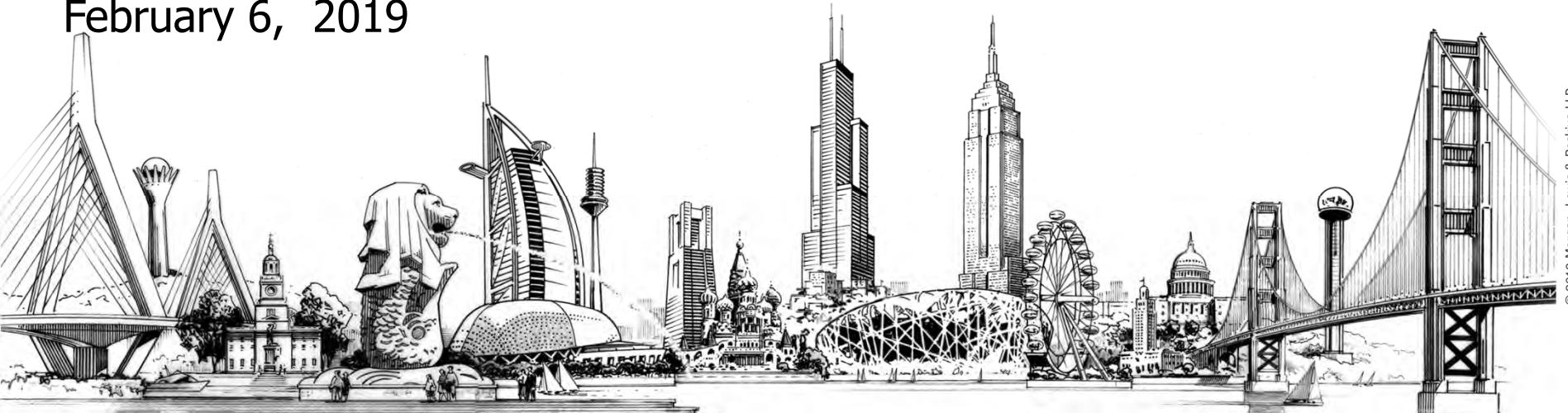


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# LEGAL AND REGULATORY MANAGEMENT OF THE GENERATING COMPANY PORTFOLIO

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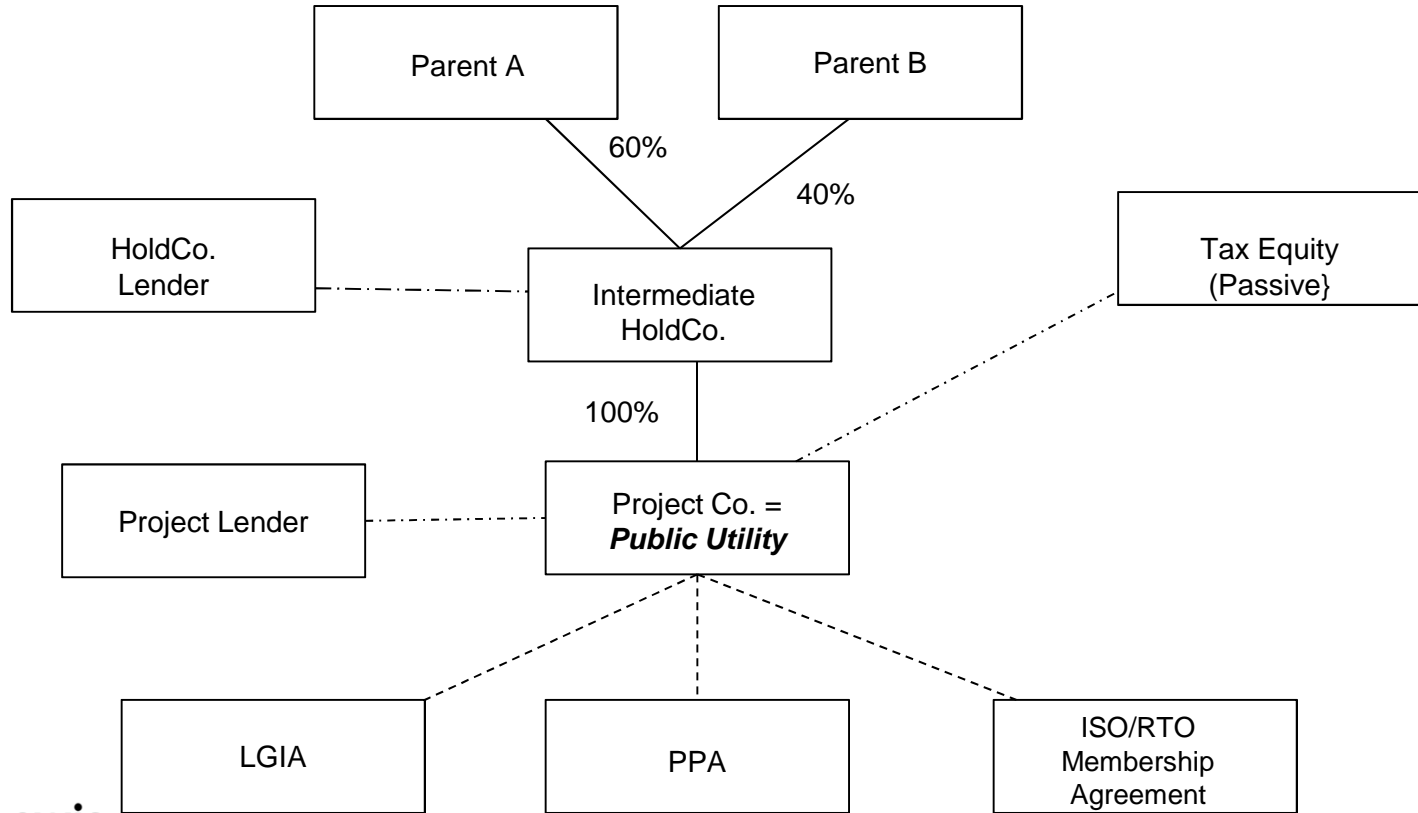
# Agenda

