

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

[ Docket Nos. EC08–91–000, EC08–91–001 ]

**Horizon Asset Management, Inc.; Order Clarifying Jurisdiction Over Certain Investment Adviser Activities Under Section 203(A)(2) of the Federal Power Act, Allowing Affected Investment Entities a 90-Day Filing Period, and Acting On Requests for Blanket Authorizations**

Issued November 20, 2008.

*Before Commissioners:* Joseph T. Kelliher, Chairman; Sudeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellenoughoff.

1. On May 19, 2008, as amended on September 25, 2008,<sup>1</sup> Horizon Asset Management (Horizon) filed a request for a disclaimer of jurisdiction by the Commission that would relieve Horizon of the obligation to obtain prior Commission authorization under section 203 of the Federal Power Act (FPA)<sup>2</sup> for acquisitions of the securities of certain public utility holding companies or certain electric utility operating companies. In the alternative, Horizon requests blanket authorizations, under sections 203(a)(1) and 203(a)(2) of the FPA: (1) For Horizon to instruct or advise on the acquisition on behalf of Account Holders, as defined below, of securities of public utilities or public utility holding companies, and (2) for public utilities or public utility holding companies to sell securities to Horizon on behalf of the Account Holders. Horizon also requests retroactive authorization for the holdings in excess of 10 percent of the voting shares of Reliant Energy, Inc. (Reliant), Sierra Pacific Power (Sierra Pacific), and Aquila, Inc. (Aquila).

2. In this order the Commission clarifies an aspect of its jurisdiction under the “purchase, acquire, or take any security” clause of FPA section 203(a)(2). We also deny the request for a disclaimer of jurisdiction, dismiss the request for blanket authorization under section 203(a)(1) as unnecessary, and find that the request for blanket authorization under section 203(a)(2) is consistent with the public interest. We grant the blanket authorization under section 203(a)(2), subject to reporting and record retention conditions, for a period of three years. We deny the

request for retroactive approval of Horizon’s holdings in excess of 10 percent of the voting shares of Reliant, Sierra Pacific, and Aquila but, in light of the previous lack of clarity regarding our interpretation of the scope of section 203(a)(2), we determine not to impose sanctions for Horizon’s failure to file for prior approval of these acquisitions of securities.

3. Having now clarified our interpretation of the Commission’s jurisdiction under the “purchase, acquire, or take any security” clause of section 203(a)(2), however, we caution Horizon and other similar investment advisers that they may face possible monetary or other sanctions if they fail to obtain advance approval under section 203(a)(2) of similar acquisitions of securities. Further, we remind investment companies and advisers that if they participate or have a role in other types of acquisitions of securities of public utility companies or public utility holding companies and it is not clear to them whether section 203(a)(2) approval is needed for those types of transactions, they have the option of seeking a jurisdictional determination from the Commission through a declaratory order or other appropriate procedural mechanism prior to engaging in the transactions.

4. Because not all investment companies and advisers may have been aware of our interpretation of the Commission’s jurisdiction under the “purchase, acquire, or take any security” clause of section 203(a)(2) to require prior authorization for the acquisition of public utility securities as discussed in this order, we will allow any such affected entity to file within 90 days of the date of publication of this order in the **Federal Register** an application requesting such authorization.

**I. Background****A. Description of Applicant**

5. Horizon is an investment adviser registered with the Securities and Exchange Commission (SEC).<sup>3</sup> Horizon states that its primary business is the management and direction of separately managed accounts. These accounts are owned by individuals and entities (Account Holders) and are generally “in

the hands of” account custodians (typically, one of the large banking institutions). The vast majority of the separately managed accounts are “discretionary accounts,” which means that Horizon has the exclusive authority to manage the account and instruct the custodian to add or reduce positions in the account. Horizon states that the Account Holder is the actual owner of all the stock in the account and is listed in the relevant stock registries as the owner. Horizon earns a fee for its management of the account.

6. Horizon states that it is the general partner and investment adviser of certain hedge funds and it is a subadviser to certain mutual funds. In one instance, Horizon has been delegated the right to vote shares in the fund. Of the total amount Horizon has under management, roughly 90 percent is in separately managed accounts. Horizon states that it employs a variety of strategies in its activities as an investment adviser, which permits an investor to select the strategy of choice for the direction of his or her separately managed account or to select a hedge fund that embodies the strategy.

7. Horizon states that its Account Holders previously held the authority to vote the shares in their accounts (absent a provision in the management agreement between Horizon and the Account Holder to the contrary). But several years ago, at the request of Account Holders, Horizon began inserting a provision in the management agreement under which the Account Holder delegated the right to vote the shares in his or her account to Horizon.

8. Horizon states it has filed as an exempt holding company under the Public Utility Holding Company Act of 2005 (PUHCA 2005)<sup>4</sup> and Commission form FERC–65A with respect to its accounts holding more than 10 percent of the voting securities of Reliant, Sierra Pacific, and Aquila.

9. Each Account Holder is a separate legal person or entity. Horizon states that it does not control any of the Account Holders. Each Account Holder has delegated to Horizon the responsibility for supervising and managing the securities portfolio of that account. The delegated responsibilities include both the purchase and sale of the securities as well as the voting rights proxies. Horizon states that in exercising the voting rights it generally defers to Institutional Shareholder Services, Inc. (Institutional Shareholder

<sup>1</sup> The May 19, 2008, filing is the original application (Original Application). The September 25, 2008, filing is an amendment to the Application (Amendment) and also provides answers to a deficiency letter from Commission staff (Answer).

<sup>2</sup> 16 U.S.C. 824b (2006).

<sup>3</sup> Under the Investment Advisers Act of 1940, an investment adviser is any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. 15 U.S.C. 80b–2(a)(11) (2006).

<sup>4</sup> 42 U.S.C. 16451 *et seq.* (2006).

Services)<sup>5</sup> but retains the option to override its decisions. Horizon maintains that Account Holders are passive investors with respect to ownership interests in utilities and will be unable to exercise control.

