

Morgan Lewis

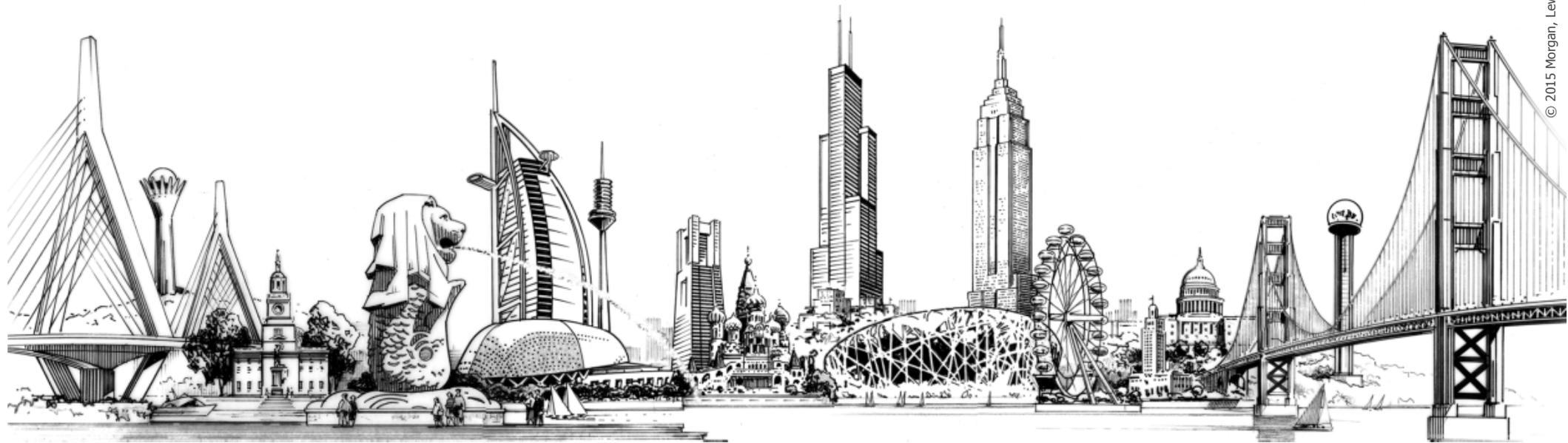
M&A REGULATORY DEVELOPMENTS AT FERC 2016 ANNUAL REVIEW

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Business Background

M&A, Divestiture, Reorganizations, Changes-In Control

- FERC exercises broad jurisdiction over electric sector mergers, acquisitions, securities transactions and “dispositions”
- Exemptions and “blanket authorizations”
- “Directly or indirectly ... by any means whatsoever...”
- There is no bankruptcy exemption
- “Public Utility” includes most U.S. wholesale generation and power marketing businesses and nearly all private sector T&D systems

[Federal Power Act Section 203, 16 U.S.C. § 824b; 18 C.F.R. § 2.26]

16 U.S. Code § 824b Disposition of property; consolidations; purchase of securities

(a) Authorization

(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so—

(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000;

(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(C) purchase, acquire, or take any security with a value in excess of \$10,000,000 of any other public utility; or

(D) purchase, lease, or otherwise acquire an existing generation facility—

(i) that has a value in excess of \$10,000,000; and

(ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

(2) No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

(3) Upon receipt of an application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable.

(4) After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

(5) The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. The Commission shall grant or deny any other application for approval of a transaction not later than 180 days after the application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of paragraph (4) and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

(6) For purposes of this subsection, the terms "associate company", "holding company", and "holding company system" have the meaning given those terms in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(b) Orders of Commission

The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

Business Background

The Numbers Are Holding!

However, note legal limitations on number of filings as a barometer for activity –

- Some transactions, even a few larger ones, immune. FERC has conferred “blanket authorization” on over a dozen different classes of entities and transactions.
[18 C.F.R. § 33.1(c)]
- \$\$-size is not always a gating factor
[16 U.S.C. § 824b(1)(A),(C),(D)]
- Some surprisingly small transactions not immune
[16 U.S.C. § 824b(1)(B)]

Legal Issues

- Competition
 - Often not similar to antitrust/HSR review
- Rates/Tariffs
- Regulation
 - Jurisdictional Impairment
 - Any-Agency Vs. State Commission
- Cross-Subsidization
 - Multiple Ingredients

[18 C.F.R. § 2.26, 18 C.F.R. § 33.2]

18 C.F.R. § 2.26 Policies concerning review of applications under section 203

(a) The Commission has adopted a Policy Statement on its policies for reviewing transactions subject to section 203. That Policy Statement can be found at 77 FERC ¶61,263 (1996). The Policy Statement is a complete description of the relevant guidelines. Paragraphs (b)-(e) of this section are only a brief summary of the Policy Statement.

