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## VII. Finance, Mergers, and Acquisitions

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A. Introduction.....	167
B. PCAOB Reproposes Auditor Reporting Standard .....	168
C. SEC Releases Concerning Regulation S-K.....	169
1. Form 10-K Summary Page .....	170
2. Concept Release on Reform of Regulation S-K.....	170
3. Disclosure Simplification Rules.....	172
D. SEC Guidance for Non-GAAP Financial Measures .....	172
E. Duke Energy Florida, LLC Nuclear Cost Securitization.....	174
F. Green Bonds Update .....	174
G. FERC Considers Changes to Utility Merger Reviews.....	176
H. Cash America International, Inc. ....	178
I. SEC Proposes Additional Rule 15c2-12 Event Disclosures.....	179
J. Announced Transactions .....	180
1. Exelon Corporation and Pepco Holdings, Inc.....	180
2. The Southern Company and AGL Resources Inc.....	181
3. Emera Inc. and TECO Energy Inc. ....	182
4. Duke Energy Corporation and Piedmont Natural Gas Company, Inc. ....	182
5. Dominion Resources Inc. and Questar Corporation .....	183
6. Algonquin Power & Utilities Corp. and Empire District Electric Co.....	184
7. Fortis Inc. and ITC Holdings Corp. ....	185
8. Great Plains Energy Incorporated and Westar Energy, Inc.....	185
9. The Southern Company and Southern Natural Gas Company, L.L.C. ....	186
10. NextEra Energy, Inc. and Oncor Electric Delivery Company LLC.....	187
11. AltaGas Ltd. and WGL Holdings, Inc. ....	189

### A. INTRODUCTION

The second half of 2016 and early 2017 were marked by a return to a more customary level of merger activity in the utility sector. The Federal Energy

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Regulatory Commission (FERC) issued a Notice of Inquiry soliciting comment on whether FERC should revise its approach to identifying and assessing market power when it reviews merger transactions. The market for green bonds continued to expand and mature with a prominent rating agency publishing a new methodology for a green bonds assessment. The Securities and Exchange Commission (SEC) continued to pursue a variety of disclosure reform and simplification initiatives. In addition, the SEC continued its efforts to increase transparency and accountability in the municipal securities markets.

## B. PCAOB REPROPOSES AUDITOR REPORTING STANDARD

On May 11, 2016, the Public Company Accounting Oversight Board (PCAOB) repropoed the auditor reporting standard for public comment. The repropoed standard seeks to make the auditor's report more informative for investors by requiring auditors to provide information on critical audit matters.<sup>1</sup>

The project to enhance the auditor's reporting model began in 2010 with PCAOB staff outreach to different stakeholders.<sup>2</sup> In June 2011, the PCAOB issued a Concept Release to seek public comment on potential changes to the auditor's reporting model. In August 2013, the PCAOB proposed a revised auditor reporting standard along with another new auditing standard regarding the auditor's responsibilities for "other information" outside the financial statements.<sup>3</sup> The PCAOB is not repropoing the other information auditing standard at this time.

The revised proposal from May 2016<sup>4</sup> would retain the pass/fail model for the auditor's report. The concept of critical audit matters has been carried forward from the 2013 proposal. This would require communication in the auditor's report of any critical audit matters arising from the audit of the current period's financial statements.<sup>5</sup> The repropoed requirements with respect to critical accounting matters have been refined in several respects, including by:

- limiting critical audit matters to matters communicated or required to be communicated to the audit committee;
- adding a materiality component to the definition of critical audit matter;
- narrowing the definition to only those matters that involved especially challenging, subjective, or complex auditor judgment;

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1. Press Release, Public Company Accounting Oversight Board, PCAOB Repropoed Standard to Enhance the Auditor's Report for Investors with Refined Requirements for Critical Audit Matters (May 11, 2016), <https://pcaobus.org/News/Releases/pages/pcaob-repropoed-auditors-report-051116.aspx>.

2. *Id.*

3. PCAOB Release No. 2013-005 (Aug. 13, 2013), [https://pcaobus.org/Rulemaking/Docket034/Release\\_2013-005\\_ARM.pdf](https://pcaobus.org/Rulemaking/Docket034/Release_2013-005_ARM.pdf).

4. See PCAOB *Fact Sheet: Auditor's Reporting Model Reproposal* (May 11, 2016), <https://pcaobus.org/News/Releases/Pages/Fact-Sheet-Reproposal-Auditors-Report-051116.aspx>.

5. *Id.*

- requiring the auditor to document the basis for its determination that each critical accounting matter (1) was communicated or required to be communicated to the audit committee and (2) relates to accounts or disclosures that are material to the financial statements and involved especially challenging, subjective, or complex auditor judgment; and
- expanding the communication requirement to require the auditor to describe how the critical audit matter was addressed in the audit.<sup>6</sup>

In addition, the auditor would be required to add language in the auditor's report, including, among other things, a statement about auditor independence.<sup>7</sup> The auditor also would be required to include a statement in the auditor's report about how long it has been the auditor for the company.<sup>8</sup>

Comments on the proposed standards and related amendments were due by August 15, 2016,<sup>9</sup> at which time the Office of the Investor Advocate of the SEC filed a comment letter supporting the PCAOB's repropoed standard.<sup>10</sup>

### C. SEC RELEASES CONCERNING REGULATION S-K

As part of the Fixing America's Surface Transportation Act of 2015 (FAST Act),<sup>11</sup> Congress prompted the SEC to revise Regulation S-K.<sup>12</sup> The FAST Act required the SEC to conduct a study to modernize and simplify the disclosure requirements in Regulation S-K, particularly to avoid repetitious and immaterial information and to propose revisions to those requirements.<sup>13</sup>

The FAST Act also directs the SEC to revise Regulation S-K to scale back or eliminate some requirements in order to reduce the burden on emerging growth companies (EGCs), accelerated filers, smaller reporting companies (SRCs), and other smaller issuers and to eliminate duplicative, overlapping, outdated, or superseded provisions.

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Letter of Rick A. Fleming, Office of the Investor Advocate, Sec. & Exch. Comm'n, to Phoebe W. Brown, Office of the Sec'y, Public Company Accounting Oversight Board (Aug. 15, 2016), [https://pcaobus.org/Rulemaking/Docket034/078c\\_SEC-Investor-Advocate.pdf](https://pcaobus.org/Rulemaking/Docket034/078c_SEC-Investor-Advocate.pdf).

11. H.R. 22 (Dec. 4, 2015), Pub. L. No. 114-94.

12. 17 C.F.R. Part 229.

13. Prior to the Fast Act, the JOBS Act of 2012 directed the SEC to comprehensively analyze Regulation S-K to determine how disclosure requirements could be updated. In December 2013, the SEC delivered a staff report to Congress summarizing its review. Based on the report's recommendations, the SEC launched the disclosure effectiveness initiative, the goal of which is to systematically review the entire disclosure regime.

## 1. Form 10-K Summary Page

The FAST Act directed the SEC to issue regulations that permit a summary page for Form 10-K as long as each item on the summary page includes cross-references to the relevant section in the Form 10-K.<sup>14</sup> On June 9, 2016, the SEC's interim final rule adding new Item 16 to Part IV of Form 10-K took effect.<sup>15</sup> The rule expressly authorizes, but does not require, an issuer to include in its Form 10-K a summary of the information required by the form if each summary item is hyperlinked to the related, more detailed disclosure item elsewhere in the report.<sup>16</sup>

## 2. Concept Release on Reform of Regulation S-K

On April 13, 2016, the SEC published a concept release on the reform of Regulation S-K. The release considers various business and financial disclosures that public companies make and seeks public input on ways to further improve those disclosures.

