UNITED STATES OF AMERICA 113 FERC ¶ 61,248
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 365 and 366

(Docket No. RM05-32-000, Order No. 667)

Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005

(Issued December 8, 2005)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations to implement the repeal of the Public Utility Holding Company Act of 1935 and the enactment of the Public Utility Holding Company Act of 2005, by adding a new Subchapter and Part to its regulations and removing its exempt wholesale generator rules as they are no longer necessary.

EFFECTIVE DATE: This Final Rule will become effective on February 8, 2006.

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20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

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

ORDER NO. 667

FINAL RULE

(Issued December 8, 2005)

Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005)[1] was signed into law. In relevant part, it repeals the Public Utility Holding Company Act of 1935 (PUHCA 1935)[2] and enacts the Public Utility Holding Company Act of 2005 (PUHCA 2005),[3] which, with one exception not relevant here, will become effective six months from the date of enactment (February 8, 2006).[4] Sections 1266, 1272, and 1275 of EPAct 2005 direct the Commission to issue certain rules and to provide detailed recommendations to Congress on technical and conforming amendments to federal law

[1] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[2] 15 U.S.C. §§ 79a et seq. (2000).

[3] EPAct 2005 at §§ 1261 et seq.

[4] Id. at § 1274(a).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

within four months after the date of enactment, i.e., by December 8, 2005.[5] In addition, EPAct 2005 directs the Commission to issue a final rule exempting certain entities from the federal access to books and records provisions of EPAct 2005 within 90 days of the effective date of Title XII, Subtitle F of EPAct 2005. This rulemaking addresses all mandatory rulemaking requirements contained in PUHCA 2005.

2. On September 16, 2005, the Commission issued a notice of proposed rulemaking (NOPR)[6] in which it proposed to add a new Subchapter U and Part 366 to Title 18 of the Code of Federal Regulations to implement Title XII, Subtitle F of EPAct 2005 and to remove Subchapter T and Part 365 of Title 18 of the Code of Federal Regulations.

3. Section 1264 of PUHCA 2005 concerns Commission access to the books and records of holding companies and other companies in holding company systems, and section 1275 of PUHCA 2005 addresses the Commission's review and authorization of the allocation of costs for non-power goods or administrative or management services when requested by a holding company system or state commission. As we stated in the NOPR, the federal books and records access provision, section 1264, and the non-power goods and services provision, section 1275, of PUHCA 2005 supplement the Commission's existing authorities under the Federal Power Act (FPA)[7] and the Natural

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[5] Id. at §§ 1266, 1272, 1275.

[6] 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, 70 Fed. Reg. 55,805 (2005), FERC Stats. & Regs. ¶ 32,588 (2005).

[7] 16 U.S.C. §§ 824d-e (2000).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Gas Act (NGA)[8] to protect customers against improper cross-subsidization or encumbrances of assets, including the Commission's broad authority under FPA section 301 and NGA section 8 to obtain the books and records of regulated companies and any person that controls or is controlled by such companies if relevant to jurisdictional activities.[9]

4. In responding to the comments on the NOPR and in deciding whether to adopt the proposals in the NOPR, our decisionmaking has been guided by the clear intent of Congress to repeal the regulatory regime established by PUHCA 1935 and to rely on state regulatory authorities and the Commission to protect energy customers, by supplementing the Commission's books and records authority under PUHCA 2005 and by enhancing our already significant authority over public utility mergers, acquisitions and dispositions of jurisdictional facilities.[10] As we recognized in the NOPR, PUHCA 2005 is primarily a "books and records access" statute and does not give the Commission any new substantive authorities. In fact, the only substantive requirement contained in the new law is that we address requests involving certain allocations of costs of non-power goods and services. Accordingly, as discussed in greater detail below, we are rejecting requests that we re-impose particular requirements in PUHCA 1935 that Congress chose not to include in PUHCA 2005.

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[8] 15 U.S.C. §§ 717c-d (2000).

[9] 16 U.S.C. § 825 (2000); 15 U.S.C. § 717g (2000).

[10] EPAct 2005 at § 1289.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

5. Our primary means of protecting customers served by jurisdictional companies that are members of holding company systems continues to be the FPA and NGA. In particular, the Commission's rate authorities and information access authorities under the FPA and NGA enable the Commission to detect and disallow from jurisdictional rates any imprudently-incurred, unjust or unreasonable, or unduly discriminatory or preferential costs resulting from affiliate transactions between companies in the same holding company system.[11] This includes both power transactions and non-power goods or services transactions between Commission-regulated companies that have captive customers and their "unregulated" affiliates. The Commission routinely places code of conduct restrictions on power sales at market-based rates between regulated and non-regulated affiliates. In the context of registered holding companies, we also have placed conditions on non-power goods and services transactions involving public utilities. Further, as discussed in greater detail infra, in the context of individual rate cases involving public utilities that seek to flow through in jurisdictional rates the costs of affiliate purchases of non-power goods or services, the Commission has the ability to protect customers by reviewing the prudence and the justness and reasonableness of such costs. The Commission also has adopted rules and policies regarding cash management practices or arrangements that involve Commission-jurisdictional companies. Importantly, repeal of PUHCA 1935 also does not repeal non-PUHCA securities laws

[11] Since the vast majority of registered holding companies have been electric public utility holding companies, our description here focuses primarily on the FPA. However, except for merger and corporate authority under the FPA, our authorities and processes under the NGA are similar.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

and accounting requirements for companies.

6. It is against this backdrop that we have determined not to require in this Final Rule all of the filing requirements that we originally proposed to adopt. In addition, in response to the numerous comments filed, we have determined that it is appropriate to permit certain exemptions from those requirements that are being adopted, based upon an expedited notification process. An overview of the Final Rule's requirements and exemptions is provided below. We emphasize, however, that this Final Rule (including its exemptions) does not affect the Commission's independent ability to obtain access to books and records under the FPA and NGA. Further, to the extent additional rulemakings or orders may be needed to protect customers, the Commission will take appropriate actions in the future. The Commission will hold a technical conference no later than one year from the effective date of PUHCA 2005 to assess whether additional actions are needed.

Overview of Final Rule

7. In the NOPR, the Commission proposed to incorporate in Part 366 of its regulations, largely without modification, the provisions of PUHCA 2005, and we have adopted a number of those proposals in the Final Rule. However, based on the very constructive comments received, the Final Rule modifies or departs from the approach in the NOPR in several respects, and we summarize the Final Rule below.

8. In the NOPR, we proposed adopting several of the Securities and Exchange Commission's (SEC) accounting and record-retention requirements into our own regulations and stated that we did not intend to broaden their applicability beyond the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

types of companies to which they now apply. Specifically, the NOPR proposed to adopt the following portions of the SEC's accounting and record-keeping requirements: 17 C.F.R. 250.26 (financial statement and recordkeeping requirements for registered holding companies and subsidiaries); 17 C.F.R. 250.27 (classification of accounts prescribed for utility companies not already subject thereto); 17 C.F.R. 250.80 (definitions of terms used in rules under section 13 of PUHCA 1935); 17 C.F.R. 250.93 (accounts and records of mutual and subsidiary service companies); 17 C.F.R. 250.94 (annual reports by mutual and subsidiary service companies); 17 C.F.R. Part 256 (uniform system of accounts for mutual and subsidiary service companies) (SEC Uniform System of Accounts); and 17 C.F.R. Part 257 (preservation and destruction of records for registered holding companies and of mutual and subsidiary service companies) (SEC record-retention rules).

9. Additionally, the NOPR proposed to require companies to file certain SEC forms with the Commission, including: SEC Form U-13-60 (annual report for mutual and subsidiary service companies); SEC Form U-5S (annual report for registered holding companies); and a version of SEC Form U-5A (notification of registration status).

10. As discussed further below, the Commission has concluded that there is no statutory basis for continuing to apply the statutory exemptions contained in PUHCA

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

1935, which Congress has repealed.[12] Although, as also discussed below, we will provide certain exemptions from PUHCA 2005, we will not re-create the PUHCA 1935 distinction between "exempt" and "registered" holding companies. Accordingly, we will apply the books and records requirements of PUHCA 2005 equally to all holding companies. However, the Commission will give holding companies until January 1, 2007, to comply with the Commission's record-retention requirements; holding companies, in contrast to traditional, centralized service companies (as distinguished from service companies that are special-purpose companies such as a fuel supply company or a construction company), will not be required to comply with the Commission's Uniform System of Accounts.

11. The Final Rule adopts modified, streamlined versions of 17 C.F.R. 250.1, 250.26, 250.80, 250.93, 250.94, and 259.313 in Part 366 of its regulations. Section 366.4(a) of our regulations will be a modified and simplified version of 17 C.F.R. 250.1(a), which originally required registered holding companies to file SEC Form U-5A, notification of

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[12] Section 5(a) of PUHCA 1935 provides five statutory exemptions for:

(1) predominantly intrastate holding companies;

(2) public-utility holding companies whose operations as such do not extend beyond the State in which they are organized and states contiguous thereto;

(3) holding companies that are only incidentally a holding company;

(4) holding companies that are temporarily holding companies; or

(5) primarily foreign utility holding companies.

15 U.S.C. §§ 79c(a)(1)-(5) (2000).

registration. Section 366.4 requires holding companies to file a FERC-65 (Notification of Holding Company Status), and, if they wish to claim an exemption from PUHCA 2005 or a waiver of the Commission's regulations thereunder, FERC-65A (Exemption Notification) or FERC-65B (Waiver Notification). The Final Rule does not adopt the 17 C.F.R. 250.1(b) (registration statement) and 250.1(c) (annual report for holding companies, to be filed on SEC Form U-5S). Section 366.21 of our regulations instead contains a modified version of 17 C.F.R. 250.26 (financial statement and recordkeeping requirements for holding companies and subsidiaries), including subparagraph (a)(2) (requirement to maintain books and records for auditing purposes), paragraphs (d) and (f) (compliance with Commission and other agencies' record-retention rules), and paragraph (e) (savings clause for previous accounting orders). It does not adopt paragraphs (a)(1) (mandating compliance with SEC Regulation S-X), (b) (information to be supplied with form SEC Form U-5S), (c) (mandating use of the equity method of accounting), or (g) (cross reference to section 250.26). In section 366.1, we adopt the definitions contained in 17 C.F.R. 250.80 (definitions of terms), i.e., "services," "goods," and "construction", and we add a definition for service company. We also adopt streamlined versions of 17 C.F.R. 250.93 (accounts and records of service companies), 250.94 (annual reports for service companies), and 259.313 (SEC Form U-13-60, for annual reports pursuant to 250.94), in sections 366.21, 366.22 and 366.23, which prescribe the Uniform System of Accounts and annual reporting requirement for service companies. The Final Rule does not adopt 17 C.F.R. 259.5s, and it does not require the submission of SEC Form U-5S. The Commission has determined that the information in these

eliminated provisions is not relevant to the costs incurred by jurisdictional entities or is not necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

12. Specifically, the Final Rule also adopts the following requirements:

(1) Holding companies will file FERC-65 (Notification of Holding Company Status), which will be treated as an informational filing.

(2) Holding companies seeking to claim an exemption from PUHCA 2005 or waiver of the Commission's regulations thereunder may file FERC-65A (Exemption Notification) or FERC-65B (Waiver Notification).

(3) Traditional, centralized service companies will be required to file a newly-created FERC Form No. 60 (Annual Report for Service Companies), which is based on a streamlined version of SEC Form U-13-60. The FERC Form No. 60 eliminates the following supporting schedules originally contained in SEC Form U-13-60: Outside Services Employed - Account 923; Employee Pensions and Benefits - Account 926; General Advertising Expenses - Account 930.1; Rents - Account 931; Taxes Other Than Income Taxes - Account 408; Donations - Account 426.1; and Other Deductions - Account 426.5. The schedules were eliminated to remove information that is either duplicative or that the Commission has determined is not necessary to carry out its statutory responsibilities under PUHCA 2005.

(4) Unless otherwise exempted by Commission rule or order, all holding companies and service companies must maintain and make available to the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

> Commission their books and records. In addition, all holding companies and all service companies that do not currently follow the Commission's record-retention requirements in Parts 125 and 225 of the Commission's regulations, as applicable, will be required to transition to the Commission's requirements by January 1, 2007. Holding companies registered under PUHCA 1935 that currently follow the SEC's record-retention rules in 17 C.F.R. Part 257, and their service companies, have the option to follow either the Commission's or the SEC's record-retention rules, as they exist on the day before the effective date of PUHCA 2005, for calendar year 2006, but these entities must transition to the Commission's record-retention rules by January 1, 2007. And, as noted above, holding companies, unlike traditional, centralized service companies, will not be required to comply with the Commission's Uniform System of Accounts.

13. The NOPR did not propose any specific exemptions from the books and records requirements of PUHCA 2005, except as required by section 1266 (i.e., persons that are holding companies solely with respect to one or more exempt wholesale generators (EWGs), foreign utility companies (FUCOs), or qualifying facilities (QFs)), but sought comments on whether passive investors and mutual funds should be exempted. Rather, we proposed to rely on case-by-case petitions for declaratory order to determine what additional waivers are appropriate. Based on the extensive comments received, in the Final Rule we have modified our original proposal to rely on declaratory order requests for exemptions and we have determined that it is appropriate to use an expedited

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

notification process to either exempt from the books and records requirements of PUHCA 2005 or waive the Commission's accounting, record-retention and reporting regulations thereunder for the following persons and classes of transactions:

(1) passive investors, including mutual funds and other financial institutions;

(2) Commission-jurisdictional utilities that have no captive customers;

(3) certain holding company and affiliate transactions that will not affect jurisdictional rates;

(4) electric power cooperatives;

(5) local distribution companies;

(6) single-state holding companies;

(7) holding companies that own 100 MW or less of generation used fundamentally for their own load or for sales to affiliated end-users;[13] and

(8) investors in independent transmission companies.

Other exemptions and waivers will be considered through the declaratory order process on a case-by-base basis.

14. With respect to Commission review of service company cost allocations in section 1275(b) and the exemption for single-state holding companies in section 1275(d), the Commission sought comments as to whether the Commission should require the formal filing of service company cost-allocation agreements under the FPA and NGA, and

[13] Holding companies that own more than 100 MW of generation used fundamentally for their own load or for sales to affiliated end users may seek waivers, and the Commission will consider them, on a case-by-case basis.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

whether the Commission should apply its traditional "market" standard for the pricing of non-power goods and services provided by system service companies or instead adopt the SEC "at-cost" standard. We conclude below that we will not require the formal filing of cost allocation agreements and that we will not require any entities that are currently using the SEC's "at-cost" standard for traditional centralized service companies to switch to our "market" standard. With respect to traditional, centralized service companies that use the "at cost" standard, we will apply a presumption that "at cost" pricing of the non-power goods and services they provide to public utilities within their holding company system is reasonable, but persons may file complaints if they believe that use of at cost pricing results in costs that are above market price. We will also retain the Commission's existing "market" standard for non-power goods or services transactions between special-purpose subsidiaries and public utilities.

15. With respect to EWGs, we proposed to cease making case-by-case determinations of exempt wholesale generator status in the future and we proposed to delete our EWG regulations. In light of the comments received, we have determined that it is reasonable to interpret PUHCA 2005 to permit new wholesale sellers to obtain EWG status. We will thus establish procedures in section 366.7 of our regulations for both self-certification of EWG and FUCO status, and Commission determinations of EWG and FUCO status, similar to the options available for entities seeking QF status.

16. Additionally, for those definitions and other aspects of PUHCA 1935 that have been re-enacted as part of PUHCA 2005, we will, where appropriate, follow the past practice and precedent of the SEC in interpreting these provisions of PUHCA 2005 to the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

extent that they are consistent with the statutory language adopted by Congress in PUHCA 2005.

17. Finally, we do not view this Final Rule as the only opportunity to address the books and records requirements and related reporting requirements under PUHCA 2005, exemptions from and waivers of these requirements, and any other issues that may arise as a result of the repeal of PUHCA 1935 and the implementation of PUHCA 2005. We intend to hold a technical conference no later than one year after PUHCA 2005 becomes effective to evaluate whether additional exemptions, different reporting requirements, or other regulatory actions (under PUHCA 2005 or the FPA or NGA) need to be considered. The technical conference will also address any needed changes or additions to accounting, cost allocation, recordkeeping, cross-subsidization, encumbrances of utility assets, and related rules, including any changes necessary to address difficulties with compliance encountered by companies within previously-exempt holding company systems during this transition period. In addition, while we do not adopt the SEC Uniform System of Accounts and record-retention rules in 17 C.F.R. Parts 256 and 257 into the Commission's regulations at this time, we will initiate a separate rulemaking proceeding to address how the Commission's Uniform System of Accounts and record-retention rules in Parts 101, 125, 201, and 225 of its regulations can be modified to adopt or otherwise integrate the relevant parts of the SEC's Uniform System of Accounts and record-retention rules. The Commission intends to issue a final rule on any appropriate accounting or record-retention rule modifications well in advance of January 1, 2007, so that service companies will be able to transition to the Commission's Uniform System of

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Accounts and record-retention rules and holding companies can transition to the Commission's record-retention rules by the January 1, 2007 deadline.

1. Definitions

18. The Commission proposed in the NOPR to largely incorporate in section 366.1 of its regulations the text of section 1262 of EPAct 2005, which contains the definitions of relevant terms used in PUHCA 2005 and in our proposed regulations. Commenters suggested a number of changes to these definitions. As these definitions are taken from section 1262 of EPAct 2005, any modification would likely create undesirable discrepancies between our regulations and the statutory language. Accordingly, we will address these comments below under the heading "Additional Technical and Conforming Amendments," below. However, to the extent that a given comment requesting clarifications of the definitions proposed in section 366.1 of the Commission's regulations can be addressed consistent with the statutory text, they are addressed below.

Comments

19. American Public Power Association and National Rural Electric Cooperative Association (APPA/NRECA) note that section 1268 of EPACT 2005 expressly exempts States and any political subdivision of a state from the provisions of PUHCA 2005, while the definition of "electric utility company" in the proposed section 366.1 includes "any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale," which appears to come directly from section 1262(5) of EPACT 2005. According to APPA/NRECA, this section, read standing alone, could be construed to state that the regulations apply to all electric utilities.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

APPA/NRECA thus urge the Commission to make explicit the exclusion of states and their political subdivisions from the regulations by cross-referencing in its regulations the exclusion in section 1268 of the statute.[14]

20. Coral Power, L.L.C. and Shell WindEnergy, Inc. (Coral Power and Shell WindEnergy) request that the Commission deem EWGs, FUCOs, and QFs not to be "electric utility companies" under PUHCA 2005, so that their upstream owners will not be "holding companies" under PUHCA 2005.[15]

21. With respect to the definition of "public-utility companies," the Edison Electric Institute (EEI) urges the Commission to clarify that energy marketers are not "public-utility companies" under the PUHCA 2005 definition. EEI notes that, under PUHCA 2005, a "public-utility company" is either an "electric utility company," which is an entity that owns or operates facilities used for the generation, transmission or distribution of electric energy for sale, or a "gas utility company," which is basically an entity that owns or operates facilities used for distribution at retail of natural or manufactured gas. EEI further asserts that the SEC has found that the ownership of only contracts and related books and records are not facilities used for the generation of electric energy, but that only physical facilities are used for the generation of electric energy. According to EEI, if power marketers are not electric utility companies, their parent companies would not be considered utility holding companies under PUHCA 2005 by reason of their

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[14] APPA/NRECA Comments at 42. See also City of Santa Clara (Santa Clara) Comments at 23, Transmission Agency of Northern California (TANC) Comments at 23.

[15] Coral Power/Shell WindEnergy Comments at 9-10.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ownership of such marketers. The same logic would apply to gas marketers, and they too, therefore, should not be considered gas utility companies, provided they own no physical gas distribution assets and their gas retail sales are made through contracts.[16]

22. Goldman Sachs Group (Goldman Sachs) and Morgan Stanley Capital Group (Morgan Stanley) urge the Commission to adopt a rule similar to the SEC's 7(d) that excludes owner-lessor and owner participants in lease financing transactions involving utility assets from the definition of "public-utility company" and their parent companies from the definition of "holding company."[17]

23. NiSource Inc. (NiSource) requests that the Commission clarify that gas utility companies authorized to make sales for resale of natural gas pursuant to a blanket certificate are not subject to new part 366 of the Commission's regulations.[18]

24. Finally, a number of commenters urge the Commission to amend certain definitions to exclude rural electric cooperatives from the scope of PUHCA 2005. APPA/NRECA argue that the Commission should recognize that, under longstanding SEC precedent, electric cooperatives were not regulated as public utility holding companies under PUHCA 1935 because member interests in cooperatives do not constitute a "voting security" interest.[19] Cooperatives state that the Commission could,

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[16] EEI Comments at 19-20.

[17] Goldman Sachs Comments at 7, Morgan Stanley Comments at 5.

[18] NiSource Comments at 15.

[19] APPA/NRECA Comments at 42. See also Santa Clara Comments at 23, TANC Comments at 23.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

alternatively, declare definitively that member interests in cooperatives do not constitute a "voting security" interest for purposes of PUHCA 2005.[20] If the Commission does not adopt this interpretation of "voting securities," APPA/NRECA urge the Commission to, at the very least, make clear that those cooperatives that have received no-action letters or other assurances in the past from the SEC can continue to rely on those assurances without any need to seek additional confirmation or a no-action assurance or waiver from the Commission.[21] Arizona Electric Power Cooperative, Inc., Southwest Transmission Cooperative, Inc., and Sierra Southwest Cooperative Services, Inc. (Cooperatives) argue that, while the Commission could grant the Cooperatives an individual waiver, the better course would be for the Commission to create a class exemption from PUHCA 2005 for cooperatives. According to Cooperatives, with the recent amendment of FPA § 201(f), cooperatives are unlikely to qualify as public utilities, and cooperatives do not operate any NGA jurisdictional pipelines.[22]

Commission Determination

25. We will grant the request of APPA/NRECA and others to clarify that section 1268 exempts from PUHCA 2005 states and any political subdivision of a state. Accordingly, we clarify in section 366.2(a) that, for the purposes of this subchapter, no provision of PUHCA 2005 shall apply to or be deemed to include: (1) the United States; (2) a state or

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[20] Cooperatives Comments at 8.

[21] APPA/NRECA Comments at 42-44. See also Tri-State Comments at 3-7.

[22] Cooperatives Comments at 7. See also APPA/NRECA Comments at 44.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

political subdivision of a state; (3) any foreign governmental authority not operating in the United States; (4) any agency, authority, or instrumentality of any entity referred to in subparagraphs (1), (2) or (3); or (5) any officer, agent, or employee of any entity referred to in subparagraphs (1), (2), (3), or (4) as such in the course of his or her official duty.

26. In response to the request of Coral Power and ShellWindEnergy that we consider EWGs, FUCOs, and QFs not to be "electric utility companies" so that their upstream owners would not be holding companies under PUHCA 2005, we note that Congress has exempted from section 1264 of EPAct 2005 entities that are holding companies solely with respect to EWGs, FUCOs, and QFs and that exemption is reflected in the regulations we adopt herein. However, we clarify that EWGs themselves are not considered "electric utility companies" under PUHCA 2005. The purpose of creating "exempt" wholesale generators in the amendments to section 32 of PUHCA 1935 made by the Energy Policy Act of 1992 (EPAct 1992)[23] was to exempt from PUHCA 1935 persons that meet the definition of EWG. This was reflected in section 32(e) of PUHCA 1935, which specifically provided that EWGs would not be considered electric utility companies under PUHCA 1935 and would be exempt. Here, we have determined to continue to allow generators to obtain EWG status, so they will not be considered electric utility companies subject to PUHCA 2005.

27. With respect to FUCOs and QFs, we clarify as follows. Section 1262(6) of PUHCA 2005 contains the term "foreign utility company," and cross-references section

[23] 79 U.S.C. § 79z-5a (2000).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

33 of PUHCA 1935. Section 33 of PUHCA 1935, as amended by EPAct 1992,[24] provided that a FUCO would be exempt from PUHCA 1935 and not deemed an electric utility company, but the exemption would not apply or be effective unless the relevant state commission(s) certified that they had the authority and resources to protect ratepayers of public utility companies that are associated or affiliated with the FUCO. As with EWGs, we will continue to allow persons to obtain FUCO status. FUCOs will not be considered electric utility companies subject to PUHCA 2005 and will be exempt from PUHCA 1935 if they can demonstrate that the relevant state commission(s) have made the determination described in section 33 of PUHCA 1935. However, even if FUCOs do not demonstrate that they should be totally exempted from PUHCA 2005, we will waive the accounting, record-retention, and reporting requirements thereunder.[25] As for QFs, QFs previously received an exemption from PUHCA pursuant to the Commission's regulations under the Public Utility Regulatory Policies Act of 1978. Nothing in PUHCA 2005 changes that.

28. With respect to EEI's request that we clarify that power marketers are not "public-utility companies," we note that EEI's reference to the "Commission" appears to be to the SEC rather than to this Commission. While the SEC has not treated power marketers as

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[24] 79 U.S.C. § 79z-5b (2000).

[25] As discussed infra, we will waive our accounting, record-retention, and reporting requirements for FUCOs, but we will not exempt them from the general provision in section 1264 of PUHCA 2005 and repeated in section 366.2 of our regulations, which authorizes access to their books and records as necessary, with respect to jurisdictional rates.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

electric utility companies under PUHCA 1935, the Commission has determined that electric marketers own facilities used for wholesale sales, i.e., "paper facilities," and therefore are public utilities under the FPA. Similarly, we have treated natural gas marketers making jurisdictional sales as natural gas companies under the NGA. In light of long-standing SEC precedent in interpreting PUHCA 1935, we will follow the same interpretation under PUHCA 2005 and will exempt power and natural gas marketers from the definition of "public-utility company," as that term is used in PUHCA 2005. However, our interpretation here does not change our long-standing precedent with respect to these entities' jurisdictional status under the FPA and the NGA.

29. We will grant the request for clarification from Goldman Sachs and Morgan Stanley that we not treat owner-lessors and owner participants in lease financing transactions involving utility assets as "public-utility companies" and their parents as "holding companies" under PUHCA 2005, so long as the ownership arrangements are passive.

30. We find that, as discussed below, electric power cooperatives should not be regulated as holding companies under PUHCA 2005.

2. Books and Records Requirements

31. Sections 1264(a) and (b) of EPAct 2005 generally provide that each holding company and each associate company of a holding company, as well as each affiliate of a holding company or any subsidiary company of a holding company, shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records (books and records) as the Commission determines are relevant to the costs

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of public utility or natural gas company customers with respect to jurisdictional rates. Moreover, section 1264(c) empowers the Commission to examine the books and records of any company in a holding company system, or any affiliate thereof, that the Commission determines are relevant to the costs incurred by a public utility or natural gas company within such holding company system and necessary or appropriate for the protection of public utility or natural gas company customers with respect to jurisdictional rates. Finally, section 1264(d) forbids any member, officer, or employee of the Commission from divulging any fact or information that has come to his or her knowledge during the course of the examination of such books and records, except as may be directed by the Commission or a court of competent jurisdiction.[26] In the NOPR, the Commission proposed to incorporate largely without modification the text of section 1264 by adding section 366.2 to the Commission's regulations.

32. In the NOPR, the Commission also proposed to adopt certain accounting, cost-allocation, recordkeeping, and related rules promulgated by the SEC for holding companies and their service companies, as they existed on the date of enactment of EPAct 2005, specifically 17 C.F.R. 250.1, 250.26, 250.27, 250.80, 250.93, 250.94, 259.5S, and 259.313 and 17 C.F.R. Parts 256 and 257. The Commission invited

[26] There are comparable confidentiality provisions in the FPA and the NGA for public utility books and records and natural gas company books and records. 16 U.S.C. § 825 (2000); 15 U.S.C. § 717g (2000).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

comments on which SEC reporting requirements the Commission should retain, which ones it should not retain, and whether the Commission should adopt any additional accounting, cost-allocation, recordkeeping and related rules to carry out its statutory duties under PUHCA 2005. Finally, the Commission stated that it does not intend to broaden the applicability of any adopted reporting requirements beyond the types of companies to which they now apply and invited comments as to whether the proposed scope of applicability is appropriate.

33. The comments below focused primarily on the Commission's proposal to adopt certain SEC regulations and are organized as follows: (a) scope of applicability, i.e., whether the books and records requirements will apply to all holding companies equally or only to holding companies registered under PUHCA 1935; (b) general comments on the Commission's proposal to adopt certain SEC regulations, including whether PUHCA 2005 grants the Commission the legal authority to adopt them; (c) comments on particular provisions of the SEC regulations; (d) other issues related to the adoption of SEC regulations; and (e) other comments related to the books and records requirements of section 1264.

a. Scope of Applicability

Comments

34. The majority of commenters urged the Commission to apply any SEC regulations adopted equally to all holding companies, without regard to whether an entity was registered or exempt under PUHCA 1935, primarily because PUHCA 2005 does not state

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

that PUHCA 1935 exemptions should continue in force.[27] APPA/NRECA state that the Commission should apply any rules to the full universe of companies because, post-PUHCA 1935, there is no longer a statutory basis for distinguishing between the former registered and exempt holding companies. APPA/NRECA contend that the Commission cannot treat some holding companies differently from others without a reasonable basis and that their legal designations under a now-repealed statute are not a reasonable basis. According to APPA/NRECA, the Commission should make distinctions based on the complexity of each holding company's corporate structure, the quantity and type of business risks in the corporate family, the magnitude of potential for cross subsidization (e.g., due to the presence of common costs between the public utility and non-utility businesses), and the geographic reach of the holding company (which could make state regulation more difficult). They argue that, to avoid charges of undue discrimination, the Commission can apply the rules to all holding companies initially, announce these factors as among those it will consider in granting exemptions, and then invite requests for

[27] See, e.g., Allegheny Energy, Inc. (Allegheny) Comments at 2, American National Power, Inc. (American National Power) Comments at 3, American Public Gas Association Comments at 3; Arkansas Public Service Commission (Arkansas PSC) Comments at 19, E.ON AG and LG&E Energy LLC (E.ON/LG&E Energy) Comments at 8, Missouri Public Service Commission (Missouri PSC) Comments at 25, National Fuel Gas Company (National Fuel Gas) Comments at 6, National Association of Regulatory Utility Commissioners (NARUC) Comments at 7, Southern Company Services Comments at 2-3. But see Detroit Edison Company (Detroit Edison) Reply Comments at 1, PPL Companies (PPL) Reply Comments at 3-4 (urging Commission to reject comments proposing to apply SEC regulations to holding companies exempted from PUHCA 1935).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

exemption from some or all of the reporting companies.[28] Similarly, American Electric Power Service Corporation (AEP) and National Fuel Gas argue that the statute mandates equal treatment of all holding companies.[29]

35. However, a number of commenters argue that the Commission should continue to exempt under PUHCA 2005 those holding companies exempted under PUHCA 1935 and SEC precedent. MidAmerican Energy Company (MidAmerican) states that the Commission should not impose a new set of accounting and reporting requirements on entities that have been exempt from the requirements developed by the SEC to enforce PUHCA 1935. According to MidAmerican, the information required under the SEC rules would require these entities to prepare and file reports that are duplicative of information contained in reports already filed with the Commission (e.g., FERC Forms 1 and 2 and the quarterly financial reports) and reports filed with the SEC (e.g., Form 10-K and Form 10-Q) and imposes an unnecessary burden and expense on such entities and provides no significant additional information to the Commission. Accordingly, MidAmerican states that the Commission should make it perfectly clear that its proposal to adopt the accounting, cost-allocation, recordkeeping and related rules promulgated by the SEC applicable to registered holding companies and their service companies does not extend to public utility holding companies that were not registered under PUHCA 1935 and that, in addition, such rules should not apply to any entities that may become public

[28] APPA/NRECA Comments at 30-31.

