting threshold, FERC applies a rebuttable presumption that such entity lacks control of a utility or holding company and, therefore, excludes that entity from classification as an affiliate.

As part of two orders issued on Oct 20, 2022, *Evergy Kansas Cent., Inc.*, 181 FERC ¶ 61,044 (2022) and *TransAlta Energy Mktg. (U.S.) Inc.*, 181 FERC ¶ 61,055 (2022), FERC clarified its interpretation of the definition of an "affiliate" by adding an "appointment" criterion deeming two companies affiliates of each other in cases where an entity has authority to appoint a board member of the public utility that is a "non-independent" officer or director. Notably, this criterion is not tied to the 10 percent threshold for ownership or control of voting shares. Thus, the power to appoint such other appointee, if that appointee is accountable to the entity, would result in the two companies becoming affiliates, even if the appointing-entity's ownership stake is less than 10 percent.

Implications

Power of appointment terms in transactions are often sought by investment partners as a means of ensuring institutional accountability and protecting their investments. As a result of these orders, public utility companies with market-based rates or needing Section 203 approvals should be aware that their corporate structures may receive additional scrutiny by FERC, particularly to ascertain whether entities with the **power to appoint** board members results in affiliation for purposes of FERC's market-based rate or Section 203 analyses. Notably, FERC's orders did not suggest that the Commission intends to revisit prior approvals or determinations of affiliate status, meaning FERC's clarifications on what constitutes an "affiliate" are likely to apply prospectively to future market-based rate and Section 203 filings.

FERC's expanded view of an "affiliate" is likely to result in additional affiliations between public utilities and their investors, thereby expanding the scope of FERC's horizontal and vertical market power review for entities with these new or additional affiliations, particularly when making market-based rate or Section 203 filings at FERC.

For More Information

Van Ness Feldman's nationally regarded electric practice provides strategic counsel to all sectors of the electric industry including generators, power marketers, utilities, municipalities, and transmission providers. If you are interested in additional information regarding FERC's two orders expanding its definition of an "affiliate," please contact Chris Zentz or any member of the firm's Electric Practice.

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