- Regulatory Background on Generator Regulation
- Key Regulatory Classifications for Electric Generators
- Key Regulatory Agreements/Arrangements
- Managing the Generation Portfolio

# Basic Regulatory Background

- Nearly all generating assets and businesses are subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA)
- Nearly all larger generating assets are subject to electric reliability and security requirements that are administered by special-purpose non-profit corporations designated and supervised by FERC
- There are dozens of different legal classes of generating businesses, and they are subject to different initial and ongoing requirements, differing treatment under FERC M&A regulations, and they expose their upstairs owners to differing kinds of FERC status
- The regulatory requirements, best practices, and contract compliance issues applicable to different legal classes of GenCos differ widely
- There is absolutely no such thing as an “unregulated” GenCo in the U.S.

# Hypothetical GenCo Structuring



# Primary GenCo Classes

- Exempt Wholesale Generators
- Qualifying Facilities
- Self-Generation Facilities

# GenCo Class: EWGs

- Established under PUHCA
- Must:
  - Own or operate all or part of a generation facility
  - Be exclusively engaged in wholesale power production and sale
  - May sell some by-products of power production
- Must Not:
  - Make any retail sale in the U.S., at all, ever
  - Engage in any business other than generation, wholesale sale, and certain limited generation by-product sales (such as waste ash, renewables credits, surplus water and steam)
- EWG status provides no power sales authority and is merely a PUHCA exemption – other FERC authorization or exemption is always required
- *See, 18 CFR Part 366*

# GenCo Class: QFs

- Depending on what factors are considered, over 20 different legal classes of QFs – often completely dissimilar
- Nearly all QFs no larger than 20 MW require no further authorization to sell wholesale electricity
- Other FERC regulatory exemptions can apply, depending on QF physical features and legal class, such as:
  - Small Power or Cogeneration status (sometimes, both)
  - Size (net MW AC)
  - Fuel/Energy Source
  - Vintage (dates of first QF filing and operations)
- Each QF of 1 mw+ must be filed before claiming QF status and QF regulatory exemptions
- *See, 18 CFR Part 292*

# QF Location Tracking

- QFs currently follow the “1-mile rule”
  - Affiliated generation assets using the same fuel source (solar, wind, geothermal, etc.) are aggregated together for purposes of measuring QF size
  - Critical (for most “small power” QFs such as solar and wind) because regulatory exemptions change at:
    - 1 MW
    - 20 MW
    - 30 MW
    - 80 MW
  - Largest problems often with 1 MW size and increase in distributed generation
    - Failure to track a single asset correctly can upset the entire enterprise
- *See, 18 CFR § 292.204(a)*



# Self-Generation

- Whether a power customer can self-generate for its own use, and remain interconnected to the local utility, is left to state law and retail utility tariffs
  - Exception: QF parallel operations rights
- If self-generation is permitted, may need to manage contract and self-gen GenCo asset to prevent sales and to permit only consumption
- Self-generation ≠ “Net metering”
- Self-generation can be and is regulated
- *See FERC Order No. 816, SunEdison, 129 FERC ¶ 61,146 (2009) (FERC Docket No. EL09-31)*

