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FERC Opens Inquiry into Upstream Investment Interests in Public Utilities: Troutman Pepper

On December 19, 2023, FERC issued a Notice of Inquiry ("NOI") to examine whether and how to revise its policy on providing blanket authorizations for holding companies, including investment companies, to acquire securities in electric utilities and their upstream owners pursuant to section 203(a)(2) of the Federal Power Act ("FPA"). Specifically, the Commission is soliciting comment on what constitutes control of a public utility in evaluating holding companies' requests for authorization and what factors it should consider when evaluating control. Commissioner Mark Christie concurred with a separate statement, stating that FERC should examine whether investment companies are truly acting as passive investors in electric utilities and whether FERC's blanket authorization practices are still sufficient to protect the interests of the electric utilities' customers.

The Commission has issued blanket authorizations on a case-specific basis to holding companies, allowing acquisitions of securities in certain electric utilities over the $10 million threshold pursuant to FPA section 203(a)(2), as well as to investment companies on a company-specific basis to acquire securities in publicly traded electric utilities over the $10 million threshold and up to 20% of the voting securities in the electric utility. These authorizations are time-limited, requiring periodic reevaluation to ensure they remain in the public interest, and are typically based on representations from the investment companies that they cannot exercise control over the electric utilities. FERC noted that changes in the public utility, finance, and banking industries, including consolidation and the growth of large index funds and asset managers, necessitate a review of the Commission's blanket authorization policy.

FERC's Notice of Inquiry seeks comments in response to various questions related to whether, and if so, how the Commission should revise its current policy on providing blanket authorizations for investment companies. In addition, FERC seeks comments in response to questions regarding whether FERC should consider the size of an investment company in evaluating a request for blanket authorization and what factors the Commission should consider when evaluating control over public utilities as part of a request for blanket authorization.

Commissioner Christie concurred in a separate statement, stating that there is a potential conflict between the interests of investment companies and the public service obligations that an electric utility has. As a result, Commission Christie stated the NOI is timely and compelling to explore whether investment companies are actually exerting control over electric utilities rather than acting as passive investors and to examine whether FERC's blanket authorization policies adequately protect the electric utilities' customers. Commissioner Christie noted that while Congress has directed the Commission to streamline regulations to facilitate greater investments in the utility industry, this should not come at the expense of protecting consumers. Commission Christie further stated that it is the Commission's task to balance these responsibilities and continually evaluate this balance.

Initial comments on the NOI are due 90 days after publication in the Federal Register, with reply

comments due 120 days after publication in the Federal Register.

FERC’s NOI, issued in Docket No. AD24-6, can be found here.

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