#### *B. Request for Disclaimer of Jurisdiction or Blanket Authorization*

10. Horizon's application contains two basic requests that are posed in the alternative. First, Horizon requests that the Commission disclaim jurisdiction over its account management activities that involve the acquisition of holding company or utility securities that otherwise would be subject to Commission approval under FPA section 203. Alternatively, Horizon seeks permanent blanket authorization under FPA sections 203(a)(1) and 203(a)(2) for: (i) Horizon to engage in account management activities involving the acquisition of the voting securities of any public utility, electric utility company, transmitting utility, or holding company in a holding company system that includes an electric utility company or transmitting utility; and (ii) utilities or holders of utility voting securities to sell their securities to Horizon or its agents in transactions that fall within the scope of its account management activities, subject to certain conditions. Horizon proposes the following conditions to its requested blanket authorization that are intended to prevent the exercise of control over jurisdictional facilities:

(1) Horizon will only manage the securities of publicly-traded utilities on behalf of Account Holders and all acquisitions of securities made pursuant to the authorizations shall be securities of publicly-traded utilities;<sup>6</sup>

(2) The shares of any public utility or public utility holding company in an individual Horizon account shall be less than 10 percent of the issued voting securities of such public utility or public utility holding company;

(3) Horizon shall maintain its policies and comply with applicable statutory prohibitions against exercising control over companies whose securities are acquired for Horizon Account Holders, and Horizon will not change such policies in the future;

(4) Horizon will maintain its eligibility to make Schedule 13G filings with the SEC pursuant to SEC rules under the Securities and Exchange Act

of 1934<sup>7</sup> and, when appropriate, will make such 13G filings with respect to securities of public utilities and public utility holding companies and contemporaneously file a copy with the Commission.<sup>8</sup> Further, Horizon shall file with the Commission any comment or deficiency letters received from the SEC that concern Schedule 13G-related compliance audits conducted by the SEC. Those filings shall be made in this docket or in appropriate sub-dockets of this docket;

(5) Horizon will not take action which would require it to make a Schedule 13D filing with the SEC with respect to the securities of any public utility or public utility holding company;

(6) Horizon will include language in its Form ADV,<sup>9</sup> its Policies and Procedures Manual, its annual letter to Account Holders, and all future Account Holder Agreements explicitly providing that Horizon shall not exercise the shareholder voting rights delegated to Horizon by Account Holders, or act in any other way, to exercise control over any public utility or any public utility holding company. Horizon shall not change or withdraw this language without providing the Commission with at least 90 days notice;

(7) The shares of any public utility or public utility holding company over which Horizon and any affiliated entity have voting power shall not exceed 19.99 percent of the voting securities of

<sup>7</sup> 15 U.S.C. 78a *et seq.* (2000) (1934 Act).

<sup>8</sup> Under the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (2000 & Supp V 2005), and the SEC's regulations under that statute, 17 CFR 240.13-1 *et seq.*, when any person acquires, directly or indirectly, beneficial ownership of five percent or more of any class of securities of a publicly-traded company, that person must file a disclosure report with the SEC on either a Schedule 13D or 13G. While there are other distinguishing characteristics, the fundamental difference is usually the "investment intent" of the investor, which can change at any time and then be acted upon after 10 days. A Schedule 13D must be filed when the owner of the securities holds the securities "with the purpose or effect of changing or influencing the control of the issuer" or if ownership "equals or exceeds 20 percent of the class of equity securities." 17 CFR 240.13-1(c). In order to qualify to file a Schedule 13G, the filer must be able to certify that it "has acquired such securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect." 17 CFR 240.13-1(b)(1)(i). The commitment not to influence control is not permanent. Under SEC rules, once a Schedule 13G has been filed, a person can change its intent and begin to exert control or commence acquiring additional securities with the intention of exerting control 10 days after filing Schedule 13D. 17 CFR 240.13-1(c).

<sup>9</sup> A Form ADV is a SEC form used to register an investment adviser under the Investment Advisers Act.

such public utility or public utility holding company;

(8) Horizon shall retain the records of its transactions concerning public utility securities as required under the Investment Advisers Act of 1940 (Investment Advisers Act).<sup>10</sup>

(9) Horizon shall generally defer to Institutional Shareholder Services voting recommendations and will exercise its voting power in a way that is consistent with its fiduciary duties to its Account Holders but, in any case, shall maintain readily auditable records of the voting of the shares of public utilities or public utility holding companies in its accounts; and

(10) Horizon shall provide the Commission with a quarterly report within 45 days of the end of each calendar quarter of the holdings of securities of public utilities and public utility holding companies as of the last day of the calendar quarter stated in terms of the number of shares held as of the end of the quarter and as a percentage of the outstanding shares.

## **II. Notice of Filings and Responsive Pleadings**

11. Notice of the Original Application was published in the **Federal Register**, 73 FR 31,085 (2008), with interventions and protests due on or before June 9, 2008. None was filed. Notice of the Amendment and Answer was published in the **Federal Register**, 73 FR 58,222 (2008), with interventions and protests due on or before October 16, 2008. None was filed.

## **III. Discussion**

### *A. Disclaimer of Jurisdiction*

#### **1. Horizon's Request**

12. Horizon states that it is an investment adviser that directs acquisitions of stock for its account holders and maintains that this activity does not bring it within the Commission's jurisdiction under FPA section 203. Horizon notes that section 203(a)(2) applies to holding companies that "purchase, acquire, or take" utility or holding company securities, and it argues that it does not engage in these activities. Horizon points out that the FPA does not define the terms "purchase," "acquire," or "take," and its analysis focuses on the meaning that should be attributed to them.<sup>11</sup> It

<sup>10</sup> 15 U.S.C. 80b-2(a)(11).

<sup>11</sup> The text of section 203(a)(2) reads as follows:

No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an

<sup>5</sup> Institutional Shareholder Services is an entity who performs proxy voting functions for a number of registered investment advisers and other entities.

<sup>6</sup> Horizon defines "publicly traded utilities" as utilities whose common stock is traded on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ.

maintains that in interpreting these terms, the Commission should begin by assuming that their ordinary meaning expresses their legislative purpose, and they should be viewed in the light of the "object and policy" of the statute.<sup>12</sup> Horizon finds their ordinary meaning in various dictionary definitions, and it maintains that those definitions show that it has not purchased, taken or acquired any securities in the course of its business activities.

13. According to Horizon, to "purchase" means "to obtain by buying,"<sup>13</sup> to "obtain for money or by paying a price,"<sup>14</sup> or to "acqui[re] by one's own or another's act \* \* \* rather than by descent or inheritance."<sup>15</sup> Horizon argues that these definitions do not apply to it because it does not obtain or buy the securities in the accounts it manages. Instead, it directs stock trading companies to buy or obtain securities for its Account Holders.

14. Horizon states that to "acquire" is normally defined as "[t]o gain possession or control of; to get or obtain,"<sup>16</sup> or to "get or gain by one's own efforts[:]; to come to have as one's own; get possession of."<sup>17</sup> Horizon argues that it is its Account Holders who acquire the securities in the course of its business operations.