The concept release first focuses on the business and financial disclosures required by Regulation S-K and discusses and solicits public comment on the following topics:<sup>17</sup>

- *Core Company Business Information:* The release solicits feedback on Items 101 and 102 of Regulation S-K, in particular (1) the description of a company's business; (2) technology and intellectual property rights; (3) government contracts and regulation, including environmental laws; (4) the number of persons employed by the company; and (5) the description of leased and owned real property.
- *Company Performance, Financial Information, and Future Prospects:* The release seeks input on Items 301, 302, and 303 of Regulation S-K, including the selected summary and supplementary financial disclosure tables, each component of management's discussion and analysis of financial condition and results of operations (MD&A), and the discussion of critical accounting elements.
- *Risk and Risk Management:* The release requests comment on Items 305 and 503(c) of Regulation S-K, including risk factor disclosure and disclosures about market risk as well as the overall approach to risk management and risk management processes.<sup>18</sup>
- *Securities of the Registrant:* The release solicits input on portions of Items 201, 202, 701, and 703 of Regulation S-K, such as disclosure

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14. *Id.*

15. Release No. 34-77969, Sec. & Exch. Comm'n (June 1, 2016), <https://www.sec.gov/rules/interim/2016/34-77969.pdf>.

16. *Id.*

17. Concept Release, No. 33-10064, Sec. & Exch. Comm'n (Apr. 13, 2016), <https://www.sec.gov/rules/concept.shtml>.

18. *Id.*

concerning the number of equity holders, the description of capital stock, recent sales of unregistered securities, use of proceeds, and issuer stock repurchases.

- *Exhibits*: The release requests feedback on Item 601 of Regulation S-K concerning the exhibits filed with Form 8-K, Form 10-Q, and Form 10-K.<sup>19</sup>

Although the release does not address other parts of Regulation S-K, including executive compensation, corporate governance, or required disclosures for foreign private issuers, the release seeks comment on the following items:

- *Industry Guides*: SEC requirements of supplemental disclosures for discrete industries have decreased over time; however, the SEC has several industry-specific reporting requirements that remain in force, including bank holding companies, oil and gas programs, real estate limited partnerships, property-casualty insurance underwriters, and mining companies.
- *Public Policy and Sustainability Matters*: The release seeks additional feedback on whether the SEC should expand its disclosure requirements on public policy and sustainability issues, including high profile topics such as climate change, corporate political spending, and supply chain management.
- *Scaled Disclosure*: The release seeks comment on whether reduced or scaled disclosures currently available to EGCs and SRCs should be offered to other categories of registrants. The release also seeks comments on whether the SEC should change the content or frequency (semiannual, quarterly, or monthly) of Form 10-Q.
- *Presentation and Delivery*—Noting that much of the current disclosure regime traces its roots back to the 1930s, the release seeks input on how the SEC can improve the overall readability and navigability of SEC reports, such as through the increased use of cross-referencing and incorporation by reference or the greater use of hyperlinks and company websites. The release also explores fundamental alterations in the presentation of disclosures that changes in technology would permit, such as a “company file” concept and other formats that could provide greater layering and interactivity of information.<sup>20</sup> The proposed release also reviews alternative presentation and delivery methods to enhance disclosure accessibility and readability with the benefit of new communications technology. This would include the use of tools such as cross-referencing, incorporation by reference, hyperlinks, company websites, standardized formatting requirements, layered disclosure, and structured data.<sup>21</sup>

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19. *Id.*

20. *Id.*

21. *Id.*

The comment period closed on July 21, 2016.<sup>22</sup> On November 23, 2016, the SEC issued a report to Congress on its findings.<sup>23</sup> The report must be followed within 360 days by proposed rules to implement the recommendations made in the report.<sup>24</sup>

### 3. Disclosure Simplification Rules

On July 13, 2016, the SEC proposed amendments to Regulation S-K, Regulation S-X,<sup>25</sup> and other disclosure requirements that over time have become redundant, duplicative, overlapping, outdated, or superseded.<sup>26</sup> Several of the amendments would delete requirements contained in Regulation S-K or Regulation S-X that duplicate requirements under U.S. Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards. The SEC also solicited comment on disclosure requirements that overlap with, but require information incremental to, U.S. GAAP.

In addition, the release identified several outdated requirements that have become obsolete (e.g., available information in the SEC Public Reference Room). The release also contains several proposed amendments addressing superseded requirements.

Comments were due on the proposal by October 3, 2016.

#### D. SEC GUIDANCE FOR NON-GAAP FINANCIAL MEASURES

On May 17, 2016, the SEC released twelve new or updated Compliance and Disclosure Interpretations (C&DIs) regarding the use of non-GAAP financial measures.<sup>27</sup> This new guidance follows public statements by former SEC Chair Mary Jo White and other SEC officials on the increased use and potentially misleading nature of such measures.<sup>28</sup>

The new guidance notes the following four examples of non-GAAP measures that are potentially misleading under Regulation G:<sup>29</sup>

1. Certain adjustments that are not explicitly prohibited but could be misleading;<sup>30</sup>

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22. *Id.*

23. A copy of the SEC's *Report on Modernization and Simplification of Regulation S-K* (Nov. 23, 2016) is available at <https://www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf>.

24. *Id.*

25. 17 C.F.R. Part 210.

26. Release No. 33-10110 (July 13, 2016), <https://www.sec.gov/rules/proposed/2016/33-10110.pdf>.

27. For a copy of the C&DIs, see <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.

28. David Michaels & Michael Rapoport, *SEC Signals It Could Curb Use of Adjusted Earnings Figures*, WALL ST. J. (Mar. 16, 2016).

29. 17 C.F.R. Part 244.

30. SEC Compliance and Disclosure Interpretation, Question 100.01 (May 17, 2016), <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.

2. Non-GAAP measures that are not consistently presented between periods;<sup>31</sup>
3. Non-GAAP measures that are adjusted only for non-recurring charges when there were also non-recurring gains during the same period;<sup>32</sup> and
4. Non-GAAP measures that substitute individually tailored revenue recognition and measurement methods for a GAAP measure.<sup>33</sup>

The new guidance also clarifies whether certain non-GAAP measures may be presented on a per share basis pursuant to Item 10(e) of Regulation S-K. The staff notes that non-GAAP liquidity measures that are based on cash generated must not be presented on a per share basis in documents filed with or furnished to the SEC. Going forward, the SEC staff is expected to focus on the substance of the non-GAAP measure and not management's characterization of such measure when analyzing whether the non-GAAP measure can be used as a liquidity measure.<sup>34</sup> The staff also notes that free cash flow is a liquidity measure that must not be presented on a per share basis, and Earnings Before Interest and Taxes and Earnings Before Interest, Taxes, Depreciation and Amortization (along with similar measures) must not be presented on a per share basis.<sup>35</sup>

The new guidance also mandates equal or greater prominence between non-GAAP measures and the corresponding GAAP measurements under Item 10(e)(1)(i), setting forth the staff's view that GAAP measures must be presented first and described narratively in a manner similar to that of the comparable non-GAAP measures. The guidance will affect, among other things, disclosures made in annual and quarterly reports and earnings releases.<sup>36</sup>

Finally, the staff clarifies that registrants should provide income tax effects on their non-GAAP measures depending on the nature of such measures. If a measure is a liquidity measure that includes income taxes, the guidance suggests that it might be acceptable to adjust GAAP taxes to show taxes paid in cash. If a measure is a performance measure, the staff notes that companies should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability. In addition, adjustments to arrive at a non-GAAP measure should not be presented "net of tax." Rather, income taxes should be shown as a separate adjustment and clearly explained.<sup>37</sup>

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31. *Id.*, Question 100.02.

32. *Id.*, Question 100.03.

33. *Id.*, Question 100.04.

34. *Id.*, Question 102.05.

35. *Id.*, Question 102.07 and Question 103.02.

36. *Id.*, Question 102.10.

37. *Id.*, Question 102.11.

### E. DUKE ENERGY FLORIDA, LLC NUCLEAR COST SECURITIZATION

In June 2016, Duke Energy Florida Project Finance, LLC, a bankruptcy remote special purpose wholly owned subsidiary of Duke Energy Florida, LLC issued \$1,294,290,000 of Series A senior secured bonds. The bonds were issued pursuant to an irrevocable financing order of the Florida Public Service Commission (FPSC) in accordance with Florida's Nuclear Asset-Recovery Statute (FLA. STAT. § 366.95).<sup>38</sup> The issuance was Duke Energy Florida's first offering of dedicated utility rate reduction bonds and is noteworthy as further expansion of the types of costs that can be recovered using the securitization financing mechanism. The FPSC financing order permitted recovery of costs associated with the early retirement of Duke Energy Florida's Crystal River Unit 3 nuclear power plant.<sup>39</sup> Duke Energy Florida had previously entered into an FPSC staff approved settlement agreement with various consumer groups relating to the recovery of these costs, but the issuance of the bonds allowed Duke Energy Florida to further reduce the overall costs to customers resulting from the early retirement.

