December 22, 2023

FERC Issues Notice of Inquiry on Blanket Authorizations for Investment Companies

On December 19, the Federal Energy Regulatory Commission (the Commission or FERC) issued a Notice of Inquiry (NOI) in Docket No. AD24-6, seeking comment on whether, and if so, how, the Commission should revise its policy on providing blanket authorizations for investment companies under Section 203(a)(2) of the Federal Power Act (FPA).[1] The NOI follows on the heels of two recent orders in which the Commission analyzed whether large investment companies are, through their investments in public utilities, actually asserting a measure of control over the public utilities.[2] Taken together, the recent orders and the NOI signal a higher level of regulatory scrutiny of investment company involvement in the electric industry. Commissioner Christie captured the agency's concern by noting in his NOI concurrence that "it is absolutely essential for regulators to make sure that the interests of investors do not conflict with the public service obligations that a utility has." While not urging immediate policy changes, the NOI poses a series of questions for industry comment regarding, for example, what constitutes control of a public utility, what factors the Commission should consider when evaluating control over a public utility, and what reporting requirements the Commission should consider to ensure that holding companies lack the ability to control public utilities and that blanket authorizations are in the public interest. Initial and reply comments are due 90 and 120 days, respectively, after publication of the NOI in the *Federal Register*, which as of the date of this alert has not yet occurred. By way of background, Section 203(a)(2) of the FPA generally restricts the ability of a holding company in a holding company system that includes an electric or transmitting utility to purchase, acquire or take any security with a value over $10 million or, "by any means whatsoever, directly or indirectly," merge or consolidate with an electric or transmitting utility or with a holding company with a value over $10 million without first receiving Commission authorization. The Commission has, however, expanded "blanket authorizations" allowing certain types of transactions to proceed without first receiving approval. The goal of the blanket authorizations, the Commission has stated, is to "ensure that all jurisdictional transactions subject to [S]ection 203 are consistent with the public interest and at the same time ensure that [FERC] rules do not impede day-to-day business transactions or stifle timely investment in transmission and generation infrastructure."[3] For example, the Commission has previously granted blanket authorizations for holding companies, including investment companies' managed funds, to acquire up to 20 percent of the outstanding voting securities of a given public utility.[4] The Commission has generally found that blanket authorizations are appropriate to promote investment while also ensuring that any non-FERC-jurisdictional entity does not exercise control over a public utility. However, in the NOI, the Commission stated that since it has expanded blanket authorizations under Section 203(a)(2) and begun granting case-specific blanket authorizations for holding companies, "there have been changes in the public utility, finance, and banking industries that warrant consideration of whether the Commission's blanket authorization policy continues to work as intended. These changes include consolidation of the public utility industry as well as the growth of large index funds and asset managers."[5] The Commission expressed particular concern that the size of index fund investment companies gives investment companies "unique leverage over the utilities whose voting securities they control."[6] The Commission therefore asked questions regarding:

1. Its blanket authorization policy and how it could be amended;
2. Large investment companies and how the Commission should consider their potential influence over public utilities; and
3. How a holding company may exercise control over a public utility and how the Commission should evaluate such control.

The Commission posed 17 questions for commenters to consider, including, but not limited to:

- Please describe whether the Commission's current blanket authorization policy … is sufficient to ensure that holding companies, including investment companies, lack the ability to control public utilities and holding companies whose securities they acquire and that the transactions underlying the blanket authorizations are consistent with the public interest.
- Does the current scope or availability of blanket authorizations for the acquisition of voting securities by holding companies, including investment companies, create concerns regarding an adverse effect on competition or jurisdictional rates?
- Should the Commission require a holding company, or a subsidiary of that company, that qualifies for FPA Section 203 blanket authorization under 18 C.F.R. 33.1(c)(9) of the FERC's regulations to report on what basis it qualifies? Are there any other measures that the Commission should take to oversee compliance with the terms of these blanket authorizations?
- How can the Commission effectively evaluate the influence and control exerted by holding companies, including investment companies, regardless of their size, over public utilities when considering blanket authorizations under Section 203(a)(2)?
- How should the Commission distinguish between various types of investment vehicles for purposes of Section 203(a)(2) blanket authorizations?
- What are the impacts on the public interest, both positive and negative, of holding companies, including investment companies, holding voting securities in multiple public utilities and Commission-regulated entities?
- In what way may a holding company, including an investment company, exert control over public utilities that is not currently captured in the Commission's current policies and regulations?

While the issuance of the NOI does not guarantee that FERC will change its blanket authorization policy, it does highlight the Commission's increasing concern with the investment community's influence over public utilities and the markets in which they operate. Specifically, the NOI calls out the increased role of passive index funds managed by some of the world's largest investment companies as "warrant[ing] the Commission's careful consideration to make sure that its blanket authorization policy is consistent with the public interest."[7] Market participants with existing blanket authorizations, or those whose securities are held by or who are otherwise affiliated with such blanket authorization holders, will be well served to follow these developments and/or perhaps to consider commenting on the NOI to provide information to the Commission.

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[1] *Federal Power Act Section 203 Blanket Authorizations for Investment Companies*, 185 FERC ¶ 61,192 (2023) (NOI). [2] *See Mankato Energy Center, LLC et al.*, 184 FERC ¶ 61,170 (2023) (finding that, by virtue of an investment advisory agreement and partnership agreement, J.P. Morgan Investments is an affiliate of an investment firm, which, in turn owns several public utilities, triggering heightened reporting requirements for J.P. Morgan Investments); *Evergy Kansas Central, Inc. et al.*, 181 FERC ¶ 61,044 (2022) (finding that sharing board members triggered affiliate status even in a case where an investment firm owned less than 10 percent of a public utility's shares). [3] *Transactions Subject to FPA Section 203,* Order No. 669, 113 FERC ¶ 61,315 at P 4 (2005). [4] NOI at P 5 (citing *Cap. Research & Mgmt. Co.*, 116 FERC ¶ 61,267 (2006)). [5] NOI at P 8. [6] NOI at P 11 (citing Public Citizen, Inc., Protest, Docket No. EC16-77-002, at 1 (filed Mar. 11, 2022)). [7] *Id*. at P 8.

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