[29] AEP Comments at 2-3, National Fuel Gas Reply Comments at 3-4.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

utility holding companies after February 8, 2006, the effective date of repeal of PUHCA 1935.[30]

36. FirstEnergy suggests that, if the Commission adopts this proposal, it should clarify the regulatory text of proposed section 366.2(e) to delineate between those holding company systems to which the rules apply and those that are exempt from such provisions, and should explain the reasons justifying such distinction.[31] Alcoa states that, even if the Commission decides not to exempt from the reach of proposed section 366.2 all companies that are currently exempt holding companies under PUHCA 1935, consideration at least should be given to blanket exemptions for holding companies having a section 3(a)(3) exemption which are, by definition and determination by SEC, engaged in a business other than being a public utility holding company.[32]

Commission Determination

37. With respect to the general applicability of the federal access to books and records requirements in section 1264 of EPAct 2005, there is no basis in PUHCA 2005 for distinguishing between holding companies based on their registered or exempt status under PUHCA 1935. Accordingly, the Commission will subject all holding company systems, whether previously exempt or registered, to the books and records requirements

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[30] MidAmerican Comments at 5-7. See also CEOB Comments (3) (supports case-by-case exemptions), Chairman Barton Reply Comments at 5, Detroit Edison Comments at 3-5, Questar Reply Comments at 2.

[31] FirstEnergy Comments at 9.

[32] Alcoa Comments at 5.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

that PUHCA 2005 imposes on holding companies and affiliates, associate companies, and subsidiaries thereof, unless they qualify for one of the statutory exemptions provided for under section 1266 of PUHCA 2005.[33] We have also determined that, while we cannot exempt certain persons from the statutory requirements of PUHCA 2005, we can and should grant waivers of the accounting, record-retention, and reporting requirements adopted herein for certain persons and classes of transactions. Additionally, for entities that do have to comply with our filing requirements, we will limit the filings that have to be made and will delay until January 1, 2007, the compliance deadline for companies not currently subject to the SEC rules. Finally, throughout the following discussion, we will distinguish between obligations that apply to all service companies and those that apply to traditional, centralized service companies.[34] Traditional, centralized service companies are a subset of service companies that holding companies have formed. They provide certain specialized services[35] to other companies in the holding company system. They

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[33] Section 1266, discussed infra, requires the Commission to exempt any person that is a holding company solely with respect to EWGs, FUCOs, and QFs. It also requires the Commission to exempt a person or transaction if it finds that the books and records of a person are not relevant to jurisdictional rates or a class of transactions is not relevant to jurisdictional rates.

[34] "Service companies" are defined in section 366.1 as "any associate company within a holding company system organized specifically for the purpose of providing non-power goods or services or the sale of goods or construction work to any public utility in the same holding company system."

[35] These "services," as defined in section 366.1, include "any managerial, financial, legal, engineering, purchasing, marketing, auditing, statistical, advertising, publicity, tax, research, or any other service (including supervision or negotiation of construction or of sales), information or data, which is sold or furnished for a charge.

are to be distinguished from other service companies that are special-purpose companies such as a fuel supply company or a construction company.

38. Specifically, the Commission will require the following for entities that are not otherwise exempted from PUHCA 2005 requirements or granted a waiver of the Commission's regulations thereunder:

(1) Unless otherwise exempted by Commission rule or order or granted a waiver, all holding companies and all service companies that do not currently follow the Commission's record-retention requirements in Parts 125 and 225 of the Commission's regulations must, effective January 1, 2007, comply with the Commission's record-retention requirements. Formerly-registered holding companies and service companies in such holding company systems that currently follow the SEC's record-retention rules in 17 C.F.R. Part 257 have the option, until December 31, 2006, to follow either the Commission's or the SEC's record-retention requirements. But these service companies must transition to the Commission's rules by January 1, 2007. Formerly-exempt holding companies and service companies within such holding company systems, which currently do not follow either the SEC's or the Commission's record-retention requirements will not be required to comply with the Commission's record-retention requirements until January 1, 2007.

(2) Unless otherwise exempted by Commission rule or order or granted a waiver, traditional, centralized service companies (i.e., those that are not

special-purpose companies such as a fuel supply company or a construction company) that do not currently follow the Commission's Uniform System of Accounts in Parts 101and 201 of the Commission's regulations, will be given until January 1, 2007, to transition to the Commission's Uniform System of Accounts. Traditional, centralized service companies in formerly-registered holding company systems that currently follow the SEC's Uniform System of Accounts have the option to follow either the Commission's or the SEC's Uniform System of Accounts for calendar year 2006. But these service companies must transition to the Commission's rules by January 1, 2007. Traditional, centralized service companies within formerly-exempt holding company systems, which currently do not follow either the SEC's or the Commission's Uniform System of Accounts, will not be required to comply with the Commission's Uniform System of Accounts until January 1, 2007. And, as noted above, holding companies, while they will be required to comply with the Commission's record-retention requirements, will not be required to comply with the Commission's Uniform System of Accounts.

(3) All entities that are currently or become holding companies under PUHCA 2005, whether previously exempt or registered under PUHCA 1935, must file FERC-65 (Notification of Holding Company Status), which will be treated as an informational filing, and holding companies seeking to claim an exemption from PUHCA 2005 or waiver of the Commission's

regulations there under may file FERC-65A (Exemption Notification) or FERC-65B (Waiver Notification). All persons that are holding companies on the effective date of PUHCA 2005 must file FERC-65 within 30 days of the effective date of PUHCA 2005, and any person that becomes a holding company thereafter must file FERC-65 within 30 days after becoming a holding company; and

(4) All traditional, centralized service companies will be required to submit an annual report on FERC Form No. 60. Such service companies in formerly-registered holding company systems must submit their first annual report, for calendar year 2005, by May 1, 2006. Such service companies in formerly-exempt holding company systems will be required to submit their first FERC Form No. 60, for calendar year 2007, by May 1, 2008.

39. The Commission will not require the filing of SEC Forms U-5A (notification of registration status), U-5S (annual reports for registered holding companies), U3A-2 (statement by holding company claiming exemption), or U-5B (registration statement), as previously proposed or suggested by some commenters. Information in these forms is in many cases available elsewhere and/or was for the purpose of monitoring activities or transactions that, with the repeal of PUHCA 1935, are no longer prohibited or no longer require prior approval. Additionally, this information is either not relevant to the costs incurred by jurisdictional entities or is not necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. Further, information needed to

protect against inappropriate cross-subsidization will be contained in the accounting and record-keeping requirements that we are adopting herein.

b. General Comments Concerning Adoption of SEC Regulations

Comments

40. APPA/NRECA suggest that, rather than incorporate the SEC rules by reference, the Commission should import the actual wording (with appropriate revisions as discussed below) into its own regulations. Merely cross-referencing existing SEC regulations (as proposed section 366.2(e) would do) would fail in its purpose if the SEC subsequently revises its own regulations to eliminate its PUHCA 1935-related regulations. Moreover, rather than adopt the SEC rules word-by-word, APPA/NRECA urge the Commission to make certain wording adjustments and offer rationales based on the current and likely future industry structure.[36]

41. EEI urges the Commission to integrate whatever it adopts from SEC practice into current Commission procedures and forms. According to EEI, repeal of PUHCA 1935 was intended to reduce the level of holding company regulation, but if current exempt holding companies suddenly are required to contend with unfamiliar SEC practice, it would have precisely the opposite effect. These formerly-exempt companies in effect would become subject to a new level of complex regulation. To avoid this unintended consequence of repealing PUHCA 1935, EEI believes that the Commission should seek to integrate whatever it adopts from SEC practice into current Commission procedures

[36] APPA/NRECA Comments at 23-24. See also FirstEnergy Service Company (FirstEnergy) Comments at 9.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

and forms, which would involve simply including existing public filings, in particular a holding company's SEC Form 10-K, as exhibits to the Commission's Form 1.[37]

42. For the same reasons, EEI requests that the Commission provide a reasonable period between the effective date of its new rules and the date on which the initial filings will be due. EEI proposes that the initial filings should be due in April 2007, giving companies time to adopt any new recordkeeping and reporting requirements and to file information starting with the next round of Form 1 for which the new information would be available. The Commission also should specify the format that will be required for filings under its new rules, and the Commission should make clear when adopting the final rule, the date(s) on which companies will first be required to make any newly required filings under such rules.[38]

43. Georgia Public Service Commission (Georgia PSC) urges the Commission to ensure that the rules to implement PUHCA 2005 provide that the Commission will have access to all of the information and documents previously provided to the SEC under PUHCA 1935. Georgia PSC emphasizes that state commissions have relied upon the filings made by holding companies with the SEC and on audits of holding companies performed by the SEC as a crucial source of information necessary in setting rates for the holding companies' subsidiaries that are regulated by state commissions. Accordingly, the Commission should adopt all provisions of the SEC rules and retain all SEC reporting

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[37] EEI Comments at 3-4.

[38] Dominion Comments at 3, EEI Comments at 6.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

requirements.[39] Similarly, the California Electricity Oversight Board (CEOB) and Utility Workers Union of American (Utility Workers) supports the Commission's adoption of the SEC accounting, cost-allocation, recordkeeping, and related rules identified in the PUHCA NOPR.[40]

44. Entergy Services, Inc. states that it agrees with the Commission's proposal to adopt the SEC regulations, but that the Commission should limit the applicability of these rules to those items that are "relevant to costs incurred by a public utility or natural gas company" and "necessary or appropriate for the protection of utility customers with respect to jurisdictional rates" as required by EPAct 2005 section 1264(a).[41] Similarly, FirstEnergy argues that the Commission should provide a clear explanation of why each category of information that is to be maintained is within the statutory limits above. To reflect these limits, FirstEnergy argues that, at a minimum, the Commission should modify proposed section 366.2(e), consistent with the other subsections of section 366.2, to add the following qualification at the end of the paragraph: "insofar as the Commission determines that such accounting, cost-allocation and related rules are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with

[39] Georgia PSC Comments at 1.

[40] CEOB Comments at 2-3, Utility Workers Comments at 3.

[41] Entergy Comments at 3.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

respect to jurisdictional rates."[42]

45. Several commenters argued that the Commission lacks the authority to adopt SEC regulations under PUHCA 2005[43] or that PUHCA 2005 does not specifically authorize the imposition of reporting requirements.[44] AGL Resources, Inc. (AGL Resources) questions the appropriateness of any requirement to file any reports at all, emphasizing that the requirement in section 1264 to maintain records does not amount to a requirement to file reports. AGL Resources emphasizes that section 14 of PUHCA 1935, which permits the SEC to require certain reports from companies subject to its jurisdiction, has been repealed by EPAct 2005, and the EPAct did not grant the Commission similar authority.[45]

46. Electric Power Supply Association (EPSA) argues that the adoption of the SEC rules as a means of implementing PUHCA 2005 is neither wise nor necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. According to EPSA, the two statutory regimes are completely different and the PUHCA 1935 regulations are incompatible with the considerably more narrow scope of PUHCA 2005, which the Commission itself notes is primarily a books and records access statute and a statute that does not give the Commission authority to pre-approve holding

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[42] FirstEnergy Comments at 6.

[43] See, e.g., Energy East Comments at 4-7, National Fuel Gas Comments at 2.

[44] See, e.g., E.ON/LG&E Energy Comments at 12.

[45] AGL Resources Comments at 5.

company activities.[46] EPSA further contends that the adoption of such rules would be contrary to Congress' intent and exceed the authority granted to it under PUHCA 2005, improperly and unnecessarily imposing PUHCA 1935-type regulation on all PUHCA 2005 holding companies and their relevant affiliates, including a large number of holding companies exempted from PUHCA 1935.[47] Moreover, EPSA emphasizes that, while the Commission has the authority to disallow a utility's recovery in its jurisdictional rates of improper affiliate charges, the Commission does not have the authority to regulate transactions among non-utility affiliates by requiring "at cost" pricing, and, therefore, has no authority to impose financial and complex accounting and reporting requirements to implement "at cost" pricing.[48]

Commission Determination

47. We agree with the comments of APPA/NRECA and EEI that any SEC regulations that the Commission adopts should be imported into and integrated with the Commission's regulations, rather than, for example, being incorporated by reference. However, the Commission does not find it appropriate to incorporate all of the relevant SEC rules at this time. Accordingly, the Commission will adopt in Part 366 of its regulations certain provisions of 17 C.F.R. Parts 250 and 259, which are discussed further below. We will not adopt the SEC Uniform System of Accounts and record-retention

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[46] EPSA Comments at 6-7.

[47] Id. at 7.

[48] Id. at 10.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

rules in 17 C.F.R. Parts 256 and 257 into the Commission's regulations at this time. Instead, the Commission will initiate a separate rulemaking proceeding, which we intend to complete well in advance of the January 1, 2007 deadline, to address how the Commission's Uniform System of Accounts and record-retention rules in Parts 101, 125, 201, and 225 of its regulations can be modified to adopt or otherwise integrate the relevant parts of the SEC's Uniform System of Accounts and record-retention rules into the Commission's regulations. As discussed above, unless otherwise exempted or granted a waiver, both holding companies and service companies will be required to comply with the Commission's record-retention requirements effective January 1, 2007, but only traditional, centralized service companies will be required to comply with the Commission's Uniform System of Accounts. We will give holding companies registered under PUHCA 1935 and service companies within formerly-registered holding company systems that currently follow the SEC's record-retention rules in 17 C.F.R. Part 257 the option to follow either the Commission's or the SEC's record-retention rules, as they exist on the day before the effective date of PUHCA 2005, for calendar year 2006. Similarly, traditional, centralized service companies in formerly-registered holding company systems that currently follow the SEC's Uniform System of Accounts in 17 C.F.R. Part 256 may follow either the SEC's or the Commission's Uniform System of Accounts for calendar year 2006. But, as discussed above, these entities must transition to the Commission's rules, by January 1, 2007.

48. We also agree with the comments of EEI that it is appropriate to provide a reasonable transition period between the effective date of this Final Rule and the date on

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

which the initial filings will be due. As discussed above, we will give traditional, centralized service companies until January 1, 2007 to conform their accounts and records to the requirements of the Commission's Uniform System of Accounts and record-retention rules. Similarly, we will give holding companies and service companies until January 1, 2007 to conform to the requirements of the Commission's record-retention rules.

49. However, as discussed below, this transition period will not apply to the filing of FERC-65 (Notification of Holding Company status). Accordingly, all persons that are holding companies within the meaning of PUHCA 2005 on the effective date of PUHCA 2005 will be required to file FERC-65 within 30 days of the effective date of PUHCA 2005 to inform the Commission of their holding company status (and by the same date, holding companies seeking exemption or waiver must file a separate FERC-65A (Exemption Notification) or FERC-65B (Waiver Notification) to assert their claims that they qualify for the statutory exemptions contained in section 1266(a) of EPAct 2005 or the other exemptions and waivers adopted in this Final Rule). Any entities that become holding companies after the effective date of PUHCA 2005 will be required to file FERC-65 no later than 30 days after becoming a holding company. FERC-65 is in lieu of the NOPR proposal to adopt SEC Form U-5A, but will contain a subset of the information that the Commission originally proposed to be filed. FERC-65 will be an information-only filing. We find that it is appropriate to impose this notification requirement on all holding companies equally because it will permit the Commission to identify the companies that may have books and records relevant to jurisdictional

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

responsibilities under the FPA and the NGA. This notification requirement, moreover, will impose only a *de minimis* burden.

50. We reject the recommendation of Georgia PSC that the Commission retain all SEC regulations and ensure collection of the same information as under PUHCA 1935. As we emphasized above, Congress repealed PUHCA 1935 and nowhere in PUHCA 2005 did it give us the same substantive regulatory authority that the SEC had under PUHCA 1935. Accordingly, we will adopt only those SEC regulations that would be consistent with Congress' intent in enacting PUHCA 2005, namely, those that provide the Commission with access to books and records relevant to the costs incurred by a public utility or natural gas company and necessary or appropriate for the protection of public utility or natural gas company customers with respect to jurisdictional rates.

51. With respect to FirstEnergy's request that we amend section 366.2(e), we note that we are not adopting this paragraph in the Final Rule. Instead, to avoid ambiguity, we have imported the text of these SEC regulations that the Commission is adopting, with appropriate modifications, into Part 366 of the Commission's regulations. Furthermore, as explained above, we will not adopt into the Commission's regulations the SEC's Uniform System of Accounts and record-retention rules at this time. Instead, we will initiate a separate rulemaking proceeding to address how the Commission's Uniform System of Accounts and record-retention rules in Parts 101, 125, 201, and 225 of its regulations can be modified to adopt or otherwise integrate the relevant parts of the SEC's Uniform System of Accounts and record-retention rules.

52. We reject the contention submitted by EPSA and others that the Commission lacks

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

the authority under PUHCA 2005 to adopt SEC regulations (or versions thereof) and that doing so is contrary to Congress' intent in repealing PUHCA 1935. The accounting, record-retention and filing requirements adopted herein impose no substantive restrictions and prior approval requirements such as those contained in PUHCA 1935. Moreover, sections 1264(a) and 1264(b) of EPAct 2005 expressly require each holding company and each associate company, affiliate or subsidiary thereof to "maintain" and "make available" books and records as the Commission determines are relevant to costs incurred by a public utility or natural gas company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. In turn, section 1272(1) of EPAct 2005 directs the Commission to issue such regulations as may be necessary or appropriate to implement PUHCA 2005, including section 1264. In addition, section 1270 of EPAct 2005 states that that the Commission shall have the same powers as set forth in sections 306 through 317 of the FPA to enforce the provisions of PUHCA 2005. In this regard, we note that section 309 of the FPA grants the Commission the power to perform any and all acts and to prescribe by order, rule or regulation, as it may find necessary or appropriate to carry out the provisions of the FPA, "the form of all statements, declarations, applications, and reports to be filed with the Commission."[49] PUHCA 2005 did not specify the manner in which books and records are to be made available to the Commission, and, in the face of statutory silence on this specific issue and the clear statements in sections 1272 and 1270 of EPAct 2005, we find

[49] 16 U.S.C. § 825h (2000); accord 15 U.S.C. § 717o (2000).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

that Congress has granted the Commission the discretion to prescribe the manner in which these entities are to "make available" their books and records to the Commission and "the form or forms of all statements, declarations, applications, and reports to be filed with the Commission."

53. For the same reasons, we similarly reject the argument submitted by AGL Resources, who notes that the SEC was empowered to require the filing of reports by section 14 of PUHCA 1935, which has been repealed, and concludes from the fact that Congress has not enacted an identically-worded provision in PUHCA 2005 that the Commission lacks the authority to require entities to file any reports under PUHCA 2005. AGL Resources' interpretation appears to rest on the erroneous assumption that, by using the terms "maintain" and "make available," Congress necessarily meant that entities were only required to make these books and records available to the Commission on the entities' premises, rather than in the form of a report filed with the Commission. Had Congress meant to restrict the Commission's access to books and records in this manner, it clearly could have done so, as it did with respect to state commissions under section 1265; section 1265 provides that entities are to "produce for inspection" "upon … written request" of a state commission a much more limited range of documents. Here, in section 1264 (and sections 1272 and 1270), Congress chose not to adopt such a restriction.

54. Finally, we note that, where appropriate, we have removed from the SEC regulations adopted herein all references to PUHCA 1935 and related SEC regulations and, where appropriate, replaced them with references to PUHCA 2005 or to the relevant

Commission regulations. Therefore, we will not further address in this Final Rule the various comments received suggesting that we remove such references.

c. Comments on Particular SEC Regulations

17 C.F.R. §§ 250.1 and 259.5A (Form U-5A)

Comments

55. SEC Form U-5A requires each non-exempt holding company to submit a complete list of corporate affiliates and brief description of the kind of business each affiliate transacts. APPA/NRECA support the adoption of 17 C.F.R. 250.1, which will require each public utility holding company to inform the Commission of its status. As to exemptions, APPA/NRECA argue that the Commission should distinguish between the exemption available under section 1266(a) (for QFs, EWGs and FUCOs) and 1266(b) (for persons and classes of transactions "not relevant to the jurisdictional rates of a public utility or natural gas company"), so that the notification the Commission requests would be limited to section 1266(a). According to APPA/NRECA, the "relevance" exemption of section 1266(b) requires more Commission attention, in the form of general standards to be applied case by case.[50]

56. Energy East Corporation (Energy East) opposes the adoption of this section because it contends that the notification requirement is inconsistent with the statement in the NOPR indicating that the Commission does not intend to reimpose the registration requirement. Energy East states that the Commission could simply instead rely on

[50] APPA/NRECA Comments at 24.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

disclosure in FERC Forms 1 and 2 which require a public utility or natural gas company to state the name of any controlling corporation, the manner in which control is held and the extent of control.[51] Similarly, Dominion Resources, Inc. (Dominion) and EEI state that the Commission's intention to not reimpose the registration requirement is inconsistent with the adoption of the three filing requirements set forth in section 250.1 (i.e., SEC Forms U-5A, U-5B, and U-5S).[52]

57. Dominion agrees with retention of the Form U-5A filing requirement because this form is considerably less burdensome than either Form U-5B or U-5S. Dominion also suggests that this form be revised to provide for a claim of exemption under section 1266 of EPAct 2005.[53] Scottish Power PLC (Scottish Power) also supports the retention of Form U-5A and suggests that the Commission consider adding a component to the Form U-5A to allow a holding company to make a claim for an exemption from the books and records requirements of section 1264.[54]

Commission Determination

58. The Commission will adopt in section 366.4(a) of its regulations a provision analogous to that contained in paragraph (a) of 17 C.F.R. 250.1. However, the Commission will not require holding companies to submit a Commission-adopted version of SEC Form U-5A and will instead require persons that are holding companies on the

[51] Energy East Comments at 4.

[52] Dominion Comments at 11-12, EEI Comments at 16.

[53] Dominion Comments at 12.

[54] Scottish Power Comments at 4.

effective date of PUHCA 2005 to submit FERC-65 (Notification of Holding Company status) and, for companies seeking exemption or waiver, FERC-65A (Exemption Notification) or FERC-65B (Waiver Notification) within 30 days of the effective date of PUHCA 2005, February 8, 2006. Furthermore, any entity that becomes a holding company after the effective date of PUHCA 2005 must submit FERC-65 (and, if appropriate, FERC-65A or FERC-65B) within 30 days of the date on which such entity becomes a holding company. This filing will be for informational purposes and will not be noticed in the Federal Register, but will be available on the Commission's website.

59. As discussed above, entities seeking exemption or waiver may do so by filing FERC-65A or FERC-65B, along with their FERC-65. All notifications of exemption or waiver submitted on FERC-65A and FERC-65B will be noticed in the Federal Register.

60. However, we will limit the use of FERC-65A and FERC-65B to those persons who claim that they qualify for one of the mandatory statutory exemptions in section 1266(a) (i.e., that they are a holding company solely with respect to one or more EWGs, FUCOs, or QFs) or for one of the class exemptions or waivers that the Commission adopts in this Final Rule, which are listed in section 366.3(b) and (c) of the Commission's regulations, or in subsequent rules or orders. Persons will be considered to have a temporary exemption or waiver upon a good faith filing of FERC- 65A or FERC-65B and the exemption or waiver will be deemed granted after 60 days from the date of the filing, absent Commission action to the contrary before that date. The Office of the Secretary will periodically issue a notice listing the persons whose notifications of exemption or waiver have gone into effect by operation of the Commission's regulations,

i.e., in the absence of Commission action to the contrary within 60 days after the date of filing.

61. Persons seeking any other type of exemption or waiver must file a petition for declaratory order pursuant to section 385.207(a) of the Commission's regulations, as required by section 366.3(d) of the regulations adopted herein. These petitions for declaratory order will be noticed in the Federal Register and no temporary exemption or waiver will attach. Such requests for exemptions or waivers will be considered case-by-case and deemed granted only upon order of the Commission.

62. We reject the assertion of Energy East and others that the adoption of a Commission analogue to 17 C.F.R. 250.1(a) (i.e., the SEC's registration requirement) is tantamount to re-imposing the registration requirement under PUHCA 1935. First and foremost, the Commission in the NOPR proposed to use a version of the SEC Form U-5A as a notification requirement, not as a registration requirement. Moreover, in this Final Rule, we are not adopting the proposal in the NOPR to require submission of SEC Form U-5A and instead using what is called FERC-65 (Notification of Holding Company Status). This notification requirement simply requires persons that are holding companies to inform the Commission of their status as such and thus that they are subject to the Commission's access to books and records under PUHCA 2005. As commenters have noted, the registration system established by PUHCA 1935 was part of a pervasive regulatory regime addressing virtually all aspects of a registered holding company's and its subsidiaries' financial and corporate activities, while PUHCA 2005 is a narrower statute intended to give the Commission access to books and records relevant to costs

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

incurred by a public utility or natural gas company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. For the Commission to carry out its jurisdictional rate responsibilities, it must be able to identify the entities that are holding companies of jurisdictional public utilities or natural gas companies. The requirement to notify the Commission facilitates our ability to do so and is thus consistent with Congress' intent in enacting PUHCA 2005, and, in any event, is hardly burdensome.

17 C.F.R. § 250.26

Comments

63. 17 C.F.R. 250.26 directs registered holding companies and their subsidiaries to comply with a number of SEC accounting and record-keeping rules, including Regulation S-X, the equity accounting method, and the record-retention rules in 17 C.F.R. Part 257. E.ON and LG&E Energy assert that section 250.26(c), which requires holding companies to use the equity method of accounting for investments in subsidiaries, is outside the jurisdiction of the Commission under section 1264 of EPAct 2005 and should not be adopted by the Commission.[55] Dominion and EEI argue that section 250.26(b), which deals with information to be supplied with Form U-5S, should be deleted and that sections 250.26(c) and (g) should not be adopted by the Commission. Moreover, EEI and Dominion argue that, rather than adopting section 250.26(d), which mandates the use of SEC record-retention policy, holding companies should have the option of following

[55] E.ON/LG&E Energy Comments at 16.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

either SEC or Commission document retention requirements.[56] EPSA states that 17 C.F.R. 250.26 pertains to financial recordkeeping requirements that would conflict with accounting and reporting requirements that many non-registered holding company systems are not currently required to follow, i.e., Regulation S-X. Moreover, EPSA notes that Rule 250.26 prohibits any company in a registered holding company system to declare or pay dividends or reacquire its securities absent SEC approval under section 12 of PUHCA 1935.[57] Finally, Energy East opposes the adoption of this rule because all top-tier registered holding companies are public issuers and most large holding companies subject to PUHCA 2005 are likely to be public issuers and are thus already required to prepare financial statements in accordance with Regulation S-X, unless exempted by other SEC rules or form instructions.[58]

Commission Determination

64. With respect to the concerns expressed by E.ON and LG&E Energy on the use of the equity method of accounting for investments in subsidiaries and Energy East and EPSA regarding SEC Regulation S-X, the Commission is not adopting paragraph (a)(1) of 17 C.F.R. 250.26 (a)(1), which mandates compliance with this SEC Regulation S-X, or paragraph (c), which mandates use of the equity method of accounting. In addition, the Commission is not adopting paragraph (b), which requires certain information to be

[56] Dominion Comments at 12, EEI Comments at 17. See also Southern Company Services, Inc. (Southern Company Services) Comments at 5.

[57] EPSA Comments at 11.

[58] Energy East Comments at 7.

supplied with the Form U-5S, or paragraph (g), which is a cross reference to 17 C.F.R. 250.26. Also, as recommended by Dominion and EEI, the Commission will not adopt paragraph (d) regarding the SEC rules on record retention in 17 C.F.R. Part 257. Instead, as discussed above, we will permit holding companies registered under PUHCA 1935 and service companies within such holding company systems that currently follow the SEC's record-retention rules in 17 C.F.R. Part 257 to follow either the Commission's or the SEC's record-retention rules, as they exist on the day before the effective date of PUHCA 2005, for calendar year 2006. These entities must transition to the Commission's rules by January 1, 2007.

17 C.F.R. § 250.27

Comments

65. 17 C.F.R. 250.27 requires registered holding companies and public-utility company subsidiaries thereof that are not subject to the Commission's or a state commission's system of accounts to conform to a classification of accounts prescribed by the Commission. If the public-utility company subsidiary is a gas utility company, it must conform to the system of accounts recommended by NARUC. According to Dominion and EEI, it is questionable whether this rule currently applies to any companies and whether there are any public utility companies under PUHCA 1935 that would not be subject to the Commission's Uniform System of Accounts or the requirements of a state utility commission. In addition, Dominion and EEI assert that section 250.27 is potentially inconsistent with the waiver of Part 101 of the Commission's regulations commonly received in connection with an authorization to sell power at market-based

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

rates because this section would subject to Part 101 any public utility under the FPA that is not required to comply with it.[59]

66. APPA/NRECA oppose the adoption of this section because it does not seem to add anything presently required by the Commission's Uniform System of Accounts.[60] Finally, Energy East opposes the adoption of this section as unnecessary because there is no evidence that utilities subject to the Commission's ratemaking jurisdiction lack a uniform system of accounting standards.[61]

Commission Determination

67. We agree with commenters that this provision should not be adopted as part of the Commission's regulations because it does not add anything to the Commission's Uniform System of Accounts. All public utilities and natural gas companies, except those that have been granted waiver of the Commission's accounting, record-retention, and reporting requirements (e.g., power marketers), already maintain their books and records in accordance with the Commission's Uniform System of Accounts in Parts 101 and 201 of its regulations.

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[59] Dominion Comments at 12-13, EEI Comments at 18.

[60] APPA/NRECA Comments at 25.

[61] Energy East Comments at 9.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

17 C.F.R. § 250.80

Comments

68. Section 250.80 defines the terms "construction," "goods," and "services," as used in the SEC regulations under PUHCA 1935. APPA/NRECA support the adoption of section 250.80, but suggest that the Commission should import the definitions of "service," "goods," and "construction" in this section into its own rules.[62] EEI and Dominion also support the adoption of this section.[63] E.ON and LG&E Energy also endorse the Commission's proposal to adopt section 250.80.[64]

Commission Determination

69. We agree with APPA/NRECA and other commenters, and as these terms and their definitions are relevant under PUHCA 2005, we will adopt the definitions contained in 17 C.F.R. 250.80 in section 366.1 of the Commission's regulations and thereby import the SEC's definitions of these terms for the purposes of PUHCA 2005. In addition, we will remove references to PUHCA 1935, where appropriate, as we have done with the other regulations adopted in this Final Rule.

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[62] APPA/NRECA Comments at 25-26.

[63] Dominion Comments at 13, EEI Comments at 18.

[64] E.ON/LG&E Energy Comments at 14.

17 C.F.R. § 250.93 and 17 C.F.R. Parts 256 and 257

Comments

70. Section 250.93 requires service companies to adopt the SEC's Uniform System of Accounts in 17 C.F.R. Part 256 and its record-retention rules in 17 C.F.R. Part 257. Some commenters opposed the adoption of these SEC regulations, while others supported their adoption or suggested various ways in which their application could be limited, in particular, by allowing holding companies and service companies to adopt the Commission's Uniform System of Accounts in Part 101 of its regulations and its record-retention rules under Part 125 of its regulations.[65]

71. Dominion and EEI agree with the Commission's proposal to adopt the SEC's Uniform System of Accounts. However, they state this system of accounts closely tracks the requirements of SEC Form U-13-60 and therefore includes a number of components that no longer will be relevant following repeal of PUHCA 1935. They thus recommend that the Commission adopt only those portions of 17 C.F.R. Part 256 that correspond to the information it recommends be included with SEC Form U-13-60.[66]

72. Dominion and EEI also argue that holding company service companies should have the option of adopting the Commission's Uniform System of Accounts and record-retention rules instead of the SEC's. They further contend that there is no reason that any company that currently follows the Commission's record-retention regulations should be

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[65] But see APPA/NRECA Comments at 25-26.