The transaction is also noteworthy because it is the first offering of securities to be registered on Form SF-1 (rather than the more common shelf offerings registered on Form SF-3).<sup>40</sup> Introduced as part of Regulation AB II,<sup>41</sup> Form SF-1 is a dedicated form for the registration of asset-backed securities and other similar securities in one-time offerings. Prior to Regulation AB II, offerings of dedicated utility rate reduction bonds had been registered on Form S-3.

### F. GREEN BONDS UPDATE

Green bonds are issued to raise funds for new and existing projects with environmental benefits. In 2016, \$93.4 billion of green bonds were issued worldwide.<sup>42</sup> This amount represented a 120 percent increase from 2015.<sup>43</sup> Issuance of green bonds in 2017 could exceed \$200 billion worldwide.<sup>44</sup>

From the issuer's perspective, a green bond can both result in the diversification of the issuer's investor base and contribute to "green" investor relations and corporate responsibility initiatives. The International Capital Market Association

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38. The Florida statute was enacted in 2015. FLA. STAT. § 366.95 (2016). The full text of the legislation is available at [http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0300-0399/0366/Sections/0366.95.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0366/Sections/0366.95.html).

39. Florida Public Service Commission, Financing Order, Order No. PSC-15-0537-FOF-EI (Nov. 19, 2015), <http://www.floridapsc.com/library/filings/15/07364-15/07364-15.pdf>.

40. See SEC Edgar Search Results (Sept. 30, 2016), [https://searchwww.sec.gov/EDGARFSClient/jsp/EDGAR\\_MainAccess.jsp?search\\_text=\\* & sort=Date & formType=FormSF1 & isAdv=true & stemming=true & numResults=10 & numResults=10](https://searchwww.sec.gov/EDGARFSClient/jsp/EDGAR_MainAccess.jsp?search_text=* & sort=Date & formType=FormSF1 & isAdv=true & stemming=true & numResults=10 & numResults=10).

41. 17 C.F.R. Part 229.1100.

42. CNBC, *Moody's says green bond issuance set for another record year* (Jan. 19, 2017, 12:44 AM), <http://www.cnbc.com/2017/01/19/reuters-america-moodys-says-green-bond-issuance-set-for-another-record-year.html>.

43. *Id.*

44. *Id.*



(ICMA) launched the green bond principles, the first set of principles for verifying the credentials of green bonds, in 2014. In June 2016, the ICMA published an updated edition of the green bond principles.<sup>45</sup> The green bond principles have four primary components: (1) use of proceeds, (2) process for project evaluation and selection, (3) management of proceeds, and (4) reporting. As there is no standard definition of what constitutes a green bond, the use of proceeds section of a typical green bond offering document normally informs potential investors of the principal green aspects of the transaction. Typically the use of proceeds, reporting, and any second party opinions do not form part of the terms and conditions of the green bond and do not create specific contractual obligations. However, they typically form part of the disclosure documents or are referred to in the disclosure documents. The green bond principles also detail certain types of potential third party review: (1) consultant review, (2) verification, (3) certification, and (4) rating.

In November 2015, Southern Power Company issued two series of notes for a total offering of \$1 billion. The use of proceeds was the financing of, or investments in, solar and wind power generation facilities located in the United States.<sup>46</sup> In March 2016, Georgia Power Company issued \$325 million of green bonds. The proceeds were to be used for investments in (1) solar power generation facilities located in the State of Georgia or elsewhere in the United States or (2) electric vehicle charging infrastructure located in the United States.<sup>47</sup> In June 2016, Southern Power Company issued \$1.1 billion of bonds. The proceeds, as with their 2015 offering, were to be used for investments in solar and wind generation.<sup>48</sup> Also in June 2016, Westar Energy Inc. sold \$350 million of bonds, the proceeds of which were used to finance investments in wind energy.<sup>49</sup> In November 2016, Southern Power Company issued an additional \$900 million of green bonds.<sup>50</sup> The proceeds were to be used for solar and wind generation facilities.<sup>51</sup> Also in November 2016, Iberdrola, S.A. issued €750 million aggregate principal amount of green bonds into the Euromarket, with proceeds earmarked for refinancing wind farm investments in Spain.<sup>52</sup>

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45. Int'l Capital Mkt. Ass'n, *Voluntary Process Guidelines for Issuing Green Bonds* (June 16, 2016), <http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/green-bonds/green-bond-principles/>.

46. Southern Power Company, Form 8-K (Nov. 12, 2015), <https://www.sec.gov/Archives/edgar/data/1160661/000116066115000041/sopower2015c-d8k11x15.htm>.

47. Georgia Power Company, Form 8-K (Mar. 2, 2016), <https://www.sec.gov/Archives/edgar/data/41091/000004109116000033/ga8k2016a2016b.htm>.

48. Southern Power Company, Form 8-K (June 13, 2016), <https://www.sec.gov/Archives/edgar/data/1160661/000116066116000057/sopo8k2016ab.htm>.

49. Westar Energy, Inc., Form 424(b)(2) (June 13, 2016), <https://www.sec.gov/Archives/edgar/data/54507/000119312516621993/d207455d424b2.htm>.

50. Southern Power Company, Form 8-K (Nov. 10, 2016) <https://www.sec.gov/Archives/edgar/data/1160661/000116066116000079/sopo2016d-ef8xk.htm>.

51. *Id.*

52. Press Release, Iberdrola, Iberdrola places fourth green bond issuance worth 750 million (Nov. 24, 2016), <https://www.iberdrola.com/press-room/news/detail/iberdrola-cierra-su-cuarta-emision-de-bonos-verdes-por-un-importe-de-750-millones-de-euros-8410487320161125>.

All of these transactions employed the issuer's independent accountants to verify the use of proceeds as outlined in the offering document. However, these utility green bond offerings did not utilize the other types of third party review outlined in the green bond principles: consultant review, certification against an external green assessment standard, or rating by a qualified third party. In March 2016, Moody's Investors Service, Inc. published a new methodology for a green bonds assessment (GBA). This presumably conforms to the "rating" category of potential third party review discussed in the green bond principles. GBA, which ranges from GB1 for excellent to GB5 for poor, is designed to help investors determine if green bond proceeds are being used to achieve "positive environmental outcomes."<sup>53</sup> The Upper Mohawk Valley Regional Water Finance Authority received a green bond assessment of GB1 for \$8.78 million of water system revenue bonds in August 2016 from Moody's. This was the first GBA the rating agency has issued in the United States.<sup>54</sup> In January 2017, Moody's assigned a GBA of GB1 to the District of Columbia Water and Sewer Authority's \$100 million Series 2017A Public Utility Senior Lien Revenue Bonds.<sup>55</sup>

### G. FERC CONSIDERS CHANGES TO UTILITY MERGER REVIEWS

FERC issued a Notice of Inquiry on September 22, 2016, requesting comments on how FERC should revise its approach to identifying and assessing market power when it reviews applications seeking authorization to engage in merger transactions and to sell electric energy at market-based rates.<sup>56</sup>

FERC has provided in its regulations a number of blanket authorizations for transactions that are subject to prior approval by FERC under section 203 of the Federal Power Act (FPA). Parties to transactions falling within the parameters of those blanket authorizations may proceed without filing an application with FERC and waiting for FERC to issue an order specifically authorizing the transactions. In the Notice of Inquiry, FERC suggests that additional blanket authorizations under section 203 of the FPA may be appropriate, including (1) dispositions of equity interests in public utilities where the securities provide their holders with limited governance rights; and (2) transfers of relatively small electric transmission assets, such as substations, to a public utility. However, the

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53. Lynn Hume, *Moody's Issues First Muni Green Bond Assessment in U.S.*, BOND BUYER, Aug. 10, 2016, <https://www.bondbuyer.com/news/moodys-issues-first-muni-green-bond-assessment-in-us>.

