

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*Federal Agency Involvement in Reviewing Mergers and
Acquisitions of Electric Utilities*

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Abstract. At least five federal agencies, excluding the Internal Revenue Commission, may have some authority in the approval process of proposed mergers or acquisitions of electric utilities. These agencies are the Department of Justice, the Federal Trade Commission, the Nuclear Regulatory Commission, the Securities Exchange Commission, and the Federal Energy Regulatory Commission. Although all of the agencies may have an important role, the Federal Energy Regulatory Commission likely has the most extensive review authority of these agencies. Federal statutes set out the review authority which the agencies may exercise.

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Federal Agency Involvement in Reviewing Mergers and Acquisitions of Electric Utilities

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Summary

At least five federal agencies, excluding the Internal Revenue Commission, may have some authority in the approval process of proposed mergers or acquisitions of electric utilities. These agencies are the Department of Justice, the Federal Trade Commission, the Nuclear Regulatory Commission, the Securities and Exchange Commission, and the Federal Energy Regulatory Commission. Although all of the agencies may have an important role, the Federal Energy Regulatory Commission likely has the most extensive review authority of these agencies. Federal statutes set out the review authority which the agencies may exercise.

This report briefly examines federal statutes which set out the authority which various federal agencies may have in a proposed merger or acquisition of electric utilities. The statutes examined in this report apply to the following federal agencies: the Department of Justice, the Federal Trade Commission, the Nuclear Regulatory Commission, the Securities and Exchange Commission, and the Federal Energy Regulatory Commission. Tax effects, involving the Internal Revenue Commission, of a merger or acquisition are not treated in this report.

The Department of Justice and the Federal Trade Commission

Both the Department of Justice and the Federal Trade Commission are charged with enforcement of section 7 of the Clayton Act¹ and of the Hart-Scott-Rodino Antitrust Improvements Act.² Section 7 of the Clayton Act states in part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the

¹ 15 U.S.C. § 18.

² 15 U.S.C. § 18a.

jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stock or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

The *Merger Guidelines* issued by the Department of Justice provide guidance as to the manner in which the Antitrust Division will analyze mergers and acquisitions. The *Guidelines* are not binding upon the courts; however, they are considered persuasive.

The Hart-Scott-Rodino Antitrust Improvements Act requires that parties which meet certain net sales or assets amounts and which wish to engage in merger or acquisition transactions must submit premerger notification forms to the Department of Justice and to the Federal Trade Commission. The reviewing agency has a specified amount of time to review the proposed transaction, and during this time the transaction is not allowed to go forward.

Electric utilities which wish to merge or acquire other electric utilities, unless they are exempted, must comply with the anti-monopolization prohibition of section 7 of the Clayton Act and with the premerger notification requirements of Hart-Scott-Rodino.

Nuclear Regulatory Commission

The Nuclear Regulatory Commission is charged with issuing licenses concerning activities associated with nuclear materials. These activities would include the transfer of ownership of nuclear facilities. Pertinent provisions of the Atomic Energy Act concerning these activities include the following provisions.

It shall be unlawful, except as provided in section 91, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 103 or 104.³

³ 42 U.S.C. § 2131.

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 123, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of chapter 16 and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this Act.⁴

Securities and Exchange Commission

The Securities and Exchange Commission administers the Public Utility Holding Company Act (PUHCA).⁵ Among other requirements, PUHCA requires the registration of public utility holding company systems, the regulation of some types of acquisitions, an examination of holding company systems by the Securities and Exchange Commission to simplify and limit their operations, and the divestiture of properties which have been found to be harmful to the functioning of a holding company system. When a holding company obtains control of at least 10% of the voting securities of another electric utility, the Securities and Exchange Commission will review the merger. Mergers and acquisitions by such holding company systems must be approved by the Securities and Exchange Commission.

Unless the acquisition has been approved by the Commission under section 79j of this title, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce or otherwise to acquire, directly or indirectly, any securities or utility assets or any other interest in any business;

(2) for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate under clause (A) of paragraph (11) of subsection (a) of section 79b of this title, of such company and of any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.⁶

The Securities and Exchange Commission is charged with making certain that an acquisition or merger will be in the public interest.

⁴ 42 U.S.C. § 2133(a).

⁵ 15 U.S.C. §§ 79 *et seq.*

⁶ 15 U.S.C. § 79i(a).

If the requirements of subsection (f) of this section are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers....⁷

Notwithstanding the provisions of subsection (b) of this section, the Commission shall not approve—

...

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system....⁸

Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission (FERC) probably has the most extensive review authority of the federal agencies which have a role in the approval process of proposed mergers and acquisitions of electric utilities. Before such a proposed merger or acquisition is allowed to take place, FERC must give its approval. In considering the proposal, FERC may consider the public interest.

(a) No public utility shall 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 \$50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon 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. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and

⁷ 15 U.S.C. § 79j(b)(1).

⁸ 15 U.S.C. § 79j(c)(2).

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.⁹

Because FERC is charged with assuring that electricity rates are just and reasonable, the rate schedule is one of the considerations which FERC will consider in reviewing the proposed merger or acquisition.

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.¹⁰

⁹ 16 U.S.C. § 824b.

¹⁰ 16 U.S.C. § 824d(a).