(b) *Factors Commission will generally consider.* In determining whether a proposed transaction subject to section 203 is consistent with the public interest, the Commission will generally consider the following factors; it may also consider other factors:

- (1)** The effect on competition;
- (2)** The effect on rates; and
- (3)** The effect on regulation.

(c) *Effect on competition.* Applicants should provide data adequate to allow analysis under the Department of Justice/Federal Trade Commission Merger Guidelines, as described in the Policy Statement and Appendix A to the Policy Statement.

(d) *Effect on rates.* Applicants should propose mechanisms to protect customers from costs due to the merger. If the proposal raises substantial issues of relevant fact, the Commission may set this issue for hearing.

(e) *Effect on regulation.*

- (1)** Where the affected state commissions have authority to act on the transaction, the Commission will not set for hearing whether the transaction would impair effective regulation by the state commissions. The application should state whether the state commissions have this authority.
- (2)** Where the affected state commissions do not have authority to act on the transaction, the Commission may set for hearing the issue of whether the transaction would impair effective state regulation.

(f) Under section 203(a)(4) of the Federal Power Act (16 U.S.C. 824b), in reviewing a proposed transaction subject to section 203, the Commission will also consider whether the proposed transaction will result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

Legal Issues

- One Section, Two Doorways
 - Section 203(a) includes two different subsections that cause Section 203 jurisdiction to attach to different classes or persons and transactions – but if a person or transaction is covered by either, the same substantive requirements apply.
- 203(a)(1)
 - Direct or indirect control
 - Substantial majority of filings
 - Public Utility buys existing generator
 - Public Utility buys any interest in another Public Utility

Legal Issues

- 203(a)(2)
 - Applies when buyer is already a “holding company”
 - Some blanket authorizations available
- Standards of review under 203(a)(1) and 203(a)(2) are identical
- 10% and \$10M floors (sometimes)

Immunities and Exemptions

- Lengthy list
 - [18 C.F.R. 292.601(c), 18 C.F.R. § 33.1(c)]
- Internal reorganizations
- 203(a)(2) blanket authorization for independent generation acquisitions of independent generation [18 C.F.R. § 33.1(c)(8)]
 - Misleading; many of these transactions are still subject to Section 203(a)(1) filings
- Publicly-traded issuers [18 C.F. R. § 33.1(c)(9),(10),(14),(15); FPA Section 203 Supplemental Policy Statement, 122 FERC ¶ 61,157 p.4 (2008).]
 - Unclear and non-explicit regulatory treatment
 - 20% cap on widely-traded issuances has been stated but does not appear in regulations
 - Buyer eligibility
 - Investor blanket authorization filings
 - Universally valuable?

Immunities and Exemptions

- QF acquisitions
 - Multiple categories of QF
 - Size, fuel, Small Power QFs vs Cogeneration QFs
- Small Power QFs over 30 mw
 - Internally inconsistent size caps
 - QF status does not equal QF 203 exemption
- QFs with “Market-Based Rate” authority and/or transmission tariffs
 - Prior substantial inconsistencies in FERC 203 treatment of QFs loosely resolved
 - A QF that is otherwise except from 203 does not become subject to 203 solely due to the QF holding MBR authority

[QF includes both cogeneration and small power Qualifying Facilities; see 18 C.F.R. Part 292]

Passive Investment

- Multiple proceedings
- FERC's AES Creative / EquiPower standard
- Blanket 203 authorizations
- Inconsistent practical treatment
 - Non-required applications?
 - Failure to rely on blanket authorizations?
 - “Abundance of caution” filings making assertions of non-required status are normally not dismissed and are treated as jurisdictional

[18 C.F.R. § 33.1(c)(2)(i); *Starwood Energy Group Global, L.L.C.*, 153 FERC ¶ 61,332 (2015); and cases cited therein, including *AES Creative Resources, L.P.*, 120 FERC ¶ 61,239 (2009).]