# MBR Authority

- Market-Based Rate authority is a form of FERC regulation under the FPA that permits power sales when a GenCo (or some other kinds of MBR entities) are not otherwise exempt
- Required for GenCo wholesale power sales by all but small QFs (NLT 20 MW)
- Compulsory ownership, control, affiliation disclosures
- Even one single MBR filing within an GenCo's corporate family requires comprehensive ownership, control, portfolio information
  - Even when an GenCo does not itself hold MBR authority, the GenCo may be included in an affiliate's MBR application
- Preparing control disclosures, affiliate disclosures, passive investor text, etc. requires uniformity across the entire affiliated portfolio
- *See 18 CFR Part 35 Subpart H, FERC Order Nos. 697, 816*

# Other GenCo Regulated Contracts

- GenCos are parties to numerous further classes of jurisdictional agreements
- “Resource Adequacy” (CAISO) filings
- “Reliability Must Run” (RMR) rates/agreements
- Reactive filings
  - In some markets (PJM, MISO), cost-of-service
  - In other markets (e.g., NYISO), flat-rate under tariff with no filing required by the GenCo
- Shared interconnection facilities
- Waivers of OATT requirements

# Interconnection/Delivery Arrangements

- Who are the GenCo's interconnecting parties/providers?
- What level (type) of interconnection is being provided?
  - Capacity/Network vs. Energy
  - Different MW interconnection rights for different levels of interconnection
- Expiration of agreements
- Changes to GenCo facility and/or to power offtake
- VAR requirements
- Post-completion upgrade and O&M changes
- *See, FERC Order Nos. 2003, 2006*

# The Docket Dictionary: Critical Working Tool

- The Docket Dictionary summarizes GenCo regulatory information
- It is intended as both a regulatory compliance record and as a management information device
- For a larger and/or more intricate portfolio, ongoing maintenance is a material legal task
- Include:
  - ALL in-hand, pending, and required FERC applications, certs, and orders
  - Annotations regarding formal applications and orders
  - Periodic reporting information and deadlines
  - Six month review (at minimum) and transaction-specific tasks/flags

# Pre-Portfolio Regulatory Planning

- Develop the Docket Dictionary
- Manage the legal role:
  - Evaluating eligibility for particular FERC status, authorizations, exemptions
  - Specifying and executing particular filings
  - Diligence and transaction support

# Portfolio Regulatory Integration

- Where is the GenCo (BAA, FERC Region)?
- Are there co-investors? Who are they and do they count as “affiliates”?
  - If they are affiliates, what do they own?
  - Needs to be tracked closely
- Does affiliation of the GenCo trigger other regulatory approval/reporting requirements?
  - MBR BAA/first-tier
- Will the GenCo’s affiliations limit growth in a particular market?
- Collection and reporting of contracts and power sales = EQRs
- D&O appointments
- ALL regulatory information in the Docket Dictionary
- *See, 18 CFR § 35.42 App. B for minimum public disclosures*

# Operating GenCos: Regulatory Management

- Training and records-management preforms
- The CRO deskbook
- Individual CRO certification by the ISO/RTO
- Contract and Notice instructions
- Internal Compliance Policy
  - Included in training – initial and periodic/cycle
  - Posted in CRO deskbook
  - Given to each applicable hire
  - Annually reviewed with counsel
- Responses to FERC Staff, ISO/RTO, MM inquiries



# Operating GenCos: Regulatory Management

Key questions and tasks:

- Does NERC/RE jurisdiction attach to a particular asset or GenCo?
- Registration categories
- Registration and reliability compliance
- Reliability record-keeping
- Inquiries from and disputes with reliability enforcement entities

# Key Task: Corp/Fin Transactions

- Immediate access to specific GenCo regulatory information for:
  - Transactional Planning and Support
  - Covenants
  - Conditions to closing
  - Defaults
  - Preparation of opinions
- Preparation of schedules
- Investor/parent disclosures and reporting
- *See, FERC Order No. 669, 18 CFR Part 33, 18 CFR § 2.26*

# Key Task: Crisis Resolution

- GenCo counsel must be immediately prepared to inform, evaluate risks, and provide technical information in emergencies:
  - GenCo sudden loss/shutdown/casualty events
  - ISO/RTO emergency start/shutdown orders
  - System failures and notification requirements

# Key Task: Interlocks

- Section 305 of the FPA prohibits certain “interlocking” positions (where an individual simultaneously holds director or officer positions at different entities) without FERC authorization.
  - Positions covered by the “interlock” rules
    - Officer or director of a public utility
    - Officer or director of a public utility and of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility (with certain exceptions)
    - Officer or director of a public utility and of any company supplying electrical equipment to a public utility
- Understand the process and identify: when the interlock rules apply, when “automatic” authorizations apply, and when prior requests and FERC orders are needed.
  - Note: Even if “automatic,” you still need to follow the process to receive the benefit of that authorization.
- Can be complex in a holding company with many public utilities.

