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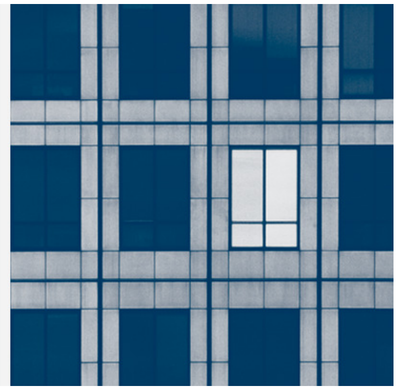
On the Subject



Energy & Commodities Advisory

January 29, 2010

FERC's proposed rules would grant additional blanket authorizations under section 203 of the Federal Power Act for holding company acquisitions, and clarify affiliation requirements under section 205 of the Federal Power Act.

FERC Seeks to Provide Additional Certainty for Investment in Utility Assets

On January 21, 2010, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) that would grant blanket authorization for certain acquisitions of public utilities by holding companies and provide waiver of certain regulatory requirements associated with becoming affiliated with a public utility through these types of acquisitions.

FERC's regulations generally require prior approval for certain dispositions and acquisitions of the voting securities of public utilities by holding companies. FERC's approval process is designed to prevent the creation of market power issues while eliminating unnecessary regulatory barriers to the investment in generation and transmission infrastructure. To date, FERC has codified several blanket authorizations where it has determined that transactions that fall within certain parameters would be consistent with the public interest. FERC's NOPR, in part, seeks to expand these blanket authorizations.

Proposed Blanket Authorization and Waivers

FERC's proposed rule would grant blanket authorization under section 203 of the Federal Power Act (FPA) for a holding company to acquire 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or holding company. As a condition, the acquiring holding company would be required to file a statement certifying that such securities were not acquired and are not held for the purpose or with the effect of changing or influencing the control of the underlying public utility. This certification will become a new FERC Form—"Affirmation in Support of Exemption from Affiliation Requirements."

The Affirmation would create a rebuttable presumption that the investor does not control the public utility by acquiring between 10 and 20 percent of the public utility's outstanding voting securities. As proposed, the Affirmation will specify, among other things, the number of voting securities acquired by the investor and the total number of outstanding securities (updated quarterly). The Affirmation would also specify any public utility affiliates of the investor. By executing the Affirmation, the investor also commits not to seek or accept board representation; receive non-public information concerning the business or affairs of the public utility; solicit or participate in any solicitation of proxies involving the public utility; influence the management or conduct of the day-to-day FERC-jurisdictional operations of the public utility; or influence the hiring or compensation of the public utility's officers, directors and employees. Affirmations must be filed within 10 days of the acquisition.

Affiliate Regulation Waiver

FERC also proposes to amend its regulations to define an "affiliate" of a specified company as any person that controls, is controlled by, or is under common control with a specified company. Under the proposed amendments, owning, controlling or holding between 10 and 20 percent of a public utility's outstanding voting securities would still create an affiliate relationship between the public utility and the investor, but waiver of FERC's regulations applicable to affiliated entities will be provided as long as an Affirmation is filed by the investor. As a consequence, a public utility would not need to file a "change in status notice" with FERC or include the investor or the investor's other affiliates in its required market power analysis. The public utility also would not be subject to FERC's affiliate transaction rules for transactions with the investor or the investor's other affiliates. Granting such waivers will provide certainty for public utilities that are concerned with the potential regulatory implications resulting from affiliation with investors of between 10 and 20 percent.

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Public Comment

FERC invited comments on its NOPR to be filed on or before March 29, 2010. In addition to comments on the NOPR generally, FERC invites comments on the following items:

- Whether the proposed blanket authorization should apply to the voting securities of both publicly traded and privately held companies
- Whether the blanket should be limited to "secondary market" transactions or should apply regardless of the form of the transaction
- Whether the Affirmation should be provided to the public utility simultaneously with being filed at FERC
- Whether an investor not subject to the blanket authorization (i.e., entities that are not holding companies) may file an Affirmation to protect the market-based authorization of the public utility
- What procedures should be in place if an investor no longer can, or wishes not to, comply with the commitments made in the Affirmation

For more information, please contact your regular McDermott lawyer, or:

Terence Healey: +1 617 535 4064 thealey@mwe.com

Kenneth W. Irvin: +1 202 756 8087 kirvin@mwe.com

For more information about McDermott Will & Emery visit: www.mwe.com