15. Finally, Horizon argues that it does not "take" public utility securities by virtue of its role as investment adviser because that would require a finding that it "obtain[s] possession or control" of, or "transfer[s] to [it]self," the public utility securities.<sup>18</sup>

16. Horizon follows this discussion of dictionary definitions with several observations on differences between the language in section 203(a)(1) and section 203(a)(2), as well as the treatment of direct and indirect acquisitions of securities under section 203(a)(2). Horizon notes that the Commission has acknowledged that section 203(a)(1)(A) contains broad, catch-all language regarding the scope of transactions that it covers, and section

203(a)(2) has no similar language. Specifically, section 203(a)(1)(A) requires Commission authorization for a public utility to sell, lease, or otherwise dispose of certain facilities, and section 203(a)(2) requires Commission authority to purchase, acquire, or take certain securities. In other words, section 203(a)(2) does not contain additional language such as "or otherwise obtain."<sup>19</sup> Horizon concludes that the absence of such language counsels against a finding that section 203(a)(2) is intended to confer jurisdiction over the type of activity it engages in.

17. Horizon also notes that the Commission has concluded that the first clause of section 203(a)(2), which pertains to securities acquisitions, addresses direct and not indirect acquisitions. Horizon maintains that in its case any direct acquisitions are made by its Account Holders, and it is not a parent holding company of its Account Holders or any of the stock trading companies that purchase the securities held in the accounts.

18. Horizon states that it does not own, legally or beneficially, the public utility securities in the accounts it manages, and it is not a beneficial owner of public utility securities under section 13(d) of the 1934 Act or the SEC's regulations under that statute because those securities are not acquired with "the purpose or effect of changing or influencing control of the issuer."<sup>20</sup> This is because the public utility securities acquired by the Account Holders at Horizon's direction are not acquired with the purpose or effect of changing or influencing control of the issuer.<sup>21</sup> Horizon states that as an

investment adviser, Horizon does not directly or indirectly own or acquire securities of public utilities in the accounts it manages; it does not itself purchase those securities on behalf of the account holders; and it does not have the authority to manage, direct, or control the day-to-day operations of any public utilities. While Horizon states in its May 19, 2008 application that it does not exercise the voting rights delegated to it and instead delegates those rights to Institutional Shareholder Services,<sup>22</sup> Horizon suggests in its September 25, 2008 amendment to its application that Institutional Shareholder Services simply provides voting recommendations.<sup>23</sup>

19. Horizon distinguishes itself from other investment companies that have received blanket authorizations under section 203(a)(2) based on three considerations.<sup>24</sup> First, those companies conceded that they or their affiliates were purchasers or acquirers of securities because they made the purchases or acquisitions themselves. Horizon states that it does not purchase securities as a broker.

20. Horizon argues that the other applicants either did not raise the issue of jurisdiction or simply conceded it or requested that the Commission assume jurisdiction. Horizon, on the other hand, does not request that the Commission assume jurisdiction and argues that it does not purchase or acquire utility or holding company securities. Finally, Horizon maintains that certain of these other applicants sought blanket authorization not only for an investment adviser but also for affiliated mutual funds that an investment adviser manages. These mutual funds clearly own or acquire the stock in question. By contrast, Horizon states that it is not seeking authorization for any of its Account Holders.

21. Horizon next argues that even if it were deemed to purchase, acquire, or take public utility securities, it should be excluded from the FPA's definition of a holding company. Horizon states that the FPA incorporates the definition of a holding company found in the Energy Policy Act of 2005 (EPAct 2005).<sup>25</sup> It notes that a holding company is defined there as a company that

electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

<sup>16</sup> U.S.C. 824b(a)(2) (2006).

<sup>12</sup> Application at 6.

<sup>13</sup> Application at 6 (citing *Webster's New World Dictionary*, Third College Ed.) at 1091 (1994)).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing *Black's Law Dictionary* at 1270 (8th deluxe ed. 2004)).

<sup>16</sup> *Id.* (citing *Black's Law Dictionary* at 25).

<sup>17</sup> *Id.* (citing *Webster's New World Dictionary* at 12).

<sup>18</sup> *Id.* (citing *Black's Law Dictionary* at 1492; *Webster's New World Dictionary* at 1364).

<sup>19</sup> *Id.* at 7 (citing *Phelps Dodge Corporation*, 121 FERC ¶ 61,251, at P 19 (2007)).

<sup>20</sup> *Id.* at 7–8 (citing *Goldman Sachs Group*, 121 FERC ¶ 61,059, at n.33 (2007) (*Goldman Sachs*) (citing 17 CFR 240.16a–1(a)(1)).

<sup>21</sup> We note that Horizon has represented that it is a beneficial owner with respect to Schedule 13G filings made for holdings of Aquila, Reliant, Allegheny Energy Inc., and Sierra Pacific. See *Horizon Asset Management, Inc.*, Form Schedule 13G, Statement of acquisition of beneficial ownership by individuals, (filed Feb. 20, 2008) <http://www.sec.gov/Archives/edgar/data/66960/000105682308000003/horizonthirteenagquila22008.txt>; *Horizon Asset Management, Inc.*, Form Schedule 13G, Statement of acquisition of beneficial ownership by individuals, (filed Feb. 20, 2008) <http://www.sec.gov/Archives/edgar/data/1056823/000105682308000007/horizonthirteenagrrright.txt>; *Horizon Asset Management, Inc.*, Form Schedule 13G, Statement of acquisition of beneficial ownership by individuals, (filed Mar. 6, 2008) <http://www.sec.gov/Archives/edgar/data/3673/000105682308000012/horizonthirteenagaye32008.txt>; *Horizon Asset Management, Inc.*, Form Schedule 13G/A, Statement of acquisition of beneficial ownership by individuals [amend], (filed Mar. 10, 2008) <http://www.sec.gov/Archives/edgar/data/741508/000105682308000013/horizonthirteenagspaight.txt>.

<sup>22</sup> Application at 8.

<sup>23</sup> September 25, 2008 Amendment at 4.

<sup>24</sup> Horizon seeks to distinguish itself from the companies dealt with in *Capital Research & Mgmt. Co.*, 116 FERC ¶ 61,267 (2006) (CRMC); *Goldman Sachs*, *supra* n.20; *Morgan Stanley*, 121 FERC ¶ 61,060 (2007) (*Morgan Stanley*); *Legg Mason, Inc.*, 121 FERC ¶ 61,061, at P 18 (2007) (*Legg Mason*); *T. Rowe Price Group Inc.*, 119 FERC ¶ 62,048 (2007).