Passive Investment

- Purely passive fund investors (LPs), co-investors, fund entities are disregarded for FERC M&A and immediately related purposes
- Fund GPs, managers, advisers are NOT disregarded, and normally control is attributed to these non-passive actors

[Starwood Energy Group Global, L.L.C. (2015)]

The Numbers

- In Gross:
- 2016 FY/YTD: 196 Section 203 Applications
- 2015 FY/DY: 218 Section 203 Applications
- 2014 FY/DY: 150 Section 203 Applications
- 2013 FY/DY: 155 Section 203 Applications
- 2012 FY/DY: 145 Section 203 Applications
- 2011 FY/DY: 119 Section 203 Applications

[Results of search results:

elibrary.ferc.gov/idmws/search/fercadvsearch.asp, Dec. 7. 2016)

The Numbers

Features:

Independent Generation v. Traditional Franchised Utilities

- Substantial majority: independent generation
- Multiple fleet transactions
- “Passive” ownership issues
- “Abundance of caution” applications

[Results of search results:

elibrary.ferc.gov/idmws/search/fercadvsearch.asp, Dec. 7. 2016)

Behind The Numbers

- Responding to post-filing Staff inquiries
- Fund changes in control
- Yield Cos – signification reduction
- International investment
- Reorganizations
- Bankruptcy Code § 1129(a)(6)

[Results of search results:

elibrary.ferc.gov/idmws/search/fercadvsearch.asp, Dec. 7. 2016)

Behind The Numbers

Market Power Studies

- Substantial majority of filings: no formal market power studies submitted
- Issues:
 - No changes to generator commitments
 - De minimis capacity, and/or
 - De minimis uncommitted capacity
- Transmission alone: few market power issues
- FERC RM 16-21 Notice of Inquiry
 - Proposes to narrow “de minimis” light-handed treatment and add screen requirements

[Notice of Inquiry, Docket No. RM16-21-000, Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act, 156 FERC ¶ 61,214, 81 Fed. Reg. 66,649 (2016).]

Recent Developments

Connected Entities Proceeding

- Re-opening of Prior Proposal
- Dramatically greater quantity, extent of reformation required for certain power sales applications and ongoing compliance purposes
- 40-page draft “data dictionary”
- Substantial impact on section 203 information disclosures

[Notice of Proposed Rulemaking, Docket No. RM16-17-000, Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, 156 FERC ¶ 61,045 (July 21, 2016); 81 Fed. Reg. 51,726 (published Aug. 4, 2016).]

Recent Developments

Section 203 Notice of Inquiry

- Companion to Connected Entity Proceeding
- Increased statistical screen requirements
 - Define “de minimis”
 - Supply curve screen
 - 400 pivotal supply screen
 - Treatment of committed capacity
 - Document disclosure – expanded requirements
- Blanket authorizations
 - Independent generation – potential burdens to QF acquisitions
 - Proposed treatment of others is hazy

[Notice of Inquiry, Docket No. RM16-21-000, Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act, 156 FERC ¶ 61,214, 81 Fed. Reg. 66,649 (2016).]

Recent Developments

QF Petition – Extent of 203 Exemptions

- All Cogeneration QFs, most Small Power QFs immune from section 203
 - Starting in 2006, many QFs subject to new FERC requirements
- New requirements are widely interpreted as triggering 203 requirements for QF interest, asset transactions
 - These interpretations asserted to be inconsistent with case law, original QF rulemaking proceedings

[*Chevron U.S.A. Inc.*, Docket No. EL15-62-000, *Order On Petition For Declaratory Order*, 153 FERC ¶ 61,192 (2015).]

Recent Developments

Fund Investors Petition

- Loosely confirmed prior law
- Passive investor, co-investors, funds, not jurisdictional, and are disregarded for FPA and PUHCA purposes
- However, in no respect are managing/controlling entities, GPs, etc. disregarded

[*Starwood Energy Group Global, L.L.C.*, Docket No. EL15-87-000, 153 FERC ¶ 61,332 (2015).]

