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FERC Clarifies Requirement for Advance Approval of Public Utility Company Stock Acquisition by Investment Advisers

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In a late November meeting, in response to a request for a disclaimer of jurisdiction by a registered investment adviser, the Federal Energy Regulatory Commission ("FERC") clarified and confirmed its jurisdiction under the Federal Power Act over the purchase, acquisition or holding of more than $10 million of stock in any public utility or public utility holding company by certain financial investment advisory companies. It ruled that any investment adviser that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the voting securities of any public utility company or holding company of a public utility company is itself a holding company that must then obtain Commission authorization prior to acquiring additional securities of the same or any other utility company valued at more than $10 million. Further, according to the statement of FERC Chairman Kelliher released along with the decision, this jurisdiction specifically includes "the circumstance in which a financial investment advisor itself is not a security account holder, the security account holders have delegated the power to vote securities to the investment advisor, and the investment advisor defers to another entity to actually vote the securities but reserves the right to override the recommendations of that entity." *Horizon Asset Management, Inc.* 125 FERC ¶ 61,209 (2008).

FERC described its ruling as addressing an issue of first impression and has given investment advisers subject to its "clarified" jurisdiction ninety days to come into compliance by seeking proper authorization from FERC. After that investment advisers will be subject to "sanction." FERC has newly enlarged sanction powers including the ability to impose penalties up to seven figures. The end date of the compliance grace period is February 23, 2009. Details of the ruling follow.

FERC addressed the issues in two steps. First, it ruled that investment advisers can themselves be "holding companies" subject to the prior approval requirements of Section 203(a) of the Federal Power Act. To qualify for holding company status, an investment adviser must directly or indirectly own, control, or hold with the power to vote 10 percent or more of the voting securities of any public utility company or a holding company of a public utility company. As noted above, this includes ownership in client accounts where the investment adviser has voting authority. The second step was to decide whether the particular way Horizon managed and directed its investment accounts brought it within the prior approval requirements of Section 203(a) because it was "purchasing, acquiring or taking" public utility or public utility holding company securities. The Commission concluded that it would broadly interpret the purchase, acquire or take language of Section 203(a) and that Section 203(a) prior approval language applied.

Having found that in Horizon's case Horizon was a holding company and thus Section 203(a) approval was required for acquisition of any additional utility or holding company shares in excess of $10 million, FERC pre-authorized Horizon to hold amounts of such voting securities up to 10 percent in any individual investor account and less than 20 percent cumulatively by granting, subject to certain conditions, blanket authorization for acquisitions of voting securities of any transmitting utility, electric utility company or public utility holding company whose holdings include a transmitting utility or electric utility company. Additionally, while declining to grant Horizon retroactive blanket authority to cover prior acquisitions, FERC declined to impose any penalties on Horizon for those prior violations.

FERC concluded by stating that its order in *Horizon* will constitute notice to all investment advisers that the types of utility transactions engaged in by holding companies such as Horizon are subject to its jurisdiction, but that in order to give advisers the opportunity to come into compliance, similar investment adviser holding companies are given 90 days to seek necessaryapprovals and come into compliance. FERC also urged companies to seek advice from FERC if they are uncertain whether particular securities acquisitions are subject to FERC's jurisdiction.