54. *Id.*

55. Press Release, Moody's Investors Service, Inc., *Moody's Investors Service Assigns GB1 Green Bond Assessment (GBA) to District of Columbia Water and Sewer Authority Green Bonds* (Jan. 20, 2017), [https://www.moodys.com/research/Moodys-Investors-Service-Assigns-GB1-Green-Bond-Assessment-GBA-to-PR\\_903819125](https://www.moodys.com/research/Moodys-Investors-Service-Assigns-GB1-Green-Bond-Assessment-GBA-to-PR_903819125).

56. 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, Sept. 22, 2016, <https://www.ferc.gov/whats-new/comm-meet/2016/092216/E-2.pdf>.

Notice of Inquiry also suggests that certain blanket authorizations currently provided in FERC's regulations may no longer be appropriate.

FERC also requested comments on certain elements of its competition analyses and on the evidence that applicants are required to provide to FERC in support of merger applications and applications for market-based rates, including as follows:

- whether FERC's analysis of market-power issues in merger applications under section 203 of the FPA should be harmonized with its analysis of similar issues in applications for market-based rates under section 205 of the FPA;
- whether and how FERC should define de minimis effect. FERC often approves transactions under section 203 of the FPA based on a showing that the transaction will have a de minimis effect on competition (in lieu of requiring a more comprehensive competition analysis), but has not clearly defined what constitutes a de minimis effect;
- whether to require that merger applications filed under section 203 of the FPA include a supply and demand curve analysis to assess whether and to what extent a transaction may increase the merged entity's ability and incentive to withhold electric generation output to affect market prices;
- whether the pivotal supplier screening analyses that FERC currently requires for applications for market-based rates under section 205 of the FPA should also be required in merger applications under section 203 of the FPA (and whether this test should be modified);
- whether a market-share screening analysis, as is required for section 205 of the FPA market-based rate applications, should be required in merger applications under section 203 of the FPA and whether any changes should be made to this analysis, such as changing the current market share threshold of 20 percent or applying the analysis to markets other than energy, including capacity and ancillary services markets; and
- whether merger applications filed under section 203 of the FPA that require competitive screening analyses should include copies of consultant reports and internal documents that are submitted to the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) in forms filed with those agencies seeking clearance of mergers.

Comments were required to be submitted within sixty days after publication of the Notice of Inquiry in the Federal Register on September 28, 2016.<sup>57</sup>

On November 28, 2016, the DOJ and the FTC submitted comments.<sup>58</sup> According to the DOJ and FTC, FERC's current approach overlooks the reality

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57. *Id.*

58. Comment of the U.S. Department of Justice and the Federal Trade Commission, Docket No. RM16-21 (Nov. 28, 2016).

of today's electricity markets by focusing too narrowly on structural screens (i.e., market share and market concentration). Instead, the DOJ and the FTC argued FERC should include a broader inquiry into the ability of market participants with relatively small market share to exercise market power.

FERC may proceed next to issue a notice of proposed rulemaking, which would initiate a further comment period, and thereafter issue a notice of final rulemaking.

#### H. CASH AMERICA INTERNATIONAL, INC.

A recent case decided by the U.S. District Court for the Southern District of New York between Wilmington Savings Fund Society, FSB and Cash America International, Inc. may expand the right of holders to receive a make-whole premium not only in the case of an optional redemption, but also in the case of certain defaults. In this case, the court interpreted an indenture, which contained standard provisions on acceleration and redemption, to support the award of a make-whole premium in the context of a "voluntary" default.

Wilmington Savings, acting as indenture trustee on behalf of holders, brought suit against Cash America and sought the award of a make-whole premium in the context of a default remedy for violating an indenture covenant.<sup>59</sup> Cash America had defaulted on the notes by distributing 80 percent of a wholly owned subsidiary's stock to its shareholders, thereby separating the subsidiary into an independently traded public company.<sup>60</sup>

When an issuer redeems notes prior to maturity, make-whole premiums are intended to compensate noteholders, to "make them whole," for their loss of future payments.<sup>61</sup> Payments of make-whole premiums have most frequently occurred in the redemption context at the option of the issuer.<sup>62</sup> But in the suit against Cash America, the district court confronted the issue of whether, under the default remedy provisions of an indenture, a plaintiff may seek make-whole premiums in lieu of pursuing acceleration (of principal and accrued interest) to remedy an indenture default.<sup>63</sup>

Wilmington Savings claimed that a proper remedy for Cash America's breach would be a judgment requiring Cash America to redeem the notes, including the make-whole premium, as opposed to accelerating the maturity date and requiring repayment at par. In finding for Wilmington Savings, the district court relied

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59. *Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc.*, Case No. 15-CV-5027, 2016 WL 5092594, at 1 (S.D.N.Y. 2016).

60. *Id.* at 3–4.

61. *Id.* at 12.

62. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1053 (2d Cir. 1982) ("The purpose of a redemption premium is to put a price upon the voluntary satisfaction of a debt before the date of maturity."); *In Re Solutia Inc.*, 379 B.R. 473, 487–88 (Bankr. S.D.N.Y. 2007) (commenting that an issuer has no right to redeem debt prior to maturity in the absence of a redemption clause).

63. *Wilmington Savings*, 2016 WL 5092594, at 12–14.

on the Second Circuit decision in *Sharon Steel Corp. v. Chase Manhattan Bank* that set forth precedent for awarding a make-whole premium in the context of default.<sup>64</sup> In *Sharon Steel*, the Second Circuit found that the acceleration provisions in the applicable debt instrument did not bar security holders from seeking specific performance of the redemption provisions where the default resulted from “voluntary actions” by the issuer. The Second Circuit held that make-whole premiums may be awarded to remedy voluntary default as long as the indenture’s provisions on acceleration are “explicitly permissive and not exclusive of other remedies.”<sup>65</sup>

The *Wilmington Savings* decision may expand the circumstances under which debtholders are entitled to make-whole premiums. Recently, several issuers have attempted to include indenture language intended to limit the impact of the *Wilmington Savings* decision. However, these changes have met with resistance from investors and have not become common in the investment grade market.<sup>66</sup>

## I. SEC PROPOSES ADDITIONAL RULE 15c2-12 EVENT DISCLOSURES

On March 1, 2017, the SEC proposed<sup>67</sup> adding two new event notices to Rule 15c2-12.<sup>68</sup> Under Rule 15c2-12, issuers and other “obligated persons” are required to provide investors with continuing disclosure of annual financial information and certain other enumerated events. Along with the new event notices, the SEC is proposing a new definition of “financial obligation” intended to capture debt obligations of issuers that are not otherwise reported to the Municipal Securities Rulemaking Board under its Electronic Municipal Market Access (EMMA) system.

Specifically, the proposed amendments would require issuers (or other obligated persons) to provide event notices to EMMA upon occurrence of the following two events:

- the incurrence of a financial obligation of the obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material; and
- default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties.

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64. *Id.* at 15; *Sharon Steel*, 691 F.2d at 1053 (holding that an issuer’s option to redeem notes by paying a make-whole premium will not bar a plaintiff’s entitlement to make-whole premiums as a default remedy or limit a plaintiff’s default remedies to acceleration).

65. *Sharon Steel*, 691 F.2d at 1053.

66. Adam B. Cohen, *The End of Covenants: The ‘No Premium on Default’ Language Is Spreading Like Wildfire—Your Future Covenant Enforcement Is Being Destroyed*, COVENANT REV., Jan. 11, 2017.

67. SEC Release No. 34-80130.

68. 12 C.F.R. § 240.15c2-12.

The proposed definition of “financial obligation” broadly means “a (i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding” but does not include municipal securities for which a final official statement has been provided on EMMA.

Issuers or other obligated persons would be required to post an EMMA notice of the proposed events within ten business days of the actual incurrence of such financial obligation or occurrence of default.