[66] Dominion Comments at 16, EEI Comments at 20.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

required to adopt those found in 17 C.F.R. Part 257 and that the Commission could reconcile the differences between the two sets of requirements in a subsequent rulemaking.[67]

73. Entergy encourages the Commission to consider limiting the applicability of these requirements to service companies and, in the case of the record-retention requirements imposed under 17 C.F.R. Part 257, limiting the scope of these requirements to information that bears a direct relationship to costs incurred by service companies or other associate companies whose costs are reflected in the jurisdictional rates or charges of public utilities.[68]

74. Energy East also opposes the adoption of 17 C.F.R. Part 257 because, it contends, some of the SEC's records retention requirements are outdated, particularly as to the storage media specified, given information storage and retrieval technologies that are now available and in common use. The Commission's rules are more flexible because a public utility or licensee may select its own storage media subject to conditions related to life expectancy and internal control procedures to assure data reliability. Energy East thus urges the Commission to expand its Part 125 rules, making them applicable to public utilities, service companies, and holding companies.[69]

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[67] Dominion Comments at 16-17, EEI Comments at 20-21. According to Dominion and EEI, to the extent the coverage of the SEC requirements is broader than the Commission's, the additional requirements relate largely to securities matters that are no longer relevant under PUHCA 2005.

[68] Entergy Comments at 6.

[69] Energy East Comments at 9.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

75. Finally, APPA/NRECA suggest that the Commission adjust the requirements of the SEC's Uniform System of Accounts to make them consistent with the Commission's Uniform System of Accounts under the FPA applicable to public utilities.[70]

Commission Determination

76. As discussed above, the requirements of section 1264 of EPAct 2005 to maintain and make available books and records apply equally to all holding companies and affiliates, associate companies, and subsidiaries thereof, regardless of their registered or exempt status under PUHCA 1935, absent a prospective exemption or waiver. Nevertheless, the Commission recognizes the long-standing differences in the treatment of these classes of entities under PUHCA 1935 and SEC regulations, namely, that companies in formerly-registered holding companies systems were subject to PUHCA 1935 and the SEC's accounting and other regulations thereunder, while companies in formerly-exempt holding company systems were not. We will therefore provide all holding companies and service companies with a reasonable period of time to transition to the Commission's regulations under PUHCA 2005. Specifically, all traditional, centralized service companies that do not currently follow the Commission's Uniform System of Accounts (Parts 101 and 201) will have until January 1, 2007 to comply with the Commission's Uniform System of Accounts, and all holding companies and service companies that do not currently follow the Commission's record-retention requirements (Parts 125 and 225) will have until January 1, 2007 to comply with the Commission's

[70] APPA/NRECA Comments at 25.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

record-retention requirements. Furthermore, traditional, centralized service companies within registered holding company systems that currently follow the SEC's Uniform System of Accounts in 17 C.F.R. Part 256 have the option to follow either the Commission's or the SEC's Uniform System of Accounts, as they exist on the day before the effective date of PUHCA 2005, for calendar year 2006. Similarly, all holding companies and service companies within registered holding company systems that currently follow the SEC's record-retention rules in 17 C.F.R. Part 257 have the option to follow either the Commission's or the SEC's record-retention requirements, as they exist on the day before the effective date of PUHCA 2005, for calendar year 2006. But, as discussed above, these entities must transition to the Commission's rules by January 1, 2007.

77. However, traditional, centralized service companies following the Commission's Uniform System of Accounts must also comply with the General Instructions and other requirements contained in the SEC's Uniform System of Accounts. These instructions and requirements pertain specifically to service company accounts and are not, at present, adequately addressed in the Commission's Uniform System of Accounts.

17 C.F.R. §§ 250.94 and 259.313 (Form U-13-60)

Comments

78. Service companies are required by 17 C.F.R. 250.94 and 259.313 to file SEC Form U-13-60, which is the annual report for service companies in registered holding company systems. It requires the submission of the service company's financial statements for each calendar year prepared using the SEC's Uniform System of

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Accounts. It also contains certain supporting schedules providing a more detailed analysis of amounts recorded in individual accounts, an analysis of billings to associated and non-associated companies, expense distribution by service company department, and an accompanying statement of methods of cost allocation.

79. Several commenters support the adoption of 17 C.F.R. 250.94 and 259.313. APPA/NRECA support the retention of 17 C.F.R. 250.94 and Form U-13-60.[71] Energy East states that it is beneficial to have one form of service company report that could be filed with the Commission and state commissions that require affiliate transactions reporting and thus supports the proposed SEC Form U-13-60 filing requirement, with which the states are already familiar. Energy East further recommends that the Commission focus the requirements of Form U-13-60, as recommended by EEI, on the information that is most relevant to allocations of costs.[72]

80. Dominion and EEI also note that the current Form U-13-60 requires companies to file a substantial amount of information that is not relevant to the Commission's duties under PUHCA 2005. EEI therefore proposes that the balance sheet and income statement portions of the Form U-13-60 be retained, but that a number of accounts and schedules not relevant to cost-allocation issues be eliminated, as these accounts and schedules in question are extremely time consuming to prepare and in some cases require invoice level detail to complete, and EEI offers suggestions as to accounts and schedules that should be

[71] APPA/NRECA Comments at 25-26.

[72] Energy East Comments at 10.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

modified.[73] Finally, EEI requests that the Commission clarify that the form applies to system service companies and provide a definition of "service company" in section 366.1 that tracks the language in section 1275(b) of PUHCA 2005, i.e., "a company organized specifically for the purpose of providing non-power goods and services to any public utility in the same holding company system."[74]

81. E.ON and LG&E Energy contend that the implementation of section 250.94 and Form U-13-60 is beyond the scope of the jurisdiction granted to the Commission in section 1275 of EPAct 2005, which is much more limited than that granted to the SEC to authorize the organization and conduct of service companies under section 13 of PUHCA 1935. They suggest that, if it is nonetheless appropriate for the Commission in its administration of PUHCA 2005 to impose reporting requirements under the FPA, the nature and extent of such reports should be limited to those matters over which the Commission is granted jurisdiction. They further contend that Form U-13-60 largely contains information which is not relevant to the jurisdiction of the Commission and propose that the Commission should instead require that FERC Form 1 be supplemented to include the following information: (i) annual filing of cost-allocation methodology used by the service company to allocate costs; (ii) annual filing of statement of receivables from and payables to associated companies, identified by associate company name; and (iii) annual filing of all charges received by associate companies from a

[73] Id.

[74] Dominion Comments at 14, EEI Comments at 19.

services company, identified by associate company and by FERC account.[75]

Commission Determination

82. Based on the comments received, the Commission has decided not to adopt SEC Form U-13-60, and the Commission will instead require traditional, centralized service companies to file their annual reports on FERC Form No. 60, attached as Appendix 2, which is based on a streamlined version of SEC Form U-13-60. FERC Form No. 60 substantially reduces the amount of information required by SEC Form U-13-60 by deleting certain schedules not necessary to fulfill our jurisdictional responsibilities. Section 366.23 of the Commission's regulations, which are based on 17 C.F.R. 250.94 and 259.313, will thus require all traditional, centralized service companies to file with the Commission FERC Form No. 60 by May 1 of the year following the calendar year that is the subject of the report. Traditional, centralized service companies in formerly-registered holding company systems must submit their first FERC Form No. 60, for calendar year 2005, by May 1, 2006, while traditional, centralized service companies in formerly-exempt holding company systems will have until May 1, 2008, to submit their first annual report, for calendar year 2007, on FERC Form No. 60.

83. SEC Form U-13-60 contains a set of financial statements for service companies, detailed supporting schedules, organizational charts, a list of cost-allocation methods they use, and other information. Prior to the repeal of PUHCA 1935, the companies to which these reporting requirements applied were entities formed specifically for the purpose of

[75] E.ON/LG&E Energy Comments at 15-16. See also Entergy Comments at 6.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

providing non-power goods and services to a public-utility company, as defined in section 366.1 of the Commission's regulations, of a holding company system. In 17 C.F.R. 250.80, the SEC defined the type of specialized services that these traditional, centralized service companies provided to public-utility companies within their holding company systems, and we have taken over this definition in section 366.1 of our regulations.[76] With the repeal of PUHCA 1935 and its associated rules on cross-subsidization, diversification, and requirements to obtain SEC approval for affiliate transactions and the formation of service companies, these traditional, centralized service companies may increasingly provide centralized services not only for public utility affiliates, but also for non-utility affiliates of financial institutions or other industrial conglomerates, increasing the opportunity for cross-subsidization.

84. The annual financial reporting requirement for service companies in FERC Form No. 60, which is based on a truncated version of SEC Form U-13-60, will provide transparency and will enable the Commission and others to better monitor for cross-subsidization. Such information will aid the Commission in carrying out its statutory duties in a number of contexts, including in its assessment of whether a given disposition of jurisdictional facilities under section 203 of the FPA will result in cross-subsidization, in its ratemaking under sections 205 and 206 of the FPA and sections 4 and 5 of the NGA, and in its review and approval of cost-allocations under section 1275 of EPAct

[76] Section 366.1 defines these "services" as "any managerial, financial, legal, engineering, purchasing, marketing, auditing, statistical, advertising, publicity, tax, research, or any other service (including supervision or negotiation of construction or of sales), information or data, which is sold or furnished for a charge."

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

2005. The accounting, record-retention, and reporting rules for service companies that we are adopting in this Final Rule are a measured response to the need for information about service company costs and functions necessary for the Commission to carry out its statutory responsibilities. Finally, in response to EEI's request that the Commission provide a definition of service company that tracks the language in section 1275(b), we note that we have added a definition of service company in section 366.1 of the Commission's regulations.

85. While we believe an annual reporting requirement for service companies is an important tool to aid the Commission in carrying out its responsibilities under the FPA and NGA, and its review of cost allocations requested under section 1275 of PUHCA 2005, as noted above, we have considered the comments received regarding the current content of SEC Form U-13-60 and concluded that some, but not all, recommendations for modifications and deletions of certain schedules should be adopted. Specifically, there are a number of schedules currently contained in the SEC Form U-13-60 that provide a greater level of detail for some items than the Commission will require in FERC Form No. 60 to carry out its statutory responsibilities. Therefore, we will not carry over from SEC Form U-13-60 to FERC Form No. 60 the requirement to submit supporting schedules for Outside Services Employed, Employee Pensions and Benefits, General Advertising Expenses, Rents, Taxes Other than Income Taxes, Donations, and Other Deductions.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

86. We will not, however, adopt EEI's request to delete Schedule XIII – Current and Accrued Liabilities. This schedule contains information about the outstanding balances of accounts and notes payable to associated companies. We consider this information to be integral to understanding inter-company transactions and cost allocations within the holding company system.

87. We also will not adopt requests to modify or delete the Schedule of Expense by Department or Service Function or the Departmental Analysis of Salaries. This information is relevant to affiliate costs recovered in jurisdictional rates. Section 1275(b) of EPAct 2005 specifically requires the Commission in certain circumstances to review and authorize the allocation of costs for non-power goods or services provided by service companies to public utilities within the same holding company system. The determination of proper cost allocation requires knowledge of the total costs and how they are distributed within the holding company system, particularly to the jurisdictional entity(ies). The submission of the information in this schedule will facilitate the Commission's understanding of cost allocations within the holding company system.[77] The Departmental Analysis of Salaries shows how salary expenses are allocated to each parent company, associate company, and non-associate company based on the department or service function allocation methods. This schedule is a tool to determine whether cost

[77] As discussed elsewhere in this Final Rule, although we have the authority to require the filing of cost allocation agreements pursuant to our ratemaking authority under sections 4 and 5 of the NGA and sections 205 and 206 of the FPA, we will not do so because the Commission believes that the submission of relevant cost-allocation information on FERC Form No. 60 provides a less burdensome method for collecting this information, for both service companies and the Commission.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

allocations are being made in accordance with the authorized methods of cost allocation and whether inappropriate cross-subsidization has occurred. The Schedule of Expense by Department or Service Function similarly promotes this end.

88. Finally, the Commission will not adopt EEI's recommendation to delete the supporting schedule for Account 930.2, Miscellaneous General Expenses. Account 930.2 is a catch-all account for recording expenses not provided for elsewhere. A single-sum total for this account simply does not provide sufficient information about the nature of the items included in the account or the associated amounts for each item. The additional disclosure that this schedule provides therefore remains important for understanding service company costs and functions. Additionally, we note that a similar schedule is required for the FERC Form No. 1 submitted by public utilities.

17 C.F.R. § 259.5S (Form U-5S)

Comments

89. SEC Form U-5S is the annual report registered holding companies must submit, which includes information about the company's corporate structure, board of directors, acquisitions or sales of utility assets, securities transactions, investments in companies outside the holding company family, political contributions, contracts between the service company and utility affiliates; relations between the holding company and any EWG or FUCO, and a copy of the company's yearly financial reports.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

90. APPA/NRECA support the retention of Form U-5S.[78] Georgia PSC also supports the adoption of this reporting requirement, and suggests that the Commission should add cash flow statements to the Financial Statement and Exhibits section of Form U-5S.[79]

91. The majority of commenters, however, oppose the adoption of Form U-5S. EEI argues that the Form U-5S filing requirement should not be adopted because it imposes burdensome and duplicative information collection requirements. EEI states that, although the Office of Management and Budget estimates that companies need approximately 13 hours to complete Form U-5S, in the experience of EEI's registered holding company members this form requires hundreds of hours to complete and as a result imposes millions of dollars in costs on ratepayers and shareholders. Much of the information required by Form U-5S is contained in other public filings, including the Commission's Form 1 and 3Q and the quarterly and annual reports that companies file with the SEC on Forms 10-Q and 10-K. Other information included in the Form U-5S relates to matters that repeal of PUHCA 1935 has made irrelevant and that holding companies no longer should be required to file.[80]

92. Similarly, AGL Resources and Emera Incorporated (Emera) argue that the information solicited by this SEC form is generally irrelevant to the Commission's ratemaking jurisdiction. They further contend that the Commission already obtains the

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[78] APPA/NRECA Comments at 25-26.

[79] Georgia PSC Comments at 2.

[80] EEI Comments at 5. See also E.ON/LG&E Energy Comments at 14, PacifiCorp Comments at 5, Progress Energy Comments at 5.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

information that it needs to regulate public utilities and natural gas companies on FERC Forms 1 and 2 and that the Commission's need for holding company-level information can be satisfied by reviewing regular SEC reports on Forms 10-K, 10-Q and 8-K, and by soliciting targeted information on a case-by-case basis should particular issues arise. Finally, they argue that the Commission should delay the imposition of additional reporting requirements until it has had sufficient time to evaluate the extent of its information needs.[81]

93. FirstEnergy suggests that, to the extent that the Commission desires to utilize information contained in those forms, it should modify those forms so that the only information required to be maintained is information that is deemed to be necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. The Commission should also provide a clear explanation of why each category of information that is to be maintained is within the statutory limits.[82] Finally, FirstEnergy notes that Item 10 of Form U-5S contemplates that the annual report for each holding company system include consolidating financial statements for the parent holding company and each of its subsidiaries for the year of the report, and will be accompanied by the opinion of the independent accountants as to the consolidated financial statements. This requirement for an accountant's opinion imposes additional costs of obtaining an opinion of the independent accountants with respect to the consolidated financial statements.

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[81] AGL Resources Comments at 4, Emera Comments at 10.

[82] FirstEnergy Comments at 5-6.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Because the financial statements of the individual subsidiaries would have been audited and opinions prepared in anticipation of development of consolidated financial statements, this need for an additional opinion with respect to the consolidated financial statements is not necessary and should be eliminated.[83]

94. Entergy submits that the proposed implementation of the comprehensive reporting requirements of the Form U-5S is unduly burdensome and unnecessary for the Commission to prevent cross-subsidization or otherwise to achieve purposes within the scope of its jurisdiction. Entergy asserts that, at a minimum, the Commission should at least review the individual items in the rules and SEC Forms and determine what, if any, additional information is really necessary for it to discharge its statutory obligations under PUHCA 2005 or the FPA.[84]

Commission Determination

95. We will not require entities that are holding companies under PUHCA 2005 to continue to file SEC Form U-5S. We agree with commenters that the information in this form is available in other Commission or SEC filings and/or is not relevant to costs incurred by jurisdictional entities and is not necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

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[83] Id. at 7. See also Emera Comments at 10.

[84] Entergy Comments at 6.

d. Other Issues Concerning Adoption of SEC Regulations

Comments

96. NARUC submits that the Commission should retain the reporting requirement set forth in 17 C.F.R. 250.58(c), Quarterly Report on Form U-9C-3 because this form contains information that is not reflected in the Annual Report on Form U-13-60.[85] FPL Group, Inc. (FPL Group) suggests that the Commission adopt a simplified annual filing requirement based solely on Part 3 of Form U-3A-2, which requires the submission of certain quantifiable factors upon which the exemption is based. Other provisions in Form U-3A-2 should not be adopted, as they are redundant to other required filings under the books and records provisions (to which exempt holding companies previously were not subject), or would not assist the Commission in making the PUHCA 2005 exemption determination.[86] PacifiCorp and Scottish Power argue that the Commission should not adopt any rules similar to that of 17 C.F.R. 250.24 which require holding companies and their subsidiaries to file certificates of notifications regarding terms and conditions to declarations and order issued by the SEC prior to the enactment of PUHCA 2005.[87]

97. Detroit Edison requests that the Commission narrow the scope of the rule by clarifying that the Commission will not require any holding company (or its associate

[85] NARUC Comments at 2.

[86] FPL Group Comments at 4.

[87] PacifiCorp Comments at 6, Scottish Power Comments at 6.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

companies) to maintain books, records or memoranda that are not used in preparing quarterly and annual filings for the Commission.[88]

Commission Determination

98. The FERC-65 (Notification of Holding Company Status) and FERC Form No. 60 (Service Company Report) adopted above will provide us with information to carry out our statutory rate responsibilities under PUHCA 2005. It is neither necessary nor appropriate to require the submission of additional forms at this time, though, in light of the first year's submissions, the comments received at the technical conference within the next year, and our day-to-day experience in implementing PUHCA 2005, we do not foreclose the possibility that additional filing requirements will later be found necessary.

99. With respect to PacifiCorp and Scottish Power's concerns, we will not adopt 17 C.F.R. 250.24. However, as discussed below with respect to previously authorized activities, we have concluded that filings directed by prior SEC financing authorizations should continue to be made, but should now be made with the Commission.

100. We will not grant Detroit Edison's requested clarification that the Commission will not require any holding company (or its associate companies) to maintain books and records that are not used in preparing quarterly and annual filings for the Commission. The clarification Detroit Edison requests could produce loopholes in holding company obligations to maintain and make available to the Commission their books and records in sufficient detail to permit examination, audit, and verification of the financial statements,

[88] Detroit Edison Comments at 6.

schedules, and reports they are required to file with the Commission or that are issued to shareholders, as required by sections 366.21 and 366.22. For example, we will not carry over from SEC Form U-13-60 to FERC Form No. 60 the requirement to submit a schedule that provides a more detailed breakdown of outside services, but the removal of this schedule does not relieve the traditional, centralized service company of its obligation to provide this information upon request by the Commission. If we were to adopt Detroit Edison's suggested clarifying language, the traditional, centralized service company (which is an associate company within the holding company system) could argue that it does not have to provide the requested information because it was not kept as it was not necessary to complete FERC Form No. 60.

e. Other Comments on the NOPR

Definition of "Relevance"

Comments

101. Several commenters urge the Commission to clarify its standard for relevance under section 1264.[89] For example, APPA/NRECA propose that the Commission should consider the books and records relating to a corporate relationship or transaction, and the parties thereto, are "relevant" if there is a reasonable possibility that the arrangement will affect a public utility affiliate in any material way, including increasing its costs; adversely impacting it financial rating or access to capital; diminishing its sales

[89] Arkansas PSC Comments at 8-11, Black Hills Comments at 2-3, National Association of State Consumer Advocates (NASUCA) Comments at 7, Missouri PSC Comments at 16-18.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

opportunities; or adversely affecting operations, planning or maintaining activities.[90]

102. Detroit Edison submits that section 366.2 as currently worded is far too open-ended, and leaves holding companies in an untenable state of uncertainty with respect to the relevance of any "books, accounts, memoranda" or "other records."[91] PacifiCorp concurs and urges that, at a minimum, the Commission clarify that it will provide a notice-and-comment proceeding before expanding its current information collection under this provision.[92]

Commission Determination

103. In PUHCA 2005, Congress left it to the Commission's discretion to determine what books and records are relevant to the costs incurred by a public utility or natural gas company and necessary or appropriate for the protection of public utility or natural gas company customers with respect to jurisdictional rates. We do not find it appropriate here to follow APPA/NRECA's suggestion that we provide a general definition of

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[90] APPA/NRECA Comments at 19. According to APPA/NRECA, the following new corporate relationships and transactions are of relevance to the Commission: (i) ownership by a holding company of public utilities having no operational integration with each other; (ii) ownership by multi-state holding companies (or their public utility affiliates) of non-utility businesses having no functional relationship to the public utility businesses; (iii) ownership of multiple public utility companies by non-utility ventures; (iv) financings by multi-state public utility companies that fall outside standard debt-equity ratios, or that would fail the six criteria of Section 7(d)(1) of PUHCA 1935; (v) public utility loans to, or guarantees of indebtedness of, the holding company or any other affiliate. Id. at 17-18.

[91] Detroit Edison Comments at 5-6. See also Cinergy Comments at 21, EEI Comments at 5.

[92] PacifiCorp Comments at 5.

relevance. We have instead adopted the requirements in Part 366 of the Commission's regulations. In particular, sections 366.21 and 366.22 require that holding companies and service companies maintain books and records of their transactions in sufficient detail to permit examination, audit, and verification of the financial statements, schedules, and reports they are required to file with the Commission or that are issued to shareholders. We will provide further guidance as to what books and records are relevant at the technical conference that we will convene within one year of the effective date of PUHCA 2005 and in the separate rulemaking proceeding we will institute to address changes in the Commission's Uniform System of Accounts and record-retention requirements. We believe that these provisions provide adequate certainty as to which books and records that holding companies and service companies need to maintain and make available to the Commission.

Preemption of State Laws

Comments

104. Several commenters request that the Commission confirm that its own access under section 1264 does not preempt rights to access information by state commissions under section 1265. In order to prevent future arguments that the federal access provisions of section 1264 preempt state commission access under section 1265, Santa Clara urges the Commission to grant this clarification in the final rule.[93] NARUC emphasizes that Congress expressly provided that states would have access under

[93] Santa Clara Comments at 23-24. See also Arkansas PSC Comments at 21, Missouri PSC Comments at 26-27, TANC Comments at 23-24.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

section 1265; that this means of state access was non-exclusive; and that Congress did not contemplate federal occupation of this field.[94] Moreover, according to NARUC, there is no inherent conflict between state access under either section 1265 or state law and federal access under section 1264.[95] Finally, Indiana Utility Regulatory Commission (IURC) requests that the final regulations include language paralleling the language of sections 1265(d), 1267(b), 1269, and 1275(c) of EPAct 2005 that confirms that the new law (and regulations promulgated under it) does not disturb historical state authority in the identified areas.[96]

Commission Determination

105. We agree with NARUC that there is no inherent conflict between state access under either section 1265 or state law and federal access under section 1264. We find that our own access under section 1264 does not preempt rights to access information by state commissions under section 1265. With respect to IURC's argument, we do not find it necessary to adopt regulatory text on this point, in light of the clear statutory language.

Scope of Commission Authority and Access to Data

Comments

106. APPA/NRECA urge the Commission to explicitly state in the final rule that the data access granted under section 1264(a) of EPAct 2005 supplements, rather than

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[94] NARUC Reply Comments at 3.

[95] Id. at 3-4.

[96] IURC Comments at 6.

supplants, the Commission's pre-EPAct 2005 access to books and records and that this pre-existing access stems from the Commission's ratemaking authority and from the general provisions of section 301 of the FPA and section 8 of the NGA.[97]

Commission Determination

107. The Commission grants APPA/NRECA's proposed clarification. The Commission's pre-EPAct 2005 access to books and records pursuant to section 301 of the FPA and section 8 of the NGA remains unchanged. As provided in section 1271 of EPAct 2005, nothing in PUHCA 2005 limits the Commission's authority under the FPA or the NGA.

State Access to Books and Records Obtained by the Commission

Comments

108. Oklahoma Corporation Commission recommends that the Commission consider language that would allow state commissions to continue to receive notices of any investigations of regulated public utility companies.[98] Public Citizen notes that Congress has not given state commissions in PUHCA 2005 the right to require holding companies or their associate companies to maintain, keep or preserve any records affecting retail rates, so that the state commission can only require the maintenance of holding company/associate company books and records that affect only retail rates if the Commission uses its existing authorities under FPA section 301 to do so. Public Citizen thus urges the Commission to explicitly state in the final rule that the Commission has the

[97] APPA/NRECA Comments at 21.

[98] Oklahoma Corporation Commission Comments at 4.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

authority under FPA section 301 to require holding companies and their associates to maintain books and records that state commissions determine affect their retail rates and provide a process through which the states can request the maintenance and preservation of such books and records.[99]

Commission Determination

109. In response to the request of Oklahoma Corporation Commission that state commissions be apprised of any investigations of regulated public utility companies, we believe our current practices regarding the disclosure of investigations are appropriate and should not be broadened at this time. We are open to further consideration on this point at the technical conference. However, Congress set forth the rights of state commissions to obtain access to the books and records of companies within a holding company system in section 1265 of EPAct 2005, and they may seek to obtain access to the books and records of holding companies in accordance with that provision. With respect to Public Citizen's request that the Commission use section 301 of the FPA to give states the opportunity to request the maintenance and preservation of books and records that state commissions determine affect their retail rates, we do not interpret section 301 to give the Commission the authority to provide a process for states to request maintenance of books and records for retail purposes. Congress has addressed in section 1265 the issue of state access to books and records of holding company systems and their members.

[99] Public Citizen Comments at 4.

3. Exemption Authority

110. Section 1266(a) of EPAct 2005 directs the Commission to issue a final rule within 90 days after the effective date of Subtitle F exempting from the requirements of section 1264 of EPAct 2005 any person that is a holding company, solely with respect to one or more:

(1) qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§ 2601 *et seq*. (2000));

(2) exempt wholesale generators; or

(3) foreign utility companies.

111. Section 1266(b) further directs the Commission to exempt a person or transaction from the requirements of section 1264 if, upon application or sua sponte:

(1) the Commission finds that the books and records of a person are not relevant to the jurisdictional rates of a public utility or natural gas company; or

(2) the Commission finds that a class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company.

112. PUHCA 2005 requires the Commission to exempt any person that falls within the classes designated by section 1266(a) from the requirements of section 1264, and therefore, the Commission proposed to adopt such an exemption. In the NOPR, however, the Commission did not propose to categorically exempt classes of entities or transactions described in section 1266(b) from the requirements of section 1264. Rather, we proposed to rely on case-by-case applications for these exemptions until we have gained further

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

experience subsequent to the repeal of PUHCA 1935. However, we sought comment on whether the Commission should exempt classes of transactions involving mutual fund passive investors or other groups of passive investors from the new federal books and records access requirements.

113. Finally, we noted that, although a person that is a holding company solely with respect to EWGs or QFs will be exempted from the federal access to books and records provisions in section 1264, many EWGs and QFs may nevertheless be public utilities under section 201 of the FPA[100] and remain subject to the Commission's authority with regard to their books and records under section 301 of the FPA, unless otherwise exempted.[101] Below, the Commission addresses comments requesting that the Commission adopt the following exemptions or waivers: (a) passive investors; (b) nontraditional utilities with no captive customers or non-utilities, including power marketers; (c) certain holding company and affiliate transactions; (d) electric power cooperatives; (e) local distribution companies; (f) single-state holding companies; (g) holding companies owning small generators; and (h) investors in independent transmission companies.

114. As discussed further below, the Commission is adopting certain specific exemptions and waivers proposed by commenters. We are also providing in section 366.4(b) and (c) of our regulations the procedures for filing for exemption or waiver,

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[100] 16 U.S.C. § 824(e) (2000).

[101] Id. at § 825.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

which are available for specified persons or classes of transactions. A holding company that falls into one of the identified categories may file for exemption or waiver by submitting FERC-65A (Exemption Notification) or FERC-65B (Waiver Notification) and shall be deemed to have a temporary exemption or waiver upon a good faith filing. Notices of all such notifications of exemption or waiver will be published in the Federal Register. If the Commission has taken no action within 60 days after the date of the filing, the exemption or waiver shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information or for further consideration of the request; in such case, the claim for exemption or waiver will remain temporary until such time as the Commission has informed the holding company of its decision to grant or deny the application by letter or order. In addition, the Office of the Secretary will periodically issue notices listing the holding companies whose notifications of exemption or waiver are deemed to have been granted in the absence of Commission action to the contrary within 60 days after the date of filing.

115. Holding companies that seek exemptions or waivers other than those specifically identified in section 366.3(b) or (c) of the Commission's regulations may not do so by means of FERC-65A or FERC-65B. Such holding companies must instead seek an individual exemption or waiver by filing a petition for declaratory order pursuant to sections 366.3(e), 366.4(b)(2) and 366.4(c)(2). Such petitions will be noticed in the Federal Register. No temporary exemption or waiver will attach, and the requested exemption or waiver will be effective only if approved by the Commission.

116. Finally, if a holding company that has been granted an exemption or waiver under section 366.4(b) or (c) fails to conform with any material facts or representations presented in its submittals to the Commission in FERC-65A or FERC-65B, the exemption or waiver may no longer be relied on. Also, the Commission may, on its own motion or on the motion of any person, revoke the exemption or waiver granted under section 366. 4(b), if the holding company fails to conform to any of the Commission's criteria under this part for obtaining the exemption or waiver.

a. Exemption of Passive Investors

Comments

117. Commenters expressed near-unanimous support for an exemption for mutual fund and other passive investors from the requirements of section 1264.[102] Commenters note that the SEC exempted passive investors under PUHCA 1935 and contend that such passive investors are similarly exempt from PUHCA 2005.[103] EEI urges the Commission to follow current SEC no-action letter practice for exempting passive investors from holding company status under section 2(a)(7) of PUHCA 1935 and Commission practice

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[102] See, e.g., APPA/NRECA Comments at 20, Arkansas PSC Comments at 12, Capital Research and Management Company Comments at 3-4, Emera Comments at 8, E.ON/LG&E Energy Comments at 9-11, International Transmission Company Comments at 10, Investment Adviser Association Comments at 2, Investment Company Institute Comments at 2-3, Missouri PSC Comments at 19, PacifiCorp Comments at 5, Southern Company Services Comments at 9, Tri-State Generation Comments at 8.

