

**Before the  
Federal Energy Regulatory Commission  
Washington, D.C. 20426**

Technical Conference on Public Utility Holding )  
Company Act of 2005 and Federal Power Act )     Docket No. AD07-2-000  
Section 203 Issues )

**COMMENTS  
OF  
THE WYOMING OFFICE OF CONSUMER ADVOCATE  
REGARDING  
CASH MANAGEMENT AND MONEY POOL ISSUES  
(Filed January 26, 2007)**

The Wyoming Office of Consumer Advocate (Wyoming OCA) is interested in this proceeding, as we are charged with representing the interests of Wyoming citizens and all classes of utility customers in matters involving public utilities. In our role as public interest advocates, we are interested in working toward only the level of regulation that is necessary to assure safe, adequate, and reliable service at fair and reasonable prices. This regulatory effort can best be done through the joint and coordinated efforts of state regulators, consumer advocates, federal regulators, and the industry. Regulation and the protection of the public interest are at their best – and both shareholder’s and ratepayers’ interests are balanced – when there is an explicit recognition of the role of both state and federal regulatory activities. It is within this context that our comments are made.

On October 23, 2003, the Commission issued a final rule regarding the Regulation of Cash Management Practices.<sup>1</sup> Cash management or “money pool” programs typically concentrate affiliates’ cash assets in joint accounts for the purpose of providing financial

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<sup>1</sup> Docket Nos. RM02-14-000 and RM02-14-001.

flexibility and lowering the cost of borrowing.<sup>2</sup> As described in the 2003 order authorizing the Commission's final rule, cash management accounts were a prevalent practice of FERC-regulated entities, with more than \$16 billion of assets in cash management accounts. While the practice of permitting affiliates to consolidate cash accounts was widespread, the Commission noted that these practices were the subject of "severe record-keeping deficiencies."<sup>3</sup>

The final rule issued in 2003 requires that the subject FERC-regulated utilities who participate in cash management programs: (1) file the agreements with the Commission; (2) file subsequent changes to the cash management agreement within 10 days of the change; (3) determine, on a quarterly basis, the percentage of their capital structure that constitutes proprietary capital; (4) notify the Commission within 45 days after the end of each quarter; and (5) describe the significant events or transactions causing their proprietary capital ratios to be less than 30 percent, if they are, and report plans, if any, to regain at least a 30 percent proprietary capital ratio, particularly if utilities have loaned or advanced money to an affiliate, parent or subsidiary.

The Commission took up the discussion of this issue again in a rulemaking proceeding wherein it addressed the *Repeal of the Public Utility Holding Company Act of 1935 and Enhancement of the Public Utility Holding Company Act of 2005*.<sup>4</sup> As part of a broad discussion, the Commission asked whether it should modify its existing cash management rules to apply not only to public utilities, natural gas companies, and oil pipelines, but also to include public utility holding companies<sup>5</sup> and generally sought comment on further cross-subsidization protections that might be necessary and appropriate. While the general tenor of the comments received was that no further action

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<sup>2</sup> Opening paragraph of Order No. 634-A, issued October 23, 2003 in Docket Nos. RM02-14-000 and RM02-14-001.

<sup>3</sup> Order No. 634-A, paragraph 8:

Cash management agreements generally were not formalized in writing.

The terms of the programs and the interest associated with loans were not documented in writing.

It was unclear whether interest had been paid to subsidiary companies by the parent companies.

<sup>4</sup> Docket No. RM05-32-000, Order No. 665, *Final Rule*, issued December 8, 2005.

<sup>5</sup> December 8, 2005 Order, paragraph 232.

in the area of cash management was necessary, at least one commentor suggested that the rules should be expanded since the current cash management rules “are insufficient to adequately protect regulated utilities.”<sup>6</sup> Several other commentors pointed to the need for further protections against cross-subsidization and cross-collateralization with unregulated assets. In response to these comments, the Commission chose not to make further changes in the cash management rules at that time. However, in response to the broader question of the need for additional rules prohibiting cross-subsidization, the Commission chose to “monitor industry activities”<sup>7</sup> and further address matters in a technical conference to be held later. That time is now.

