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FERC Grants New “Blanket Authorizations” for Dispositions of Securities and Contracts

The Federal Energy Regulatory Commission (“FERC”) recently issued a new rule—Order No. 708—that adopts new “blanket authorizations” for certain dispositions of public utility securities and contracts under Section 203 of the Federal Power Act (“FPA”). The new blanket authorizations will make it easier for entities to engage in sales and purchases of securities for investment purposes. FERC issued Order No. 708 in conjunction with a related rule—Order No. 707—that broadens the scope of regulations governing transactions between traditional utilities with captive customers and their affiliates.¹ In conjunction with this Client Alert, we are also circulating an alert on Order No. 707.

The FPA gives FERC broad jurisdiction over dispositions and acquisitions of interests in the utility sector, including interests in non-traditional utilities such as “Exempt Wholesale Generators” (“EWGs”) and Qualifying Facilities (“QFs”). FERC had previously granted a series of “blanket authorizations” for public utility holding companies to make acquisitions without having to file for FERC approval, including:

- An authorization for a holding company to acquire up to 9.9 percent of the outstanding voting securities of a transmitting utility, electric utility company (including EWGs and QFs), or holding company of a transmitting utility or electric utility company.
- An authorization for a holding company regulated under the Bank Holding

Company Act of 1956 to acquire securities of a transmitting utility, electric utility company, or holding company of a transmitting utility or electric utility company if the securities are acquired (a) as a fiduciary; (b) for derivatives hedging purposes; (c) as collateral for a loan; or (d) for purposes of liquidation in connection with a loan (“Section 33.1(c)(9) Authorization”).

- An authorization for a holding company to acquire securities of a transmitting utility, electric utility company, or holding company of a transmitting utility or electric utility company for purposes of engaging in underwriting or hedging transactions (“Section 33.1(c)(10) Authorization”).

These blanket authorizations contained a gap—they covered holding company acquisitions of certain securities without also covering the disposition of those securities. In many cases, this rendered the blanket authorizations meaningless because Section 203 filings were still required for any transaction that involved pre-authorized acquisitions but not a pre-authorized disposition. In a policy statement issued last summer, the Commission held that a disposition of less than 10 percent of a public utility’s outstanding voting securities would be presumed not to require Commission approval, but did not create a definitive safe harbor.

Order No. 708 addresses this issue by granting blanket authorizations for dispositions of utility securities that complement the blanket authorizations already adopted for holding company acquisitions. The key

¹ FERC also issued a third order upholding the rulings in its 2007 FPA Section 203 Supplemental Policy Statement.

blanket authorizations adopted by Order No. 708 are:

- An authorization for a public utility to dispose of its outstanding voting securities to a holding company (but not any other entity) as long as the holding company and its affiliate and associate companies will not own, in the aggregate, more than 9.99 percent of the public utility's outstanding voting securities.
- An authorization for a public utility to dispose of its outstanding voting securities, in any amount, to a holding company with a Section 33.1(c)(9) Authorization or a Section 33.1(c)(10) Authorization.

- An authorization for a public utility to dispose of or acquire a FERC-jurisdictional contract as long as (1) neither the seller nor the buyer have captive customers or own or provide service over FERC-jurisdictional transmission facilities; (2) the contract does not convey control over a generation or transmission facility; (3) the parties to the transaction are neither associate nor affiliate companies; and (4) the purchaser is a "public utility" under the FPA. This authorization complements a blanket authorization that FERC previously adopted that permits a public utility to transfer a wholesale market-based rate contract to an affiliated public utility as long as neither entity is affiliated with a traditional public utility with captive customers.

These blanket authorizations are significant because they clarify the circumstances under which FERC pre-approval under FPA Section 203 will be required, and expand the types of transactions for which no such pre-approval is necessary. Nonetheless, FPA Section 203 issues continue to be very complex, and now carry higher risks in light of FERC's new authority to impose civil penalties.

For more information concerning Order Nos. 707 and 708, as well as other FERC issues, please contact Hunton & Williams through one of the attorneys listed on the "Contacts" section of this Client Alert.

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