[103] Chairman Barton Reply Comments at 5, EPSA Comments at 21-22 (stating that there is a long line of SEC no-action letter precedent addressing passive investor equity interests in holding companies and public utility companies under PUHCA 1935 in which it was determined that passive investors did not own voting securities), Scottish Power Comments at 6-7.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

in disclaiming jurisdiction under section 201(e) of the FPA.[104] Barclays requests the Commission establish an additional, regulatory exclusion from the books and records requirements for passive investments in utilities that are made by collective investment vehicles whose assets are managed by banks, savings and loan associations and their operating subsidiaries, or brokers and dealers.[105] National Grid suggests that the Commission should define a passive investor as an entity that holds 50 percent or less of outstanding voting securities of public utility or holding company and does not otherwise exercise controlling influence.[106] Alternatively, National Grid suggests that, if Commission does not adopt this proposal, it should define "holding company" to exclude passive investors who own, control, or hold 20 percent or less of the outstanding voting securities.[107] Finally, Morgan Stanley recommends that the Commission modify section 366.2 of the proposed rules to make clear that holding securities in the ordinary course of business as a broker/dealer, underwriter or as a fiduciary, and not exercising operations control over the utility, does not make one a "holding company."[108]

118. Some commenters expressed general support for the proposed exemption, but argued that passive investors should not be exempted when certain circumstances were present. NARUC submits that the Commission should not exempt passive investors

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[104] EEI Comments at 21.

[105] Barclay Comments at 5.

[106] National Grid Comments at 12.

[107] Id. at 14.

[108] Morgan Stanley Comments at 9.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

where either of the following conditions occurs or is present: (1) the transaction involves and will result in an ownership interest of ten percent or more of the debt or equity capital of any entity within the holding company system; or (2) the transaction will result in the mutual fund or other passive investor groups holding two or more seats or ten percent or more of the voting representation seats on the board of directors of any entity within the holding company system.[109] Wisconsin PSC and CEOB assert that passive investors can exert control where their stock ownership or debt interest grants them control or influence over the selection of the board of directors. They urge the Commission to scrutinize carefully an application for an exemption filed by a passive investor who holds the power to influence the outcome of any jurisdictional issue that comes before the holding company's board of directors, and to deny the application for exemption in those circumstances.[110] MBIA Insurance, on the other hand, argues that the Commission should not at this time grant an across-the-board exemption for entities that may claim passive investor status.[111]

Commission Determination

119. We agree with the majority of commenters that the Commission should exempt passive investors from section 1264. Passive investors do not exercise control over jurisdictional companies, and thus the Commission does not need access to their books

[109] NARUC Comments at 7-8.

[110] CEOB Comments at 3, Wisconsin PSC Comments at 5.

[111] MBIA Insurance Comments at 14.

and records for purposes of ensuring just and reasonable rates. In response to the comments of Barclay's and Morgan Stanley, we will also clarify here that the exemption for passive investors applies to the following entities: mutual funds; passive investments in collective investment vehicles whose assets are managed by banks, savings and loan associations and their operating subsidiaries, or brokers/dealers; and persons that directly, or indirectly through their subsidiaries or affiliates, buy and sell the securities of public utilities in the ordinary course of business as a broker/dealer, underwriter or fiduciary, and not exercising operational control over the public utility.

120. We will not adopt a specific definition of "passive investor" at this time. Our precedent under the FPA on whether certain asset owners are "passive" and thus not public utilities provides guidance for purposes of claiming exemption under PUHCA 2005; further guidance may be provided in the Commission's rulemaking to implement EPAct 2005 amendments to section 203 of the FPA. In addition, claimants should describe the relevant facts in their FERC-65 (Notification of Holding Company Status), FERC-65A (Exemption Notification), or petition for declaratory order.

b. <u>Nontraditional Utilities With No Captive Customers or Non-Utilities Comments</u>

121. EPSA proposes that the following classes of entities be exempted from section 1264's requirements: (i) utilities that do not serve captive customers and are not affiliated with a utility that serves captive customers (nontraditional utilities); and (ii) a

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

holding company that owns only nontraditional utilities and/or EWGs, FUCOs, or QFs.[112] According to EPSA, the PUHCA 2005 rate protections simply are not needed for such entities.[113] EPSA notes that the Commission has reasoned that when nontraditional utilities serve no captive customers, the potential for "transactions undertaken by any of the non-traditional affiliates [affiliates without captive customers] at the expense of other non-traditional affiliates simply results in an allocation of revenues among the 'non-regulated' affiliates; the profits ultimately go to the shareholders regardless of the entity that makes the sale."[114]

122. EPSA proposes that the Commission should not consider energy marketers (i.e., energy sellers owning no "hard" assets for power sales but only contracts for wholesale or retail electric energy sales or retail gas sales) to be "public-utility companies" under the PUHCA 2005 definition. According to EPSA, if power marketers are not electric utility companies, their parent companies would not be considered utility holding companies under PUHCA 2005 by reason of their ownership of such marketers. The same logic would apply to gas marketers, and they too, therefore, should not be considered gas utility companies, provided that they own no physical gas distribution assets and their gas retail sales are made through contracts.[115]

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[112] EPSA Comments at 18.

[113] Id.

[114] Id. (citing US Gen Power Services, L.P., 73 FERC ¶ 61,037 at 61,846 (1995)).

[115] EPSA Comments at 19-20.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Commission Determination

123. The Commission will exempt power marketers and other utilities that do not serve captive customers and are not affiliated with a utility that serves captive customers (i.e., non-traditional utilities) from section 1264 because we find that the books and records of these entities are not necessary to protect customers. Although we regulate most power marketers' rates under the FPA pursuant to their authorizations to sell at market-based rates, in situations where they have no captive customers and are not affiliated with anyone that does have such customers, their records are not necessary to fulfilling our jurisdictional responsibilities to ensure just and reasonable rates. With respect to EPSA's request for exemption of holding companies that own only nontraditional utilities and/or EWGs, FUCOs, or QFs, PUHCA 2005 already exempts persons that are holding companies solely with respect to one or more EWGs, FUCOs, or QFs, and we have determined it appropriate to exempt power marketers and other utilities that do not have captive customers. With respect to power marketers, as previously noted, the SEC did not treat power marketers as public-utility companies under PUHCA 1935, in contrast to the Commission's long-standing determination that power marketers are public utilities under the FPA. As discussed above, we will follow SEC precedent for purposes of interpreting PUHCA 2005 and will not treat power marketers as "electric utility companies" under PUHCA 2005. However, this interpretation will not affect our long-standing interpretation that power marketers selling at wholesale in interstate commerce are public utilities under the FPA.

c. Certain Holding Company and Affiliate Transactions

Comments

124. MidAmerican proposes that the Commission exempt from proposed section 366.2(e) the following classes of transactions: (i) where the holding company affirmatively certifies on behalf of itself and its subsidiaries, as applicable, that it will not charge, bill or allocate to the public utility or natural gas company any costs or expenses in connection with goods and service transactions, and will not engage in financing transactions with any public utility except as authorized by a state commission or the Commission; (ii) transactions between or among affiliates that are independent of and do not include a public utility or natural gas company; and (iii) transactions between a public utility company or a natural gas company and an affiliate if such transactions are conducted in the ordinary course of business, occur at prevailing market prices or on terms not different from those made available to unaffiliated entities and do not exceed individually or in the aggregate in cost to the public utility company or natural gas company one-half of one percent of its operating revenue during its most recent fiscal year, or are conducted in accordance with and pursuant to an approved rate or service tariff.[116]

125. MidAmerican states that, by granting an exemption where a holding company certifies that it will not charge, bill or allocate to the public utility or natural gas company any costs in connection with goods and service transactions, the Commission will be

[116] MidAmerican Comments at 8-11.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

encouraging additional investments from outside the utility industry in the country's energy infrastructure.[117] Further, the Commission could periodically confirm the exemption through a review of the books and records of the public utility or natural gas company or annual certification by the holding company.[118]

126. MidAmerican proposes exemptions for transactions in the ordinary course of business between and among a public utility holding company's non-utility subsidiaries and affiliates and de minimis ordinary course transactions involving the public utility company. In arguing for these exemptions, MidAmerican states that without these exemptions these transactions will be too numerous to track and requiring an individual exemption for each of them from Rule 366.2(e) could overwhelm the Commission while increasing the cost of doing business for the regulated entities.[119]

Commission Determination

127. We will grant MidAmerican's first and second requests for exemptions: (i) in cases where the holding company affirmatively certifies on behalf of itself and its subsidiaries, as applicable, that it will not charge, bill or allocate to the public utility or natural gas company any costs or expenses in connection with goods and service transactions, and will not engage in financing transactions with any public utility except as authorized by a state commission or the Commission; and (ii) transactions between or

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[117] Id. at 8.

[118] Id.

[119] Id. at 11.

among affiliates that are independent of and do not include a public utility or natural gas company. These classes of transactions are not relevant to jurisdictional rates and will therefore be exempted from the books and records requirements of section 1264.

128. The Commission will deny MidAmerican's request for an exemption of transactions between a public utility or a natural gas company and an affiliate if such transactions are conducted in the ordinary course of business, occur at prevailing market prices or on terms not different from those made available to unaffiliated entities and do not exceed individually or in the aggregate in cost to the public utility or natural gas company one-half of one percent of its operating revenue during its most recent fiscal year, or are conducted in accordance with and pursuant to an approved rate or service tariff. These transactions involve regulated companies, and we do not believe they should be exempted because of the potential for cross-subsidization between regulated and non-regulated companies in the same holding company system, which could adversely affect jurisdictional rates.

d. Rural Electric Cooperatives

Comments

129. Several commenters urge the Commission to exempt rural electric cooperatives from section 1264. APPA/NRECA argue that the Commission should recognize that under longstanding SEC precedent, electric cooperatives were not regulated as public utility holding companies under PUHCA 1935 and that, read together with the plain language of PUHCA 2005, that precedent shows that rural cooperatives fall outside PUHCA 2005. In addition, APPA/NRECA contend that, at an absolute minimum, the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Commission should make clear that those cooperatives that have received no-action letters or other assurances in the past from the SEC can continue to rely on those assurances without any need to seek additional confirmation or a no-action assurance or waiver from the Commission and adopt a class exemption from PUHCA 2005 for cooperatives that are organized and operate in reliance on such well-settled precedent.[120] Similarly, Santa Clara and TANC note that the SEC has consistently excluded rural cooperatives from PUHCA 1935 requirements for several reasons, including the fact that the ownership relationship in a cooperative is not a voting security under PUHCA 1935 and urge the Commission to follow this precedent in implementing PUHCA 2005.[121]

Commission Determination

130. The Commission finds the arguments of APPA/NRECA and other commenters in this regard persuasive. We find that all electric power cooperatives, including those that are regulated by the Commission under the FPA, i.e., those that are not financed under the Rural Electrification Act of 1936 or that sell four million or more megawatt-hours of electricity per year, should be exempted. We are therefore granting the request to define "voting security" to not include member interests in electric power cooperatives; this definition in and of itself should result in most cooperatives being excluded from the definition of a holding company, and thus most cooperatives will automatically fall outside the scope of PUHCA 2005. For those cooperatives that might still fall within the

[120] APPA/NRECA Comments at 42-44.

[121] Santa Clara Comments at 23, TANC Comments at 23. See also Redding Comments at 3.

definition of holding company and thus within the scope of PUHCA 2005, they may be exempted from PUHCA 2005 by filing for exemption pursuant to the procedures in section 366.4(b).[122]

e. Local Distribution Companies

Comments

131. American Gas Association requests that the Commission clarify that local distribution companies that are not regulated by the Commission are not embraced within the phrase "natural-gas company."[123] American Gas Association also notes that the Commission does not regulate local distribution companies.[124] Washington Gas & Light argues that the Commission should clarify that the proposed rules do not apply to local distribution companies and section 7(f) companies that have previously been exempt from regulation by the Commission.[125] Washington Gas & Light notes that no regulatory gap exists here, and new Commission regulation would be duplicative.[126]

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[122] To the extent electric cooperatives are public utilities subject to our jurisdiction under the FPA, as noted above, we have broad authority under FPA section 301 to obtain the books and records of regulated companies and any person that controls or is controlled by such companies if relevant to jurisdictional activities. 16 U.S.C. § 825 (2000); accord 15 U.S.C. § 717g (2000).

[123] American Gas Association Comments at 2. See also Keyspan Corporation (Keyspan) Comments at 6-7.

[124] American Gas Association Comments at 3.

[125] Washington Gas & Light Comments at 3.

[126] Id. at 4.

Commission Determination

132. The Commission finds that the books and records of local distribution companies that are not regulated by the Commission are not relevant to jurisdictional rates. Therefore, we will amend the proposed rules to reflect that local distribution companies are exempt from the regulations.

f. Single-State Holding Companies

Comments

133. Consolidated Edison (ConEd) contends that customers of single-state holding companies are adequately protected by the Commission's existing regulatory authority under the FPA and NGA, so that the imposition of additional books-and-records requirements would be superfluous. Accordingly, ConEd requests that the proposed regulations be revised to expressly exempt from the provisions of section 366.2 all single-state holding companies that were exempt under PUHCA 1935 as of the date of enactment of PUHCA 2005 and all companies that subsequently demonstrate to the Commission their status as a single-state holding company. Those companies should remain exempt pending a change in circumstances that alters a company's single-state status.[127]

134. In its reply comments, Public Citizen argues that the single state exemption, for example, requires that both a utility and its holding company primarily operate in a single state, so that the state is capable of regulating the holding company, as well as the utility,

[127] ConEd Comments at 3.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

under state law. Such companies at a minimum should be required to file an annual statement, as they do now, to show that they continue to meet the standards for such an exemption.[128]

Commission Determination

135. We cannot approve a categorical exemption for single-state holding companies. Congress has chosen not to re-enact this exemption from PUHCA 1935, and ConEd has not demonstrated that single-state holding companies satisfy the criterion for exemption pursuant to section 1266(b) of PUHCA 2005 (i.e., that their books and records are not relevant to the jurisdictional rates of a public utility or natural gas company). Nevertheless, single-state holding companies do not present the scope of potential cross-subsidy and cost allocation issues that multi-state holding companies do; state commissions generally have significant regulatory authority over single-state holding companies and their transactions, and we have sufficient authority pursuant to sections 205 and 206 of the FPA and sections 4 and 5 of the NGA to address any issues that could affect jurisdictional rates for public utilities in single-state holding companies. Therefore, the Commission will grant a waiver of our requirements in sections 366.21, 366.22, and 366.23 of our regulations[129] for single-state holding companies.

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[128] Public Citizen Reply Comments at 13.

[129] The Commission is permitted to exempt entities from the requirements of section 1264 only if their books and records are not relevant to jurisdictional rates. In this case, the books and records are relevant to jurisdictional rates, so we cannot exempt single-state holding companies from the statute. However, the Commission always possesses discretion to waive a regulatory requirement.

g. Holding Companies Owning Industrial Small Generators

Comments

136. Barrick Goldstrike Mines argue that the Commission should exempt the holding companies of small industrial generators and their transactions from regulatory oversight because the exemptions that have existed until now, have encouraged the development of additional electrical generation.[130] Alternatively, Mittal Steel requests that the Commission issue an exemption to any company who would not otherwise qualify as a "holding company," but for its ownership of an entity that has been granted authority to sell electric power for resale at market-based rates. If the Commission is unwilling to adopt a general exemption as proposed by Barrick and Mittal Steel at this time, the Commission should grant a limited waiver of its PUHCA 2005 regulations to persons that file good faith applications for exemptions under section 366.3 within sixty (60) days of the Commission's final order in this proceeding, with such waiver effective until such time as the Commission denies the exemption application.[131]

Commission Determination

137. The Commission is not persuaded by the arguments of Barrick and Mittal Steel to provide a blanket exemption for holding companies owning industrial small generators, since they have not demonstrated that the statutory criterion is satisfied, i.e., that books and records of such holding companies are not relevant to jurisdictional rates. However,

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[130] Barrick Goldstrike Mines Comments at 9. See also Morgan Stanley Reply Comments at 6.

[131] Mittal Steel Reply Comments at 1-2.

to eliminate what might otherwise be a barrier to the development of additional electric generation, we will allow a waiver of our requirements in sections 366.21, 366.22, and 366.23 of our regulationsto persons that own a small amount of generation (100 MW or less) used fundamentally for their own load or for sales to affiliated end-users. Similar entities, but owning more than 100 MW of generation, may individually seek waiver by filing a petition for declaratory order, and we will consider such petitions in light of all relevant information.

138. With respect to Mittal Steel's request regarding good faith applications, we note that in section 366.4(b) of our regulations, we have provided that the filing of FERC-65B provides temporary waiver upon a good faith filing and that after 60 days a waiver is deemed to be granted, absent timely Commission action to the contrary.

h. Investors in Independent Transmission Companies

Comments

139. International Transmission Company submits that investors in independent transmission companies that are subject to Commission jurisdiction should be exempted and that, without this exemption, this requirement creates a new barrier to investment.[132]

Commission Determination

140. The Commission will grant waiver of the our regulations under PUHCA 2005 for investors in independent transmission companies. The rate issues that may arise in connection with entities that serve retail customers or that generate or sell electricity at

[132] International Transmission Company Comments at 8.

wholesale are not present with respect to an independent transmission company. Further, the Commission has sufficient authority under sections 205 and 206 of the FPA, as well as informational authority under section 301 of the FPA and section 1264 of EPAct 2005, to obtain the relevant books and records of a jurisdictional independent transmission company, and any company that controls or is controlled by such jurisdictional company. Therefore, the Commission will grant a waiver our requirements in sections 366.21, 366.22, and 366.23 of our regulations for investors in independent transmission-only companies.

4. Allocation of Costs of Non-Power Goods or Services

141. Section 1275(b) of EPAct 2005 provides that, in the case of non-power goods or administrative or management services provided by an associate company organized specifically for the purpose of providing such goods or services to any public utility in the same holding company system, at the election of certain holding company systems or a state commission having jurisdiction over the public utility, the Commission, after the effective date of PUHCA 2005, shall review and authorize an allocation of costs for such goods and services to the extent relevant to that associate company. In the NOPR, we proposed to reflect this statutory provision in new section 366.5(b) of our regulations.

a. Mandatory Filing of Cost-Allocation Agreements

142. In the NOPR, we noted that, irrespective of the new section 1275(b) of PUHCA 2005, with the repeal of PUHCA 1935 and the elimination of SEC review of the allocation of costs for non-power goods and services, we have authority under sections 205 and 206 of the FPA and sections 4 and 5 of the NGA to review the rate recovery in

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

jurisdictional rates of such associate and affiliated company non-power goods and services costs, either upon application under section 205 of the FPA or section 4 of the NGA or upon complaint or our own motion under section 206 of the FPA and section 5 of the NGA, and that we also have the authority to review and/or require the filing of cost-allocation agreements with the Commission since they are contracts affecting jurisdictional rates.[133] We invited comments as to whether, in light of the repeal of PUHCA 1935, holding companies that prior to the repeal of PUHCA 1935 were registered holding companies should be required to file such cost-allocation agreements with the Commission under section 205 of the FPA and section 4 of the NGA.

Comments

143. A number of commenters supported the Commission's proposal to require holding companies that were registered under PUHCA 1935 to file cost-allocation agreements under section 205 of the FPA and section 4 of the NGA.[134] These commenters emphasize the importance of information on cost allocations for effective federal and state regulation.[135] In addition, Santa Clara argues that Commission oversight of cost

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[133] 16 U.S.C. §§ 824d-e (2000); accord 15 U.S.C. §§ 717c-d (2000); see generally EPAct 2005 at § 1275(c) (stating that nothing in section 1275 affects the authority of the Commission under other applicable law). While the scope of our jurisdiction over wholesale sales of natural gas is more limited than our jurisdiction over wholesale sales of electric energy, and our rate review may differ in certain respects, such reviews could be undertaken under sections 4 or 5 of the NGA.

[134] See, e.g., Georgia PSC Comments at 2, Santa Clara Comments at 6-7, TANC Comments at 6-7.

[135] Georgia PSC at 2, IURC Comments at 7, NARUC Comments at 9, Ohio PSC Reply Comments at 2.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

allocations is necessary due to the lack of uniformity of state review.[136] Santa Clara further emphasizes that, under current rules promulgated pursuant to section 13 of PUHCA 1935, the SEC generally requires that such companies seek prior approval from the SEC to engage in such transactions. Thus, the requirement to file cost-allocation agreements with the Commission would simply maintain the current obligation, albeit with a different agency.[137]

144. Some commenters suggest expansion of the Commission's proposed filing requirement. APPA/NRECA noted that the risk of misallocation of costs and cross-subsidization does not depend on whether the public utility holding company was registered or statutorily exempted under PUHCA 1935 and urge the Commission to require the filing of all cost-allocation practices between public utility and non-utility activities, including both formerly registered and exempted utility holding companies.[138] NARUC recommends that the Commission institute procedures for periodic audits of cost allocations, to be conducted in coordination with state regulators.[139]

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[136] Santa Clara Comments at 8.

[137] Id. at 6. See also American Public Gas Association Comments at 4.

[138] APPA/NRECA Comments at 7. See also American Public Gas Association Comments at 4, MBIA Insurance Comments at 20, Missouri PSC Comments at 8-9, NASUCA Comments at 9, Ohio PUC Comments at 3, Utility Workers Comments at 3-4, Wisconsin PSC Comments at 7.

[139] NARUC Comments at 9 (arguing that multi-state holding companies should be subject to filing requirement), Ohio PUC Reply Comments at 2, AGPA Comments at 4, NASUCA Comments at 9. But see National Grid Reply Comments at 9-10. National Grid responds to NARUC, arguing that there is no general distinction under PUHCA 2005 between formerly registered multi-state holding companies and typically exempt

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

145. Several commenters opposed the Commission's proposed filing requirement as contrary to Congress' intent and inconsistent with the statutory scheme established by PUHCA 2005 and the FPA. FirstEnergy contends that there is nothing in PUHCA 2005 to suggest that the Congress intended to grant the Commission the authority to regulate the agreements for procurement of non-power goods and services by public utility companies from associated service companies in the same way that it regulates the sale of electricity for resale and that, if the Commission found that such agreements are "…contracts affecting jurisdictional rates" within the meaning of section 205(c) of the FPA it would be asserting jurisdiction over virtually every agreement for procurement of non-power goods and services by all regulated electric utilities.[140] Entergy argues that the Commission's proposal is inconsistent with the voluntary review procedures established under section 1275(b) of EPAct 2005. According to Entergy, to mandate the filing of such service company agreements would read out of PUHCA 2005 the ability of the holding company or applicable retail regulators to elect or, more importantly, to not elect Commission review and authorization of cost allocations.[141]

146. EPSA opposes the mandatory filing requirement because it contends that the Commission lacks jurisdiction to impose this requirement under the FPA. EPSA asserts

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single-state holding companies except in section 1275's single-state exemption and that there is no reason to impose a separate requirement to file cost allocation agreements on any holding company.

[140] FirstEnergy Comments at 11.

[141] Entergy Comments at 7-8. See also Chairman Barton Reply Comments at 9, Southern Company Services Comments at 3.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

that section 205 of the FPA requires only public utilities as defined in section 201(e) of the FPA to file with the Commission the schedules, tariffs and agreements under which they provide FPA jurisdictional services. Registered holding companies, by contrast, (and non-registered holding companies) may have public utility subsidiaries, but they are not public utilities under section 201(e) of the FPA. In addition, EPSA claims that being required to make filings under section 205 of the FPA could force a holding company to become a fully regulated public utility. Under existing Commission precedent, upon the acceptance of a filing under section 205 of the FPA, the Commission has deemed that the filing entity owns FPA jurisdictional facilities within the meaning of section 201(e) of the FPA. Hence, they argue, if registered holding companies are required to file cost-allocation agreements under section 205, this could have the unintended effect of forcing such companies to become public utilities.[142]

147. A number of commenters state that the Commission already has authority under sections 205, 206, and 301 of the FPA and PUHCA 2005 to require the public utility to file any relevant cost-allocation agreements with affiliates to the extent they affect jurisdictional rates. Thus, they argue, there is no need to impose an additional filing requirement.[143] Dominion and EEI argue that there should be no mandatory filing unless

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[142] EPSA Comment at 23-25. EPSA's argument that the filing of a contract affecting jurisdictional rates forces every party to the contract to become a jurisdictional public utility is erroneous and a misunderstanding of the law. See also NiSource Comments at 13. NiSource further states that it is opposed to the mandatory filing requirement, but if filing is made mandatory, such agreements should be filed for informational purposes only in the same manner as cash management agreements.

[143] Ameren Services (Ameren) Comments at 15-16, Entergy Comments at 14,

these agreements are relevant to Commission review of cost-allocation at the election of a holding company or a state commission pursuant to section 1275(b) of PUHCA 2005, or where they are relevant to a Commission rate proceeding. According to Dominion and EEI, there are no grounds for reopening all cost-allocation arrangements at this time by requiring that allocation agreements to be filed for review under section 205 of the FPA and section 4 of the NGA.[144]

148. Finally, Coral Power and Shell WindEnergy argue that holding companies that own only EWGs, FUCOs, and QFs and are not affiliated with traditional utilities with captive ratepayers should be exempted from the filing requirement. They argue that such entities typically sell energy at negotiated or market-based rates, not at cost-based rates, so there can be no issue of cost allocation when rates are not based on the generator's costs, so that they cannot pass through excessive costs associated with affiliate transactions without pricing themselves out of the market.[145]

Commission Determination

149. We reject arguments that the Commission does not have the authority under the FPA to require public utilities that are members of a holding company system to file

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E.ON/LG&E Energy Comments at 19, EPSA Comments at 24-25, Scottish Power Comments at 9, Santa Clara Comments at 6-7. See also Energy East Comments at 14 (arguing that cost-allocation methods are disclosed in the report on Form U-13-60, so there is no reason to require their filing in another context).

[144] Dominion Comments at 18-19, EEI Comments at 25-26. See also Alliant Comments at 6, Ameren Comments at 15, Scottish Power Comments at 9.

[145] Coral Power/Shell WindEnergy Comments at 12.

agreements involving the allocation of costs of non-power goods and services to public utilities and other members of the holding company. Clearly, if one or more of the public utility members of the holding company seeks to recover their share of the allocated costs in jurisdictional rates, the agreement is a contract affecting rates and may be reviewed by the Commission insofar as it pertains to jurisdictional rates.

150. We also disagree with Entergy's argument that, if the Commission were to require cost-allocation agreements affecting jurisdictional rates to be filed, this would be inconsistent with section 1275(b) of PUHCA 2005, which allows holding company systems or state commissions to obtain a Commission determination of appropriate cost allocations under such agreements. While the Commission has discretion under section 205(c) of the FPA to require contracts affecting jurisdictional rates to be filed (i.e., contracts affecting rates are to be filed within such time and in such form as the Commission may prescribe),[146] and may on its own change cost allocations to jurisdictional companies that seek recovery of the costs in jurisdictional rates, we interpret section 1275(b) to require the Commission to make a cost-allocation determination if one is sought by the holding company system or the state commission.

151. The Commission will not mandate the blanket filing of cost-allocation agreements governing the costs of non-power goods and services purchased by jurisdictional public utilities from affiliated service companies under section 1275(b) of EPAct 2005. As discussed above, although we have the authority to require the filing of cost-allocation

[146] 16 U.S.C. § 824d(c) (2000). See also 15 U.S.C. § 717c(c) (2000).

agreements pursuant to our ratemaking authority under sections 4 and 5 of the NGA and sections 205 and 206 of the FPA, we do not find it necessary to do so in light of the requirement that traditional, centralized service companies (i.e., service companies that are not special-purpose companies such as a fuel supply company or a construction company) file relevant cost-allocation information on FERC Form No. 60. FERC Form No. 60 is a less burdensome method for collecting this information from service companies. Furthermore, where appropriate, we will rely on our ratemaking authority to examine these agreements or require them to be filed on an as-needed basis to determine whether the regulated utility's purchases of non-power goods and services were prudently incurred and just and reasonable.

152. We agree with the numerous commenters who express a desire to protect captive customers from inflated affiliate transactions. However, imposing a blanket requirement to file each cost-allocation agreement for non-power goods and services is not necessary to fulfill our jurisdictional responsibilities. Instead, we believe that the review of cost-allocation information contained in FERC Form No. 60 submissions by traditional, centralized service companies, review of service agreements and other information in the context of rate proceedings, and/or review of cost information through the audit function provide sufficient protection for customers.

b. <u>Inclusion of Natural Gas Companies under Section 1275(b)</u>

153. In the NOPR, we also 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

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

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. We invited comments as to whether the Commission should recommend an amendment clarifying that holding company systems and state commissions having jurisdiction over gas utility companies and natural gas companies in the holding company systems are included within the scope of section 1275(b).

Comments

154. Commenters were generally supportive of the Commission's proposal in this regard. Dominion and EEI state that such a clarification would be appropriate with respect to holding companies with combined electric utility company and gas utility company systems because cost allocations in those systems will affect both types of companies and the inclusion of both in section 1275(b) would help ensure that a consistent approach is applied throughout the system.[147] NARUC also supports the proposal, arguing 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) impacts the Commission's ability to prevent the cross-subsidization of affiliates of public utilities and natural gas companies, as well as effectively eliminating the prior review of the allocation of service company costs upon the request of state commissions

[147] Dominion Comments at 19-20, EEI Comments at 26. See also Ameren Comments at 16, Cinergy Comments at 24-25, Energy East Comments at 12, Keyspan Comments at 5, NASUCA Comments at 3, Northeast Utilities Comments at 6, Oklahoma Corporation Commission Comments at 5.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

and holding company systems to public utilities.[148] In addition, NARUC recommends that gas-related agreements be filed with the Commission and that the Commission institute procedures for periodic audits, as discussed above in reference to the electric context.[149]

155. Duke opposes the inclusion of natural gas companies under section 1275(b) because, unlike public utilities, natural gas companies are not subject to the ratemaking authority of state regulatory commissions, and therefore are not in danger of incurring trapped or otherwise unrecoverable costs as a result of conflicting state commission decisions.[150]

Commission Determination

156. In the report to Congress mandated by section 1272(2) of EPAct 2005, we intend to request that Congress clarify whether it intended section 1275(b) to include natural gas companies and, if so, to adopt a conforming amendment. As EEI and Dominion note, many holding company systems include both electric and natural gas companies, utilities, affiliates, and subsidiaries. Maintaining a consistent standard would add to transparency and reduce confusion.

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[148] NARUC Comments at 9-10. See also IURC Comments at 9-10, Ohio PUC Comments at 3-4.

[149] Id. at 10.

[150] Duke Comments at 5. See also NiSource Comments at 9.

c. Adoption of the SEC "At Cost" Standard

157. The SEC and state commissions previously have been primarily responsible for determining allocations of costs for non-power goods and services among the various associate companies in registered holding company systems, and these allocations have been made on an "at cost" basis. By contrast, the Commission's long-standing policy is that registered holding company special-purpose subsidiaries must provide non-power goods and services to a public utility regulated by the Commission at a price no higher than market. For at least a decade, we have imposed this standard as a condition for approval of mergers that result in the creation of a new registered holding company.[151] We invited comments as to whether the Commission should apply the market standard for the allocation of costs for non-power goods and services, or if we should instead adopt the SEC at cost standard.

