

Report
Submitted to the
United States Congress
by the Federal Energy Regulatory Commission

Recommendations of the Federal Energy Regulatory Commission on Technical
and Conforming Amendments to Federal Law Necessary to Carry Out the Public
Utility Holding Company Act of 2005 and Related Amendments

December 8, 2005

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This report by the Federal Energy Regulatory Commission is submitted in response to section 1272 of the Energy Policy Act of 2005 (EPAcT 2005),¹ which requires the Commission to submit, no later than four months after the date of enactment of the Public Utility Holding Company Act of 2005 (PUHCA 2005),² “detailed recommendations on technical and conforming amendments to Federal law necessary to carry out [PUHCA 2005] and the amendments made by [PUHCA 2005].” As discussed below, the Commission recommends three technical and conforming amendments, and points out a fourth issue that was raised in comments to the Commission.

First, the Commission recommends that section 1275(b) of EPAcT 2005³ be amended to provide for Commission review and authorization of cost allocations to the extent that they are relevant to a “natural gas company,” as defined by section 1261(11) of EPAcT 2005,⁴ within a holding company system. In the Notice of Proposed Rulemaking (NOPR) that the Commission issued to implement PUHCA 2005,⁵ the Commission noted that section 1275(b) provides that holding companies and state commissions may under certain circumstances require Commission review and authorization of cost allocations for non-power goods or services provided by service companies to public utilities, but it does not provide for such determinations where such non-power goods and services are provided to gas utility companies and natural gas companies. The Commission invited comments on this issue. Commenters emphasized that inclusion of natural gas companies in section 1275(b) would ensure consistency in the treatment of cost allocations throughout the holding company systems for holding companies with both electric utility companies and gas utility companies and that, since gas utility companies and natural gas companies are included in most of the other provisions of PUHCA 2005, their omission from section 1275(b) could adversely affect the Commission’s ability to prevent the cross-subsidization of affiliates of not only public utilities but also natural gas companies. Accordingly, the Commission recommends that section 1275(b) be amended to include not just public utilities but also natural gas companies.

¹ Pub. L. No. 109-58, § 1272(2), 119 Stat. 594, 977 (2005).

² Pub. L. No. 109-58, §§ 1261-77, 119 Stat. 594, 972-78 (2005).

³ Pub. L. No. 109-58, § 1275(b), 119 Stat. 594, 977 (2005).

⁴ Pub. L. No. 109-58, § 1261(11), 119 Stat. 594, 973 (2005).

⁵ *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,588 (2005).

Second, the Commission recommends that section 1270 of EAct 2005⁶ be amended to clarify that, not only does the Commission have the same enforcement powers to enforce PUHCA 2005 as set forth in sections 306 through 317 of the Federal Power Act,⁷ but the Commission should have the same enforcement powers to enforce PUHCA 2005 as set forth in sections 13 through 20 of the Natural Gas Act.⁸ In response to the NOPR, commenters noted that section 1270 of EAct 2005 gives the Commission the authority to enforce the provisions of PUHCA 2005 with respect to public utilities, using the powers granted to it under sections 306 through 317 of the Federal Power Act (FPA)⁹ and urged the Commission to recommend an amendment granting it the same authorities to enforce PUHCA 2005 with respect to natural gas companies using the comparable powers granted it under the Natural Gas Act. Given that PUHCA 2005 generally applies equally to both public utilities and natural gas companies within holding company systems, the Commission believes that amending section 1270 to clarify that the Commission has the same powers to enforce PUHCA 2005 as set forth in the Natural Gas Act as it does under the Federal Power Act will best ensure that the Commission is able to carry out its statutory responsibilities under PUHCA 2005.

Third, the Commission recommends that section 1274(a) of EAct 2005¹⁰ be amended to specify that the savings provisions of section 1271(a) of EAct 2005¹¹ are effective as of the date EAct 2005 was enacted. Section 1274(a) states that all provisions of PUHCA 2005 (except section 1272,¹² which addresses the Commission's responsibilities to implement PUHCA 2005) shall take effect six months after enactment. In response to the NOPR, commenters have argued that, unless this provision is amended to make clear that Section 1271(a) is effective as of the date EAct 2005 was enacted, it will remain unclear whether holding companies will, in fact, be entitled to rely on existing Securities and Exchange Commission (SEC) orders during the six-month period between the date of enactment of EAct 2005 (August 8, 2005) and the effective date of PUHCA 2005 (February 8, 2006). While the Commission believes that EAct 2005, and particularly section 1271(a), is reasonably interpreted to allow holding companies to rely on SEC orders even during this six-month period, the Commission nevertheless believes

⁶ Pub. L. No. 109-58, § 1270, 119 Stat. 594, 976 (2005).

⁷ 16 U.S.C. §§ 825e-p (2000).

⁸ 15 U.S.C. §§ 7171-s (2000).

⁹ 16 U.S.C. §§ 825e-p (2000).

¹⁰ Pub. L. No. 109-58, § 1274(a), 119 Stat. 594, 977 (2005).

¹¹ Pub. L. No. 109-58, § 1271(a), 119 Stat. 594, 976 (2005).

¹² Pub. L. No. 109-58, § 1272, 119 Stat. 594, 977 (2005).

that this amendment is appropriate to provide holding companies with additional regulatory certainty.

One commenter to the NOPR recommended an amendment to section 3(c)(8) of the Investment Company Act of 1940, which provides that a company subject to regulation under PUHCA 1935 shall not be an “investment company” as defined in and regulated under the Investment Company Act of 1940.¹³ While such companies can file with the SEC and seek exemption from the Investment Company Act of 1940 by claiming that they fall within other exemptions, the commenter notes that an amendment to section 3(c)(8) would allow such companies to avoid having to make such filings with the SEC. The Investment Company Act of 1940, however, is not a statute with which the Commission has experience, and the amendment is not essential to the Commission’s carrying out its responsibilities under PUHCA 2005 or any other statute the Commission administers. Consequently, the Commission is bringing this issue to the attention of Congress, but is not making any recommendation.

Finally, to aid in Congress’ consideration of the above recommendations, accompanying this report is a copy of the Commission’s Final Rule, issued today, entitled *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Docket No. RM05-32-000, which implements PUHCA 2005.

¹³ 15 U.S.C. § 80a-3(c)(8) (2000).