Current Rule 15c2-12 already contains two event notices “reflecting financial difficulties”: unscheduled draws on debt service reserve funds and unscheduled draws on credit enhancements. However, the SEC noted that investors and market participants may lack access or timely access to information regarding defaults, acceleration, termination, modification of terms, or other similar events under the terms of a financial obligation.

The SEC proposes that such event notices should include a description of the event and the consequences of the event, if any.

Comments on the proposed rule amendments were due by May 15, 2017.

## J. ANNOUNCED TRANSACTIONS

### 1. Exelon Corporation and Pepco Holdings, Inc.

Exelon Corporation and Pepco Holdings, Inc. (PHI) announced on April 30, 2014, that they had entered into a definitive agreement to combine the two companies in an all-cash transaction.<sup>69</sup>

On March 23, 2016, the District of Columbia Public Service Commission (DCPSC) approved Exelon’s acquisition of PHI.<sup>70</sup> The DCPSC approval was the last remaining authorization required for the merger. The shares of PHI common stock, which traded under the symbol POM, were immediately suspended from trading on, and were delisted from, the New York Stock Exchange (NYSE).<sup>71</sup> The merger combined Exelon utilities Baltimore Gas and Electric Company, Commonwealth Edison Company, and PECO Energy Company and PHI utilities Atlantic City Electric Company, Delmarva Power & Light Company, and Potomac Electric Power Company, all under Exelon as the ultimate holding company parent.

Opponents of the completed merger, including the District of Columbia Office of the People’s Counsel, filed an appeal of the DCPSC order with the D.C.

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69. Press Release, Exelon Corporation, Exelon to Acquire Pepco Holdings, Inc., Creating the Leading Mid-Atlantic Electric and Gas Utility (Apr. 30, 2014), <http://www.pepcoholdings.com/library/templates/Interior.aspx?Pageid=87&id=644245881>.

70. Formal Case No. 1119, *In re* Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, Order No. 18148, [http://dcpsc.org/pdf\\_files/commorders/orderpdf/orderno\\_18148\\_FC1119.pdf](http://dcpsc.org/pdf_files/commorders/orderpdf/orderno_18148_FC1119.pdf).

71. Pepco Holdings, Inc., Form 8-K (Mar. 23, 2016), <http://www.sec.gov/Archives/edgar/data/8192/000119312516515384/d104799d8k.htm>.

Circuit in August 2016.<sup>72</sup> The Office of the People's Counsel is seeking to reinstate various provisions included in the merger settlement agreement that were not included in the final DCPSC order approving the merger, including \$25.6 million in credits to residential rate customers and funding for job training and workforce development.<sup>73</sup>

## 2. The Southern Company and AGL Resources Inc.

The Southern Company and AGL Resources Inc. announced on August 24, 2015, that they had entered into an agreement to combine the two companies in an all-cash transaction.<sup>74</sup>

The shareholders of AGL approved the transaction on November 19, 2015.<sup>75</sup> On December 7, 2015, Southern and AGL announced that the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) had expired.<sup>76</sup>

On June 29, 2016, Southern and AGL received unanimous regulatory approval of the proposed merger from the New Jersey Board of Public Utilities (NJBPU).<sup>77</sup> The NJBPU's decision represented the final regulatory approval needed to close the merger, which had been unanimously approved by state regulators in each of the other five required jurisdictions, California, Georgia, Illinois, Maryland, and Virginia, in the prior six months.<sup>78</sup>

At the close of the transaction on July 1, 2016, AGL became a wholly owned subsidiary of Southern. On July 1, each share of AGL common stock was canceled and converted into the right to receive \$66 in cash, for a total purchase price of approximately \$8 billion.<sup>79</sup> AGL common stock ceased trading on the NYSE immediately prior to market open on July 1.<sup>80</sup> Following the merger, AGL's name was changed to Southern Company Gas (Southern Gas).

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72. Andy Medici, *Opponents of the \$6.8B Pepco-Exelon merger will have their day in court*, WASH. BUS. J., Dec. 15, 2016.

73. *Id.*

74. AGL Resources Inc., Form 10-K for the year ended December 31, 2015, <http://www.sec.gov/Archives/edgar/data/1004155/000100415516000098/a201510-k.htm#sf6b681a15c634c63b86f315734702e58>.

75. *Id.*

76. Press Release, The Southern Company, Southern Company, AGL Resources announce expiration of Hart-Scott-Rodino waiting period (Dec. 7, 2015), <http://doingenergybetter.com/2015-12-07-article.cshhtml>.

77. Press Release, The Southern Company, Southern Company, AGL Resources receive final merger approval from New Jersey regulators (June 29, 2016), <http://www.prnewswire.com/news-releases/southern-company-agl-resources-receive-final-merger-approval-from-new-jersey-regulators-300292098.html>.

78. *Id.*

79. Press Release, The Southern Company, Southern Company and AGL Resources complete merger, create a leading U.S. energy company (July 1, 2016), <http://www.southerncompany.com/news/2016-07-01-complete-merger.cshhtml>.

80. *Id.*

### 3. Emera Inc. and TECO Energy Inc.

On September 4, 2015, Emera Inc. and TECO Energy, Inc. entered into an agreement under which Emera agreed to acquire TECO.<sup>81</sup> FERC approved the transaction in January 2016.<sup>82</sup> The waiting period under HSR<sup>83</sup> expired in February 2016 and the Committee on Foreign Investment in the United States (CFIUS) completed its review with no adverse finding in March 2016.<sup>84</sup> Finally, following a settlement with various stakeholders, the New Mexico Public Regulatory Commission approved the transaction on June 22, 2016.<sup>85</sup>

On July 1, 2016, Emera completed the acquisition of all outstanding shares of TECO for approximately \$6.5 billion.<sup>86</sup> The all-cash transaction was valued at \$10.4 billion.<sup>87</sup>

In order to finance the transaction, on June 16, 2016, Emera US Finance LP completed a private offering of \$3.25 billion of senior notes.<sup>88</sup> On the same day, Emera Incorporated completed a \$1.2 billion offering of fixed-to-floating subordinated notes.<sup>89</sup>

As a result of the acquisition, trading of TECO Energy, Inc. common stock on the NYSE was suspended. TECO Energy, Inc. shareholders received \$27.55 per share.<sup>90</sup>

### 4. Duke Energy Corporation and Piedmont Natural Gas Company, Inc.

On October 26, 2015, Duke Energy Corporation and Piedmont Natural Gas Company, Inc. entered an agreement whereby Duke agreed to acquire Piedmont for \$4.9 billion in cash.<sup>91</sup> Completion of the transaction was conditioned upon approval by the North Carolina Utilities Commission, expiration or termination of any applicable waiting period under HSR, and Piedmont shareholder approval.<sup>92</sup>

81. TECO Energy, Inc., Form 8-K (Sept. 8, 2015), <https://www.sec.gov/Archives/edgar/data/350563/000119312515314517/d71493d8k.htm>.

82. Press Release, Emera Inc., Emera Acquisition of TECO Energy Approved by FERC (Jan. 21, 2016), <http://www.businesswire.com/news/home/20160121005311/en/Emera-Acquisition-TECO-Energy-Approved-FERC>.

83. 15 U.S.C. § 18a, tit. II.

84. Press Release, Emera Inc., Emera Announces Completion of CFIUS Review for TECO Energy Acquisition (Mar. 23, 2016), <http://finance.yahoo.com/news/emera-announces-completion-cfius-review-225400276.html>.

85. TECO Energy, Inc., Form 8-K (June 22, 2016), <https://www.sec.gov/Archives/edgar/data/350563/000119312516629621/d153590d8k.htm>.

86. Press Release, Emera Inc., Emera Closes Acquisition of TECO Energy (Jan. 1, 2016), <http://investors.emera.com/file.aspx?IID=4072693&FID=34951054>.

87. Press Release, Emera Inc., Emera to Acquire TECO Energy in \$10.4 Billion Transaction (Sept. 4, 2015), <http://investors.emera.com/file.aspx?IID=4072693&FID=30965484>.

88. Emera Incorporated., Form 6-K (June 2016), <https://www.sec.gov/Archives/edgar/data/1127248/000119312516623112/d100102d6k.htm>.