Comments

158. The comments as to whether the Commission should adopt the SEC's "at cost" standard were mixed, with a number of entities expressing general support for a lower of

[151] See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 FR 68595 (Dec. 18, 1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 at 30,124-25 (1996) (Merger Policy Statement), reconsideration denied, Order No. 592-A, 62 FR 33341 (June 19, 1997), 79 FERC ¶ 61,321 (1997). Where the regulated public utility has provided non-power goods or services to the non-regulated affiliate, our policy has been that the public utility provides the goods or services at the higher of cost or market.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

cost or market standard.[152] APPA/NRECA argue that, first, with respect to purchases of goods and services by the public utility from a non-utility affiliate, a public utility should not pay to a non-utility affiliate a price exceeding what the public utility would have incurred had the public utility self-provided the service or purchased it prudently from an unaffiliated third party; similarly, if the affiliate can produce the good or service at a below-market price, presumably so can the public utility. APPA/NRECA assert that the pricing rule that supports these principles is the Commission's market standard.[153] Second, with respect to the sale of goods and services by the public utility to the non-utility affiliate, APPA/NRECA contend that the price to the non-utility affiliate should be at no less than cost. According to APPA/NRECA, this rule follows from the public utility's obligation to minimize its revenue requirement, and a standard of no less than cost removes any incentive for a public utility to "over acquire" resources and provide them at a price below cost to a non-utility affiliate.[154] Finally, with respect to public utility provision of financial support to affiliated non-utility ventures, APPA/NRECA

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[152] See, e.g., Georgia PSC Comments at 3, NASUCA Comments at 10, Northeast Utilities Comments at 6 (Commission should also apply standard to construction activities), Santa Clara Comments at 10-12, TANC Comments at 10-12.

[153] APPA/NRECA Comments at 9. See also Arkansas PSC Comments at 3, Electricity Consumers Resource Council, et al. (ELCON) Comments at 6, Kentucky Public Service Commission (Kentucky PSC) Comments at 1, Missouri PSC Comments at 11, NASUCA 10.

[154] Id. at 10. See also Arkansas PSC Comments at 3, Missouri PSC Comments at 14, NASUCA Comments at 10.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

note that section 12(c) of PUHCA 1935 prohibited a registered holding company from receiving any such benefit from a public utility subsidiary or any other subsidiary and urges the Commission to continue this prohibition.[155]

159. APPA/NRECA note that the argument made for service companies is the efficiency of centralization, but argue that the use of such companies can do damage to auditability. The damage arises from the holding company practice, endorsed by the SEC, of charging service company costs to FERC Account 923—Outside Services. According to APPA/NRECA, what appears on the public utility's books is not detail about each service company cost, but instead a single large charge representing the public utility's allocated share of total service company cost. They further argue that the use of the Commission's "Outside Services" account implies an arm's-length relationship between the buyer of the outside services and the supplier; but in fact the relationship between service company and public utility is not at arm's length. APPA/NRECA contend that the solution for this problem would be for the Commission to require an accounting process that treats the public utility operating company incurring these inter-affiliate costs as if the public utility had incurred the costs directly. The public utility then would post the charges to the appropriate accounts (making sure to segregate the costs passed through by the service company from the public utility's own directly

[155] Id. at 10-11. See also Missouri PSC Comments at 15-16.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

incurred costs), thereby facilitating oversight by the Commission and by outside auditors.[156]

160. NARUC supports a lower of cost or market standard, noting that the NARUC Guidelines state that: "Generally, the price for services, products and the use of assets provided by a non-regulated affiliate to a regulated affiliate should be at the lower of fully allocated cost or prevailing market prices. Under appropriate circumstances, prices could be based on incremental cost, or other pricing mechanisms as determined by the regulator." Although the NARUC Guidelines call for more flexibility than was reflected in the NOPR, NARUC asserts that its position and the Commission's standard for the allocation of costs for non-power goods and services are consistent.[157]

161. In their reply comments, Xcel and Progress Energy submit that there are a number of fallacies to the arguments in favor of the market standard. Xcel states that, first, if the affiliated service company charges for its services at cost, it does not and cannot profit from its activities. Second, the notion that at cost pricing could cause a utility to pay a service company more for services than it would otherwise incur is, as a practical matter, also wrong. Third, the underlying premise of service company formation is that such administrative and general activities can be performed more efficiently and at a less costly rate by a service company on behalf of a utility than a utility could perform the

[156] APPA/NRECA Comments at 29.

[157] NARUC Comments at 20.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

service for itself.[158] Progress Energy contends that, typically, service companies provide administrative services such as tax, accounting, human resources, legal, information technology, finance and shareholder relations, which are materially different from other products or services needed by a utility such as fuel, vehicles, poles, transformers, etc. Specifically, the services provided by a service company are not fungible, and there is no market for such specialized services.[159]

162. On the other hand, the majority of commenters favor the continued use of the SEC's at-cost standard. Dominion and EEI argue that the Commission has not demonstrated the need to revise the current standards. They assert that the cost-allocation factors found in registered holding company system service agreements have been worked out in cooperation with both the SEC and the relevant state commissions, and that there is no evidence that the application of this standard has led to cross subsidization or other forms of abuse.[160] MidAmerican emphasizes that public utilities have relied on the at cost standard as the basis for assigning the costs of non-power goods and services and that these costs may be subject to the provisions of an intercompany services agreement which has received state regulatory approval and have proven to work well.[161]

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[158] Xcel Reply Comments at 3-4.

[159] Progress Energy Reply Comments at 2.

[160] Dominion Comments at 17, EEI Comments at 22-23. See also Cinergy Comments at 21-22, Entergy Comments 9, E.ON/LG&E Energy Comments at 14, FirstEnergy Comments at 14, Keyspan Comments at 4, Progress Energy Comments at 3, Southern Company Services Comments at 4.

[161] MidAmerican Comments at 13-14.

In addition, Entergy argues that its existing retail rates are based on the at-cost standard and any changes will disrupt existing agreements and retail rate structures.[162] MBIA Insurance, however, also asserts that many utilities have already committed to using a lower-of-cost or market standard as part of various mergers. It contends that holding companies already applying the lower of-cost-or-market standard for non-power goods and services should continue meeting this requirement and not disrupt pre-existing arrangements.[163]

163. Dominion and EEI further argue that there is no need to revise these standards because the Commission can address this issue in ratemaking proceedings. Given the repeal of PUHCA 1935 and section 318 of the FPA, they assert that there is no longer an impediment to the exercise of the Commission's powers under sections 205 and 206 of the FPA to disallow particular expenditures made at cost that the Commission finds to be imprudent.[164] AEP adds that cost-based standards also have the benefit of being verifiable and easy to audit.[165]

164. EEI further asserts that a market test can be difficult to apply for highly-specialized goods or services because there is no market for the services supplied by a system service company and, thus, it can be extremely difficult to calculate a market

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[162] Entergy Comments at 9. See also Alliant Comments at 5-6, Keyspan Comments at 4, Progress Comments at 4.

[163] MBIA Comments at 17.

[164] Dominion Comments at 18, EEI Comments at 23-24. See also Cinergy Comments at 23, E.ON/LG&E Energy Comments at 14, Xcel Comments at 6.

[165] AEP Comments at 5. See also Cinergy at 23.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

price for such services. None of these difficulties accompany the at-cost standard.[166] Similarly, MidAmerican argues that, by using cost, the public utility company or affiliate is not required to undertake a potentially lengthy and subjective process to ascertain what a market price would be for the non-power goods or service, which in many instances, such as the allocation of employee labor, is not readily available due to the variation in pay scales across the industry and the country.[167] Moreover, EEI argues that there is a significant danger of under-recovery of costs under the Commission's market standard where the service company's cost to provide a service is higher than market. Thus, while the at-cost standard keeps the service company whole, a lower of cost or market standard can lead only to under-recovery and an increase in the regulated utilities' cost of capital.[168] Finally, Oklahoma Corporation Commission opposes the adoption of the Commission's market basis because it might impose additional costs on such entities due to potential requirements that companies enter into a competitive bidding processes, hire consultants, enter into special contracts, and use variable pricing structures based on the

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[166] EEI Comments at 23. See also Alliant Energy Corporation (Alliant) Comments at 5-6, Ameren Comments at 16, AEP Comments at 6, Cinergy Comments at 22, Energy East Comments at 13, Entergy Comments at 10, E.ON/LG&E Energy Comments at 14, FirstEnergy Comments at 15, Keyspan Comments at 4, Progress Energy Comments at 4, Southern Company Services Comments at 4, Xcel Comments at 6.

[167] MidAmerican Comments at 13.

[168] EEI Comments at 23. See also Ameren Comments at 15, AEP Comments at 6, Duke Comments at 4, Entergy Comments at 10, Energy East Comments at 13-14, FirstEnergy Comments at 14.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

different services that are provided.[169] Santa Clara responds that the at-cost standard allows the holding company to bill its utility affiliate for the total cost of the non-power goods or services, no matter how unnecessarily high the costs might be. Thus, the holding company has no incentive to minimize its costs.[170]

165. Energy East and EPSA contend that the Commission lacks the authority to impose its pricing standard. Energy East asserts that the plain language of section 1275(b) indicates Congress' intent that the Commission should retroactively review costs and then properly allocate them. Nothing in section 1275(b), argues Energy East, indicates that Congress intended that the Commission pre-approve the cost of non-power goods and services rendered to associated public utilities under a lower of cost or market pricing standard.[171] EPSA argues that the Commission does not have authority under the FPA, NGA or PUHCA 2005 to approve the formation and corporate structure of any company in a holding company system, let alone companies that propose to provide services to holding company system companies. Thus, while the Commission has the authority to disallow a utility's recovery in its jurisdictional rates of improper affiliate charges, the Commission does not have the authority to regulate transactions among non-utility affiliates by requiring at-cost pricing, and, therefore, has no authority to impose financial

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[169] Oklahoma Corporation Commission Comments at 5-6.

[170] Santa Clara Comments at 12.

[171] Energy East Comments at 12.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

and complex accounting and reporting requirements to implement at-cost pricing.[172]

166. Finally, some commenters suggest alternatives to switching to the SEC's at-cost standard. Dominion argues that service companies that have been subject to the SEC at-cost standard under PUHCA 1935 should be permitted to continue using that standard if they so elect.[173] American Transmission Company recommends that the Commission establish a rebuttable presumption that cost equals market for those companies that can demonstrate that they have appropriate purchasing practices in force for those goods or services above a certain dollar amount.[174] Entergy states that the Commission should not preclude holding company systems from deviating from the at-cost standard to the extent that such alternative pricing proposals are demonstrated to not result in inappropriate cross-subsidization of non-utility associate companies.[175] IURC states that, while in most cases, the SEC's fully-distributed cost may be appropriate, there will be instances where the market standard will be appropriate; specifically, where there is reasonable confidence that the market is sufficiently competitive to produce an unbiased competitive price. In the absence of a competitive market to determine the appropriate arm's-length

[172] EPSA Comments at 10-11.

[173] Dominion Comments at 17, EEI Comments at 22-23. See also Black Hills Comments at 4, Energy East Comments at 13, FirstEnergy Comments at 13, NiSource Comments at 14, Northeast Utilities Comments at 5, Southern Company Services Comments at 4.

[174] American Transmission Company Comments at 4.

[175] Entergy Comments at 10-11.

value for a specific transaction, incremental costs might be appropriate.[176]

Commission Determination

167. As an initial matter, some commenters appear to misconstrue the purposes of the Commission's request for comments on the use of the SEC's "at-cost" standard. Contrary to EPSA's implication that the Commission seeks to approve the formation and corporate structure of companies within a holding company system, this was not the subject of the Commission's proposal or request for comments. Rather, there are two circumstances in which the "at-cost" or "market" standard may arise in the context of the Commission's jurisdictional responsibilities. First, the Commission has a responsibility to ensure that the costs of non-power goods and services provided by a traditional, centralized service company to public utilities within the holding company system are just, reasonable, and not unduly discriminatory or preferential. This can arise in the context of a review of the prudence of costs incurred when a public utility seeks to flow through the costs in jurisdictional rates or a general review of the justness and reasonableness of the public utility's costs. It can arise in the context of an individual public utility within the holding company system or in the context of the appropriate non-discriminatory allocation among multiple public utilities within the same holding company system.[177] In reviewing centralized service company cost allocations, the

[176] IURC Comments at 11.

[177] While the Commission would have authority to require pre-approval of non-power goods and services cost allocations to public utilities that want recovery of such costs in Commission-jurisdictional rates, the Commission historically has not taken such an approach, and instead typically reviews such matters at the time the public utility files

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Commission's focus would be on the costs allocated to the jurisdictional public utilities, whether the jurisdictional public utilities are bearing their fair share of costs vis-à-vis the non-regulated affiliates (i.e., whether the non-regulated affiliates are receiving an undue preference), and whether costs are fairly allocated among public utilities. If the Commission disallowed costs to be allocated to public utilities or changed the allocation among multiple public utilities, this would not directly affect allocations to the non-jurisdictional, non-regulated companies. Our concern and jurisdictional responsibilities relate to how the costs are allocated to and among Commission-jurisdictional companies, not how remaining costs are allocated among the non-regulated affiliates.

168. The second context in which the "at-cost" or "market" standard is likely to arise is when a service company that is a special-purpose company within a holding company (e.g., a fuel supply company or construction company), provides non-power goods or services to one or more public utilities in the same holding company system. The same potential issues arise: whether the public utility's costs incurred in purchasing from the affiliate are prudently incurred and just and reasonable, and whether non-regulated affiliates purchasing non-power goods and services from the same special-purpose company are receiving preferential treatment vis-à-vis the public utility. The Commission in this context also, if it found costs were imprudent, unjust and unreasonable, or unduly discriminatory vis-à-vis the public utility, would develop a rate or remedy applicable to the jurisdictional public utility.

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for rate recovery.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

169. With these two types of situations in mind – traditional, centralized service companies and service companies that are special-purpose companies – we reach the following conclusions based on the comments. The Commission will not require traditional, centralized service companies currently using the SEC's at-cost standard to comply with the Commission's market standard for their sales of non-fuel, non-power goods and services to regulated affiliates. Fundamentally, we agree with commenters such as American Transmission Company and Progress Energy that centralized provision of accounting, human resources, legal, tax and other such services benefits ratepayers through increased efficiency and economies of scale. Further, we recognize that it is frequently difficult to define the market value of the specialized services provided by centralized service companies. Accordingly, the Commission will apply a rebuttable presumption that costs incurred under "at cost" pricing of such services are reasonable. However, we will entertain complaints that "at cost" pricing for such services exceeds the market price, but complainants will have the burden of demonstrating that that is the case.

170. We also agree with commenters such as Dominion and EEI that the Commission has the power to disallow any expenditures that it finds to be imprudent under sections 205 and 206 of the FPA, and sections 4 and 5 of the NGA. Additionally, the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

audit function can be used to identify and protect against any cross-subsidization between regulated public utilities and non-regulated affiliates.

171. With respect to non-power goods and services transactions between holding company affiliates other than traditional, centralized service companies, i.e., service companies that are non-regulated, special-purpose affiliates such as a fuel supply company or a construction company, we will continue our prior policies.[178] First, with respect to sales from a public utility to a non-regulated, affiliated special-purpose company, we agree with APPA/NRECA that the price should be no less than cost, i.e., the higher of cost or market; otherwise, a public utility could attempt to game the system and forego profits it could otherwise obtain by selling to a non-affiliate, to the benefit of its non-regulated affiliate who receives a good or service at a below-market price. When the situation is reversed, i.e., the non-regulated, affiliated special-purpose company is providing non-power goods and services to the public utility affiliate, the Commission will continue to apply its market standard. The non-regulated, affiliated special-purpose company may not sell to its public utility affiliate at a price above the market price. We believe that such transactions involving such non-regulated, affiliated special-purpose

[178] Our adoption of different policies for traditional, centralized service companies compared to special-purpose companies could make the distinction between the two more important than it has been previously. We view the former as performing generally corporate administration functions and the latter as providing generally a single input to utility operations, such as fuel supply, construction, or real estate. If holding companies are unclear about whether a subsidiary is a traditional, centralized service company or a special-purpose company, they may seek a determination in an appropriate proceeding. We will also monitor the issue through the auditing process.

companies pose a greater risk of inappropriate cross-subsidization and adverse effects on jurisdictional rates.

172. APPA/NRECA note that section 12(c) of PUHCA 1935 prohibits a public utility from providing financial support to affiliated non-utility ventures, and they suggest that the Commission continue this prohibition through its regulations. Congress did not reenact this provision of PUHCA 1935 in PUHCA 2005, and, although we believe we have authority under the FPA and NGA to impose such a restriction, we do not believe such a restriction is necessary at this time.

173. We find that APPA/NRECA raise some valid points concerning service company billings and how those amounts should be reflected in the accounts of a public utility company. However, resolution of this issue may have policy implications as well as practical accounting system implementation issues that should be explored more broadly than the record in this proceeding allows. Therefore, we decline to adopt at this time APPA/NRECA's recommendations on this issue.

174. We disagree with Energy East and EPSA that section 1275 of PUHCA 2005 in any way restricts this Commission’s authority to impose either the market standard or the at-cost standard. By remaining silent on the standard to be employed, Congress has placed the matter squarely within the Commission’s discretion. Contrary to assertions by EPSA and others, the Commission is not exceeding its authority by establishing policies governing the sale or provision of non-power goods and services by a non-regulated company to an affiliated public utility. The standard used affects jurisdictional rates, and the Commission has the authority to establish a standard insofar as it pertains to

jurisdictional rates pursuant to its ratemaking authority under sections 205 and 206 of the FPA and section 4 and 5 of the NGA, as well as pursuant to the additional authority to review and authorize cost allocations requested under section 1275 of EPAct 2005.

d. Other Issues Regarding Cost-Allocation Agreements

Comments

175. APPA/NRECA assert that the language of proposed section 366.5(b) could be misinterpreted to mean that a company "organized specifically" for one purpose (say, providing legal services to the system's utility members) and that later takes on other responsibilities (like providing accounting services to the system's utility members) can escape review under this section (for example, at the request of a state commission). Such "after-acquired" functions should not preclude Commission review.[179] Similarly, MBIA Insurance contends that, even if the non-utility associate exists primarily for another purpose, such as providing services to companies outside of the system, its intra-system costs to regulated utilities should still be subject to the Commission's review, if a state or holding company opts for Commission review. To the extent that the Commission believes it may lack the authority to adopt such a regulation, MBIA Insurance urges the Commission to ask Congress to clarify or grant the Commission this authority to protect customers and prevent regulatory gaps.[180]

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[179] APPA/NRECA Comments at 8. See also Missouri PSC at 9.

[180] MBIA Insurance Comments at 18.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

176. A number of commenters expressed concern about the potential preemptive effect of Commission review of cost-allocation agreements. In order to avoid any preemption issue, NARUC suggests that the filing of such agreements occur under section 304 of the FPA and section 10 of the NGA, instead of under section 205 of the FPA and section 4 of the NGA.[181] Missouri PSC states that a Commission-approved allocation should bind Commission ratemaking but not state ratemaking, except in limited circumstances, and urges the Commission to make clear that a state commission is not preempted by any Commission-determined service cost allocation, whether the initiating entity is a holding company system or another state commission.[182] In addition, Missouri PSC urges the Commission not to interpret section 1275(b) to permit gaming of the state commission retail ratemaking process by holding companies or state commissions, i.e., to permit state commissions or holding companies to petition the Commission to review and authorize a holding company system-wide cost-allocation methodology that would be imposed on all state commissions. Finally, Missouri PSC contends that an interpretation of section 1275(b) giving Commission-approved cost allocations preemptive effect would also be contrary to the clear language contained within section 1275(c), which provides that: "Nothing in this section shall affect the authority of the Commission or a state commission under other applicable law." Since state commissions have state law

[181] NARUC Comments at 2.

[182] Missouri PSC Comments at 9.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

authority to set retail rates, including authority to disallow purchase costs or sales prices deemed unreasonable or imprudent, section 1275(c) on its face protects the state commissions from any asserted preemptive effect of a Commission allocation under section 1275(b).[183]

177. By contrast, Xcel and NiSource contend that any Commission-approved cost allocations under section 1275 will necessarily preempt state determinations. Xcel argues that it would negate the intent of Congress to give the Commission the authority to review these allocations if state commissions could undertake their own cost allocations and urges the Commission to avoid any kind of actions or statements that would support the argument that the preemptive effect of section 1275 is dependent on the form of filing of service agreements with the Commission.[184] NiSource states that it fails to see how the Commission can approve service company cost allocations that will apply to entities across multiple states if one of these state commissions can then simply refuse to accept the Commission's cost allocation as binding. For this reason, NiSource requests that the Commission needs to provide certainty in the final rule that a Commission-approved cost allocation is binding on the states.[185]

178. Dominion and EEI contend that the primary situation in which the Commission would need to impose a specific methodology would be a situation in which a multi-state

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[183] Id. at 11-12. See also Progress Energy Comments at 9.

[184] Xcel Reply Comments at 5-6.

[185] NiSource Reply Comments at 7.

holding company system finds that all state commissions do not approve a single allocation agreement. In such cases, the multi-state holding company system would apply to the Commission to impose consistent requirements that would eliminate the possibility of trapped costs.[186]

Commission Determination

179. In response to APPA/NRECA's concerns regarding the "organized specifically" language, we clarify that we do not interpret this to allow a cost allocation to escape review if the associate company later takes on additional responsibilities. In response to the comments from MBIA Insurance, the Commission has authority to review any intra-system costs to any jurisdictional company under FPA and NGA authority.

180. In response to the requests for clarification of the potential preemptive effect of section 1264 and the Commission's regulations thereunder, we believe that issues related to preemption are more appropriately addressed on a case-by-case basis to give the Commission the opportunity to consider the potential preemptive effect of section 1264 in specific circumstances. However, we anticipate that such issues would arise only in unusual circumstances.

5. Single-State Holding Company Systems and Other Classes of Transactions

181. Section 1275(d) of EPAct 2005 directs the Commission to issue rules no later than four months after the date of enactment of EPAct 2005 to exempt from the requirements of section 1275 (service allocation requests by holding company systems or state

[186] Dominion Comments at 18-19, EEI Comments at 25-26.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

commission) "any company in a holding company system whose public utility operations are confined substantially to a single state" and any other class of transactions that the Commission finds are not relevant to the jurisdictional rates of a public utility. We interpreted this to exempt single-state holding companies and sought comments on how the Commission should define "confined substantially to a single state."

182. While section 1275(d) states that companies in single-state holding company systems are exempt from the "requirements" of section 1275, section 1275 does not impose any requirements on holding company systems or companies within these systems, but rather grants holding company systems and relevant state commissions the right to obtain Commission review and authorization of cost allocations. Instead, the only requirements in section 1275 are directed toward the Commission, in particular that "the Commission shall review and authorize" cost allocations if asked to do so by the holding company system or the relevant state commission. Based on the structure of section 1275, we suggested that the most reasonable interpretation of the exemption in section 1275(d) is that Congress intended to deny single-state holding company systems and state commissions having jurisdiction over a public utility in such systems the right to obtain Commission review of cost allocations pursuant to section 1275. Accordingly, we proposed to reflect this limitation by excluding single-state holding company systems from the scope of Commission review under section 366.5(b) of the Commission's regulations. The Commission invited comments on this interpretation of section 1275(d).

a. Definition of Single-State Holding Company System Exemption

Comments

183. Some commenters agree with the Commission's interpretation that section 1275(d) exempts single-state holding company systems whose public utilities operations are confined substantially to a single state (i.e., all of the holding companies' public utility affiliates or subsidiaries operate principally in a single state), whereas other commenters (as discussed below) interpret the exemption to apply only to individual "companies" within the holding company system, i.e., where the individual public utility, operating primarily in a single state.

184. A number of commenters who agree with the Commission's interpretation also suggest various modifications to the scope of the single-state holding company exemption and propose definitions of the phrase "confined substantially to a single state." EEI suggests that the Commission follow SEC practice and precedent in interpreting this exemption, in particular, section 3(a)(1) of PUHCA 1935 which provides an exemption for intrastate holding companies. According to EEI, under current SEC practice, a holding company will qualify for the intrastate exemption if it derives no more than approximately 13 percent of its utility revenues from out-of-state public utility company operations. EEI further suggests that, in administering this exemption, the Commission should follow current SEC practice and require the annual submission of information in Part 3 of Form U-3A-2 by companies seeking an exemption under section 1275(d).[187]

[187] EEI Comments at 27-28. See also MidAmerican Comments at 11.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Scottish Power also agrees that Congress intended to deny single-state holding company systems and relevant state commissions the right to obtain Commission review of cost allocations pursuant to section 1275 and urges the Commission to clearly reflect this limitation by excluding single-state holding company systems from the scope of Commission review under section 366.5(b) of the Commission's regulations.[188]

185. NARUC submits that the exemption should apply to any company in a holding company system whose public utility operations are confined substantially to a single state, rather than applying the exemption to the holding company system that is confined substantially to a single state. Thus, the relevant inquiry should involve an analysis of the extent to which the individual company operates in a single state rather than the extent to which the holding company system is predominately single-state in nature.[189] NARUC further asserts that the Commission should follow the SEC's interpretation of this single-state holding company exemption under PUHCA 1935. Consistent with this precedent, NARUC proposes that, if a company in a holding company system whose public utility operation derives 70 percent or more of its gross utility operating revenues from within a single state, that individual company should be considered exempt from section 1275 and any related Commission regulations.[190] NiSource supports the 70 percent threshold

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[188] Scottish Power Comments at 11.

[189] NARUC Comments at 12-13.

[190] Id. See also E.ON/LG&E Energy Comments at 18-19 (the standard should be whether 80 percent or more of the retail customers served by the public utilities in the holding company system are located within a single state).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

because, first, it would be unusual for a traditional public utility that has its physical operations in one state to derive more than 30 percent of its gross utility operating revenues from outside that state. Second, NARUC's proposed standard correctly captures the statutory language of section 1275(d); whereas the Commission's proposed language in proposed section 366.5(c) of the NOPR is, at best, ambiguous.[191]

186. Commenters also suggested revisions to the Commission's proposed regulatory text in section 366.5. NiSource notes that the current language can be read so that a holding company with operations in multiple states falls under section 1275(b) even if its public utility is confined substantially (or entirely) to a single state. NiSource urges the Commission to modify the first sentence in section 366.5(c) to read that "any company in a holding company system whose public utility operations are confined substantially to a single state, as defined herein, is exempt from paragraph (b) of this section."[192] Santa Clara and TANC state that, in light of the complexities of effective state oversight and regulations of holding companies, the Commission should interpret the definition of single-state strictly and narrowly to prevent creeping variations from the letter and spirit of the exemption, and avoid a gap in effective regulation of multi-state utility holding company systems. Santa Clara and TANC therefore urge the Commission to reevaluate its interpretation of the single-state holding company exemption from Commission

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[191] NiSource Comments at 9.

[192] Id. NiSource further states that the final rule should make clear that section 1275 applies only to traditional public utilities. In addition, if a traditional public utility engages in wholesale sales beyond its service territory, such sales should not render the utility subject to section 1275.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

review under section 1275.[193] Ameren argues that the focus of the term "confined substantially to a single state" should be on the state or states in which a holding company system is subject to retail rate regulation since there are no "captive" customers who could be harmed in a state where the public utility does not have cost-based rates.[194] Finally, Public Citizen contends that the single-state exemption requires that both a public utility and its holding company primarily operate in a single state, so that the state is capable of regulating the holding company, as well as the public utility, under state law.[195]

Commission Determination

187. Despite the ambiguous language of section 1275(d), we believe that the most reasonable interpretation of section 1275(b) and (d) together is that section 1275(b) is designed to offer this Commission as a forum for holding company systems and state commissions to obtain cost allocations within holding companies whose public utility operations are not confined substantially to a single state. Specifically, section 1275(b) is designed to allow multi-state holding companies, or the regulatory agencies of states in which the holding company's public utility subsidiaries operate, to obtain Commission review and authorization of cost allocations. However, Congress in section 1275(d) does not permit single-state holding companies to take advantage of the procedures in

[193] Santa Clara Comments at 14-15, TANC Comments at 14-15.

[194] Ameren Comments at 18.

[195] Public Citizen Comments at 13.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

section 1275(b).[196] This means that, if a holding company has several public utility subsidiaries operating in different states, even if the individual subsidiaries' businesses are each confined substantially to a single state, the holding company itself does not confine its public utility operations to a single state, and therefore, the exemption does not apply. On the other hand, if the holding company has multiple non-utility subsidiaries operating in more than one state, but one or more public utility subsidiaries that all operate primarily in the same state, the exemption would apply.

188. Several commenters agree that a holding company should be considered to be a single-state holding company if it complies with current SEC practice on granting a similar exemption under PUHCA 1935, which requires that a certain percentage of public-utility revenues be derived from operations within a single state. We believe it is reasonable to adopt a standard that is consistent with SEC rules and will define a single-state holding company as one that does not derive more than 13 percent of its public-utility revenues from outside a single state.

189. We agree with several commenters that the relevant analysis should be whether a holding company's regulated public utility operations are confined substantially to a single state, not whether the holding company itself is confined substantially to a single state. As discussed above, we interpret the single-state holding company exemption in

[196] With respect to NARUC's alternative interpretation of the scope of this exemption, we note that the phrase "whose public utility operations are confined substantially to a single state" directly follows, and thus modifies, "holding company system" rather than "company." This interpretation is consistent with the structure of section 1275(b) which provides the election to the holding company system, rather than individual companies within it.

section 1275(d) to apply in cases where a holding company has multiple non-utility subsidiaries operating in more than one state, but one public utility subsidiary that operates primarily in a single state. In such a case, the holding companies' public utility operations would be subject to the jurisdiction of a single state commission, while the holding companies' operations would not. Accordingly, we find that Public Citizen's interpretation is inconsistent with the text of section 1275(d).

b. Other Classes of Transactions That Should Be Exempted

190. In the NOPR, we concluded that an exemption under section 1275(d) forecloses Commission review under section 1275(b). In section 366.5(c) of the Commission's regulations, we proposed to establish a procedure by which the Commission, either upon petition for declaratory order or upon its own motion, may exclude from the scope of Commission review and authorization under section 366.5(b) any class of transactions that we determine are not relevant to the jurisdictional rates of a public utility. The Commission invited comments as to other classes of transactions that, pursuant to section 1275(d), should be exempted from the requirements of section 1275.

Comments

191. No comments were received on this subject. Accordingly, we will not at this time establish any blanket exemptions for certain classes of transactions.

6. Previously Authorized Activities

192. Section 1271 of EPAct 2005 states essentially that a person may continue to engage in activities or transactions authorized by rule or order as of the date of enactment of EPAct 2005 if that person continues to comply with the terms of the authorization. In

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

the NOPR, the Commission proposed to reflect this statutory provision in section 366.6 of the Commission's regulations. The Commission also proposed to require that, if any such activities are challenged in a formal Commission proceeding, the person claiming prior authorization shall be required to provide the full text of any such authorization (whether by rule, order, or letter) and the application(s) or pleading(s) underlying such authorization (whether by rule, order, or letter).

193. A number of commenters have noted that proposed section 366.6 states that persons will be able to continue to engage in activities or transactions authorized under PUHCA 2005, and that it should instead refer to PUHCA 1935. In response to the comments, we have corrected this error in the regulations adopted here.

