

FERC Clarifies Its Rules on Holding Companies and Review of Mergers, Acquisitions, and Asset Dispositions

April 27, 2006

On April 24, 2006, the Federal Energy Regulatory Commission (FERC) issued an order on rehearing of the final rule implementing repeal of the Public Utility Holding Company Act of 1935 (PUHCA 1935) and enactment of the Public Utility Holding Company Act of 2005 (PUHCA 2005). On the same day, FERC issued an order on rehearing of the final rule implementing the 2005 amendments to FERC's authority to review public utility mergers, acquisitions, and asset dispositions, and holding company mergers and acquisitions under § 203 of the Federal Power Act (FPA).

Implementation of PUHCA 2005

EWGs, FUCOs, and QFs: In the rehearing order on the rules implementing PUHCA 2005 (Order No. 667-A), FERC clarified that entities that own only exempt wholesale generators (EWGs), foreign utility companies (FUCOs), or qualifying facilities (QFs) are "holding companies," but are automatically exempt from FERC's regulations implementing PUHCA 2005. These holding companies are not required to make any filings to secure the exemption, provided their subsidiaries have attained EWG, QF, or FUCO status. FERC also clarified that entities that own only power or gas marketers do not qualify as "holding companies."

Single-State Holding Company Systems: New regulatory text provides that a holding company system can request a waiver of the accounting, record retention, and filing requirements set forth in FERC's PUHCA regulations, if it can demonstrate that no more than 13% of the system's "public-utility company revenues" are derived from outside a single state. Such revenues include revenues from the generation, transmission, or distribution of electricity for sale or the distribution of natural gas at retail.

Material Changes in Facts: Material changes in the facts affecting exemptions or waivers of FERC's PUHCA regulations or the status of a company as an EWG or a FUCO must be reported within 30 days. Any entity that ceases to qualify for an exemption, a waiver, or the status of EWG or FUCO may no longer rely upon the waiver, exemption, or status of EWG or FUCO. Moreover, FERC may, on its motion or in response to a complaint, revoke an exemption, waiver, or status as an EWG or a FUCO.

Mergers, Acquisitions, and Asset Dispositions

Blanket Authorizations: In the rehearing order on rules implementing the amended § 203 of the FPA (Order No. 669-A), FERC expanded and clarified the blanket authorizations adopted in Order No. 669. In particular, FERC granted to public utilities new blanket authorizations under FPA § 203(a)(1) for:

- Internal corporate reorganizations that do not affect traditional utilities with captive customers or transmission customers;

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- Purchases of public utility securities in connection with an intra-system cash management program; and
- The transfer of wholesale market-based rate contracts to a public utility affiliate under the same ultimate upstream ownership, if there are no traditional utility affiliates with captive customers.

In addition, FERC granted to holding companies blanket authorizations under FPA § 203(a)(2) for the acquisition of:

- Securities of companies that own generators of 100 MW or less fundamentally used for their own load or for sales to affiliated end-users;
- Securities of EWGs, FUCOs, or QFs, if the holding company only owns EWGs, FUCOs, and QFs;
- Securities held in the normal course of business as a fiduciary, as collateral for a loan, or for purposes of liquidation of a loan, if the purchasing holding company is subject to regulation as a bank; and
- Securities held for conducting underwriting and hedging activities, subject to certain conditions.

Cross-subsidization: Applicants will no longer be allowed to include verifications stating that a proposed transaction will not result in cross-subsidization or pledge or encumbrance of utility assets. Instead, FERC now requires applicants to disclose any existing pledges or encumbrances of utility assets and to provide a detailed showing of why the proposed transaction will not result in inappropriate cross-subsidization by utility customers of non-utility associate companies or inappropriate pledges or encumbrances for the benefit of such companies.

Processing of FPA § 203 Applications: FERC clearly stated that FPA § 203 applications typically require a minimum notice period of 21 days. Therefore, FERC admonished that applicants requesting a notice period of less than 21 days or FERC action within a specified time must clearly identify a significant harm to the public interest (as opposed to private commercial interest) that justifies such expedited treatment.

For Additional Information

Van Ness Feldman advises energy companies and financial institutions on issues arising under PUHCA, the FPA, and the NGA. For further information about the implementation of PUHCA 2005 or FERC's review of mergers, acquisitions, and asset dispositions under FPA § 203, please contact Peg Moore, Vincenzo Franco, or any member of the firm's Electricity practice at (202) 298-1800.

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