<sup>25</sup> 42 U.S.C. 16451(8) (2006).

directly or indirectly owns, controls, or holds with power to vote 10 percent or more of the outstanding voting securities of a public utility company or a holding company of a public utility company. Horizon argues that it does not directly or indirectly own, control, or hold any outstanding voting securities of public utility companies or holding companies in the accounts it manages, and it therefore does not fall within the definition. To the extent that Horizon is delegated any voting power, it re-delegates that power to Institutional Shareholder Services. Horizon notes that the Commission can find a company that does not meet the definition of a holding company to be a holding company if the company exerts a "controlling influence" over the management of any public utility company or holding company. Horizon maintains that it exercises no such influence, and it has no plans to do so.

22. Horizon states that while it made a filing with the Commission on form FERC-65A providing notice of its status as a holding company, this was done out of an abundance of caution under PUHCA 2005, not the FPA, and the filing should have not determined whether Horizon is a holding company under the FPA. Horizon also states that it is not evident that its actions in filing a form FERC-65A can confer jurisdiction on the Commission or that Horizon can concede jurisdiction even if it wished to do so.

## 2. Commission Determination

23. As an initial matter, we note that in certain respects this case represents an issue of first impression because the Commission has not previously clearly addressed the meaning of "to purchase, acquire or take any security" under FPA section 203(a)(2). While the Commission has acted on a number of requests for blanket authorizations to purchase, acquire or take securities, it either has been clear in those contexts that entities would be "purchasing, acquiring or taking" securities within the common (dictionary) meaning of those terms, or entities have filed for approval as a precautionary matter and the Commission has acted without analysis or discussion of these statutory terms. In particular, the Commission has not specifically opined on whether an investment adviser is considered to be an entity that "purchases, acquires, or takes" securities in circumstances where the adviser is not itself a security account holder, the security account holders have delegated the power to vote securities to the financial adviser, but the financial adviser generally defers to another entity that it engages

to vote the securities (as in this case, discussed below, Institutional Shareholder Services). The Commission for the first time in this docket addresses the meaning of the "purchase, acquire, or take any security" clause of FPA section 203(a)(2).

24. Horizon starts from the premise that because the FPA does not define the terms "purchase," "acquire," or "take," one must assume that their legislative purpose is expressed in their ordinary meaning viewed in light of the "object and policy" of the statute. Horizon discusses the dictionary definitions of these terms, but it fails to view them in light of the underlying purpose of section 203(a)(2) and the interrelationship between this section and PUHCA 2005. Instead of attempting to place the ordinary meanings of these terms in their statutory context, Horizon considers the meaning of "purchase, acquire, or take," in the abstract, *i.e.*, as they are presented in the dictionary, then claims that it does not engage in any of the actions described in the dictionary, and finally argues in the alternative that even if it does engage in these actions, it is not a holding company for these purposes. This approach is particularly problematic when dealing with terms as general as "purchase," "acquire," or "take" since the meaning of these terms can vary widely depending on the context in which they appear.

25. The relevant context here is one where a *holding company* purchases, acquires, or takes something, and this means that we must first address Horizon's assertion that it is not a holding company for purposes of the Federal Power Act. Only when that question is answered can one determine whether, in light of the purpose underlying FPA section 203(a)(2), it is reasonable to conclude that Horizon's activities fall within the "purchase, acquire, or take" language of section 203(a)(2). Horizon argues that it is not a holding company, *i.e.*, it does not directly or indirectly own, control, or hold with power to vote 10 percent or more of a public utility company or holding company's voting securities, because it does not purchase, acquire or take such securities.<sup>26</sup> However, the terms "purchase," "acquire," or "take" do not appear in the definition of a holding company, and therefore whether Horizon is a holding company must be decided independently of them based on the applicable statutory definition.

26. The facts that Horizon presents make it clear that it is a holding

company. Section 203(a)(6) of the FPA states that for purposes of section 203, the term holding company has the meaning given to it in PUHCA 2005.<sup>27</sup>

27. PUHCA 2005 defines a holding company in section 1262(8)(i) as a company that "directly or indirectly owns, controls, or holds, with power to vote," 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company.<sup>28</sup> Horizon's Account Holders have delegated to it the power to vote the securities in question, and it therefore holds those securities with the power to vote them. Horizon's choice to defer in most cases to Institutional Shareholder Services on how to vote the securities does not alter the fundamental facts because it has reserved the right to override the recommendations of Institutional Shareholder Services and, in any case, Horizon nowhere suggests that the delegation is irrevocable.

28. Horizon in fact concurs with our determination because it has previously conceded in filings made at the Commission that it "is a holding company under PUHCA 2005 because, in its capacity as investment adviser to certain accounts it has power to vote more than ten percent of the outstanding voting securities of Aquila, Inc."<sup>29</sup> Horizon now states that its filings were made out of an abundance of caution under PUHCA 2005, not the FPA, and it therefore should not be found to be a holding company under the FPA. For the reasons stated above, we disagree that Horizon does not fall within the PUHCA 2005 definition of holding company. Further, as noted above, section 203(a)(6) of the FPA states that for purposes of section 203, the term holding company has the meaning given to it in PUHCA 2005. To be a holding company for purposes of

<sup>27</sup> 16 U.S.C. 824b(a)(6) (2006).

<sup>28</sup> The applicable statutory definition states that the term "holding company" means:

(i) Any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company; and

(ii) Any person, determined by the Commission, after notice and opportunity for hearing, to exercise directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the management or policies of any public-utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this subtitle upon holding companies.

<sup>42</sup> U.S.C. 16451(8) (2006).

<sup>29</sup> See June 15, 2006 filing by Horizon in Docket No. PH06-90-000.

<sup>26</sup> Application at 10.

PUHCA 2005 is therefore to be a holding company for purposes of FPA section 203(a)(2).

29. We thus reject the claim that Horizon's filing of a form FERC-65A is not indicative of whether Horizon is a holding company under the FPA. Horizon nowhere references in its original form FERC-65A filing that it filed out of an abundance of caution and makes the claim for the first time here. Horizon has previously conceded, and does not dispute here, that it holds 10 percent or more of a holding company's voting securities with power to vote. In light of this, Horizon is a holding company under PUHCA 2005 and, by virtue of section 203(a)(6), it is also a holding company for purposes of section 203(a)(2).

30. We also reject Horizon's argument that it is not a holding company because it does not exert any controlling influence over the management of any public utility company or holding company. PUHCA 2005 treats as a holding company any company that directly or indirectly owns, controls, or holds with power to vote 10 percent or more of the voting securities of a public utility company or of a public utility holding company. Such companies are deemed to be holding companies regardless of whether the facts of their particular situation prevent them from exercising control. While the PUHCA 2005 definition of holding company also gives the Commission additional powers to determine an entity to be a holding company where it has a controlling influence over management or policies of a public utility company, this authority pertains to situations where the entity does not fall within the formal definition of a holding company set forth in PUHCA 2005 section 1262(8)(A)(i), but there is nevertheless a reason to treat that entity as a holding company. Since Horizon falls within the formal definition, there is no reason to consider whether Horizon "controls" a public-utility company for purposes of determining that it is a holding company.

