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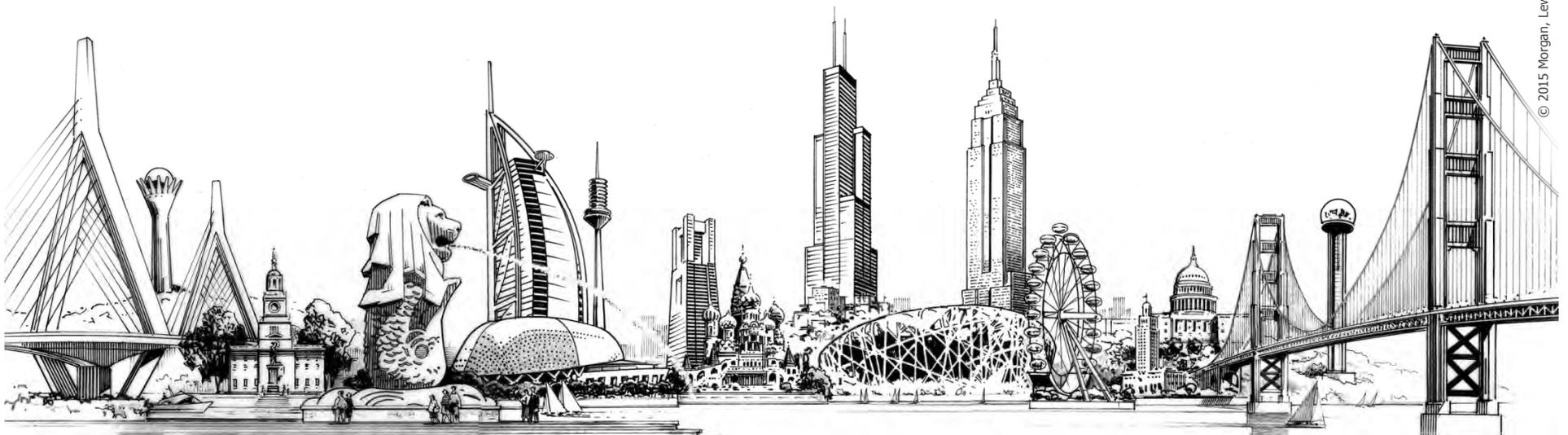
M&A REGULATION AT FERC 2015 ANNUAL REVIEW

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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

Business Background

The Numbers Are Up!

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

- Some transactions, even a few larger ones, immune
- \$\$-size is not always a gating factor
- Some surprisingly small transactions not immune

Legal Issues

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

See, 18 C.F.R. § 2.26, 18 C.F.R. § 33.2.

Legal Issues

- One Section, Two Doorways
- 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
- Internal reorganizations
- 203(a)(2) blanket authorization for independent generation acquisitions of independent generation
 - Misleading; many of these transactions are still subject to Section 203(a)(1) filings
- Publicly-traded issuers
 - Fuzzy regulatory treatment
 - ~ 20% cap
 - 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
 - Substantial FERC confusion, inconsistency
 - Petition regarding all QFs

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

The Numbers

- In Gross:
 - 2015 FY/DYTD: As of 9/28/15, 217 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

The Numbers

Features:

Independent Generation v. Traditional Franchised Utilities

- Substantial majority: independent generation
- Multiple fleet transactions
- “Passive” ownership issues

Behind The Numbers

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

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

Recent Developments

Hold-Harmless Policy Statement

- Transaction costs
 - Significant number of items
 - Permanency
- Transition costs

(Docket No. PL15-3)

Recent Developments

Delinquency Cases

ITC Proceedings (IN14-2)

- 20 Late-Filed Transactions
- Enforcement Self-Reporting, Disclosure
- Post-Consummation Section 203 Applications

ATC September 2015 Orders

- Only Prospective Approval
- Equity, Financing, Other-Regulatory Issues

Recent Developments

Rejections, Sanctions Threats

- Multiple orders regarding delinquent applications (unfiled-deal applications)
- Unusual cases:
 - Ownership dispute, competing inconsistent applications (Docket Nos. EC15-75, EC15-88)
 - Complete GP exit from ownership
 - Formal deficiency letters

Recent Developments

Fund Investor Petition – Pending

- LPs, equivalent investors in private equity funds and similar vehicles are typically treated as passive
 - Investment requires no Section 203 authorization
 - Interests tradable, subject to other requirements and fund agreements
- Petition seeks FERC confirmation of long-established practices

(Docket No. EL15-87)

Recent Developments

QF Petition – Extent of 203 Exemptions – Pending

- 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

(Docket No. EL15-62)

Concluding Comments

- Questions and comments