Comments

194. The majority of the comments supported the Commission's proposal to allow entities to rely on SEC orders, in particular, SEC financing authorizations.[197] For example, Dominion and EEI note that, with the repeal of section 318 of the FPA, many additional public utilities will become subject to Commission jurisdiction under section 204 and that, unless registered holding company public utility subsidiaries can rely on their current SEC orders, it will be necessary for them to apply immediately for Commission authorization under section 204 of the FPA. According to Dominion and EEI, this would create a substantial burden for the holding companies and their public utility subsidiaries and could also lead to a surge in section 204 applications at precisely

[197] See, e.g., Cinergy Comments at 25-27, FirstEnergy Comments at 16-17, National Grid Comments at 7-8, Scottish Power Comments at 12, Xcel Comments at 6.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

the time that the Commission is burdened with implementing its new duties under EPAct 2005. Dominion and EEI thus recommend that the Commission in its rulemaking make a finding under section 204 of the FPA authorizing holding company public utility subsidiaries, at their option, to issue securities and assume liabilities following the effective date of PUHCA 2005, provided that they comply with the terms of their SEC financing authorization. Dominion and EEI further recommend that this authorization continue through the later of December 31, 2007 or the date on which the SEC order is set to expire.[198]

195. EEI further suggests that, to the degree it deems necessary, the Commission could condition its acceptance of SEC financing authorizations on specific requirements related to the provisions of FPA section 204, such as the restrictions on secured and unsecured debt set forth in Westar Energy, Inc.[199] However, if the Westar or other conditions are imposed, EEI contends that they should apply prospectively only and not to securities issued prior to February 8, 2006.[200]

196. Entergy supports the Commission's proposed interpretation of the savings provision in section 1271, but asserts that there are several technical concerns regarding the manner in which the proposed rule is drafted that, if not corrected, may prevent the rule from achieving its intended purpose. Entergy urges the Commission to clarify the

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[198] Dominion Comments at 20-21, EEI Comments at 29-30.

[199] 102 FERC ¶ 61,186 (2003), order rescinding authorization, 104 FERC ¶ 61,018 (Westar).

[200] EEI Comments at 30.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

condition in the proposed rules insofar as it provides authority to continue to engage in "activities or transactions" approved by the SEC "[u]nless, otherwise provided by Commission rule or order." Entergy inquires if, for example, a Commission section 204 financing order imposes a condition that is not present in an existing SEC financing order issued to another public utility under PUHCA 1935, can the other public utility continue to rely on its PUHCA 1935 order or is the applicability of the saving provision negated by the referenced condition? Similarly, Entergy asserts that there may be a question whether the "unless otherwise provided language" will necessitate compliance with the requirements of Part 34 of the Commission's regulations or other regulatory conditions or requirements adopted by the Commission, to the extent that such requirements are absent from an existing PUHCA 1935 financing order (which otherwise would continue in effect beyond the PUHCA 1935 repeal date as a result of the saving provision).[201]

197. Entergy also seeks clarification as to the statement in the NOPR that existing PUHCA 1935 authorizations are to remain "in effect for the period of time provided in such authorization" with respect to authorizations that do not contain a specified expiration date, in particular, orders authorizing creation of service companies, which typically do not reference any expiration date. Entergy recommends that authorizations granted by the SEC under PUHCA 1935 should remain in effect after repeal, unless and until such time as such authorization would otherwise expire under the applicable PUHCA 1935 order, rule or statutory provision, or until such time as the Commission

[201] Entergy Comments at 12-13.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

issues a new order expressly modifying the authorization previously granted to the applicable company by the SEC under PUHCA 1935.[202]

198. Finally, Entergy requests clarification of the statement in the NOPR that such authorizations will remain effective only "so long as that person continues to comply with the terms of such authorization." According to Entergy, many orders issued by the SEC require periodic reporting to the SEC of financing transactions that are consummated pursuant to the authorization set forth in the order, so the question arises as to whether such reporting requirements will be considered "terms" of the PUHCA 1935 authorization that must be satisfied in order to continue to engage in the SEC-approved financing transactions subsequent to the February 8, 2006. Entergy requests that the Commission clarify that following February 8, 2006, such reports (originally required to be filed with the SEC pursuant to Rule 24, adopted under PUHCA 1935) are to be filed with the Commission, rather than with the SEC.[203]

199. PacifiCorp requests that the Commission clarify that SEC financing authorizations will be preserved for a sufficient period of time to permit a reasonable transition period (through December 31, 2007) to the requirements of section 204 for both utilities and the Commission. PacifiCorp further requests that the Commission provide a mechanism for such further approvals until February 8, 2006, and to preserve tax treatment by retaining

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[202] Id. at 13-14.

[203] Id. See also NiSource Comments at 14-15 (the Commission should clarify that only the SEC's conditions and terms apply, unless the Commission states otherwise in a specific order).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

the right of holding companies to avail themselves of Internal Revenue Code section 1081, which section 1271 also preserves.[204]

200. MGTC requests that the Commission clarify that prior status determinations by the SEC remain valid and are grandfathered by the operation of section 1271, so that, for example, if a person was declared not to be a "gas utility company" by the SEC, and the facts on which that determination was made have not materially changed, that person will not be a "natural gas company" under PUHCA 2005 and implementing regulations. MGTC further contends that, if the Commission is not willing at this time to issue a broad declaration that prior SEC status determinations are grandfathered by section 1271, the Commission should nonetheless hold that a person that the SEC found was not a "gas utility company" under PUHCA 1935 will not be required to comply with the Commission's new regulations until the Commission makes an affirmative finding that the person is a "natural gas utility" under PUHCA 2005.[205]

201. Northeast Utilities Service Company (Northeast Utilities) notes that some registered holding companies may have obtained amendments to existing SEC orders or new orders after August 8, 2005, i.e., date of enactment of EPAct 2005, and thus urges the Commission to make clear that such modified and/or new orders should also be grandfathered, if possible.[206]

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[204] PacifiCorp Comments at 7-8.

[205] MGTC Reply Comments at 1, 4. See also Mittal Steel Reply Comments at 2-5.

[206] Northeast Utilities Comments at 6.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

202. Some commenters, however, emphasized that section 1271 of EPAct 2005 does not insulate activities previously approved by the SEC from Commission review under the FPA or NGA.[207] According to APPA/NRECA, the savings provision in section 1271(a) of EPAct 2005, which allows entities with SEC approvals to continue engaging in the transactions so approved, does not diminish the Commission's authority to establish conditions that ensure just and reasonable rates under the FPA or NGA.[208] APPA/NRECA further emphasize that any interpretation of section 1271(a) that would limit the Commission's ability to review the effect of particular activities or transactions on Commission-jurisdictional rates would be inconsistent with section 1271(b), which makes clear that section 1271(a) does not circumscribe in any way the Commission's regulatory authority under the FPA and the NGA.[209] Similarly, Santa Clara notes that it might be argued that a conflict between section 1271(a) and 1271(b) arises when SEC rules under PUHCA 1935 require different or less rigorous standards than the Commission's rules under the FPA, e.g. SEC at-cost standard vs. the Commission's market standard. Santa Clara urges the Commission to clarify that all activities, including those previously authorized by the SEC and the Commission itself, are subject

[207] See, e.g., Arkansas PSC Comments at 7, Missouri PSC Comments at 14-15.

[208] APPA/NRECA Comments at 4. See also Santa Clara Comments at 17, TANC Comments at 17.

[209] Id. at 13-14.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

to review, rules, regulations and policy administered independently by the Commission under the FPA.[210]

203. Finally, Oklahoma Corporation Commission suggests that the Commission should amend proposed section 366.6 to include language that clearly articulates that said person or entity should also bear the burden of proof that that person or entity has complied with the rule, order, or letter.[211]

Commission Determination

204. In the NOPR, we noted that the repeal of PUHCA 1935 and section 318 of the FPA would give the Commission jurisdiction under section 204 of the FPA over certain issuances of securities and assumptions of liabilities by companies within holding company systems that are currently subject to the jurisdiction of the SEC. Furthermore, Congress expanded the Commission's jurisdiction over holding company acquisitions of securities through its amendments to section 203 of the FPA in section 1289 of EPAct 2005. Finally, Congress explicitly stated in section 1271(b) that nothing in PUHCA 2005 limits the Commission's authority under the FPA and the NGA. Thus, it is clear that in EPAct 2005 Congress intended to preserve, and in some ways expand, the Commission's authority over issuances of securities, assumptions of liabilities by companies within holding company systems, and holding company acquisitions of securities. However, Congress also included in PUHCA 2005 a transition provision, which allows persons to

[210] Santa Clara Comments at 18-19.

[211] Oklahoma Corporation Commission Comments at 7.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

continue to rely on previously-granted SEC authorizations.

205. We will adopt section 366.6 as proposed in the NOPR and allow entities to continue to rely on SEC orders, including SEC financing authorizations. We will also grant a number of the clarifications with respect to SEC financing authorizations requested by commenters. However, the Commission will require all holding companies that intend to rely on their SEC financing authorizations to issue securities, assume liabilities, or engage in securities transactions that would otherwise be reportable under section 203 of the FPA, as amended by EPAct 2005, or section 204 of the FPA to file with the Commission a copy of these SEC orders by the effective date of PUHCA 2005. The filing of these orders will permit the Commission to maintain effective oversight of the previously-authorized activities and transactions that, due to the repeal of PUHCA 1935, are now subject to the Commission's jurisdiction under the FPA.

206. Section 1271(a) states that nothing in PUHCA 2005 or PUHCA 1935 and the rules, regulations, and orders thereunder, prohibits a person from engaging in or continuing to engage in activities or transactions in which it is legally engaged or authorized to engage on the date of enactment of PUHCA 2005, if that person continues to comply with the terms (other than an expiration date or termination date) of any such authorization. This provision, and section 366.6 of our regulations that we adopt herein, permit persons to rely on the SEC multi-year financing authorizations for the period of time provided in that authorization. Accordingly, we clarify that, to the extent companies in a holding company system engage in authorized financing transactions, in compliance with the terms of that authorization, we will not require those entities to seek additional

authorization under sections 203 or 204 at this time.

207. We find that EEI's concerns regarding Westar are beyond the scope of this rulemaking and, therefore, we will not address them here. Instead, the Commission will consider whether to place Westar conditions upon future applications on a case-by-case basis.

208. Section 1271(a) permits a person to engage in previously-authorized activities if that person continues to comply with the terms of that authorization, other than an expiration date or termination date. We agree that it is necessary to provide a reasonable transition period for entities subject to the requirements of PUHCA 2005 and, therefore, we agree with Dominion and EEI that these authorizations should continue through the later of December 31, 2007 or the date on which the SEC order is set to expire and with PacifiCorp that section 204 authorizations should not be required until December 31, 2007, without regard to the duration of the SEC authorization. We conclude that it is reasonable to permit entities to rely on their SEC financing authorizations for the period of their duration or through December 31, 2007, whichever is later. Similarly, with respect to Entergy's request for clarification regarding authorizations for the formation of service companies, which do not have a termination date, we conclude that PUHCA 2005 does not grant the Commission authority over service company formation and thus Commission authorization is not required.

209. We will also grant Entergy's clarification that, after the effective date of PUHCA 2005 (i.e., February 8, 2006), for SEC orders that require periodic reporting to the SEC of financing transactions that are consummated pursuant to the authorization set forth in the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

order, such reports are to be filed with the Commission, rather than with the SEC, so long as the company continues to rely on such authorization. We do not think it is reasonable to assume that Congress intended to carry forward the SEC's financing authorizations without the specific reports required to be submitted as a condition of those authorizations. More importantly, the receipt of such reports will allow the Commission to perform its oversight duties, while allowing the entities to continue to rely on these SEC financing authorizations for a reasonable transition period.

210. PacifiCorp appears to be requesting that the Commission grant further financing approvals under PUHCA 1935 until February 8, 2006, since it could not do so under PUHCA 2005, which does not take effect before that date. While the Commission has no authority to take any action under PUHCA 1935, which was entrusted to the SEC, to the extent necessary to permit continuity of financing authorizations or to preserve tax treatment referenced in section 1271(c) of PUHCA 2005,[212] the Commission will entertain requests for financing approvals prior to February 8, 2006, but will be able to make any such approvals effective only upon the effective date of PUHCA 2005, February 8, 2006.

211. As noted, section 1271(c) explicitly states that tax treatment under section 1081 of the Internal Revenue Code of 1986 as a result of transactions ordered in compliance with PUHCA 1935 shall not be affected in any manner due to the repeal of PUHCA 1935 and

[212] Section 1271(c) of PUHCA 2005 states that such tax treatment shall not be affected in any manner due to the repeal of PUHCA 1935 and enactment of PUHCA 2005.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

the enactment of PUHCA 2005, and we will comply with this provision insofar as such tax treatment is reflected in jurisdictional rates or in the Commission's Uniform System of Accounts and the SEC's Uniform System of Accounts, as they exist on the day before the date of enactment of PUHCA 2005.

212. We will also grant Northeast Utilities' request that section 1271 will apply to modifications of SEC orders made between the date of enactment and the effective date of PUHCA 2005.

213. We will also grant the clarification requested by APPA/NRECA and others that transactions entered into pursuant to prior SEC authorizations are not insulated from Commission review under the FPA and the NGA. Previously, certain securities transactions were exempted from Commission jurisdiction due to section 318 of the FPA, which Congress has repealed. While we agree that section 1271(a) permits companies within holding company systems to continue to rely on SEC financing authorizations, this authorization simply permits them to engage in such transactions without prior Commission approval under sections 203 and 204 of the FPA, but does not insulate them from our review of jurisdictional rates under sections 205 and 206 of the FPA and sections 4 and 5 of the NGA.

214. We will not adopt Oklahoma Corporation Commission's suggestion that we amend section 366.6 to include language that clearly articulates that said person or entity should also bear the burden of proof that that person or entity has complied with the rule, order, or letter. We find that such an amendment is unnecessary at this time.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

7. <u>Exempt Wholesale Generators and Foreign Utility Companies</u>

215. EPAct 2005 repeals PUHCA 1935 in its entirety, including section 32, which requires the Commission to make EWG determinations on a case-by-case basis, upon application. Although the definitional section of PUHCA 2005 references section 32 of PUHCA 1935, the Congress nevertheless repealed section 32 in its entirety and did not re-enact that provision in the new PUHCA 2005. The Commission stated in the NOPR that it believed that the most reasonable interpretation of EPAct 2005, given the omission of section 32 in the new PUHCA 2005, is that Congress did not intend the Commission to continue to make case-by-case determinations of EWG status in the future (i.e., after the effective date of PUHCA 2005). Rather, we stated in the NOPR that the most reasonable interpretation of the statute is that only those entities that are holding companies with respect to persons granted EWG status before the repeal of PUHCA 1935 would qualify for an exemption from the new federal books and records access requirements under proposed section 366.3(a)(2) of the Commission's regulations. Accordingly, we proposed to remove Part 365 of the Commission's regulations, which set forth the filing requirements and ministerial procedures for persons seeking EWG status under section 32 of PUHCA 1935, and we invited comments on whether we should do so.

216. We further noted that the benefit of EWG status under PUHCA 1935 was that entities that the Commission determined to have met the definition of EWG were exempted from the myriad requirements of PUHCA 1935. The principal benefit of being an EWG under PUHCA 2005 is exemption from the new federal books and records access requirements. To the extent that these new federal books and records access

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

requirements add to the Commission's existing very broad books and records access authority under FPA section 301 and NGA section 8, we concluded that our interpretation served to err on the side of greater customer protection.

217. We also noted that, in any event, entities that qualified as EWGs under PUHCA 1935 were not exempted from the Commission's authority under the FPA if they met the FPA definition of "public utility," including the very broad access to books and records provisions of FPA section 301. Nor will they be exempt from these FPA provisions as a result of PUHCA 2005.

218. In addition, we noted that Congress repealed section 33 of PUHCA 1935, which addresses FUCOs. As with EWGs, we stated our belief that Congress intended to limit the exemption for persons that are holding companies with respect to FUCOs to those attaining FUCO status before repeal of PUHCA 1935. The Commission invited comments as to this interpretation of EPAct 2005.

Comments

219. Some commenters expressed support for the Commission's decision to no longer make determinations of EWG status. These commenters note that, while Congress repealed the section of PUHCA 1935 addressing EWGs, the exemption in subsection 1266(a)(2) refers to these repealed designations, they have to apply to something, and they agree with the Commission's position that the exemptions must apply only to the existing EWGs and FUCOs.[213] Public Citizen agrees that grandfathered EWGs have a

[213] APPA/NRECA Comments at 21, Georgia PSC Comments at 3, Santa Clara Comments at 18, TANC Comments at 18.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

reliance argument for maintaining their status, but disagrees with extending such grandfathering to new entities that are now aware that the distinction no longer exists. Furthermore, Public Citizen states that grandfathered EWGs must continue to comply with EWG requirements to maintain their grandfathered EWG status and that they should be required to make an annual filing with the Commission stating how each continues to comply with the original terms of its EWG or FUCO exemptions.[214]

220. The majority of commenters, however, opposed the Commission's proposal to stop making determinations of EWG status as contrary to Congress' intent and the plain meaning of the statute.[215] According to Calpine, by incorporating the definition of EWG into PUHCA 2005 and relying on that definition to permit holding companies with respect to only EWGs, QFs, and/or FUCOs to be exempt from the federal books and records access requirement, Congress recognized the continuing need for EWG determinations after the repeal of PUHCA 1935 takes effect; nowhere in EPAct 2005 is the exemption limited to holding companies with EWGs prior to the repeal of PUHCA 1935 takes effect. Calpine thus contends that, if Congress wanted to restrict EWG determinations to a certain time period, it knew how to do so, but chose not to.[216] Similarly, Dominion and EEI argue that, by preserving the meaning of the term "exempt

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[214] Public Citizen Comments at 5.

[215] See, e.g., Coral Power/Shell Windenergy Comments at 8, EPSA Comments at 16-17, Goldman Sachs Comments at 5, PPM Energy Comments at 3-4.

[216] Calpine Comments at 5-6 (quoting section 1253(a) of EPAct 2005 defining "existing qualifying cogeneration facility").

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

wholesale generator" found in PUHCA 1935, Congress in essence preserved section 32(a) of PUHCA 1935, which defines an EWG, in part, as a company that the Commission determines to be an EWG. Thus, according to Dominion and EEI, the Commission's case-by-case determination process is incorporated directly in the definition.[217] Morgan Stanley argues that the Commission's interpretation effectively renders superfluous the EWG exemption contained in EPAct 2005.[218]

221. Other commenters believe that the Commission's interpretation is not a permissible one because the decision to eliminate Part 365 and future EWG determinations would produce unreasonable or unduly discriminatory results. Calpine argues that, under the Commission's interpretation of the statute, if Calpine added one more wholesale generator that would have been an EWG under Part 365, Calpine and its subsidiaries will lose the exemption and thus it is not reasonable for the addition of one wholesale generator that is identical to Calpine's EWG affiliates in every respect but one (i.e., EWG status), to result in all of these companies and their affiliates being subject to the books and records access requirements and SEC rules, particularly when these companies were exempt from regulation under PUHCA 1935 and have no captive customers in need of protection.[219] Further, Calpine asserts that the use of proposed section 366.3(b), which would provide for entities to file for a petition for a declaratory

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[217] Dominion Comments at 22-23, EEI Comments at 32.

[218] Morgan Stanley Comments at 7.

[219] Calpine Comments at 6. See also Coral Power/Shell WindEnergy Comments at 8.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

order that they are exempt from the Commission's books and records requirements, is not an adequate alternative for Calpine due to the high costs of filing such petitions.[220] Morgan Stanley further argues that comments supporting the Commission's proposed deletion of Part 365 offer no substantive basis for why such a course of action comports with legislative intent, nor do they explain how it will not chill investor confidence or dissuade capital from entering the wholesale generation sector.[221] Finally, Dominion and EEI note that a number of states provide exemptions from state laws based on EWG status and that failure to make additional EWG determinations would also deprive those companies of the benefits of those laws.[222]

222. With respect to determinations of FUCO status, Calpine disagrees with the Commission's proposal in the NOPR. Calpine asserts that, by incorporating the definition of FUCO into PUHCA 2005 and relying on that definition to permit holding companies with respect to only EWGs, QFs, and/or FUCOs to be exempt from the federal books and records access requirement, Congress recognized the continuing need for FUCOs after the repeal of PUHCA 1935 takes effect. As with EWGs, Calpine contends that it is not reasonable for the addition of a single foreign subsidiary having no potential to impact the operations of its domestic affiliates to subject such affiliates to the books

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[220] Id. at 10-11.

[221] Morgan Stanley Reply Comments at 2-3.

[222] Dominion Comments at 23, EEI Comments at 33.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

and records access requirement and the SEC rules when they were not subject to such rules under PUHCA 1935.[223]

223. EEI proposes that the Commission should exempt FUCOs from the requirement that they maintain their books and records under proposed Rule 366.2(e), but that they otherwise should be subject to the books and records access provisions of section 366.2 of the Commission's proposed regulations. According to EEI, the Commission should continue to have access to FUCO records to the extent that such records are relevant to the costs incurred by a public utility or natural gas company that is an associate of a holding company and necessary and appropriate for the proper exercise of the Commission's statutory charge under the FPA and NGA with respect to jurisdictional rates.[224]

224. Some commenters suggested that the Commission should adopt a self-certification process similar process to that used by the SEC. For example, Scottish Power argues that FUCOs that operate exclusively outside of the US should not be subject to Commission oversight. The Commission should continue the SEC's practice of allowing for the creation of FUCOs by submittal of a notice filing. FUCOs and their subsidiary operations are generally separate from that of the domestic utility operations and

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[223] Calpine Comments at 8-9. See also EPSA Comments at 16-17, PPM Comments at 3.

[224] EEI Comments at 34. See also National Grid Comments at 5-8. National Grid also argues that extending the Commission's books and records mandates to FUCOs would subject them to conflicting mandates resulting in maintaining separate duplicative books and inappropriately expand the extraterritorial impact of PUHCA 2005 without any benefit to U.S. consumers.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

therefore would not bear in any way on the jurisdiction rates of such utility company.[225]

Commission Determination

225. Having again reviewed the ambiguities in statutory construction, and balancing the facts that Congress repealed section 32 of PUHCA 1935 in its entirety, yet referred to section 32 in the definitional sections of PUHCA 2005, we conclude that it is reasonable to interpret PUHCA 2005 to allow entities to obtain EWG status under PUHCA 2005. However, we will reject the requests from various commenters that we retain part 365 of our regulations, which permit only case-by-case applications for EWG status.

226. Instead, in line with the comments received from Scottish Power and others, we will establish a self-certification process for companies that believe they satisfy the criteria for EWG or FUCO status. This process is similar to that used for self-certifications for QFs under the Public Utility Regulatory Policies Act of 1978, and is set forth in section 366.7. Section 366.7(a) provides that the owner or operator of an EWG or FUCO, or its representative, may file with the Commission a notice of self-certification demonstrating that it satisfies the definition of EWG or FUCO. In the case of EWGs, the owner or operator must also file a copy of the notice with the state regulatory authority of each state in which the facility is located. Notices of self-certification or self-recertification will be published in the Federal Register. An entity filing a good faith notice of self-certification of EWG or FUCO status will be deemed to have temporary status upon filing. If no action is taken by the Commission within 60

[225] Scottish Power Comments at 14. See also EEI Comments at 34, Public Citizen Comments at 6.

days after the date of filing of a self-certification notice, the exempt wholesale generator status or foreign utility company status shall be deemed to have been granted. The Office of the Secretary will periodically issue notices listing the entities whose self-certification of EWG or FUCO status is deemed to have been granted in the absence of Commission action to the contrary within 60 days after the date of filing. We believe that such a self-certification of EWG and FUCO status will be adequate in the vast majority of cases.

227. For entities that require a higher degree of legal certainty as to their status, we will permit them to seek a Commission determination of their EWG and FUCO status as defined under section 366.1 of the Commission's regulations. Specifically, section 366.7(b) provides that they may seek such a determination by filing a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure justifying the request for EWG or FUCO status. These petitions will be noticed in the Federal Register. A person filing a petition for declaratory order in good faith will be deemed to have temporary EWG or FUCO status until the Commission takes action to grant or deny the petition.

228. The self-certification procedure established herein, along with the continued availability of Commission determinations of EWG and FUCO status, ensures that the EWG and FUCO exemptions will continue to be available to any persons who satisfy the statutory criteria. Moreover, we note that the self-certification procedures established herein, and advocated by various commenters, are less burdensome than the procedures established under section 32 of PUHCA 1935.

229. We disagree with commenters such as Calpine and EEI who argue that Congress,

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

by incorporating the definition of EWGs and FUCOs into PUHCA 2005, carried over the requirement from PUHCA 1935 that the Commission make case-by-case determinations of EWG status. This argument appears to rest on the erroneous assumption that Congress effectively reenacted (only) section 32(a) of PUHCA 1935. Had Congress meant to do so, it could have simply so stated in PUHCA 2005; alternatively, it could have imported the text from section 32(a) of PUHCA 1935, with appropriate modifications, into section 1262(6) of EPAct 2005, as it did for many of the other definitions carried over from PUHCA 1935. Instead, however, Congress directed that "[t]he terms 'exempt wholesale generator' and 'foreign utility company' have the same *meanings* as in section 32 and 33" of PUHCA 1935 as they existed on the day prior to the date of enactment of EPAct 2005. We believe it is a reasonable interpretation that, even if Congress preserved the option of EWG status determinations going forward, it did not prescribe the procedural mechanics requiring a case-specific Commission ruling on what it means for a person "to be engaged directly, or indirectly through one more affiliates …, and exclusively in the business of owning or operating, all or part of one more eligible facilities and selling electric energy at wholesale." Thus, we conclude that, by repealing section 32 of PUHCA 1935, Congress left to the Commission the discretion to prescribe the procedures for obtaining EWG status.

230. As noted earlier, with respect to FUCOs, section 33 of PUHCA 1935, as amended by EPAct 1992 provided that FUCOs would be exempt from PUHCA 1935 and not deemed an electric utility company, but the exemption would not apply or be effective unless relevant state commission(s) certified that they had the authority and resources to

protect ratepayers of public utility companies associated or affiliated with the FUCO. Given that PUHCA 2005 is largely a books and records statute, we will waive our accounting and reporting requirements for FUCOs. However, we will not exempt them from section 366.2 of our regulations, which allows us to obtain access as necessary with respect to jurisdictional rates. The case-by-case approach that we adopt here is consistent with our precedent concerning the treatment of FUCOs under the FPA and will allow us to ensure adequate protection of captive customers in the United States.

8. <u>Cross-Subsidization and Encumbrances of Utility Assets</u>

231. In the NOPR, we noted that PUHCA 2005 is primarily a "books and records access" statute and does not give the Commission any new substantive authorities, other than the requirement in section 1275 of EPAct 2005 that the Commission review and authorize certain non-power goods and services cost allocations among holding company members upon request. Nor does it give the Commission authority to pre-approve holding company activities. Accordingly, outside the context of reviewing a holding company transaction requiring approval under section 203 of the FPA or a proposed issuance of securities under section 204 of the FPA, the Commission will continue to rely primarily on its ratemaking authorities under sections 205 and 206 of the FPA and sections 4 and 5 of the NGA to protect jurisdictional customers against inappropriate cross-subsidization or encumbrances of utility assets on an ongoing basis.

232. In the NOPR, we also noted that the Commission already has in place, pursuant to the FPA and NGA, certain reporting requirements regarding money pools and cash

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

management activities that affect jurisdictional companies.[226] Further, in the electric area, we have policies that protect against cross-subsidization occurring as a result of wholesale power sales between affiliates in a holding company system as well as sales of non-power goods and services between such affiliates.[227] In the NOPR, we invited comment on whether, in light of the repeal of PUHCA 1935, the Commission needs to promulgate additional rules or to adopt additional policies to protect against inappropriate cross-subsidization or encumbrances of utility assets, pursuant to our authorities under the FPA and NGA. For example, we asked whether, if it has the authority to do so, the Commission should issue rules regarding public utility holding company diversification into non-utility businesses. Would the Commission have authority to promulgate such rules under its FPA or NGA ratemaking authority? Should the Commission 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? We sought comment on these and any other related issues in order to determine whether, in addition to the regulations being proposed herein under PUHCA 2005, the Commission may need to consider promulgating separate, additional rules under the FPA or the NGA.

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[226] Regulation of Cash Management Practices, Order No. 634, 68 FR 40500 (Jul. 8, 2003), III FERC Stats. & Regs. ¶ 31,145 (June 26, 2003), Order No. 634-A, 68 FR 61993 (Oct. 31, 2003), III FERC Stats. & Regs. ¶ 31,152 (2003).

[227] See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124-25. See also Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at 62,062-65 (1994); LG&E Power Marketing Inc., 68 FERC ¶ 61,247 at 62,121-24 (1994).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Comments

233. Commenters were largely opposed to the adoption of any new rules on cross-subsidization, encumbrances of utility assets, diversification into non-utility businesses, or the extension of existing cash management rules.[228] With respect to rules on cross-subsidization and encumbrances of utility assets, several commenters emphasize that additional Commission rules are unnecessary because existing Commission and state oversight is adequate.[229] For example, E.ON and LG&E Energy assert that it is not necessary or appropriate for the Commission to promulgate additional rules or adopt additional policies with respect to cross-subsidization or encumbrances of utility assets because, with the repeal of PUHCA 1935, Congress expressed the clear intent to eliminate the comprehensive regulation of holding company systems which had been characterized by PUHCA 1935. In addition, E.ON and LG&E Energy assert that current Commission and state regulation of affiliate transactions is sufficient, emphasizing that: (i) affiliate transactions also are controlled and/or monitored on an ongoing basis through codes of conduct in many states; (ii) the Commission regulates wholesale power sales between affiliates, which is often the largest portion of affiliate transactions activity; (iii)

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[228] See, e.g., Alliant Comments at 6, AEP Comments at 9-10, Ameren Comments at 20, AGL Resources Comments at 8-9, Cinergy Comments at 30-31, Emera Comments at 12, Entergy Comments at 14-16, International Transmission Company Comments at 11, KeySpan Comments at 7-8, MidAmerican Comments at 14, National Grid Comments at 31-32, PacifiCorp Comments at 7-8, Progress Energy Comments at 8, Questar Comments at 5-6, Southern Company Services Comments at 8, Washington Gas & Light Comments at 5, Xcel Comments at 7, Scottish Power Comments at 14-15.

[229] See, e.g., EPSA Comments at 25, FirstEnergy Comments at 17-19.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

under section 1275 of EPAct 2005, the Commission has additional authority to review the allocation of non-power goods and service transactions between service companies and public utilities; (iv) the terms of affiliate financing transactions also are closely monitored by the Commission and state commissions to make sure that public utility capital costs are not inflated; (v) where state commissions do not have jurisdiction over such issuances, Commission authorization would be required under section 204 of the FPA; and (vi) the Commission has jurisdiction under section 203 of the FPA over the sale, lease or disposal of public utility facilities subject to Commission jurisdiction and under section 204 of the FPA, the Commission must authorize the assumption of any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person.[230] FirstEnergy argues that the routine review of each of the FirstEnergy Operating Companies by independent financial rating agencies also acts as a deterrent to inappropriate cross-subsidization or establishment of unreasonable encumbrances on utility assets.[231] Finally, Energy East agrees that no new rules are required, but contends that some benefit could be gained from a single, uniform set of federal rules on cross-subsidization and affiliate abuse and federal code of conduct to avoid potentially conflicting state-imposed standards.[232]

234. With respect to rules on diversification, several commenters argued that the

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[230] E.ON/LG&E Energy Comments at 21.

[231] FirstEnergy Comments at 19.

[232] Energy East Comments at 14-15.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Commission lacks the statutory authority to adopt such rules.[233] For example, commenters argue that the SEC had authority under section 10 and 11 of PUHCA 1935 to regulate such diversification, but that these sections were repealed and Congress did not provide the Commission with authority to issues these or similar rules and that the cross-subsidization language in the PUHCA Repeal Subtitle is only a reference to the Commission's existing authorities under the FPA, not a new grant of authority and that the Commission already has ample authority under sections 203, 205 and 206 of that statue to address whether inappropriate cross-subsidization or other forms of affiliate abuse have occurred.