31. Having concluded that Horizon is a public utility holding company, we now turn to whether the activities in which it engages constitute the purchase, acquisition, or taking of securities within the meaning of FPA section 203(a)(2). While we agree that dictionary definitions are a starting point of the analysis where, as here, the terms "purchase, acquire, or take" are not defined in either the FPA or PUHCA, nevertheless the terms must also be given meaning in light of the statutory context and purposes of FPA section 203(a)(2). Taking into account

the simultaneous repeal of PUHCA 1935 and enactment of additional corporate review authority in the FPA—and specifically the addition of section 203(a)(2) of the FPA which pertains to certain public utility holding company investments—the Commission concludes that it is reasonable to read the terms "purchase, acquire, or take" sufficiently broadly to permit the Commission to adequately protect energy customers of public-utility companies and transmitting utilities. EPAct 2005's repeal of PUHCA 1935 and enactment of a "books and records" holding company statute in the form of PUHCA 2005 were intended to remove certain barriers to investment in the electric industry. However, at the same time, Congress added section 203(a)(2) to the FPA to ensure adequate Federal oversight of certain holding company transactions involving public-utility companies and transmitting utilities. Were the Commission to interpret new section 203(a)(2) to exclude the types of investment activities engaged in by Horizon or by similar investment advisers that, like Horizon, are holding companies, it is possible that such holding companies could exercise control over public-utility companies or transmitting utilities in a way that harms energy customers.<sup>30</sup>

32. If the critical mark of a holding company is that it owns, controls, or holds securities with power to vote them, then what it means to purchase, acquire or take securities must be considered in light of that fact. As Horizon notes, to "acquire" is normally defined as "[t]o gain possession or control of; to get or obtain,"<sup>31</sup> or to "get or gain by one's own efforts[;] to come to have as one's own; get possession of."<sup>32</sup> It also notes that to take something means, in part, to "obtain possession or control" of it.<sup>33</sup> We do not see how Horizon could hold securities with power to vote them if it did not gain possession or control of them, *i.e.*, if it did not "acquire" or "take" them.<sup>34</sup>

<sup>30</sup> With regard to the consumer protection purposes of EPAct 2005, Senator Bingaman stated:

I am a strong supporter of section 1289 [the section of EPAct 2005 that is codified at FPA section 203(a)(2)] because I believe it is vital, especially since we are repealing the Public Utility Holding Company Act [of 1935], that FERC be given the authority it needs to protect U.S. consumers. In my opinion, section 1289 gives FERC the appropriate authority to ensure that utility mergers and acquisition do not adversely impact consumers.

151 Cong. Rec. S9359 (daily ed. July 29, 2005) (statement of Sen. Bingaman).

<sup>31</sup> See *supra* n.15.

<sup>32</sup> See *supra* n.16.

<sup>33</sup> See *supra* n.18.

<sup>34</sup> We note in this connection that while Horizon sometimes states that it "delegates" the power to vote the shares it holds to Institutional Shareholder

The fact that Horizon does not acquire all the rights in the bundle of rights that constitute a property interest in these securities does not mean that it does not acquire them for purposes of section 203(a)(2). What matters is that it acquires rights that bring it within the definition of, and thus make it, a holding company, *i.e.* voting rights. Moreover, such rights could (but may not necessarily) result in the exercise of control over a public utility company. It is thus reasonable to conclude that Congress intended section 203(a)(2) to require Commission approval of such securities transactions and to find that Horizon acquires the securities for purposes of section 203(a)(2). We believe this interpretation is consistent with the protective, prophylactic purpose of section 203(a)(2) and that this authority can be exercised in a way that balances both the investment and consumer protection purposes envisioned in the EPAct 2005 amendments.

33. Finally, while we recognize that FPA section 203(a)(2) does not contain broad, catch-all language such as "or otherwise obtain securities" (*i.e.*, broad language to parallel the "or otherwise dispose" language of FPA section 203(a)(1)), we do not find this determinative of the specific issue before us. Nor do we find determinative the fact that the Commission has found that section 203(a)(2) applies to direct rather than indirect acquisitions. Our conclusion here rests on our finding that Horizon itself, and not an entity in which Horizon has an interest, acquires and holds the securities with the power to vote.

#### *B. Blanket Authorization Under Section 203*

34. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction "will be consistent with the public interest."<sup>35</sup> The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) The effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>36</sup> In

Services, there is no evidence of a delegation of legal rights or powers. On the contrary, as noted above, Horizon retains the power to override Institutional Shareholder Services' voting recommendations. In addition, Horizon represents in the Schedule 13G filings it has made in connection with its holdings of Reliant, Sierra Pacific, and Aquila that it has "sole voting power" with respect to these shares. See *supra* n.21.

<sup>35</sup> 16 U.S.C. 824b (2006).

<sup>36</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy*  
Continued

addition, EPC Act 2005 amended section 203 to specifically require that the Commission also determine that the transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.<sup>37</sup> The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>38</sup>

35. As discussed below, we dismiss Horizon's request for blanket authorization under section 203(a)(1) as unnecessary. We also find Horizon's request for blanket authorization under section 203(a)(2) to be consistent with the public interest and approve that request for a period of three years. In addition, we deny the request for retroactive approval under section 203(a)(2) of Horizon's holdings in excess of 10 percent of the outstanding voting shares of Reliant, Sierra Pacific, and Aquila.

#### 1. Blanket Authorization Under Section 203(a)(1)

36. Horizon requests blanket authority under section 203(a)(1) for utilities or holders of utility voting securities to sell such securities to Horizon or, on behalf of the Account Holders, to entities acting on the basis of Horizon's instructions or advice subject to certain conditions.<sup>39</sup>

*Statement*, Order No. 592, 61 FR 68,595 (1996), FERC Stats. & Regs.; ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 FR 33,341 (1997), 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 FR 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 FR 16,121 (2001), 94 FERC ¶ 61,289 (2001); see also *Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 FR 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, 71 FR 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006) (*Order No. 669-A*), *order on reh'g*, Order No. 669-B, 71 FR 42,579 FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>37</sup> 16 U.S.C. 824b(a)(4) (2006).

<sup>38</sup> 18 CFR 33.2(j) (2008).