89. *Id.*

90. *Id.*

91. Press Release, Duke Energy Corp., Duke Energy to Acquire Piedmont Natural Gas for \$4.9 Billion in Cash (Oct. 26, 2015), <https://www.duke-energy.com/news/releases/2015102601.asp>.

92. *Id.*



On October 3, 2016, having received all necessary shareholder and regulatory approvals, Duke completed its acquisition of Piedmont. The transaction was valued at \$6.7 billion.<sup>93</sup>

Piedmont retained its name and operates as a business unit of Duke. Both companies are headquartered in Charlotte, North Carolina. The acquisition added Piedmont's one million natural gas customers to Duke's existing customer base of 525,000 natural gas customers and 7.4 million electric customers.<sup>94</sup>

Under the terms of the agreement, Piedmont shareholders received \$60 in cash for each share of Piedmont common stock. Duke also assumed \$1.8 billion of Piedmont's existing debt.<sup>95</sup>

In March 2016, Duke issued 9.25 million shares of common stock to finance a portion of the acquisition costs.<sup>96</sup> In August 2016, Duke issued \$3.75 billion aggregate principal amount of senior notes to provide additional funding for the acquisition.<sup>97</sup>

## 5. Dominion Resources Inc. and Questar Corporation

On January 31, 2016, Dominion Resources Inc. and Questar Corporation entered into an agreement whereby Dominion agreed to acquire Questar.<sup>98</sup>

Questar is an integrated natural gas company operating through three principal subsidiaries: Questar Gas provides retail natural gas distribution in Utah, Wyoming, and Idaho; Wexpro develops and produces natural gas on behalf of Questar Gas; and Questar Pipeline operates interstate natural gas pipelines and storage facilities in the Western United States.<sup>99</sup>

The transaction was subject to the approvals of Questar's shareholders, the FTC under HSR, the Utah Public Service Commission, the Wyoming Public Service Commission (WPSC), and the Public Utilities Commission of Idaho.<sup>100</sup>

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93. Press Release, Duke Energy Corp., Duke Energy Completes Acquisition of Piedmont Natural Gas (Oct. 3, 2016), <https://news.duke-energy.com/releases/duke-energy-completes-acquisition-of-piedmont-natural-gas>.

94. *Id.*

95. Piedmont Natural Gas Co., Form 10-K (Dec. 23, 2015), <https://www.sec.gov/Archives/edgar/data/78460/000007846015000047/0000078460-15-000047-index.htm>.

96. Press Release, Duke Energy Corp., Duke Energy Announces Public Offering of Common Stock in Connection with Its Pending Acquisition of Piedmont Natural Gas (Feb. 29, 2016), <https://news.duke-energy.com/releases/duke-energy-announces-public-offering-of-common-stock-in-connection-with-its-pending-acquisition-of-piedmont-natural-gas>.

97. Duke Energy Corp., Form 424(b)(5) (Aug. 9, 2016), <https://www.sec.gov/Archives/edgar/data/1326160/000104746916014889/a2229382z424b5.htm>.

98. Dominion Resources, Inc., Form 8-K, dated February 1, 2016, <http://www.sec.gov/Archives/edgar/data/715957/000119312516446233/d131314d8k.htm>.

99. Press Release, Dominion Resources Inc., Dominion-Questar Combination Receives Wyoming Public Service Commission Approval; Companies Expect to Close on Merger September 16 (Sept. 14, 2016), <http://dom.mediaroom.com/2016-09-14-Dominion-Questar-Combination-Receives-Wyoming-Public-Service-Commission-Approval-Companies-Expect-to-Close-on-Merger-September-16>.

100. Dominion Resources, Inc., Form 8-K, dated February 1, 2016, <http://www.sec.gov/Archives/edgar/data/715957/000119312516446233/d131314d8k.htm>.

The last remaining approval, from the WPSC, was received on September 14, 2016.<sup>101</sup> On September 16, 2016, pursuant to the Agreement and Plan of Merger dated as of January 31, 2016 (Merger Agreement) by and among Dominion, Diamond Beehive Corp., a Utah corporation and wholly owned subsidiary of Dominion (Merger Sub), and Questar, Merger Sub merged with and into Questar, with Questar continuing as the surviving corporation and a wholly owned subsidiary of Dominion. Following the merger, Questar's corporate name was changed to Dominion Questar Corporation.<sup>102</sup>

Under the terms of the Merger Agreement, as of market close on September 16, 2016, each Questar share was canceled and Questar shareholders received \$25 per share of common stock, or about \$4.4 billion. Dominion also assumed approximately \$1.5 billion of Questar's outstanding debt.<sup>103</sup>

## 6. Algonquin Power & Utilities Corp. and Empire District Electric Co.

On February 9, 2016, Algonquin Power & Utilities Corp. and Empire District Electric Co. entered into a merger agreement whereby Algonquin would acquire Empire.<sup>104</sup>

The transaction was subject to approvals from Empire's shareholders; the state commissions of Arkansas, Kansas, Missouri, and Oklahoma; and various federal agencies, including the Federal Communications Commission (FCC) and FERC.<sup>105</sup>

All necessary regulatory approvals for the transaction were obtained by the end of the third quarter of 2016, except for the approval of the Kansas Corporation Commission (KCC),<sup>106</sup> which was granted on December 22, 2016.<sup>107</sup>

On January 1, 2017, Algonquin announced completion of its acquisition of Empire.<sup>108</sup> Algonquin acquired Empire through a subsidiary of Liberty Utilities Co., which is Algonquin's wholly owned regulated utility business.<sup>109</sup> As a

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101. Press Release, *supra* note 99.

102. Dominion Resources, Inc., Form 8-K, dated September 16, 2016, <https://www.sec.gov/Archives/edgar/data/715957/000119312516712317/d262114d8k.htm>.

103. Press Release, Dominion Resources Combines with Questar Corporation (Sept. 16, 2016), <https://www.dom.com/corporate/news/news-releases/137170>.

104. Algonquin Power & Utilities Corp. to Acquire the Empire District Electric Company in C\$3.4 Billion (US\$2.4 Billion) Transaction, BUS. WIRE, Feb. 9, 2016, <http://www.businesswire.com/news/home/20160209006719/en/Algonquin-Power-Utilities-Corp.-Acquire-Empire-District>.

105. *Id.*

106. The Empire District Electric Company, Form 10-Q for the quarterly period ended September 30, 2016, [https://www.sec.gov/Archives/edgar/data/32689/000110465916154988/a16-17203\\_110q.htm](https://www.sec.gov/Archives/edgar/data/32689/000110465916154988/a16-17203_110q.htm).

107. Press Release, Algonquin Power & Utilities Corp. and The Empire District Electric Company Announce Kansas Corporation Commission Authorization of Merger Transaction (Dec. 22, 2016), <http://www.prnewswire.com/news-releases/algonquin-power-utilities-corp-and-the-empire-district-electric-company-announce-kansas-corporation-commission-authorization-of-merger-transaction-607938646.html>.

108. Press Release, Algonquin Power & Utilities Corp. Completes Acquisition of The Empire District Electric Company (Jan. 1, 2017), <http://www.prnewswire.com/news-releases/algonquin-power-utilities-corp-completes-acquisition-of-the-empire-district-electric-company-609135805.html>.