The provisions of the Energy Policy Act of 2005 that repealed the Public Utility Holding Company Act of 1935 (PUHCA) did not eliminate the need for proper regulation of affiliate transactions. To the contrary, Section 1267 of the Act explicitly sets forth the Commission’s authority to require just and reasonable rates, and specifically states that the Commission’s authority includes actions necessary to prevent cross-subsidization and actions *necessary or appropriate for the protection of utility customers*. Pursuant to this provision, the Commission clearly has the authority to closely examine and seek formal comment from interested parties on what those appropriate actions may be relative to cash management and money pools beyond the reporting requirements that are currently in effect. We urge it to do so.

Corporate mergers and acquisitions continue within the energy industry. Previously unheard of, requests to take public utilities and make them privately held companies are becoming more prevalent.<sup>8</sup> Unregulated, non-utility companies are

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<sup>6</sup> Page 153 of the December 8, 2005 Order, Docket No 665 in Docket No. RM05-32-000, citing the comments of MBIA Insurance comments at page 25.

<sup>7</sup> *Ibid*, paragraph 241.

<sup>8</sup> For example, Kinder Morgan, Inc. currently has a request before the Wyoming Public Service Commission to allow it to become a privately held company that is no longer publicly traded. Additionally, on March 8, 2004, Oregon Electric Utility Company, LLC (Oregon Electric), TPG Partners HI and IV, L.P. (known collectively as “TPG”), Managing Member LLC (Managing Member), Neil Goldschmidt, I Gerald Grinstein and Tom Walsh (known collectively as “Local Applicants”) filed an application under ORS

seeking to diversify into the utility business.<sup>9</sup> Each transaction places more pressure on the need for internal efficiencies, cost savings, and earning authorized returns. These transactions are also seeing the introduction of more players into the utility business who come from the world of unregulated private enterprise (and fewer rules of the game) and a greater mixing of regulated utilities with non-regulated diversified private businesses. These are all reasons to assure that a wide variety of ring-fencing provisions – wherein the private utility is protected from other aspects of these conglomerate businesses – are put into place. We urge that the enacted protections include ring-fencing conditions specifically intended to safeguard utilities’ access to their own cash.

Specifically, the Wyoming OCA urges the Commission to consider implementing a minimum set of protections that would address appropriate and inappropriate actions on the part of public utilities who participate in money pools with parent companies, affiliate companies, or unregulated subsidiaries. These minimum standards should be developed with input from the state regulators, consumer advocates and industry. These should be mandatory, enforceable standards, rather than guidelines, but should not diminish any state standards that may supplement or complement the minimum federal requirements. In other words, the federal protections would be the lowest reasonable common denominator that protects the public interest. They would provide a minimum level of protection for states who may not have the ability or resources to impose their own minimum standards.

If these standards are truly established at a safety-net level, the federal imposition of such standards would not interfere with a state’s ability to raise the bar and set their own guidelines at a higher level. This is as it should be. It would also not prohibit a utility from agreeing to extra restrictions on a voluntary basis or as part of a stipulated agreement. The federal standards should be complimentary to the standards of the state, in that the Commission’s authority may be able to bridge gaps in regulatory oversight that

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757.511, asking the Oregon Commission to authorize the purchase of Portland General Electric from Enron Corporation (Enron).

<sup>9</sup> For example, General Electric is seeking an entry into the natural gas local distribution business through the purchase of Kinder Morgan’s distribution retail business.

may otherwise be limited by state boundaries. This may be particularly true given the movement of cash that occurs among regulated and non-regulated entities and among multiple jurisdictions.