<sup>39</sup> Section 203(a)(1) reads as follows:

(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so—

(A) Sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000;

37. We dismiss the request for blanket authorization under section 203(a)(1) as unnecessary.<sup>40</sup> We have clarified that transactions that do not transfer control of a public utility or jurisdictional facilities do not fall within the "or otherwise dispose" language of section 203(a)(1)(A) and thus do not require approval under section 203(a)(1)(A).<sup>41</sup> With the conditions imposed in granting Horizon's request for section 203(a)(2) authorization, we find that the transactions under the blanket authorization requested by Horizon will not result in the change in control of a public utility or jurisdictional facilities, or the sale, lease or merger of a public utility or jurisdictional facilities.<sup>42</sup> Therefore, we dismiss, as unnecessary, Horizon's request for authorization under section 203(a)(1).

#### 2. Analysis Under Section 203(a)(2)

##### a. Effect on Competition

##### i. Horizon's Analysis

38. Horizon requests blanket authorization under section 203(a)(2) for the acquisition of securities of public utilities, electric utility companies, transmitting utilities or a holding company in a holding company system that includes an electric utility company or transmitting utility subject to certain conditions. Horizon argues that the proposed blanket authorizations will not adversely affect competition because the commitments it makes in the application, Horizon's fiduciary obligation, the internal policies it has in place, as well as applicable securities law, will prevent Horizon from exercising control over the companies in which it invests.

39. Horizon states that under section 13 of the 1934 Act,<sup>43</sup> any person acquiring more than five percent of the

(B) Merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(C) Purchase, acquire, or take any security with a value in excess of \$10,000,000 of any other public utility; or

(D) Purchase, lease, or otherwise acquire an existing generation facility—

(i) That has a value in excess of \$10,000,000; and  
(ii) That is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

16 U.S.C. 824b(a)(1) (2006).

<sup>40</sup> See *Legg Mason*, 121 FERC ¶ 61,061 at P 18.

<sup>41</sup> *FPA section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 37 (2007).

<sup>42</sup> We note that the transactions under the blanket authorization requested by Horizon pursuant to section 203(a)(2) do not implicate sections 203(a)(1)(C) or 203(a)(1)(D), which apply to public utilities' acquisitions of public utility securities and generating facilities.

<sup>43</sup> 15 U.S.C. 78m (2000).

beneficial ownership of any class of equity securities traded on a public exchange must file with the SEC on either Schedule 13D or 13G providing certain information concerning the acquirer's intentions and purposes with respect to the acquisition. Schedule 13G requires the filer to certify that the securities in question have been acquired

In the ordinary course of \* \* \* [its] business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such a purpose or effect \* \* \*.<sup>44</sup>

40. Horizon states that, if the intentions of a filer of a Schedule 13G change, the filer must notify the SEC of this fact and wait for a "cooling off" period<sup>45</sup> before attempting to exercise control over the security issuer. Horizon also states that the SEC has provided guidance that makes it clear that any activity designed to replace the issuing company's management or influence the day-to-day commercial conduct of its business constitutes an attempt to control and therefore renders the acquiring person ineligible to file Schedule 13G.

41. Horizon states that it currently notifies the SEC of reportable transactions under the 1934 Act using Schedule 13G, and it is completely prohibited from exercising control over any public utility whose securities are covered by the Schedule 13G filing. The filing of Schedule 13G by a person having the intention or purpose of exercising control over the issuer is said to be a violation of the 1934 Act and exposes the filer to possible civil and criminal liability. Horizon states that it has never had and does not now have any intention to exercise control over any public utility or public utility holding company.

42. As noted above, Horizon commits to maintain its eligibility to make Schedule 13G filings with the SEC pursuant to SEC rules under the 1934 Act and, when appropriate, will make such 13G filings with respect to securities of public utilities and public utility holding companies and contemporaneously file a copy with the Commission. Horizon also will file with the Commission any comment or deficiency letters received from the SEC that concern Schedule 13G-related compliance audits conducted by the SEC.

43. Horizon also states that, as a registered investment adviser, it could

<sup>44</sup> 17 CFR 240.13d-1(b)(1)(i) (2008).

<sup>45</sup> Under 17 CFR 240.13d-1(e)(2), the "cooling off" period is 10 days.

also be subject to an enforcement action under the Investment Advisers Act<sup>46</sup> if it exercised control over any public utility. Horizon states that under the Investment Advisers Act, investment advisers are required to provide full disclosure of material information to investors. If Horizon were or was planning to be “in the energy business,” or a “public utility,” or if Horizon were engaging in or was planning to engage in acts which would render it ineligible to file Schedule 13G, this information would have to be disclosed to investors. In addition, as a registered investment adviser regulated by the SEC, Horizon states that it is required to provide Part II of its Form ADV (or a document containing at a minimum the information contained in Part II) to its current and prospective clients, which must include a disclosure of all material facts and information so that an investor can make an informed investment decision. Further, as a fiduciary, Horizon states that it is obligated to make sure that the information contained in its Form ADV does not omit information regarding its investment strategies that a reasonable investor would find relevant.

44. In addition, Horizon has proposed the conditions, listed in P 8 above, that are intended to prevent the exercise of control over jurisdictional facilities.

#### ii. Commission Determination

45. When combined with other factors, the Commission has previously relied upon an applicants' filing of Schedule 13G, along with the associated regulatory and enforcement regime administered by the SEC, to ensure that the applicant would not exercise control over public utilities or public utility holding companies.<sup>47</sup> Horizon similarly proposes use of Schedule 13G along with other measures as support for its request for blanket authorization under section 203(a)(2). Under the conditions Horizon proposes, all security purchases made pursuant to the requested blanket authorization will be of publicly traded securities for which Horizon will maintain eligibility to file Schedule 13G. Horizon states that it has never filed a Schedule 13D and proposes the condition that it will not take action which would require it to file a Schedule 13D with the SEC with respect to the securities of any public utility or public utility holding company. Horizon also commits to maintain its policies and to comply with applicable statutory

prohibitions against exercising control over companies whose securities are acquired for Horizon Account Holders.

46. Horizon also proposes to include language in its Form ADV, its Policies and Procedures Manual, its annual letter to Account Holders, and all future Account Holder Agreements explicitly providing that Horizon shall not exercise the shareholder voting rights delegated to Horizon by Account Holders, or act in any other way, to exercise control over any public utility or any public utility holding company.<sup>48</sup> With that language in place, actions by Horizon in violation of it would subject Horizon to potential legal action by both the SEC and the Account Holders, in addition to appropriate action by the Commission.

47. We will accept Horizon's proposed conditions restricting the holdings of the voting securities of any public utility or public utility holding company to less than 10 percent in an individual Horizon account and to no more than 19.99 percent for Horizon or any affiliated entity having voting power, since these conditions are similar to limits on ownership that the Commission has placed on holdings of public utilities or public utility holding companies by firms who are investment advisers or engage in similar activities.<sup>49</sup> The Commission will require the 19.99 percent limit on holdings for Horizon or any affiliated entity having voting power to be interpreted as the maximum which Horizon and affiliated entities may cumulatively hold.