109. *Id.*

result of the closing, Empire is now a wholly owned subsidiary of Liberty Utilities and is no longer a publicly held corporation.<sup>110</sup>

Empire's shareholders received \$34 per common share, and Algonquin assumed \$800 million in debt, which represents an aggregate purchase price of approximately \$2.3 billion.<sup>111</sup> Empire's common stock was delisted from the NYSE as a result of the closing.<sup>112</sup>

## 7. Fortis Inc. and ITC Holdings Corp.

On February 9, 2016, Fortis Inc. and ITC Holdings Corp. entered into an agreement and plan of merger whereby Fortis agreed to acquire ITC.<sup>113</sup> The acquisition was valued at approximately \$11.3 billion, including \$6.9 billion in Fortis common shares and cash and the assumption of approximately \$4.4 billion of ITC's debt.<sup>114</sup>

The acquisition required approvals from Fortis's and ITC's shareholders; FERC; the FTC or the DOJ under HSR; the FCC; the CFIUS; and regulatory commissions of Illinois, Missouri, Kansas, Oklahoma and Wisconsin.<sup>115</sup> All required approvals were received by October 11, 2016.<sup>116</sup>

The transaction closed and common shares of Fortis began trading on the NYSE on October 14, 2016. Fortis common shares continue trading on the Toronto Stock Exchange. As a result of the closing, ITC's common stock was delisted from the NYSE. ITC shareholders received \$22.57 in cash and 0.7520 Fortis common shares per share of ITC common stock.<sup>117</sup>

## 8. Great Plains Energy Incorporated and Westar Energy, Inc.

On May 29, 2016, Great Plains Energy Incorporated and Westar Energy, Inc. entered an agreement whereby Great Plains agreed to acquire Westar in a combined cash and stock transaction valued at \$12.2 billion, including \$8.6 billion in total stock and cash consideration to be received by Westar's shareholders and the assumption of \$3.6 billion in Westar's debt.<sup>118</sup>

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110. *Id.*

111. *Id.*

112. *Id.*

113. ITC Holdings Corp., Form 8-K, dated February 9, 2016, [http://www.sec.gov/Archives/edgar/data/1317630/000110465916094831/a16-3847\\_18k.htm](http://www.sec.gov/Archives/edgar/data/1317630/000110465916094831/a16-3847_18k.htm).

114. Press Release, ITC, Fortis Inc. to Acquire ITC Holdings Corp. for US\$11.3 Billion (Feb. 9, 2016), [http://www.itc-holdings.com/itc/newsroom/2016/02/09/fortis-inc.-to-acquire-itc-holdings-corp.-for-us\\$11.3-billion](http://www.itc-holdings.com/itc/newsroom/2016/02/09/fortis-inc.-to-acquire-itc-holdings-corp.-for-us$11.3-billion).

115. Press Release, Kansas Corporation Commission Approves Fortis Inc. Acquisition of ITC Holdings Corp. (Oct. 11, 2016), <http://www.prnewswire.com/news-releases/kansas-corporation-commission-approves-fortis-inc-acquisition-of-itc-holdings-corp-300342986.html>.

116. *Id.*

117. Press Release, ITC, Fortis Inc. and GIC Private Limited Complete Acquisition of ITC Holdings Corp. (Oct. 14, 2016), <http://www.itc-holdings.com/itc/newsroom/2016/10/14/fortis-inc.-and-gic-private-limited-complete-acquisition-of-itc-holdings-corp>.

118. Press Release, Westar Energy, Inc., Great Plains Energy to Acquire Westar Energy, Creating Long-Term Value for Shareholders and Cost Savings for Customers (May 31, 2016), <https://www>.

In October 2016, the FTC granted Great Plains' request for early termination of the HSR waiting period, and the DOJ also notified Great Plains Energy that it had closed its investigation of the antitrust aspects of the anticipated acquisition. In January 2017, the FCC consented to the Transfer of Control application relating to the anticipated acquisition.<sup>119</sup>

The transaction remains subject to the approval of FERC; the U.S. Nuclear Regulatory Commission; the KCC; and the notification, clearance and reporting requirements under HSR by the FTC and the DOJ. In addition, on February 22, 2017, the Missouri Public Service Commission (MPSC) issued an order directing Great Plains to file an application with the MPSC for approval of the anticipated acquisition of Westar.<sup>120</sup>

In December 2016, the KCC staff recommended that the KCC not approve the acquisition, citing concerns regarding the size of the acquisition premium, the amount of anticipated cost synergies, and potential impacts to service provided to Kansas customers. Great Plains and Westar responded to the KCC in January 2017 and an evidentiary hearing was held from January 30, 2017, through February 7, 2017, with a final order expected from the KCC by April 24, 2017.<sup>121</sup>

With respect to the MPSC proceedings, Westar and Great Plains had previously reached separate stipulations and agreements with the MPSC staff and the Office of the Public Counsel (OPC), pursuant to which the MPSC staff and the OPC agreed not to file complaints alleging that MPSC approval was necessary for the proposed acquisition.<sup>122</sup> Pursuant to the February 22, 2017, MPSC order, Great Plains filed an application with the MPSC on February 24, 2017.<sup>123</sup> The MPSC has indicated that it intends to work toward a ruling on a timeline consistent with the KCC approval timeline indicated above.<sup>124</sup>

## 9. The Southern Company and Southern Natural Gas Company, L.L.C.

On July 10, 2016, Southern and Kinder Morgan, Inc. announced a natural gas pipeline venture through Southern's acquisition of a 50 percent equity interest in Southern Natural Gas Company, L.L.C. (SNG).

SNG owns a 7,600-mile pipeline system connecting natural gas supply basins in Texas, Louisiana, Mississippi, Alabama, and the Gulf of Mexico to markets in

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[westarenergy.com/content/about-us/news/2016-news-releases/great-plains-energy-to-acquire-westar-energy](http://westarenergy.com/content/about-us/news/2016-news-releases/great-plains-energy-to-acquire-westar-energy).

119. *Id.*

120. Westar Energy, Inc., Form 10-K for the year ended December 31, 2016, <https://www.sec.gov/Archives/edgar/data/54476/000114306817000011/gxp-12312016x10k.htm>.

121. *Id.*

122. *Id.*

123. Missouri Public Service Commission, Great Plains Energy Incorporated Application for Approval of Transaction; Motion to Consolidate Proceedings and Schedule Procedural Conference; and Motion for Expedited Treatment, File No. EM-2017-0113 (Feb. 23, 2017), <https://www.efis.psc.mo.gov/mpsc/DocketSheet.html>.

124. Westar Energy, Inc., Form 10-K for the year ended December 31, 2016, <https://www.sec.gov/Archives/edgar/data/54476/000114306817000011/gxp-12312016x10k.htm>.

Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, and Tennessee.<sup>125</sup> Kinder Morgan will continue to operate the system.<sup>126</sup>

The transaction was subject to the notification and clearance and reporting requirements under HSR.<sup>127</sup>

On August 31, 2016, Southern assigned its rights and obligations to purchase SNG to a subsidiary of Southern Company Gas (Southern Gas).<sup>128</sup> On September 1, 2016, Southern, through Southern Gas, completed the acquisition.<sup>129</sup> On September 13, 2016, Southern Company Gas Capital Corporation, the finance subsidiary of Southern Gas, closed on two series of senior notes with an aggregate principal amount of \$900 million. A portion of the net proceeds of the senior notes was used to repay funds that Southern lent to Southern Gas in order to complete the acquisition.<sup>130</sup>

## 10. NextEra Energy, Inc. and Oncor Electric Delivery Company LLC

The federal bankruptcy court judge overseeing Energy Future Holding Corp.'s (EFH) bankruptcy case approved EFH's plan of reorganization.<sup>131</sup> In approving the plan, the court approved sale of EFH's ownership in Oncor Electric Delivery Company LLC to NextEra Energy, Inc.<sup>132</sup> The transaction is valued at \$18.7 billion. Prior to being approved by the bankruptcy court judge, the transaction was approved by FERC.<sup>133</sup>

In addition to approval of the transaction at FERC and by the bankruptcy court, the transaction still must be approved by the Public Utility Commission of Texas (PUCT). Numerous stakeholders submitted their views on the acquisition. NRG Energy, Inc., which owns no transmission but does own 10,586 MW of generation in the Electric Reliability Council of Texas market, submitted to the PUCT a statement of position on the proposed acquisition.<sup>134</sup> Among the issues raised, NRG argued that the PUCT should (1) prohibit the interconnection

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125. Press Release, Kinder Morgan, Inc., Southern Company, Kinder Morgan Enter Southern Natural Gas Pipeline Strategic Venture (July 10, 2016), <http://ir.kindermorgan.com/press-release/kindermorgan/southern-company-kinder-morgan-enter-southern-natural-gas-pipeline-strate>.