The Wyoming OCA offers some examples of the types of regulations the Commission should seek comment on relative to cash management issues:

- A designated level or percentage of equity at the holding company level and the utility subsidiary or affiliate level, or a designated minimum level of equity as a percentage of all debt and common stock equity reported on the balance sheet of the consolidated holding company system, all to assure that the internal payment of dividends, the lending of all excess cash, or the forced borrowing from unregulated affiliates does not irreparably skew the utility's capital structure, credit rating, or ability to obtain outside financing.
- A prohibition against internal money management transactions with affiliates or subsidiaries whose securities are not designated as at-least investment grade level, limiting the risk of not being repaid.
- A prohibition against allowing the regulated utility to lend asset-secured funds to others within the holding company or to unregulated affiliated entities, thus protecting customer assets from the risk of an unsecured, unregulated transaction.
- A limitation on the amount of funds that a utility may internally lend an affiliate, subsidiary, or parent entity thus limiting the amount of funds that are not otherwise available for utility capital and operating needs.
- A prohibition against a utility borrowing from an affiliate if it would not be cost effective to do so, that is, if it would cost more to borrow from an internal fund than it would to borrow from a bank, through the sale of its own commercial paper, or from other alternative sources of funding.
- A requirement that the utility lending funds to a non-regulated affiliate receive interest or other compensation of not less than what the utility

would receive from an unaffiliated transaction of reasonably similar risk, or alternatively, not less than the rate that the unregulated affiliate would pay to an unrelated third party, in order to avoid harm to the utility and discourage cross-subsidization of the unregulated affiliate.

- The maintenance of a liquidity ratio at a rate that would reasonably allow a regulated entity to meet its current obligations without the intercession of a parent company.
- A mandatory statement indicating compliance with the minimum standards signed by the utility's auditor, a utility's officer, or both, with the certification included as a periodic mandatory reporting item.

At the Commission's December 7, 2006 technical conference, several utility representatives continued to urge the Commission not to adopt additional cash management restrictions. They argued that further provisions were unnecessary either because the states were already addressing the issue or because the utility would have been hurt, rather than helped, by further restrictions.

The Wyoming OCA is aware that several states have chosen to establish ring-fencing provisions that address cash management concerns. But, such is not the case in Wyoming. The Wyoming Public Service Commission has not adopted any general or specific standards on the topic of cash management. There are no informational filing requirements, let alone approval processes. We do not believe that Wyoming is the only state in this circumstance. This demonstrates the need for a safety-net or stop gap arrangement that could be filled by the Commission.

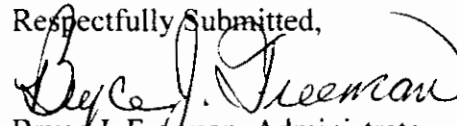
Again, with this recommendation, we are not retreating from our advocacy for states' rights and federal-state partnerships. Instead, we think that the establishment of federal minimum standards that could then be enhanced by those states with the ability and desire to do so would be the right regulatory partnership. An alternative would be to adopt a federal minimum level of protection, but allow states to file for a waiver from

such standards, if the state showed that the federal standards were either unnecessary or inconsistent with the best interest of customers in that particular state.

We also appreciate the arguments that the utilities' made at the technical conference that cash management restrictions could actually hurt, rather than assist utilities and their customers. The examples given generally related to financially troubled utilities, whose financial health was improved by their access to cash accounts shared by utilities, parents, and other affiliates. But, using these more unusual examples to decide the permitted behavior for the industry as a whole is a slippery slope. It would be more reasonable to prohibit the commingling of funds between regulated and non-regulated entities and then allow utilities to request exceptions to that prohibition in unique circumstances, than to risk having a troubled non-regulated affiliate of a utility leave the utility short of necessary cash or other internal financing.

The capital intensive nature of utilities is more apparent in today's market than at any time in recent history, as the need for new infrastructure intensifies. Yet, as more mergers and acquisitions occur, as private equity firms look to purchase utilities, and as utilities become part of organizations with competing cash needs, the risk increases that the internal funds needed to meet the utilities' operational and capital requirements will not be available. Minimum federal money pooling and cash management standards should be considered that limit the risk to the utility and its customers. The Wyoming OCA urges the Commission to take the next step of soliciting formal comments from interested parties on the specific requirements that would provide a reasonable level of protection for both utility customers and utility investors.

Respectfully Submitted,



Bryce J. Freeman, Administrator  
Wyoming Office of Consumer Advocate  
2515 Warren Avenue, Suite 304  
Cheyenne, WY 82002  
Phone (307) 777-5742  
[bfreem@state.wy.us](mailto:bfreem@state.wy.us)