48. Efforts by Horizon to use its voting power from security holdings to exercise control over public utilities or public utility holding companies will be further limited by Horizon's proposed condition that it will exercise its voting power in a way that is consistent with its fiduciary duties to its Account Holders, and to maintain readily auditable records of the voting of the shares.

49. We will also accept Horizon's commitment to file contemporaneously with the Commission a copy of relevant Schedule 13G filings made to the SEC, and to file with the Commission any comment or deficiency letters received from the SEC. We will also accept Horizon's commitment to provide the Commission with quarterly reports of

security holdings of public utilities and public utility holding companies. We will also require that any changes in the information provided on the initial Schedule 13G be reflected in an annual amended filing due within 45 days of the end of each calendar year. With this additional requirement, the Schedule 13G-related filings and quarterly informational filings of the holdings of securities are similar to those previously required of firms similar to Horizon which requested blanket authorizations under section 203.<sup>50</sup> In addition, records that may be useful in any future audit will be accessible through Horizon's proposal to keep records of its transactions concerning public utility securities as required by the Investment Advisers Act. We accept this commitment.

50. We find that, with the conditions proposed by Horizon and accepted here, as modified above, Horizon will be unable to exercise control over the public utilities and public utility holding companies whose securities are acquired under the blanket authorization requested under section 203(a)(2). Thus, we find that the transactions under that requested blanket authorization have no adverse effect on competition.

#### b. Effect on Rates

##### i. Horizon's Analysis

51. Horizon argues that the acquisition of securities pursuant to the requested blanket authorization will have no adverse effect on rates of wholesale customers or retail electric service customers because, as Horizon will not acquire or exercise control over any utility, it will have no role in the setting of rates by such entities. Further, Horizon argues that acquisition of securities pursuant to the requested blanket authorization will not affect the market-based or cost-based rates of the utilities in which the Account Holders will be investing.

##### ii. Commission Determination

52. We find that the transactions under the blanket authorization requested by Horizon under section 203(a)(2) will not have an adverse effect on rates for the reasons set forth by Horizon above.

#### c. Effect on Regulation

##### i. Horizon's Analysis

53. Horizon argues that the acquisition of securities pursuant to the

<sup>46</sup> 15 U.S.C. 80b-1 et seq. (2000).

<sup>47</sup> See, e.g., *Legg Mason*, 121 FERC ¶ 61,061 at P 26-30; *Goldman Sachs*, 121 FERC ¶ 61,059 at P 30-41; *Morgan Stanley*, 121 FERC ¶ 61,060 at P 37-49; *CMRC*, 116 FERC ¶ 61,267 at P 16-20.

<sup>48</sup> Horizon pledges not to change or withdraw the language without providing the Commission with a least 90 days notice. We will accept that commitment. If prior authorization under section 203 is necessary, the Commission will require Horizon to file an appropriate application under section 203.

<sup>49</sup> See, e.g., *Legg Mason*, 121 FERC ¶ 61,061 at P 22 and *CMRC*, 116 FERC ¶ 61,267 at P 20.

<sup>50</sup> See, e.g., *Legg Mason*, 121 FERC ¶ 61,061 at P 30, *CMRC*, 116 FERC ¶ 61,267 at P 30, and *Ecofin Holdings Limited*, 120 FERC ¶ 61,189 at P 41 (2007).

requested blanket authorization will have no adverse effect on regulation either by the Commission or by state regulatory authorities because the acquisition will not result in any change in the activities, corporate structure, or control of a utility that might affect its jurisdictional status under either federal or state law. Horizon further argues that, because no exercise of control is involved, Horizon is and will be in no position to cause a utility to take action which would have an adverse effect on regulation.

#### ii. Commission Determination

54. We find that the transactions under the blanket authorization requested by Horizon under section 203(a)(2) will not have an adverse effect on regulation for the reasons set forth by Horizon above.

#### d. Cross-subsidization

##### i. Horizon's Analysis

55. Horizon argues that the acquisition of securities pursuant to the requested blanket authorization will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company because Horizon and the Account Holders will be non-controlling investors in utilities with no ability to improperly cause or direct the utilities in which they have an interest to cross-subsidize their non-utility associate companies or to pledge or encumber their assets.

56. Horizon further states that the transactions pursuant to the requested blanket authorization will not result in any: (1) Transfers of facilities between a traditional public utility associate company that has captive ratepayers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods

and services agreements subject to review under sections 205 and 206 of the FPA.

##### ii. Commission Determination

57. We find that the transactions under the blanket authorization requested by Horizon under section 203(a)(2) will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company for the reasons set forth by Horizon above.

#### e. Authorization Period

##### i. Applicant's Request

58. Horizon requests the Commission to grant a permanent blanket authorization.

##### ii. Commission Determination

59. We will grant Horizon's blanket authorization for a three-year period, rather than on a permanent basis. We find that a three-year limitation balances Horizon's need to operate under the requested authorizations with our duty to provide adequate regulatory oversight under section 203 of the FPA, particularly as we continue to gain experience with FPA section 203(a)(2) authorizations. Accordingly, the authorizations expire three years from the date of this order, without prejudice to requests to extend the authorizations.

#### f. Request for Retroactive Authorization

##### i. Horizon's Request

60. Horizon requests retroactive authorization for the holdings in excess of 10 percent of the voting shares of Reliant, Sierra Pacific, and Aquila. Horizon states that the decision to direct the accounts under its management to acquire stock of Reliant, Sierra Pacific, and Aquila was in no way an indication of any intention to exercise control over such companies. Horizon states that its investment decision in this regard was motivated solely by its analysis of the value of those securities as passive investments.

##### ii. Commission Determination

61. Section 203(a)(2) of the FPA requires Commission approval before a public utility holding company purchases, acquires, or takes any security (with a value in excess of \$10 million) of a transmitting utility, an electric utility company, or a public utility holding company in a holding company system that includes a transmitting utility or an electric utility company having a value in excess of \$10 million. Acquiring securities without prior Commission authorization is directly contrary to statutory

requirements. Therefore, the Commission denies the request for retroactive approval under 203(a)(2) of Horizon's holdings in excess of 10 percent of the voting shares of Reliant, Sierra Pacific, and Aquila. Although we are denying retroactive approval, we recognize that prior to this case the Commission had not directly or clearly addressed the scope and meaning of the "purchase, acquire, or take any security" clause of section 203(a)(2) and therefore we will not impose sanctions on Horizon for failing to obtain advance Commission approval in these circumstances. Now that we have clarified our jurisdiction, however, Horizon and all similar companies that acquire or hold securities on behalf of account holders are on notice that we consider the types of transactions described in Horizon's petition to be jurisdictional under FPA section 203(a)(2), thus requiring prior approval, and we will consider sanctions including possible monetary penalties to companies that do not obtain advance approval. Finally, we remind companies that if there is any question as to whether particular securities acquisitions fall under section 203(a)(2), they may seek a determination from the Commission through a petition for a declaratory order or other appropriate procedural mechanism.