235. With respect to the Commission's cash management rules, Dominion and EEI contend that there is no need to extend the Commission's current cash management rules to apply to holding companies. According to Dominion and EEI, the rules already effectively apply to holding companies because, where a jurisdictional utility is a participant in a cash management arrangement with a holding company, that arrangement must comply with Commission cash management rules and the agreement must be filed. The only "extension" of the rules would be to require a holding company to comply with the rule in a cash management arrangement that involved only non-utility companies. That would be an inappropriate expansion of

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[233] See, e.g., Chairman Barton Reply Comments at 10-11, Dominion Comments at 25, EEI Comments at 36, E.ON/LG&E Energy Comments at 22, EPSA Comments at 25.

[234] Dominion Comments at 24, EEI Comments at 35.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

the Commission's authority.[234]

236. A number of commenters, however, argued that the Commission should adopt additional rules to protect against the dangers of cross-subsidization and diversification into non-utility businesses,[235] in particular, structural separation requirements regarding transactions between utility and non-utility affiliates. APPA/NRECA argue that the Commission must ensure complete structural protection, so that the public utility's affiliation with a non-utility business causes no additional, non-utility risk, including the following requirements: (i) public utility business must be conducted through corporations legally distinct (and financially insulated) from non-utility affiliates; (ii) public utilities must maintain books and records that are separate from the books and records of non-utility affiliates, and must prepare separate financial statements; (iii) public utilities must not commingle their assets or liabilities with the assets or liabilities of a non-utility affiliate, or pledge or encumber their assets on behalf of a non-utility affiliate; and (iv) service or management fees charged by a public utility's holding company parent or affiliated service company to the public utility must not include allocations of financing costs for entities other than the public utility, charges against equity in other subsidiaries of the parent holding company, or operating losses of the parent holding company or other affiliated companies.[236] MBIA Insurance argues that the Commission should impose financial and corporate separation requirements regarding

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[235] See, e.g., CEOB Comments at 3, Missouri PSC Comments at 30-32, Santa Clara Comments at 21-22, TANC Comments at 21-22, Utility Workers Comments at 3.

[236] APPA/NRECA Comments at 34-35.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

transactions between utility and non-utility affiliates to adequately protect utilities and their customers: (i) a utility company must not declare or pay any dividend on any security of the utility if such action would threaten the financial integrity of the utility; (ii) utilities should have at least one independent director on their boards of directors; (iii) non-utility affiliates should not have recourse against the tangible or intangible assets of utility affiliates; (iv) a utility must not cross-subsidize or shift costs from a non-utility affiliate of the utility to the utility, and must fully disclose and fully value any assets or services by the utility that are provided for the benefit of a non-utility affiliate; (v) electricity and natural gas customers must not be subject to the financial risks of non-utility diversification, and must not be subject to rates or charges that are not reasonably related to the provision of electricity or natural gas service.[237] NARUC urges the Commission to prohibit holding companies from encumbering the assets of its public utility in order to fund a diversification program and from issuing debt or preferred securities to pay dividends to a holding company or to making unduly risky loans to any organization within the holding company system. Specifically, the Commission should guard against a situation where the relationship between a financially strong public utility and relatively weaker affiliates has the effect of increasing the utility's cost of capital to the detriment of customers. In the event that a public utility became over-leveraged as a result of subsidization of the holding company, Commission should consider taking appropriate action, including limitations of the payment of common stock dividends from

[237] MBIA Insurance Comments at 20-24. But see EEI Reply Comments at 3.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

the utility to a parent.[238]

237. NASUCA argues that, in the case of captive customers, the proper structural protection would be to prohibit a utility's affiliation with non-utility businesses, unless there is no risk involved. If a customer has power supply options, dealings between utilities and their non-utility affiliates could be approved if: (a) the information on the risk is fully disclosed; (b) the potential gains to the customer are commensurate with the risk; and (c) there can be no possible level of harm so large as to render the utility unable to comply with its duty to provide service reliably and economically.[239] Finally, Ohio PUC recommends that the Commission adopt rules similar to those found in its transition plan administrative rules, which prevent electric utilities from issuing any security for the acquisition, ownership, or operation of an affiliate, assuming liabilities with respect to any security of an affiliate, or pledge, mortgage, or use as collateral any of its assets for the benefit of an affiliate. In addition, Ohio PUC recommends the Commission utilize the newly-established joint federal/state board to develop "ring-fencing" rules to insulate regulated assets from being the subject of cross-collateralization with unregulated assets.[240]

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[238] NARUC Comments at 13-14. National Grid and NiSource assert that NARUC has not shown that the existing protections are ineffective and that NARUC's proposed additional reporting requirements are unnecessary. National Grid Reply Comments at 7-8, NiSource Reply Comments at 5.

[239] NASUCA Comments at 11-12.

[240] Ohio PUC Comments at 6-8. AGL Resources argues that Ohio PUC's ring-fencing proposals are unnecessary, but that if the Commission decides to impose additional rules, it should do so through a collaborative process including the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

238. With respect to the procedure for implementing these structural measures to protect customers against the risks of diversification into non-utility businesses, APPA/NRECA urge the Commission to create a procedure for evaluating a public utility's acquisition of, or acquisition by, a non-utility business to ensure: (a) compliance with aforementioned limits; (b) non-interference by the non-utility side in the management of the public utility side; and (c) that holders of the public utility's debt, and credit rating agencies which rate that debt, have confirmed that there is no risk of adverse effect on their position.[241]

239. These commenters argue that the Commission has sufficient authority to issue additional rules on cross-subsidization and diversification. For example, Arkansas PSC contends that the Commission has authority under sections 203, 205, and 206 of the FPA to issue such rules.[242] Emera argues that the Commission should use its current authority under sections 203 and 204 of the FPA to address international diversification. Emera thus urges the Commission to explain in its orders authorizing public utility financing under FPA section 204 that no public utility shall use the proceeds of any such financing to finance the acquisition or operation of a FUCO, while pledges of utility assets to support FUCO financings would similarly be restricted under FPA section 203.[243]

Commission, state commissions, and industry participants. AGL Resources Reply Comments at 2. See also National Grid Reply Comments at 7-8.

[241] APPA/NRECA Comments at 35-36. See also NASUCA Comments at 12.

[242] Arkansas PSC Comments at 24-32.

[243] Emera Comments at 7.

240. A number of entities also supported the extension of the Commission's cash management rules to public utility holding companies.[244] According to MBIA Insurance, the Commission's cash management rules are insufficient to adequately protect regulated utilities, and it urges the Commission to broaden the application of the rules beyond utilities and to apply them to holding companies.[245]

Commission Determination

241. We interpret section 1275(c) of EPAct 2005 to be a savings clause, which does not give the Commission the authority to issue additional Commission rules regarding cross-subsidization, encumbrances of utility assets, diversification into non-utility businesses, or the extension of existing cash management rules. Rather, any such authority resides in the FPA and NGA. In addition, as noted by E.ON and LG&E Energy, current Commission and state regulations already provide oversight regarding cross-subsidization and encumbrances of utility assets. Accordingly, we will monitor industry activities, and we will adopt new regulations on cross-subsidization or encumbrances of utility assets, pursuant to our FPA and NGA authorities, only at such time as our current regulations appear to be insufficient. However, these matters will be further addressed at the technical conference that we will be holding within the next year.

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[244] See, e.g., Georgia PSC Comments at 4, Santa Clara Comments at 22, TANC Comments at 22. AGL Resources opposes comments to expand cash management rule, noting that some holding companies such as AGL have two cash management programs to address concerns regarding cross-subsidization and encumbrances, i.e., separate utility and non-utility money pools and that the Commission's current rules allow it to review the utility money pool. AGL Resources Reply Comments at 4-5.

[245] MBIA Insurance Comments at 25.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

242. The Commission finds persuasive Dominion's argument that Congress repealed the investment diversification limitations that have been applicable to registered holding companies, and therefore we will not propose additional rules regarding diversification into non-utility businesses at this time. Moreover, we note that, if the Commission were to propose such rules, we would have to do so under our FPA and NGA authorities, as we lack the authority to do so under PUHCA 2005.

243. Finally, we will not propose to extend our cash management rules to holding companies. As noted by Dominion and EEI, the cash management rules adopted under the FPA and NGA already effectively apply to holding companies because, where a jurisdictional utility is a participant in a cash management arrangement with a holding company, that arrangement must comply with Commission cash management rules and the agreement must be filed. Therefore, the Commission will not propose to extend existing cash management rules.

9. <u>Additional Conforming or Technical Amendments</u>

244. Section 1272(2) of EPAct 2005 directs the Commission to submit to Congress detailed recommendations on technical and conforming amendments to federal law necessary to carry out PUHCA 2005 within four months after the date of enactment. In the NOPR, the Commission invited comments as to what technical and conforming amendments the Commission should include in this submission to Congress.

245. We received comments on recommendations we should make to Congress, as well as comments on how we should interpret certain terms in PUHCA 2005 or modifications we should make to our proposed regulatory text.

a. Amendments of Definitions

Comments

246. Oklahoma Corporation Commission requests that the definitions of "affiliate" and "subsidiary" in PUHCA 2005 be amended. Oklahoma Corporation Commission contends that the difference in the two percentages, i.e., five percent for affiliates and ten percent for subsidiaries, would cause an affiliate company that is five percent owned by a holding company to be subject to Commission rules while a subsidiary that is also owned five percent by a holding company would avoid the Commission rules. Thus, it urges the Commission to consider definitions that would cause both the terms "affiliate" and "subsidiary" to have the same requirements and treatment.[246]

247. A number of entities requested amendments to the definition of "electric utility company." Morgan Stanley contends that the definition of "electric utility company" is not in accord with other definitions in PUHCA 2005 and that Congress intended that the two types of "public-utility companies," i.e. "electric utility company" and "gas utility company" should relate to retail activities only. Accordingly, Morgan Stanley recommends that the words "and not for resale" be placed at the end of the PUHCA 2005 definition of "electric utility company" to conform this definition with "public utility company" and "gas utility company."[247]

248. Morgan Stanley also urges the Commission to recommend to Congress that at

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[246] Oklahoma Corporation Commission Comments at 7.

[247] Morgan Stanley Comments at 10.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

least the entire definition of "exempt wholesale generator" from PUHCA 1935 be incorporated into PUHCA 2005, including other terms that appear within that defined term, namely, "eligible facility" from 15 U.S.C. § 79z-5(a)(2), and "affiliate" from 15 U.S.C. § 79b(a)(11)(B).[248]

249. Emera and National Grid recommend that the Commission adopt a definition of "foreign utility company" clarifying that a FUCO is not a "public-utility company", an "electric utility company," or a "gas utility company." Emera contends that such a definition would be consistent with section 33 of PUHCA 1935 which provides that FUCOs are not "public-utility companies."[249]

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[248] Id.

[249] Emera proposes the following definition:

> Foreign utility company. The term "foreign utility company" means any company that –
>
> (A) Owns or operates facilities that are not located in any state and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, if such company--
>
> (i) derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, within the United States; and
>
> (ii) neither the company nor any of its subsidiary companies is a public utility company operating in the United States.
>
> A foreign utility company shall not be deemed a public utility company, electric utility company or gas utility company under this part.

Emera Comments 3-4. See also National Grid Comments at 4-11.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

250. Emera and National Grid argue that the Commission should implement the exemption for passive investors by seeking an amendment the definition of "holding company" to exclude passive investors in a public-utility company or holding company securities, such as investment companies.[250]

251. Some commenters have requested that local distribution companies be exempted from the requirements of PUHCA 2005 and suggest that the Commission exclude them from the definition of "natural gas company." For example, American Gas Association requests that the Commission clarify that local gas distribution companies that are not regulated by the Commission are not embraced within the phrase "natural-gas company," noting that EPAct 2005 defines the separate term "gas utility" as a local distribution company. AGA asserts that, while many local distribution companies are technically "natural-gas companies" under the NGA because the natural gas in their systems flows in interstate commerce, the Commission does not regulate local distribution companies that are exempted under section 1(b) of the NGA, Hinshaw pipelines exempted under section

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[250] Emera proposes following definition:

> Holding company.
> * * *
> (2) Exclusions. The term "holding company" shall not include –
> * * *
> (iii) A person who directly or indirectly owns, controls, or holds, with power to vote, less than 50% of the outstanding voting securities of a public utility company or of a holding company, if such person has acquired such securities for investment purposes and does not have the intention of exercising a controlling influence over the management or policies of a public utility company or holding company.

Emera Comments at 9. See also National Grid Comments at 11-15.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

1(c) of the NGA, entities subject to service-area determinations under section 7(f) of the NGA, and local distribution companies with blanket certificates.[251] Dominion requests that the Commission clarify that this same pattern of exemption from Commission regulation will be carried over with the respect to the rules that the Commission proposes to issue here.[252] Finally, Washington Gas & Light urges the Commission to clarify that the proposed rules do not apply to local distribution companies and section 7(f) companies that have previously been exempt from regulation by the Commission. Washington Gas & Light emphasizes that no regulatory gap would result because these local distribution companies and section 7(f) companies are subject to oversight of their rates and terms and conditions of service by relevant local regulatory commissions. Washington Gas & Light further contends that failure to grant this exemption could cause federal rules, especially for rate setting purposes, to become inconsistent with the regulations promulgated by state commissions, creating compliance issues that might have to be litigated in order to find resolution.[253]

Commission Determination

252. We will reject Oklahoma Corporation Commission's request to modify the definitions of "affiliate" and "subsidiary." Congress chose to carry over these long-standing definitions from PUHCA 1935 to PUHCA 2005 and thus clearly expressed its

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[251] American Gas Association Comments at 3-4. See also Keyspan Comments at 6.

[252] Dominion Comments at 26-27.

[253] Washington Gas & Light Comments at 3-4.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

intent to retain these statutory thresholds. However, we emphasize that section 1262(16)(B) gives the Commission the authority to deem someone a "subsidiary" if necessary for the rate protection of utility customers, even for ownership interests of less than ten percent. Further, section 1264 gives the Commission the authority to examine the books and records of any company in a holding company system, including affiliates and subsidiaries. Thus, we believe that the Commission has sufficient authority to protect customers without seeking a modification of these definitions.

253. We will reject the requests of Morgan Stanley and others to amend the definitions of "electric utility company." The definitions of "electric utility company" and "gas utility company" in PUHCA 1935 similarly differed in that the definition of "electric utility company" was not limited to retail activities. By carrying over this distinction into PUHCA 2005, it is clear that Congress did not intend that these two definitions should be consistent. Moreover, if adopted, Morgan Stanley's proposal would deprive the Commission of jurisdiction over holding companies that own public utilities, and Morgan Stanley has not provided any evidence that Congress meant to do so. With respect to the definition of "exempt wholesale generator," we will grant Morgan Stanley's request to carry over the definition of "eligible facility" since that term is used within the definition of EWG. The definition of eligible facility and other relevant provisions are cross-referenced in the regulatory text of this Final Rule.

254. We deny Emera and National Grid's requests that we change the definition of FUCO to state that a FUCO shall "not be deemed a public utility company, electric utility company or gas company under this part." However, we clarify the definition of FUCO

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

to state that these companies shall not be subject to any of the requirements of this subchapter other than section 366.2. Therefore, FUCOs are not required to follow PUHCA 2005 accounting and reporting requirements, but must continue to grant the Commission access to their accounts, books, memoranda, and other records.

255. We will reject Emera's and National Grid's request that we recommend an amendment to the definition of "holding company" to reflect the exemption for passive investors. We have already adopted this exemption in our regulations, and thus it is unnecessary to amend the statutory definition.

256. With respect to the requests by various commenters on an amendment concerning local distribution companies that are not regulated by the Commission as natural gas companies under the NGA, we find that such a statutory amendment is unnecessary, as we have exempted local distribution companies from the books and records requirements of PUHCA 2005 in section 366(c) of our regulations, pursuant to our exemption authority under section 1266(b).

b. <u>Other Proposed Amendments</u>

<u>Comments</u>

257. EEI suggests that Commission recommend a technical amendment to section 3(c)(8) of the Investment Company Act of 1940 (ICA). According to EEI, section 3(c)(8) currently provides that, notwithstanding the definition of "investment company" found in section 3(a) of the ICA, a company subject to regulation under PUHCA 1935 shall not be an investment company. By the date repeal of PUHCA 1935 becomes effective, many holding companies will need to assert their exempt status under section 3(b)(1) of the

ICA, or seek an order of exemption from the SEC under section 3(b)(2) of the ICA; if section 3(c)(8) is not amended, holding companies may be expected to seek the certainty provided by an SEC order under section 3(b)(2), rather than to rely on "self-certification" under section 3(b)(1). EEI asserts that an amendment to section 3(c)(8) would, by continuing the exemption from investment company status that holding companies have enjoyed to date, make sure that holding company financing may proceed without disruption after the date repeal of PUHCA 1935 becomes effective.[254]

258. NARUC notes that section 1270 of EPAct 2005 indicates that the Commission has the same powers to enforce the provisions of PUHCA 2005 available under Sections 306 through 317 of the FPA. NARUC recommends that the Commission request an amendment clarifying that the Commission is able to enforce the provisions of PUHCA 2005 concerning natural gas companies using the equivalent powers granted under the NGA.[255]

259. EEI submits that the Commission should recommend that section 1274(a) of EPAct 2005 be amended to specify that the savings provisions of section 1271 are effective as of the date EPAct 2005 was enacted.[256] Similarly, PacifiCorp suggests that, in order to avoid any gaps, the Commission propose a correction to the savings provision

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[254] EEI Comments at 37. See also Energy East Comments at 18-19, National Grid Comments at 34-35.

[255] NARUC Comments at 14. See also NASUCA Comments at 3.

[256] EEI Comments at 36. See also Cinergy Comments at 31, Dominion Comments at 25.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

in section 1271 of EPAct 2005 that allows activities and transactions authorized under PUHCA 1935 or other law until February 8, 2006, when PUHCA 2005 takes effect, to continue under the terms of the authorization notwithstanding any provision of PUHCA 2005 or related Commission regulations to the contrary.[257]

260. EEI submits that the Commission should provide a procedure similar to the SEC's general procedural rules, for submitting information on a confidential basis.[258] FirstEnergy states that certain information is contained in Form U-5S is proprietary information and that, although the Commission has rejected requests by regulated public utilities to protect the confidentiality of certain information contained in their FERC Forms 1, the SEC has permitted information reported in Form U-5S to be so protected. FirstEnergy argues that the Commission should therefore make clear that it will similarly protect the confidentiality of such information.[259]

261. FirstEnergy further contends that, because of the very limited time available to the Commission to adopt rules needed to implement PUHCA 2005, the Commission should make clear that any rules that may be adopted in this proceeding are only interim rules that will be in effect for no longer than one year. Such a procedure would enable the Commission to meet its obligation to adopt rules required for implementation of PUHCA 2005 within four months after its enactment, but would provide assurance that such

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[257] PacifiCorp Comments at 6.

[258] EEI Comments at 37-38, FirstEnergy Comments at

[259] FirstEnergy Comments at 8.

hastily-crafted rules would not be in effect indefinitely. FirstEnergy contends that this approach would give the Commission and interested parties additional time in which to learn from their experience under the final rules that are adopted in this proceeding, to give further consideration to the many issues that have been raised by the Commission in the NOPR, and to work toward development of final rules that are properly designed to protect the public interest.[260]

Commission Determination

262. EEI recommends 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.[261] 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, EEI 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 for the Commission to carry out its responsibilities under PUHCA 2005 or any other statute the Commission administers. Consequently, the Commission will bring this issue to the attention of Congress, but will not make any recommendation.

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[260] Id. at 21-22.

[261] 15 U.S.C. § 80a-3(c)(8) (2000).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

263. We agree with the comments of NARUC and will recommend an amendment to section 1270 clarifying that the Commission is able to enforce the provisions of PUHCA 2005 concerning natural gas companies using the equivalent powers granted under the NGA.

264. We also agree with the suggestions of EEI and others regarding the effective date of the savings provisions in section 1271, and we will recommend that section 1274(a) of EPAct 2005 be amended to specify that the savings provisions of section 1271 are effective as of the date EPAct 2005 was enacted.

265. In response to the requests of EEI and others concerning the protection of confidential information, we note that section section 1264(d) provides that no member, officer, or employee of the Commission shall divulge any fact or information that may come to his or her knowledge during the course of examination of books and records as provided in this section, except as may be directed by the Commission or by a court of competent jurisdiction. Furthermore, the Commission already has in place procedures governing the treatment of confidential and other non-public information in Part 388 of its regulations. Commenters have not demonstrated that the Commission's current rules are inadequate, and we conclude that it is unnecessary to adopt further rules at this time.

266. We will also reject FirstEnergy's request that the Commission clarify that any rules adopted in this Final Rule are of an interim nature. Nevertheless, the Commission will evaluate the rules it adopts here on an ongoing basis based on its own experience and the submissions received from parties in individual proceedings and the technical conference.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Information Collection Statement

267. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.[262] However, the Commission is carrying out an express statutory mandate spelled out in EPAct 2005. Moreover, to the extent that the Commission is carrying over and applying requirements that the SEC previously has applied, we note that the proposed regulations assume responsibility for already approved information collections and reduce their reporting burdens. Indeed, insofar as the regulations adopted herein eliminate certain SEC regulations concerning accounting, cost-allocation, recordkeeping, and related rules, they reduce the information collection burden on regulated entities.

268. In particular, we are adopting a FERC Form No. 60 (annual reports for service companies), a substantially streamlined version of what had previously been SEC Form U13-60 implemented by the SEC. In addition, we will require entities that are or become holding companies within the meaning of PUHCA 2005 to submit a simple one-time filing, FERC-65 (Notification of Holding Company Status), as compared to the more substantial filings and forms previously required by SEC Form U-5A. We establish a similar, simplified filing, as compared to the SEC's existing filings and forms, for exemptions and waivers, namely FERC-65A (Exemption Notification) and FERC-65B (Waiver Notification).

269. The Commission also eliminates the requirements contained in its own regulations

[262] 5 CFR 1320.11 (2005).

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

in 18 C.F.R. Part 365; the corresponding information collection is FERC-598 "Determinations for Entities Seeking Wholesale Generator Status." In its place, we are allowing a much simpler self-certification.

Public Reporting Burden: (The table below reflects both SEC reporting burden estimates and the Commission's projections.)

Data Collection	No. of Respondents	No. of Responses	No. of Hours Per Response	Total Annual Hours
SEC U-5A *(current)*	4	1	80	320
SEC U-13-60	65	1	13.5	878
FERC Form 60	65	1	8	520
FERC-65	110	1	3	330
FERC-65A	35	1	1	35
FERC-65B	20	1	1	20
FERC-568 *(current)*	112	1	6	672
FERC-598 (proposed)	27	1	3	51

Action: Revision and adoption by Commission of currently approved SEC collections of information

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

OMB Control Nos.: Currently the relevant SEC and Commission information collections have the following control numbers- SEC: 3235-0153, 3235-0164, 3235-0182, 3235-0183, 3235-0306 and Commission: 1902-0166.

Frequency of Responses: The FERC Form No. 60 information collection has annual submissions while FERC Form Nos. 65, 65A, and 65B involve one-time submittals. FERC-598 certifications will be submitted on occasion.

Necessity of the Information: The proposed rule implements new rules under part 366 of the Commission's regulations and deletes requirements contained in part 365 of its regulations. These revisions are to implement the repeal of PUHCA 1935 and the implementation of certain provisions of the EPAct 2005.

270. For information on the requirements, submitting comments on these collection of information including ways to reduce the burden imposed by these requirements, please send your comments to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426 (Attention: Michael Miller, Office of the Executive Director, (202-502-8415)) or send comments to the Office of Management and Budget (Attention: Desk Officer for the Federal Energy Regulatory Commission, fax: 202-395-7285, e-mail: oira_submission@omb.eop.gov.)

Environmental Analysis

271. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect

on the human environment.[263] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that carry out legislation, involve information gathering, analyses and dissemination, and involve accounting.[264] Thus, we affirm the finding made in the NOPR that this Final Rule carries out EPAct 2005 and involve information gathering and analysis and accounting and therefore falls under this exception; consequently, no environmental consideration is necessary.

Regulatory Flexibility Act Certification

272. The Regulatory Flexibility Act of 1980 (RFA) requires rulemakings to contain either a description and analysis of the effect that the rule will have on small entities or to contain a certification that the rule will not have a significant economic impact on a substantial number of small entities.[265] The Commission concludes that the Final Rule would not have such an impact on small entities. Most companies to which the Final Rule applies do not fall within the RFA's definition of small entity.[266] Therefore, the

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[263] Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

[264] 18 C.F.R. 380.4(a)(3), (5), (16) (2005).

[265] 5 U.S.C. § 603 (2000).

[266] 5 U.S.C. § 601(3) (2000), citing to section 3 of the Small Business Act, 15 U.S.C. § 632 (2000). Section 3 of the Small Business Act defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. § 632 (2000). The Small Business Size Standards component of the North American Industry Classification System, for example, defines a small electric utility as one that, including its affiliates, is primarily engaged in the

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. Moreover, PUHCA 2005 exempts certain persons, and allows the Commission to exempt other persons and classes of transactions. The various exemptions and waivers adopted herein further minimize the effect of the Final Rule on small entities, as many of the entities that should be able to take advantage of these exemptions and waivers are small entities.

Document Availability

273. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

274. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

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generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal year did not exceed four million MWh. 13 C.F.R. 121.201 (2005).

275. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

Effective Date and Congressional Notification

This Final Rule will take effect February 8, 2006. The Commission has determined with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[267] The Commission will submit the Final Rule to both houses of Congress and the General Accounting Office.[268]

List of subjects in 18 C.F.R. Parts 365 and 366

Electric power, Natural gas, Public utility holding companies and service companies, Reporting and recordkeeping requirements, and Cost allocations.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[267] See 5 U.S.C. 804(2) (2000).

[268] See 5 U.S.C. 801(a)(1)(A) (2000).

In consideration of the foregoing, under the authority of EPAct 2005, the Commission is amending Chapter I of Title 18 of the Code of Federal Regulations, as set forth below:

SUBCHAPTER T - - [Removed and Reserved]

Part 365 - - [Removed]

1. Subchapter T, consisting of Part 365, is removed and reserved.

2. Subchapter U, consisting of Part 366, is added to read as follows:

Subchapter U - - Regulations Under The Public Utility Holding Company Act Of 2005

Part 366 - - Public Utility Holding Company Act Of 2005

Subpart A – PUHCA 2005 Definitions and Provisions

366.1 Definitions.

366.2 Commission access to books and records.

366.3 Exemption from Commission access to books and records; waivers of accounting, record-retention, and reporting requirements.

366.4 FERC-65, notification of holding company status, FERC-65A, exemption notification, and FERC-65B, waiver notification.

366.5 Allocation of costs for non-power goods and services.

366.6 Previously authorized activities.

366.7 Procedures for obtaining exempt wholesale generator and foreign utility company status.

Subpart B – PUHCA 2005 Accounting and Recordkeeping

366.21 Accounts and records of holding companies.

366.22 Accounts and records of service companies.

366.23 FERC Form No. 60, annual reports by service companies.

Subpart A – PUHCA 2005 Definitions and Provisions

§ 366.1 Definitions.

For purposes of this part:

Affiliate. The term "affiliate" of a company means any company, 5 percent or more of the outstanding voting securities of which are owned, controlled, or held with power to vote, directly or indirectly, by such company.

Associate company. The term "associate company" of a company means any company in the same holding company system with such company.

Commission. The term "Commission" means the Federal Energy Regulatory Commission.

Company. The term "company" means a corporation, partnership, association, joint stock company, business trust, or any organized group of persons, whether incorporated or not, or a receiver, trustee, or other liquidating agent of any of the foregoing.

Construction. The term "construction" means any construction, extension, improvement, maintenance, or repair of the facilities or any part thereof of a company, which is performed for a charge.

Electric utility company. The term "electric utility company" means any company

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale. For the purposes of this subchapter, "electric utility company" shall not include entities that engage only in marketing of electric energy or "exempt wholesale generators."

Exempt wholesale generator. The term "exempt wholesale generator" means any person engaged directly, or indirectly through one or more affiliates as defined in this subchapter, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale. For purposes of establishing or determining whether an entity qualifies for exempt wholesale generator status, sections 32(a)(2) through (4), and sections 32(b) through (d) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-5a(a)(2)-(4), 79z-5b(b)-(d)) shall apply. An exempt wholesale generator shall not be considered an electric utility company under this subchapter.

Foreign utility company. The term "foreign utility company" means any company that:

(i) Owns or operates facilities that are not located in any state and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, if such company:

(A) Derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, within the United States; and

(B) Neither the company nor any of its subsidiary companies is a public utility

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

company operating in the United States.

A foreign utility company shall not be subject to any requirements of this subchapter other than § 366.2.

Gas utility company. The term "gas utility company" means any company that owns or operates facilities used for distribution at retail (other than the distribution only in enclosed portable containers or distribution to tenants or employees of the company operating such facilities for their own use and not for resale) of natural or manufactured gas for heat, light, or power. For the purposes of this subchapter, "gas utility company" shall not include entities that engage only in marketing of natural and manufactured gas.

Goods. The term "goods" means any goods, equipment (including machinery), materials, supplies, appliances, or similar property (including coal, oil, or steam, but not including electric energy, natural or manufactured gas, or utility assets) which is sold, leased, or furnished, for a charge.

Holding company.

(1) In general. 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

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

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.

(2) Exclusions. The term "holding company" shall not include--

(i) A bank, savings association, or trust company, or their operating subsidiaries that own, control, or hold, with the power to vote, public utility or public utility holding company securities so long as the securities are—

(A) Held as collateral for a loan;

(B) Held in the ordinary course of business as a fiduciary; or

(C) Acquired solely for purposes of liquidation and in connection with a loan previously contracted for and owned beneficially for a period of not more than two years; or

(ii) A broker or dealer that owns, controls, or holds with the power to vote public utility or public utility holding company securities so long as the securities are—

(A) Not beneficially owned by the broker or dealer and are subject to any voting instructions which may be given by customers or their assigns; or

(B) Acquired in the ordinary course of business as a broker, dealer, or underwriter with the bona fide intention of effecting distribution within 12 months of the specific securities so acquired.

Holding company system. The term "holding company system" means a holding company, together with its subsidiary companies.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Jurisdictional rates. The term "jurisdictional rates" means rates accepted, established or permitted by the Commission for the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.

Natural gas company. The term "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce or the sale of such gas in interstate commerce for resale.

Person. The term "person" means an individual or company.

Public utility. The term "public utility" means any person who owns or operates facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce.

Public-utility company. The term "public-utility company" means an electric utility company or a gas utility company. For the purposes of this subchapter, the owner-lessors and owner participants in lease financing transactions involving utility assets shall not be treated as "public-utility companies."

Service. The term "service" means any managerial, financial, legal, engineering, purchasing, marketing, auditing, statistical, advertising, publicity, tax, research, or any other service (including supervision or negotiation of construction or of sales), information or data, which is sold or furnished for a charge.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Service company. The term "service company" means any associate company within a holding company system organized specifically for the purpose of providing non-power goods or services or the sale of goods or construction work to any public utility in the same holding company system.

Single-state holding company system. The term "single-state holding company system" means a holding company system whose public utility operations are confined substantially to a single state.

