

FERC Proposes New Blanket Authorizations and Waivers for Non-Controlling Investors, Subject to Conditions and Reporting Requirements

On January 21, 2010 the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) to propose new blanket authorizations and waivers for non-controlling investors acquiring less than 20 percent of the outstanding voting securities of certain energy companies and holding companies. Blanket authorizations and waivers would be available to such investors if they file the new FERC Form No. 519-C to certify that the acquisition does not have the purpose or the effect of changing or influencing the control of the issuer. By filing FERC Form No. 519-C, investors commit to specific ongoing conditions and reporting requirements. Comments on the proposed rule are due on *March 29, 2010*.

BACKGROUND

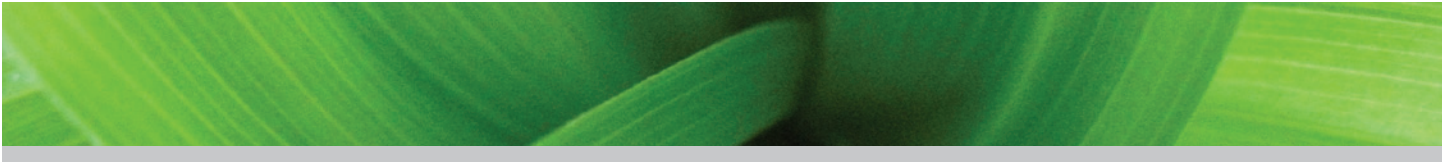
The disposition and acquisition of 10 percent or more of the voting securities of entities that own or operate electric facilities or are engaged in the sale at wholesale or transmission of electricity (public utilities) may require FERC prior authorization under section 203 of the Federal Power Act (FPA). Moreover, public utilities in which an investor owns a voting interest of 10 percent or more are treated as affiliates for purposes of the market-based rate (MBR) requirements under section 205 of the FPA. For sellers of electricity under an MBR tariff, a new affiliation may trigger change in status reporting requirements, affect a seller's MBR authority, and result in the applicability of FERC's rules governing affiliate restrictions and cross-subsidization. Affiliation may also result in the applicability of FERC's standards of conduct.

On September 2, 2008, the Electric Power Supply Association (EPSA) filed at FERC a petition for declaratory order seeking guidance on investments in less than 20 percent of the voting securities of publicly-held companies for which investors make Schedule 13G filings with the Securities and Exchange Commission (SEC) certifying that the investment is not for the purpose of controlling the issuer. EPSA requested a determination that such investments do not trigger FPA section 203 prior approval requirements and do not result in affiliation for purposes of the MBR requirements. The NOPR proposes revised regulations to address those issues.

THE PROPOSAL

The NOPR proposes the adoption of a new FERC Form 519-C, Affirmation in Support of Exemption from Affiliation Requirements. Investors would file FERC Form No. 519-C within 10 days of the acquisition of 10 percent or more, but less than 20 percent, of the outstanding voting securities of a public utility or a holding company. The NOPR does not link the applicability of the new form to the Schedule 13G filings with the SEC.

Transactions for which FERC Form No. 519-C is filed would benefit from blanket authorizations under section 203 of the FPA. The companies in which a common investor owns 10 percent or more of the voting securities



would still be affiliates under FERC's rules, but the filing of FERC Form No. 519-C would result in an exemption from the MBR requirements applicable to affiliates. The NOPR does not discuss whether a FERC Form No. 519-C filing would affect the applicability of FERC's standards of conduct.

The NOPR seeks comments on whether FERC Form 519-C should apply only to the acquisition of publicly-traded securities or also to acquisitions of voting securities of privately-held companies. The NOPR also seeks comments on whether FERC Form 519-C should apply only to secondary market transactions or also to acquisitions from the issuer.

FERC FORM NO. 519-C CONDITIONS AND REPORTING REQUIREMENTS

FERC Form No. 519-C requires an investor to identify any existing public utility affiliates (including the percentage of outstanding voting securities owned or controlled in any such affiliates) and to describe any inputs to electric power production owned or controlled by the investor or its affiliates.

In addition, FERC Form No. 519-C requires a senior executive officer of the investor to verify under oath that the investor did not acquire and does not hold the securities for the purpose of or with the effect of changing or influencing the control of the issuer, and that the investor, or any of its employees, officers, or investors:

- shall not request or receive, directly or indirectly, non-public information concerning the business of the issuer;
- shall not have representation on the issuer's board of directors;
- shall not solicit proxies regarding the issuer or its subsidiaries;
- shall not serve as an officer, agent, or employee of the issuer; and
- shall not seek to influence the management or conduct of the issuer's day-to-day operations.

Within 45 days of the end of each calendar quarter, the investor must file an amendment to FERC Form No. 519-C to update the information on its ownership of outstanding voting securities of the issuer as of the end of the quarter. An investor that no longer wishes to be bound by these commitments would either reduce its ownership interest to less than 10 percent of the issuer's voting securities or file with FERC an application under section 203 seeking authorization to retain the securities (with corresponding filing requirements under section 205).

FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly advises energy companies, investors, and financial institutions on issues arising under section 203 of the FPA and FERC's MBR requirements. For further information, please contact Peg Moore, Jessica Friedman, Vincenzo Franco, or any member of the firm's Electricity practice at (202) 298-1800.

© 2010 Van Ness Feldman, P.C.
All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.