62. As noted above, because not all investment companies and advisers may have been aware of our interpretation of the Commission's jurisdiction under the "purchase, acquire, or take any security" clause of section 203(a)(2) to require prior authorization for the acquisition of public utility securities as discussed in this order, we will allow any such affected entity to file within 90 days of the date of the publication of this order in the **Federal Register** an application requesting such authorization. After that time, the failure to make a timely filing may result in subjecting the entity in question to sanctions.

#### *The Commission orders:*

(A) The Commission rejects the request for a disclaimer of jurisdiction. The Commission also denies the request for retroactive approval under section 203(a)(2) of Horizon's holdings in excess of 10 percent of the voting shares of Reliant, Sierra Pacific, and Aquila. In addition, the Commission hereby dismisses the request for blanket authorization under FPA section 203(a)(1) and grants the request for blanket authorization under section 203(a)(2) for a period of three years from the date of this order, without prejudice to requests to extend the authorization, as discussed in the body of the order.

(B) Transactions under the blanket authorizations are subject to the terms and conditions and quarterly reporting requirements and for the purposes set forth in the Application, as discussed and modified in the body of this order.

(C) The foregoing authorizations are without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of costs or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Horizon is subject to audit to determine whether it is in compliance with the representations, conditions and requirements upon which the authorizations are herein granted and with applicable Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

(G) Horizon shall file with the Commission, for informational purposes, contemporaneously with filing at the SEC the Schedule 13G filings made with the SEC that are relevant to the authorizations granted in this order. Any changes in the information provided on the initial Schedule 13G must be reflected in an annual amended filing due within 45 days of the end of each calendar year. Horizon shall file with the Commission any comment or deficiency letters received from the SEC that concern Schedule 13G-related compliance audits conducted by the SEC. Such filings shall be made in this docket or in appropriate sub-dockets of this docket.

(H) Horizon shall file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report of securities of public utilities and public utility holding companies as of the last day of the calendar quarter stated in terms of the number of shares held as of the end of the quarter and as a percentage of the outstanding shares.

(I) Horizon shall retain the records of its transactions concerning public utility securities as required under the Investment Advisers Act.

(J) Horizon must inform the Commission, within 30 days, of any material change in circumstances that

would reflect a departure from the facts, policies, and procedures the Commission relied upon in granting the request and specifying the terms and conditions under which the blanket authorization, as set forth in section 33.1(c)(5) of the Commission's regulations, will be available to them.

(K) The Secretary is directed to publish a copy of this order in the **Federal Register**.

By the Commission.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. E8-27984 Filed 11-24-08; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER02-2001-009; Docket No. ER07-559-000]

#### Before Commissioners: Joseph T. Kelliher, Chairman; Suedeene G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellingshoff; Electric Quarterly Reports, Flat Earth Energy, LLC Order on Intent To Revoke Market-Based Rate Authority

November 20, 2008.

1. Section 205 of the Federal Power Act (FPA), 16 U.S.C. 824d (2000), and 18 CFR part 35 (2008), require, among other things, that all rates, terms, and conditions of jurisdictional services be filed with the Commission. In Order No. 2001, the Commission revised its public utility filing requirements and established a requirement for public utilities, including power marketers, to file Electric Quarterly Reports summarizing the contractual terms and conditions in their agreements for all jurisdictional services (including market-based power sales, cost-based power sales, and transmission service) and providing transaction information (including rates) for short-term and long-term power sales during the most recent calendar quarter.<sup>1</sup>

2. Commission staff's review of the Electric Quarterly Report submittals indicates that one utility with authority to sell electric power at market-based rates has failed to file its Electric Quarterly Reports. This order notifies this public utility that its market-based

rate authorization will be revoked unless it complies with the Commission's requirements within 15 days of the date of issuance of this order.

3. In Order No. 2001, the Commission stated that,

[i]f a public utility fails to file a[n] Electric Quarterly Report (without an appropriate request for extension), or fails to report an agreement in a report, that public utility may forfeit its market-based rate authority and may be required to file a new application for market-based rate authority if it wishes to resume making sales at market-based rates.<sup>2</sup>

4. The Commission further stated that,

[o]nce this rule becomes effective, the requirement to comply with this rule will supersede the conditions in public utilities' market-based rate authorizations, and failure to comply with the requirements of this rule will subject public utilities to the same consequences they would face for not satisfying the conditions in their rate authorizations, including possible revocation of their authority to make wholesale power sales at market-based rates.<sup>3</sup>

5. Pursuant to these requirements, the Commission has revoked the market-based rate tariffs of several market-based rate sellers that failed to submit their Electric Quarterly Reports.<sup>4</sup>

6. As noted above, Commission staff's review of the Electric Quarterly Report submittals identified one public utility with authority to sell power at market-based rates that failed to file Electric Quarterly Reports through the third quarter of 2008. Commission staff contacted this entity to remind it of its regulatory obligations.<sup>5</sup> Nevertheless, the public utility listed in the caption of this order has not met those obligations.<sup>6</sup> Accordingly, this order notifies this public utility that its market-based rate authorization will be revoked unless it complies with the Commission's requirements within 15 days of the issuance of this order.

7. In the event that the above-captioned market-based rate seller has already filed its Electric Quarterly Report in compliance with the Commission's requirements, its inclusion herein is inadvertent. Such market-based rate seller is directed, within 15 days of the date of issuance of this order, to make a filing with the

<sup>2</sup> Order No. 2001 at P 222.

<sup>3</sup> *Id.* at P 223.

<sup>4</sup> See, e.g., *Electric Quarterly Reports*, 73 FR 31,460 (June 2, 2008); *Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006), *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006).

<sup>5</sup> See *Flat Earth Energy, LLC*, Docket No. ER07-559-000 (October 7, 2008) (unpublished letter order).

<sup>6</sup> According to the Commission's records, the company subject to this order last filed its Electric Quarterly Reports for the 1st quarter of 2008.

<sup>1</sup> Revised Public Utility Filing Requirements, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reconsideration and clarification denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filings*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002) *order directing filings*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003).