126. *Id.*

127. *Id.*

128. Southern Company Gas, Form 8-K (Aug. 31, 2016), <https://www.sec.gov/Archives/edgar/data/1004155/000100415516000204/sogas8-kassignofsonat.htm>.

129. The Southern Company, Form 8-K (Sept. 1, 2016), <https://www.sec.gov/Archives/edgar/data/92122/000009212216000190/so8-ksonatclose9x16.htm>.

130. Southern Company Gas, Form 8-K (Sept. 8, 2016), <https://www.sec.gov/Archives/edgar/data/1004155/000100415516000218/sogas7yr30yr2016sr8k.htm>.

131. Darren Sweeney, *Energy Future gets long-awaited court approval for bankruptcy plan*, SNL FIN., Feb. 17, 2017, <https://www.snl.com/web/client?auth=inherit#news/articleAbstract?id=39520352&KPLT=8>.

132. George Lobsenz, *Court approves NextEra purchase of Oncor; Texas PUC staff balks*, IHS ENERGY DAILY, Feb. 22, 2017.

133. Marcy Crane, *FERC easily approves NextEra-Oncor merger*, SNL FIN., Jan. 5, 2017, <https://www.snl.com/InteractiveX/article.aspx?id=38935704&Printable=1>.

134. See Docket No. 46238, Joint Report and Application of Oncor Electric Delivery Company LLC, and NextEra Energy, Inc., for Regulatory Approvals Pursuant to PURA §§ 14.101, 39.262, and 39.915.

of any NextEra generation to the Oncor transmission system and (2) ensure that the transmission and distribution rates customers pay are based upon the effective consolidated corporate tax rate of NextEra.<sup>135</sup>

In testimony filed on February 13, 2017, the PUCT staff raised concerns about the structure of the deal. The staff focused on the amount of debt that would remain on Oncor's books as well as NextEra's request to remove the ring-fencing measures that the PUCT put in place when EFH acquired Oncor in 2007.<sup>136</sup> As a result of these concerns, the staff concluded in its testimony that the transaction, as currently structured, would not be in the public interest.

On the first day of hearings held by the PUCT to review the sale, the PUCT commissioners also expressed skepticism about the transaction. Like the staff, the commissioners raised concerns about removing the ring-fencing and noted that it had protected Oncor through the EFH bankruptcy.<sup>137</sup> The PUCT further questioned whether it would be in customers' interest for Oncor to be run by an out-of-state company. In response to concerns raised by the PUCT commissioners as well as several intervenors, NextEra's Chairman and CEO, James Robo, addressed the PUCT to emphasize that NextEra was committed to Oncor and maintaining Oncor's strong credit ratings as well as to its Texas customers. He also emphasized NextEra's support for renewables.<sup>138</sup> NextEra argued that it had demonstrated through its ownership and operations of other utilities that the ring-fencing measures would no longer be necessary.

In considering whether to approve the transaction, the PUCT must determine that the sale is in the public interest, and will not adversely affect the health and safety of customers or employees or result in the transfer of jobs outside the state or a decline in service.<sup>139</sup>

On March 30, 2017, the PUCT directed the staff to draft an order finding that the proposed acquisition of Oncor by NextEra, as currently constituted, is not in the public interest.<sup>140</sup> The three members of the PUCT said they could not accept the conditions placed on the transaction by NextEra and indicated they would formally reject the merger at their April 13, 2017, meeting unless NextEra made further concessions. In particular, the PUCT expressed concern about NextEra's request to remove financial ring-fencing measures that were put in place by the PUCT to protect Oncor when it was bought in a heavily leveraged acquisition by EFH in 2007.

The deadline for a PUCT decision was April 28, 2017.

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135. *NRG takes aim at NextEra's plans for Oncor*, MEGAWATT DAILY, Jan. 13, 2007.

136. Lobsenz, *supra* note 132.

137. Tom Kleckner, *NextEra still faces skepticism over Oncor Acquisition*, RTO INSIDER, Feb. 22, 2017, <https://www.rtoinsider.com/puct-nextera-oncor-acquisition-39232/>.

138. Lillian Federico, *NextEra's Robo defends Oncor acquisition before Texas PUC*, SNL FIN., Feb. 24, 2017, <https://www.snl.com/web/client?auth=inherit#news/article?id=39606773&KeyProductLinkType=4&cid=A-39606773-10541>.

139. *Id.*

140. Lillian Federico, *Texas PUC signals rejection of NextEra acquisition of Oncor*, ENERGY FIN. DAILY, Mar. 31, 2017.

## 11. AltaGas Ltd. and WGL Holdings, Inc.

On January 25, 2017, AltaGas Ltd. and WGL Holdings, Inc. announced a definitive agreement and plan of merger whereby AltaGas agreed to acquire WGL in an all-cash transaction valued at approximately C\$8.4 billion (US\$6.4 billion), including C\$2.4 billion of debt.<sup>141</sup> The transaction is expected to close in the second quarter of 2018.<sup>142</sup>

AltaGas is a North American diversified energy infrastructure company with a focus on natural gas, power, and regulated utilities.<sup>143</sup> WGL is a diversified energy infrastructure company which is the sole shareholder of Washington Gas Light Company, a regulated natural gas utility headquartered in Washington D.C., and owns midstream assets in the Marcellus/Utica shale areas. WGL also owns non-regulated contracted power and energy marketing businesses throughout the United States. WGL will maintain its utility headquarters in Washington, D.C., and continue to manage its regulated utility business, while also assisting in the management of AltaGas's U.S. regulated utility business. AltaGas also intends to relocate the headquarters of its U.S. power business to WGL's service region.<sup>144</sup>

Under the terms of the transaction, WGL shareholders will receive \$88.25 in cash per WGL share, which represents a premium of 27.9 percent to WGL's closing share price on November 28, 2016.<sup>145</sup>

The transaction is subject to certain closing conditions, including WGL common shareholder approval, expiration or termination of any applicable waiting period under HSR, and certain regulatory and government approvals, including by the public utility commissions of Maryland, Virginia, and Washington D.C.; FERC; and the CFIUS.<sup>146</sup>

AltaGas has secured various sources of acquisition financing, including a fully committed \$4.95 billion bridge financing facility.<sup>147</sup> On February 3, 2017, AltaGas completed a public offering of 67,800,000 subscription receipts, at an issue price of \$31 per subscription, for total gross proceeds of approximately \$2.1 billion. Additionally, AltaGas has completed a private placement to OMERS, the pension plan for Ontario's municipal employees, of 12,910,000 subscription

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141. Press Release, AltaGas Ltd., AltaGas Ltd. to Acquire WGL Holdings, Inc. in C\$84 Billion Transaction (Jan. 25, 2017), <http://altagas.mwnewsroom.com/press-releases/altagas-ltd-to-acquire-wgl-holdings-inc-in-c8-4-billion-transaction-tsx-ala-201701251083922001>.

142. WGL Holdings, Inc., Form 8-K, filed on January 25, 2017, <https://www.sec.gov/Archives/edgar/data/104819/000119312517018218/d316578dex991.htm>.

143. *Id.*

144. *Id.*

145. *Id.*

146. Press Release, AltaGas Ltd., AltaGas Ltd. Announces Closing of \$2.5 Billion Subscription Receipt Offering Comprised of \$2.1 Billion Bought Deal and \$400 Million Private Placement (Feb. 3, 2017), <http://altagas.mwnewsroom.com/press-releases/altagas-ltd-announces-closing-of-2-5-billion-subscription-receipt-offering-comp-tsx-ala-201702031084794001>.

147. Press Release, AltaGas Ltd., AltaGas Ltd. to Acquire WGL Holdings, Inc. in C\$84 Billion Transaction (Jan. 25, 2017), <http://altagas.mwnewsroom.com/press-releases/altagas-ltd-to-acquire-wgl-holdings-inc-in-c8-4-billion-transaction-tsx-ala-201701251083922001>.

receipts at the offering price for aggregate gross proceeds of approximately \$400 million.<sup>148</sup> Furthermore, AltaGas will also finance the transaction with subsequent offerings of senior debt, preferred shares and hybrid securities, as well as selected AltaGas asset sales.

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148. Press Release, *supra* note 147.