

FERC Increases Regulatory Oversight of Investors With Officers or Directors on Public Utilities' Boards

by Steven A. Weiler, Brian Bell, and Zev Simpser

The Federal Energy Regulatory Commission ("FERC") recently ruled that an investor is deemed an affiliate of a public utility if the investor has a seat on the public utility's board of directors. This rule indicates heightened scrutiny of affiliate relationships under FERC's market-based rate program for electricity sales. Specifically, the energy assets of an investor with membership on a utility's board will be considered for market-power determinations. FERC's ruling came in a pair of companion orders issued on October 20, 2022—*Evergy Kansas Central Inc.* and *TransAlta Energy Mktg. (U.S.) Inc.* Each order addressed affiliate relationships under different aspects of FERC regulation under the Federal Power Act ("FPA"). *Evergy* involved a Section 205 market-based rate proceeding, while *TransAlta* involved Section 203 and a change of control of utility assets.

Evergy

FERC's regulations require that a market-based rate seller must "timely report" any ownership changes including any new entities that are an "upstream affiliate" of the utility. FERC defines an "affiliate" as an entity that owns ten percent or more of the specified utility. Conversely, owning less than ten percent of a utility's outstanding securities creates a rebuttable presumption of lack of control.

Evergy resulted from a contested, notice-of-change-in-status filing and multiple data requests from FERC staff over two years. At issue was a hedge fund's acquisition of less than ten percent of the stock in a public utility. As part of the acquisition, the hedge fund secured two seats on the utility's board, one board member was the hedge fund's executive chairman. FERC explained that the board membership rebutted the presumption that the hedge fund (with less than ten percent ownership interest) was not affiliated. "Board membership confers rights, privileges, and access to non-public information, including information on commercial strategy and operations. . . . [With board membership] the investor itself will have those rights, privileges, and access, and thus the authority to influence significant decisions involving the public utility or public

Related People

- Steven A. Weiler
- Brian Bell
- Zev Simpser

Related Capabilities

- Energy & Natural Resources
- Electric Power

utility holding company.”

TransAlta

Under FPA, Section 203, a public utility must obtain FERC approval before a change in ownership. If a shareholder acquires less than ten percent of a public utility’s shares, there is a rebuttable presumption that there has been no change in control.

An investor in TransAlta held more than ten percent of the utility’s common shares, subject to a standstill agreement that arguably prohibited exercise of control. However, the investor also held two seats on TransAlta’s board. TransAlta filed an application for change in control in anticipation of the standstill agreement expiring. FERC determined that, even before the standstill agreement expired, the investment together with the appointment of two board members constituted a change of control requiring prior approval.

The *Eversource/TransAlta* policy increases the transparency of utility governance and clarifies the need for FERC filings involving board membership of minority investors. FERC Chairman Richard Glick explained, “It’s very important that we have the insight to understand when parties are affiliated so we can do a better job of regulating entities and overseeing their activities.” Given the new policy, utilities with minority investors should analyze their corporate relationships and FERC filing requirements before appointing board members.