# Key Task: Policy Tracking & Input

- FERC continues to expand (and occasionally reduce) the regulatory burdens imposed on generators and holding companies of generators. Active involvement in these proceedings provides the ability to influence the outcome.
- Current Proceedings of Interest:
  - Docket No. RM19-2 (Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets, 165 FERC 61,268 (2018))
    - Proposing to reduce the circumstances in which market power screens must be submitted by entities seeking MBR authority
  - Docket No. RM19-4 (Implementation of Amended Section 203(a)(1)(B) of the Federal Power Act, 165 FERC 61,091 (2018))
    - Proposing revisions to FERC's regulations to establish a \$10 million threshold on transactions that will be subject to the Commission's review and authorization under section 203(a)(1)(B)

# Opportunities for Policy Input (continued)

- Current Proceedings of Interest (continued)
  - Docket No. RM18-15 (Revisions to Parts 45 and 46 of the Commission's Regulations, 164 FERC 61,032 (2018))
    - Considering revisions to the interlocking officer and director requirements that would reduce the compliance burden
- Recent Final Rules:
  - Docket No. RM17-13 (Supply Chain Risk Management Reliability Standards, Order No. 850, 165 FERC 61,020 (2018))
    - Adopting cybersecurity requirements for the IT supply chain of certain NERC-regulated entities

# Biography



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J. Daniel Skees represents electric utilities before the Federal Energy Regulatory Commission (FERC) and other agencies on rate, regulatory, and transaction matters. He handles rate and tariff proceedings, electric utility and holding company transactions, reliability standards development and compliance, and FERC rulemaking proceedings. The mandatory electric reliability standards under Section 215 of the Federal Power Act are a major focus of Dan's practice. He advises clients regarding compliance with reliability standards, and helps them participate in the development of new standards.

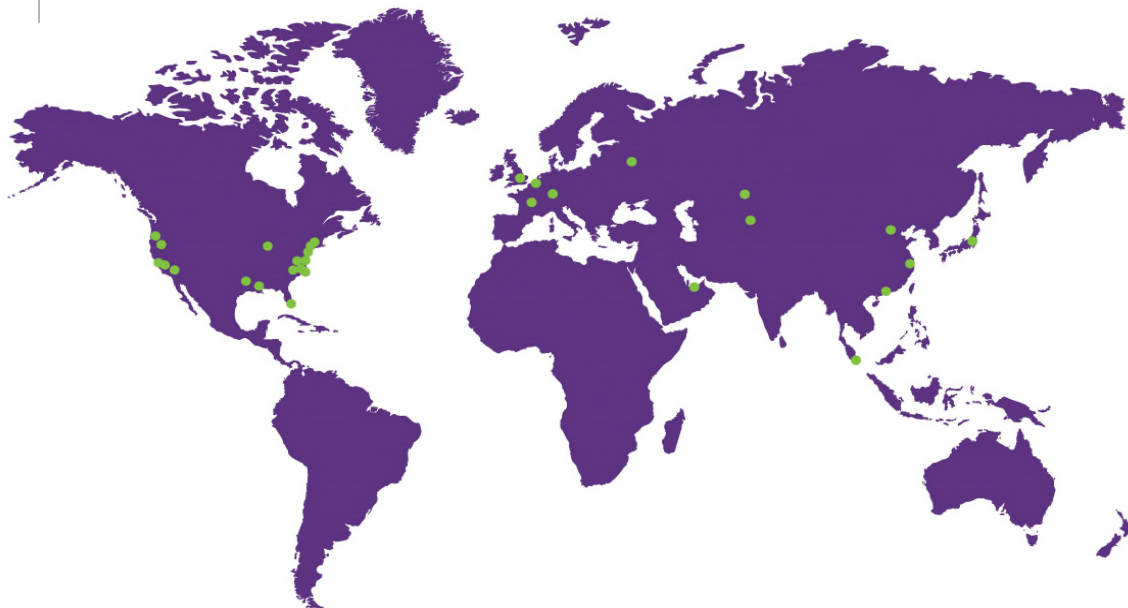


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