

# Energy

## E-ALERT

December 2, 2008

### FERC Clarifies Regulations and Reporting Requirements for Holding Companies, Announces New Pipeline Posting Requirements, Opens Inquiry into Non-Interstate Pipeline Posting Requirements, and Denies Rehearing of Order Lifting Maximum Rate Ceiling for Short-Term Pipeline Capacity Releases

At its November 20, 2008 meeting, FERC clarified its jurisdiction under section 203 of the Federal Power Act ("FPA") with respect to investment advisers and its material changes in facts filing requirement for public utility holding companies. In addition, the Commission finalized new posting requirements for interstate and major non-interstate pipelines, opened a notice of inquiry into non-interstate pipeline posting requirements, and denied rehearing on, but clarified, its order lifting the maximum rate ceiling for short term pipeline capacity releases.

#### **JURISDICTION UNDER FPA SECTION 203(A)(2) (DOCKET NOS. EC08-91-000 AND EC08-91-001)**

In a matter of first impression, the Commission clarified its jurisdiction under the "purchase, acquire, or take any security" clause of section 203(a)(2) of the FPA with respect to certain investment adviser activities. At issue was whether Horizon Asset Management, Inc. ("Horizon"), an investment adviser, qualified as a holding company that "purchases, acquires, or takes" securities for the purposes of section 203(a)(2).

Although Horizon is not a security account holder, security account holders delegate the power to vote securities to Horizon and Horizon generally defers to another entity to vote the securities. Because Horizon acquired voting rights which brought it within the definition of a holding company, and because these rights could result in the exercise of control over a public utility company, the Commission held that that 203(a)(2) required FERC approval of Horizon's securities transactions. The Commission found that Horizon's choice to defer to another entity on how to vote the securities did not alter the fact that Horizon reserved the right to override the entity's recommendations and the fact that there was not evidence that the delegation was irrevocable.

FERC did, however, conditionally grant Horizon's request for a blanket authorization to acquire voting securities of less than 10 percent for any individual investor account and less than 20 percent cumulatively for Horizon and any of its affiliates in public utility companies or public utility holding companies for a period of three years.

Because investment companies and advisers may not have been previously aware of the scope of the Commission's jurisdiction under section 203(a)(2), FERC did not impose any sanctions on Horizon for failing to obtain prior FERC approval. However, the Commission put Horizon and all similar companies that

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acquire or hold securities on behalf of account holders on notice that proper approval is required. FERC will allow them 90 days from the date of publication of its order in the Federal Register to make appropriate 203(a)(2) filings requesting authorization. The failure to do so may result in civil penalties or other sanctions.

**MATERIAL CHANGES IN FACTS FILING REQUIREMENT - PUHCA 2005 (DOCKET NO. PL09-2-000)**

FERC approved an order clarifying that holding companies that have obtained exemptions or waivers from certain accounting, reporting and recordkeeping requirements by filing FERC-65A or FERC-65B notifications, or by obtaining a declaratory order granting a waiver or exemption, must notify the Commission when they obtain the power to vote 10 percent or more of the voting securities of an additional public utility company or holding company of any public utility company. Notification is required whether or not a change has occurred with respect to the basis for the original exemption or waiver.

Because not all holding companies may have interpreted FERC's regulations to require this filing and because FERC had not previously clarified the requirement, the Commission will allow such holding companies 45 days from the date of publication of the order in the Federal Register to make any appropriate filings.

**NEW POSTING REQUIREMENTS UNDER NGA SECTION 23 AND NOTICE OF INQUIRY INTO CERTAIN NON-INTERSTATE PIPELINE POSTING REQUIREMENTS (DOCKET NOS. RM08-2-000 AND RM09-2-000)**

FERC issued a final rule, Order No. 720, establishing new posting requirements under Section 23 of the Natural Gas Act ("NGA") to promote market transparency. Under the rule, interstate pipelines must post information regarding no-notice service and major non-interstate pipelines must post daily operational information, including design capacity at receipt and delivery points that have a design capacity equal to or greater than 15,000 MMBtus/day and scheduled volumes at these points.

Major non-interstate pipelines are defined as those that are not classified as natural gas companies under the NGA and deliver on average more than 50 million MMBtus of gas annually over a three-year period. However, pipelines that are located entirely upstream of a processing or treatment plant, or deliver more than 95 percent of their gas directly to retail end-users according to average deliveries over the previous three years, or are storage providers are exempt from the rule.

The Commission also opened a notice of inquiry into whether differences in posting requirements for interstate and certain non-interstate pipelines have an adverse competitive effect on interstate pipeline competition and, if so, whether it should modify posting requirements with respect to the details of transactions with individual shippers for section 311 intrastate and Hinshaw pipelines in a manner comparable to those that govern interstate pipelines under section 284.13(b) of the Commission's regulations.

**CLARIFICATION REGARDING SHORT-TERM PIPELINE CAPACITY RELEASES (DOCKET NO. RM08-1-001)**

FERC denied rehearing, but clarified certain provisions of Order No. 712, which lifted the maximum rate ceiling on secondary capacity releases of one year or less and exempted releases that are part of asset management arrangements ("AMAs") from the Commission's tying prohibition. FERC clarified that AMAs and retail unbundling releases are exempt from regulations barring extensions and roll-overs of short-term releases and

that the delivery purchase obligation under an AMA is five months for annual periods and five to twelve months for non-annual periods.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our :

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