Concluding Comments

M&A Regulatory Development at FERC

December 15, 2016

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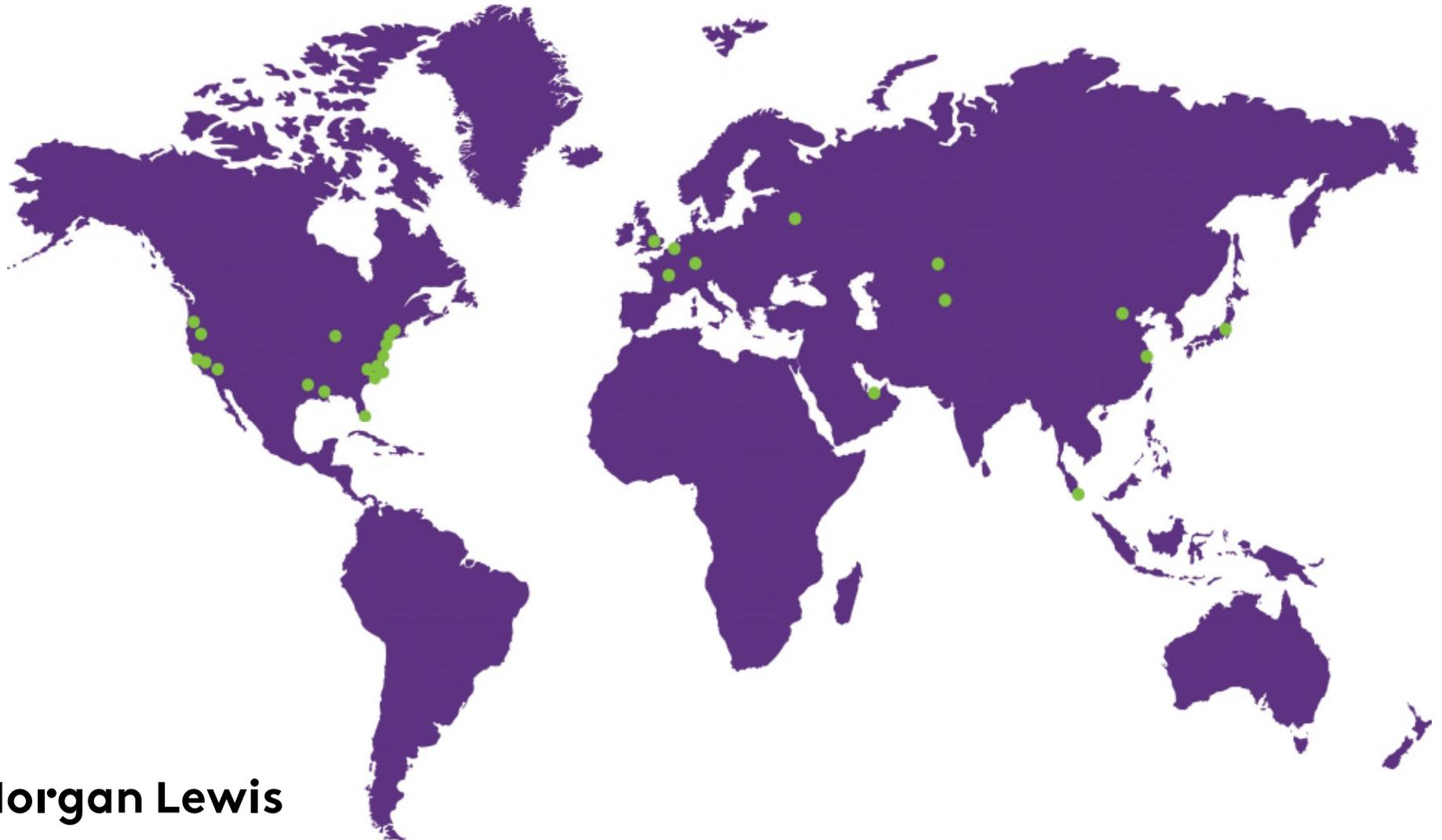
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Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	Los Angeles	Philadelphia	Silicon Valley
Astana	Dubai	Miami	Pittsburgh	Singapore
Beijing	Frankfurt	Moscow	Princeton	Tokyo
Boston	Hartford	New York	San Francisco	Washington, DC
Brussels	Houston	Orange County	Santa Monica	Wilmington
Chicago	London	Paris	Shanghai	



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