State commission. The term "state commission" means any commission, board, agency, or officer, by whatever name designated, of a state, municipality, or other political subdivision of a state that, under the laws of such state, has jurisdiction to regulate public utility companies.

Subsidiary company. The term "subsidiary company" of a holding company means—

(1) Any company, 10 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company; and

(2) Any person, the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary 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 subsidiary companies of

holding companies.

Voting security. The term "voting security" means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company. For the purposes of this subchapter, the term "voting security" shall not include member interests in electric power cooperatives.

§ 366.2 Commission access to books and records.

(a) In general. Unless otherwise exempted by Commission rule or order, each holding company and each associate company thereof shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records as the Commission determines are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. However, for purposes of this subchapter, no provision in the subchapter shall apply to or be deemed to include:

(1) the United States;

(2) A state or political subdivision of a state;

(3) Any foreign governmental authority not operating in the United States;

(4) Any agency, authority, or instrumentality of any entity referred to in subparagraphs (1), (2), or (3) of this section; or

(5) Any officer, agent, or employee of any entity referred to in subparagraphs (1), (2), (3), or (4) of this section as such in the course of his or her official duty.

(b) Affiliate companies. Unless otherwise exempted by Commission rule or order,

each affiliate of a holding company or of any subsidiary company of a holding company shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records with respect to any transaction with another affiliate, as the Commission determines are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(c) Holding company systems. The Commission may examine the books, accounts, memoranda, and other records of any company in a holding company system, or any affiliate thereof, as the Commission determines are relevant to costs incurred by a public utility or natural gas company within such holding company system and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(d) Confidentiality. No member, officer, or employee of the Commission shall divulge any fact or information that may come to his or her knowledge during the course of examination of books, accounts, memoranda, or other records as provided in this section, except as may be directed by the Commission or by a court of competent jurisdiction.

§ 366.3 Exemption from Commission access to books and records; waivers of accounting, record-retention, and reporting requirements.

(a) Exempt classes of entities. Any person that is a holding company, solely with respect to one or more of the following, is exempt from the requirements of § 366.2 and any accounting, record-retention, or reporting requirements in this subchapter:

(1) Qualifying facilities under the Public Utility Regulatory Policies Act of 1978

(16 U.S.C. 2601 et seq.);

(2) Exempt wholesale generators; or

(3) Foreign utility companies.

(b) Exemptions of additional persons and classes of transactions. The Commission has determined that the following persons and classes of transactions satisfy the requirements of paragraph (d) of this section and may file to obtain an exemption from the requirements this subchapter pursuant to the notification procedure contained in § 366.4(b)(1):

(1) Passive investors, so long as the ownership remains passive, including:

(i) Mutual funds,

(ii) Collective investment vehicles whose assets are managed by banks, savings and loan associations and their operating subsidiaries, or brokers/dealers; and

(iii) Persons that directly, or indirectly through their subsidiaries or affiliates, buy and sell the securities of public utilities in the ordinary course of business as a broker/dealer, underwriter or fiduciary, and not exercising operational control over the utility;

(2) Commission-jurisdictional utilities that have no captive customers and that are not affiliated with any jurisdictional utility that has captive customers, and holding companies that own or control only such utilities;

(3) Transactions where the holding company affirmatively certifies on behalf of itself and its subsidiaries, as applicable, that it will not charge, bill or allocate to the public utility or natural gas company in its holding company system any costs or

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

expenses in connection with goods and services transactions, and will not engage in financing transactions with any such public utility or natural gas company, except as authorized by a state commission or the Commission;

(4) Transactions between or among affiliates that are independent of and do not include a public utility or natural gas company;

(5) Electric power cooperatives;

(6) Local distribution companies that are not regulated as "natural gas companies" pursuant to sections 1(b) or 1(c) of the Natural Gas Act, 15 U.S.C. 717(b), (c)).

(c) Waivers. The following persons may file to obtain a waiver of the accounting, record-retention, and filing requirements of § 366.21, 366.22, and 366.23 pursuant to the notification procedures contained in § 366.4(c)(1):

(1) Single-state holding company systems as defined in § 366.1;

(2) Holding companies that own generating facilities that total 100 MW or less in size and are used fundamentally for their own load or for sales to affiliated end-users; or

(3) Investors in independent transmission-only companies.

(d) Commission authority to exempt additional persons and classes of transactions. The Commission shall exempt a person or classes of transaction from the requirements of § 366.2 if, upon individual application as described in paragraph (e) of this section or upon the motion of the Commission--

(1) The Commission finds that the books, accounts, memoranda, and other records of any person are not relevant to the jurisdictional rates of a public utility or natural gas company; or

(2) The Commission finds that any class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company.

(e) Other requests for exemptions and waivers. Any person seeking an exemption or waiver that is not covered by paragraphs (b) or (c) of this section, shall file a petition for declaratory order pursuant to § 385.207(a) justifying its request for exemption. Any person seeking such an exemption or waiver shall bear the burden of demonstrating that such an exemption is warranted.

§ 366.4 FERC-65, notification of holding company status, FERC-65A, exemption notification, and FERC-65B, waiver notification.

(a) Notification of holding company status. Companies that meet the definition of a holding company as provided by § 366.1 as of February 8, 2006, shall notify the Commission of their status as a holding company no later than March 10, 2006. Holding companies formed after February 8, 2006, shall notify the Commission of their status as a holding company, no later than 30 days after their formation. Notifications shall be made by submitting FERC-65 (notification of holding company status), which contains the following: the identify of the holding company and of the public utilities and natural gas companies in the holding company system; the identity of service companies or special-purpose subsidiaries providing non-power goods and services; the identity of all affiliates and subsidiaries; and their corporate relationship to each other. This filing will be for informational purposes and will not be noticed in the Federal Register, but will be available on the Commission's website.

(b) FERC-65A (exemption notification) and petitions for exemption.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

(1) Persons or companies seeking exemption from the requirements of PUHCA 2005 and the Commission's regulations thereunder under § 366.3(a), or one of the class exemptions adopted under § 366.3(b), may do so by filing FERC-65A (exemption notification). These filings will be noticed in the Federal Register; persons or companies that file FERC-65A must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). Persons or companies that file FERC-65A in good faith shall be deemed to have a temporary exemption upon filing. If the Commission has taken no action within 60 days after the date of filing FERC-65A, the exemption shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information or for further consideration of the request; in such case, the claim for exemption will remain temporary until such time as the Commission has determined whether to grant or deny the exemption. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee, and authority to act on uncontested FERC-65A filings is delegated to the Director of the Office of Markets, Tariffs and Rates or to the Director of the Office of Markets, Tariffs and Rates' designee.

(2) Persons or companies that do not qualify for exemption pursuant to § 366.3(a) or § 366.3(b) may seek an individual exemption from this subchapter. They may not do so by means of filing FERC-65A and instead must file a petition for declaratory order as required under § 366.3(e). Such petitions will be noticed in the Federal Register; persons or companies that file a petition must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). No temporary

exemption will attach upon filing and the requested exemption will be effective only if approved by the Commission. Persons or companies may also seek exemptions for classes of transactions by filing a petition for declaratory order.

(c) FERC-65B (waiver notification) and petitions for waiver.

(1) Persons or companies seeking a waiver of the Commission's regulations under PUHCA 2005 pursuant to § 366.3(c) may do so by filing FERC-65B (waiver notification). FERC-65B will be noticed in the Federal Register; persons or companies that file FERC-65B must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). Companies that file FERC-65B in good faith shall be deemed to have a temporary exemption upon filing. If the Commission has taken no action within 60 days after the date of filing of FERC-65B, the waiver shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information or for further consideration of the request; in such case, the waiver will remain temporary until such time as the Commission has determined whether to grant or deny the waiver. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee, and authority to act on uncontested FERC-65B filings is delegated to the Director of the Office of Markets, Tariffs and Rates or the Director of the Office of Markets, Tariffs and Rates' designee.

(2) Persons or companies that do not qualify for waiver pursuant to § 366.3(c) may seek an individual waiver from this subchapter. They may not do so by means of filing FERC-65B and instead must file a petition for declaratory order pursuant as required under § 366.3(e). Such petitions will be noticed in the Federal Register; persons or

companies that file a petition must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). No temporary waiver will attach upon filing and the requested exemption will be effective only if approved by the Commission. Persons or companies may also seek waivers for classes of transactions by filing a petition for declaratory order.

(d) Revocation of exemption or waiver.

(1) If a person or company that has been granted an exemption or waiver under paragraphs (b) or (c) of this section fails to conform with any material facts or representations presented in its submittals to the Commission, such company or company may no longer rely upon FERC-65A, FERC-65B, or a Commission determination granting the exemption or waiver.

(2) The Commission may, on its own motion or on the motion of any person, revoke the exemption or waiver granted under paragraphs (b) or (c) of this section, if the person or company fails to conform to any of the Commission's criteria under this part for obtaining the exemption or waiver.

§ 366.5 Allocation of costs for non-power goods and services.

(a) Commission review. In the case of non-power goods or administrative or management services provided by an associate company organized specifically for the purpose of providing such goods or services to any public utility in the same holding company system, at the election of the system (the public utility holding company, together with its subsidiary companies) or a state commission having jurisdiction over the public utility, the Commission shall review and authorize the allocation of the costs for

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

such goods or services to the extent relevant to that associate company. Such election to have the Commission review and authorize cost allocations shall remain in effect until further Commission order.

(b) Exemptions. Any holding company system whose public utility operations are confined substantially to a single state is exempt from the requirements of paragraph (a) of this section. A holding company system's public utility operations will be deemed confined substantially to a single state if the holding company system does not derive more than 13 percent of its public-utility revenues from outside a single state. A holding company system or state commission may, pursuant to this subsection, seek a Commission determination that a holding company's public utility operations are confined substantially to a single state by filing a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure (§ 385.207(a)). Any holding company system or state commission seeking such a determination shall bear the burden of demonstrating that such determination is warranted.

(c) Other classes of transactions. Either upon petition for declaratory order or upon its own motion, the Commission may exclude from the scope of Commission review and authorization under paragraph (a) of this section any class of transactions that the Commission finds is not relevant to the jurisdictional rates of a public utility. Any holding company system or state commission seeking to obtain such a determination under this subsection shall file a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure justifying its request for exemption (§ 385.207(a)). Any holding company system or state commission seeking such an

exemption shall bear the burden of demonstrating that such determination is warranted.

(d) Nothing in paragraphs (a)-(c) of this section shall affect the authority of the Commission under the Federal Power Act (16 U.S.C. 791 et seq.), the Natural Gas Act (15 U.S.C. 717 et seq.), or other applicable law, including the authority of the Commission with respect to rates, charges, classifications, rules, regulations, practices, contracts, facilities, and services.

§ 366.6 Previously authorized activities.

(a) General. Unless otherwise provided by Commission rule or order, a person may continue to engage in activities or transactions authorized under the Public Utility Holding Company Act of 1935 prior to the effective date of the Public Utility Holding Company Act of 2005, February 8, 2006, until the later of the date such authorization expires or December 31, 2007, so long as that person continues to comply with the terms of such authorization. If any such activities or transactions are challenged in a formal Commission proceeding, the person claiming prior authorization shall be required to provide at that time the full text of any such authorization (whether by rule, order, or letter) and the application(s) or pleading(s) underlying such authorization (whether by rule, order, or letter).

(b) Financing Authorizations. Holding companies that intend to rely on financing authorization orders or letters issued by the Securities and Exchange Commission must file these orders or letters with the Commission within 30 days after the effective date of the Public Utility Holding Company Act of 2005, February 8, 2006; any reports or other submissions that, pursuant to such financing authorizations, previously were filed with

the Securities and Exchange Commission must instead be filed with the Commission, effective February 8, 2006. For the purposes of this section, compliance with the terms of such financing authorizations includes the requirement to notify the Commission of any financing transactions that a holding company engages in pursuant to such financing authorization.

§ 366.7 Procedures for obtaining exempt wholesale generator and foreign utility company status. (a) Self-certification notice procedure. An exempt wholesale generator or a foreign utility company, or their representative, may file with the Commission a notice of self-certification demonstrating that it satisfies the definition of exempt wholesale generator or foreign utility company. In the case of exempt wholesale generators, the person filing a notice of self-certification under this section must also file a copy of the notice with the state regulatory authority of the state in which the facility is located. Notices of self-certification will be published in the Federal Register. Persons that file such notices must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). A person filing a notice of self-certification in good faith will be deemed to have temporary exempt wholesale generator or foreign utility company status. If the Commission takes no action within 60 days from the date of filing of the notice of self-certification, the self-certification shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information, or for further consideration of the request; in such cases, the person's exempt wholesale generator or foreign utility company status will remain temporary until such time as the Commission has determined whether to grant or deny

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

exempt wholesale generator or foreign utility company status. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee, and authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.

(b) Optional procedure for Commission determination of exempt wholesale generator status or foreign utility company status. A person may file for a Commission determination of exempt wholesale generator status or foreign utility company status under § 366.1 by filing a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure (§ 385.207(a)), justifying its request for exemption. Persons that file petitions must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). Authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.

(c) Revocation of status.

(1) If an exempt wholesale generating facility or a foreign utility company fails to conform with any material facts or representations presented by the applicant in its submittals to the Commission, the notice of self-certification of the status of the facility or Commission order certifying the status of the facility may no longer be relied upon.

(2) The Commission may, on its own motion or on the application of any person, revoke the status of a facility or company, if the facility or company fails to conform to any of the Commission's criteria under this part.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Subpart B – Accounting and Recordkeeping

§ 366.21 Accounts and records for holding companies.

(a) General. Unless otherwise exempted or granted a waiver by Commission rule or order, every holding company shall maintain and make available to the Commission books, accounts, memoranda, and other records of all of its transactions in sufficient detail to permit examination, audit and verification, as necessary and appropriate for the protection of utility customers with respect to jurisdictional rates, of the financial statements, schedules and reports required to be filed with the Commission or issued to stockholders.

(b) Unless otherwise exempted or granted a waiver by Commission rule or order, beginning January 1, 2007, all holding companies must comply with the Commission's record-retention requirements for public utilities and licensees or for natural gas companies, as appropriate (Parts 125 and 225). Until December 31, 2006, holding companies registered under the Public Utility Holding Company Act of 1935 (16 U.S.C. 79a et seq.) may follow either the Commission's record-retention rules for public utilities and licensees or for natural gas companies, as appropriate (Parts 125 and 225), or the Security and Exchange Commission's record-retention rules in 17 C.F.R. Part 257.

(c) Nothing in this section shall relieve any company subject thereto from compliance with the requirements as to recordkeeping and record-retention that may be prescribed by any other regulatory agency.

§ 366.22 Accounts and records of service companies.

(a) Record-retention requirements.

(1) General. Unless otherwise exempted or granted a waiver by Commission rule or order, beginning January 1, 2007, every service company shall maintain and make available to the Commission such books, accounts, memoranda, and other records in such manner and preserve them for such periods, as the Commission prescribes in Parts 125 and 225 in sufficient detail to permit examination, audit, and verification, as necessary and appropriate for the protection of utility customers with respect to jurisdictional rates.

(2) Transition period. Until December 31, 2006, service companies in holding company systems registered under the Public Utility Holding Company Act of 1935 (16 U.S.C. §§ 79a et seq. (2000)) may follow either the Commission's record-retention requirements in Parts 125 and 225 or the Securities and Exchange Commission's record-retention rules in 17 C.F.R. Part 257.

(3) Nothing in this section shall relieve any service company subject thereto from compliance with requirements as torecord-retention that may be prescribed by any other regulatory agency.

(b) Accounting requirements.

(1) General. Unless otherwise exempted or granted a waiver by Commission rule or order, beginning January 1, 2007, every service company that is not a special-purpose company (e.g., a fuel supply company or a construction company) shall maintain and make available to the Commission such books, accounts, memoranda, and other records

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

as the Commission prescribes in Parts 101 and 201, in sufficient detail to permit examination, audit, and verification, as necessary and appropriate for the protection of utility customers with respect to jurisdictional rates. Every such service company shall maintain and make available such books, accounts, memoranda, and other records in such manner as are prescribed in Parts 101 and 201, and shall keep no other records with respect to the same subject matter except:

(i) records other than accounts;

(ii) records required by federal or state law;

(iii) subaccounts or supporting accounts which are not inconsistent with the accounts required either by the Uniform System of Accounts in Parts 101 and 201 ; and

(iv) such other accounts as may be authorized by the Commission.

(2) Transition period. Until December 31, 2006, service companies in holding company systems registered under the Public Utility Holding Company Act of 1935 (16 U.S.C. 79a et seq.), as described in subparagraph (1), may follow either the Commission's Uniform System of Accounts in Parts 101 and 201 or the Securities and Exchange Commission's Uniform System of Accounts in 17 C.F.R. Part 256.

(3) Nothing in this section shall relieve any service company subject thereto from compliance with requirements as to accounting that may be prescribed by any other regulatory agency.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

§ 366.23 FERC Form No. 60, annual reports by service companies.

(a) General. Unless otherwise exempted or granted a waiver by Commission rule or order, every service company in a holding company system that is not a special-purpose company (e.g., a fuel supply company or a construction company) that provides non-power goods or services to a Commission-jurisdictional public utility or natural gas company shall file with the Commission by May 1, 2006 and by May 1each year thereafter, a report, FERC Form No. 60, for the prior calendar year.. Every such report shall be submitted on the FERC Form No. 60 then in effect and shall be prepared in accordance with the instructions incorporated in such form. For good cause shown, the Commission may extend the time within which any such report is to be filed or waive the requirements applicable to any such report. The authority to act on motions for extensions of time to file any such reports or to waive the requirements applicable to any such reports, including granting or denying such motions, in whole or in part, is delegated to the Chief Accountant or the Chief Accountant's designee.

(b) Transition period. Service companies in holding company systems exempted from the requirements of the Public Utility Holding Company Act of 1935 (16 U.S.C. 79a et seq.) need not file an annual report, FERC Form No. 60, for calendar years 2005 and 2006.

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20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Appendix 1 List of commenters

Acronym	Name
AGL Resources	AGL Resources Inc.
Alcoa	Alcoa Inc.
	Allegheny Energy Inc.
Alliant	Alliant Energy Corporation
Ameren	Ameren Services Company
AEP	American Electric Power Service Corporation
AGA	American Gas Association
American National Power	American National Power, Inc.
APGA	American Public Gas Association
APPA/NRECA	American Public Power Association/National Rural Electric Cooperative Association
	American Transmission Company LLC
Cooperatives	Arizona Electric Power Cooperative, Inc./Southwest Transmission Cooperative, Inc./Sierra Southwest Cooperative Services, Inc.
Arkansas PSC	Arkansas Public Service Commission
Barclays	Barclays Global Investors, N.A.
Barrick	Barrick Goldstrike Mines Inc.
Black Hills	Black Hills Corporation
CEOB	California Electricity Oversight Board
Calpine	Calpine Corporation
	Capital Research and Management Company
Cinergy	Cinergy Corporation
	City of Redding, California
Santa Clara	City Santa Clara, California
Chairman Barton	Congressman Joe Barton
ConEd	Consolidated Edison Company of New York, Inc.
Coral Power and Shell WindEnergy	Coral Power, LLC and Shell WindEnergy Inc.
Detroit Edison	Detroit Edison Company
Dominion	Dominion Resources, Inc.
Duke Energy	Duke Energy Corporation
EEI	Edison Electric Institute
EPSA	Electric Power Supply Association
ELCON	Electricity Consumers Resource Council/American Iron and Steel Institute/American Chemistry Council/Portland Cement Association
Emera	Emera Incorporated
Energy East	Energy East Corporation
Entergy	Entergy Services, Inc.
E.ON/LG&E	E.ON AG and LG&E Energy LLC

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Energy	
Exelon	Exelon Corporation
FirstEnergy	FirstEnergy Service Company
FPL Group	FPL Group, Inc.
Georgia PSC	Georgia Public Service Commission
Goldman Sachs	The Goldman Sachs Group, Inc.
IURC	Indiana Utility Regulatory Commission
	International Transmission Company
	Investment Advisor Association
	Investment Company Institute
Kentucky PSC	Kentucky Public Service Commission
Keyspan	Keyspan Corporation
MBIA	MBIA Insurance Corporation
MGTC	MGTC Inc.
MidAmerican	MidAmerican Energy Holdings Company
Missouri PSC	Missouri Public Service Commission
Mittal Steel	Mittal Steel USA ISG, Inc.
Morgan Stanley	Morgan Stanley Capital Group Inc.
NARUC	National Association of Regulatory Utility Commissioners
NASUCA	National Association of State Utility Consumer Advocates
National Fuel	National Fuel Gas Company
National Grid	National Grid USA
NiSource	NiSource Inc.
Northeast Utilities	Northeast Utilities Service Company
	PG&E Corporation
Ohio PUC	Public Utilities Commission of Ohio
Oklahoma Corporation	Oklahoma Corporation Commission
	Pacificorp
	Pepco Holding, Inc./Potomac Electric Power Company/Atlantic City Electric Company/Delmarva Power & Light Company/Conectiv Energy Supply, Inc./PEPCO Energy Services Inc./PHI Service Company and other system companies.
	Portland General Electric Company
PPL	PPL Companies
	PPM Energy, Inc.
Progress Energy	Progress Energy, Inc.
Public Citizen	Public Citizen Inc.
Wisconsin PSC	Public Service Commission of Wisconsin
	Questar Corporation
	Scottish Power
	Southern Company Services, Inc.
TANC	Transmission Agency of Northern California

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

	Tri-State Generation/Transmission Association, Inc.
Utility Workers	Utility Workers Union of American
	WGL Holdings, Inc. and Washington Gas & Light Company
Xcel	Xcel Energy Services Inc.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Appendix 2 FERC Form No. 60

UNITED STATES
FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

FORM 60

ANNUAL REPORT

FOR THE PERIOD

Beginning _____ and Ending _____

TO THE

FEDERAL ENERGY REGULATORY COMMISSION

OF

(Exact Name of Reporting Company)

A _____ Service Company
("Mutual" or "Subsidiary")

Date of Incorporation _____ If not Incorporated, Date of Organization _____.

State or Sovereign Power under which Incorporated or Organized _____

Location of Principal Executive Offices of Reporting Company _____

Name, title, and address of officer to whom correspondence concerning this report should be addressed:

(Name) (Title) (Address)

Name of Principal Holding Company under which Reporting Company is organized:

INSTRUCTIONS FOR USE OF FORM 60

1. Timing of Filing

   On or before the first day of May in each calendar year, each mutual service company and each subsidiary service company shall file with Commission an annual report on Form 60 and in accordance with the Instructions for that form.

2. Number of Copies

   Each annual report shall be filed in duplicate. The company should prepare and retain at least one extra copy for itself in case correspondence with reference to the report becomes necessary.

3. Period Covered by Report

   The first report filed by the company shall cover the period from the date the Uniform System of Accounts was required to be made effective as to that company to the end of that calendar year. Subsequent reports should cover a calendar year

4. Report Format

   Reports shall be submitted on the forms prepared by the Commission. If the space provided on any sheet of such form is inadequate, additional sheets may be inserted of the same size as a sheet of the form or folded to each size.

5. Money Amounts Displayed

   All money amounts required to be shown in financial statements may be expressed in whole dollars, in thousands of dollars or in hundred thousands of dollars, as appropriate and subject to provisions of Regulation S-X (210.3-01)

6. Deficits Displayed

   Deficits and other like entries shall be indicated by the use of either brackets or a parenthesis with corresponding reference in footnotes (Regulation S-X, 210.3-01(c))

7. Major Amendments or Corrections

   Any company desiring to amend or correct a major omission or error in a report after it has been filed with the Commission shall submit an amended report including only those pages, schedules and entries that are to be amended or corrected. A cover letter shall be submitted requesting the Commission to incorporate the amended report changes and shall be signed by a duly authorized officer of the company.

8. Definitions

   Definitions contained in Instruction 01-8 to the Uniform System of Accounts for Mutual Service Companies and Subsidiary Service Companies, Public Utility Holding Act of 2005, shall be applicable to words or terms used specifically within this Form 60.

9. Organization Chart

   The Service Company shall submit with each annual report a copy of its current organization chart.

10. Methods of Allocation

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

The Service Company shall submit with each annual report a listing of the currently effective methods of allocation being used by the service company and on file and approved previously by the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act of 19355.

11. Annual Statement of Compensation for Use of Capital Billed

The service company shall submit with each annual report a copy of the annual statement supplied to each associate company in support of the amount of compensation for use of capital billed during the calendar year.

12. Collection of Information

The information requested by this form is being collected under authority of the Public Utility Holding Act of 2005. The Commission estimates that it will take each respondent thirteen and one-half (13.5) hours to respond to this collection of information. A response to this form is mandatory. The information on this form will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless a currently valid OMB control number is displayed.

13. Where to File

File Form 60 at the following address:

Federal Energy Regulatory Commission
888 First Street N.E.
Washington, DC 20426

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

LISTING OF SCHEDULES AND ANALYSIS OF ACCOUNTS

Description of Schedules and Accounts	Schedule or Account Number	Page Number
Comparative Balance Sheet	Schedule I	5
Service Company Property	Schedule II	7
Accumulated Provision for Depreciation and Amortization of Service Company Property	Schedule III	8
Investments	Schedule IV	9
Accounts Receivable from Associate Companies	Schedule V	9
Fuel Stock Expenses Undistributed	Schedule VI	10
Stores Expense Undistributed	Schedule VII	10
Miscellaneous Current and Accrued Assets	Schedule VIII	11
Miscellaneous Deferred Debits	Schedule IX	11
Research, Development, or Demonstration Expenditures	Schedule X	12
Proprietary Capital	Schedule XI	12
Long-Term Debt	Schedule XII	13
Current and Accrued Liabilities	Schedule XIII	14
Notes to Financial Statements	Schedule XIV	14
Comparative Income Statement	Schedule XV	15
Analysis of Billing - Associate Companies	Account 457	16
Analysis of Billing - Nonassociate Companies	Account 458	17
Analysis of Charges for Service - Associate and Nonassociate Companies	Schedule XVI	18
Schedule of Expense Distribution by Department or Service Function	Schedule XVII	19
Departmental Analysis of Salaries	Account 920	20
Miscellaneous General Expenses	Account 930.2	20
Notes to Statement of Income	Schedule XVIII	21
Organization Chart		22
Methods of Allocation		22
Annual Statement of Compensation for Use of Capital Billed		22

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

SCHEDULE I - COMPARATIVE BALANCE SHEET

Give balance sheet of the Company as of December 31 of the current and prior year.

		As of December 31,	
Account	Assets and Other Debits	Current	Prior
	Service Company Property		
101	Service company property (Schedule II)		
107	Construction work in progress (Schedule II)		
	Total Property		
108	Less: Accumulated provision for depreciation and amortization of service company property (Schedule III)		
	Net Service Company Property		
	Investments		
123	Investments in associate companies (Schedule IV)		
124	Other investments (Schedule IV)		
	Total Investments		
	Current and Accrued Assets		
131	Cash		
134	Special deposits		
135	Working funds		
136	Temporary cash investments (Schedule IV)		
141	Notes receivable		
143	Accounts receivable		
144	Accumulated provision for uncollectible accounts		
146	Accounts receivable from associate companies (Schedule V)		
152	Fuel stock expenses undistributed (Schedule VI)		
154	Materials and supplies		
163	Stores expense undistributed (Schedule VII)		
	Prepayments		
165	Miscellaneous current and accrued assets (Schedule VIII)		
174	Total Current and Accrued Assets		
	Deferred Debits		
	Unamortized debt expense		
181	Clearing accounts		
184	Miscellaneous deferred debits (Schedule IX)		
186	Research, development, or demonstration expenditures (Sch. X)		
188	Accumulated deferred income taxes		
190	Total Deferred Debits		
	TOTAL ASSETS AND OTHER DEBITS		

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

SCHEDULE I - COMPARATIVE BALANCE SHEET

		As of December 31,	
Account	Liabilities and Proprietary Capital	Current	Prior
	Proprietary Capital		
201	Common stock issued (Schedule XI)		
211	Miscellaneous paid-in-capital (Schedule XI)		
215	Appropriated retained earnings (Schedule XI)		
216	Unappropriated retained earnings (Schedule XI)		
	Total Proprietary Capital		
	Long-Term Debt		
223	Advances from associate companies (Schedule XII)		
224	Other long-term debt (Schedule XII)		
225	Unamortized premium on long-term debt		
226	Unamortized discount on long-term debt-debit		
	Total Long-Term Debt		
	Current and Accrued Liabilities		
228	Accumulated provision for pensions and benefits		
231	Notes payable		
232	Accounts payable		
233	Notes payable to associate companies (Schedule XIII)		
234	Accounts payable to associate companies (Schedule XIII)		
236	Taxes accrued		
237	Interest accrued		
241	Tax collections payable		
242	Miscellaneous current and accrued liabilities (Schedule XIII)		
243	Obligations under capital leases - Current		
	Total Current and Accrued Liabilities		
	Deferred Credits		
253	Other deferred credits		
255	Accumulated deferred investment tax credits		
	Total Deferred Credits		
282	Accumulated Deferred Income Taxes		
	TOTAL LIABILITIES AND PROPRIETARY CAPITAL		

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE II - SERVICE COMPANY PROPERTY

ACCOUNT	DESCRIPTION	Balance at Beginning of Year	Additions	Retirements or Sales	Other [269] Changes	Balance At Close Of Year
301	Organization					
303	Miscellaneous Intangible Plant					
304	Land and Land Rights					
305	Structures and Improvements					
306	Leasehold Improvements					
307	Equipment [270]					
308	Office Furniture and Equipment					
309	Automobiles, Other Vehicles and Related Garage Equipment					
310	Aircraft and Airport Equipment					
311	Other Property: [271]					

SUB-TOTALS

107 Construction Work in Progress [272]

TOTAL

Subaccount Description	Additions	Balance at Close of Year

[269] Provide an explanation of those changes considered material:

[270] Subaccounts are required for each class of equipment owned. The service company shall provide a listing by subaccount of equipment additions during the year and balance at the close of the year.

[271] Describe other service company property:

[272] Describe construction work in progress:

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE III - ACCUMULATED PROVISION FOR DEPRECIATION AND AMORTIZATION OF SERVICE COMPANY PROPERTY

ACCOUNT	DESCRIPTION	Balance at Beginning Of Year	Additions Charged to Account 403	Retirements	Other Changes Additions (Deductions)*	Balance at Close of Year
301	Organization					
303	Miscellaneous Intangible Plant					
304	Land and Land Rights					
305	Structures and Improvements					
306	Leasehold Improvements					
307	Equipment					
308	Office Furniture and Equipment					
309	Automobiles, Other Vehicles and Related Garage Equipment					
310	Aircraft and Airport Equipment					
311	Other Service Company Property:					

* Provide an explanation of those changes considered material:

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE IV - INVESTMENTS

Instructions: Complete the following schedule concerning investments.

Under Account 124 "Other Investments", state each investment separately, with description, including the name of issuing company, number of shares or principal amount, etc.

Under Account 136, "Temporary Cash Investments", list each investment separately.

Description	Balance at Beginning of Year	Balance at Close of Year
Account 123 - Investment in Associate Companies		
Account 124 - Other Investments		
Account 136 - Temporary Cash Investments		
TOTAL		

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE V - ACCOUNTS RECEIVABLE FROM ASSOCIATE COMPANIES

Instructions: Complete the following schedule listing accounts receivable from each associate company. Where the service company has provided accommodation or convenience payments for associate companies, a separate listing of total payments for each associate company by subaccount should be provided.

Description	Balance at Beginning of Year	Balance at Close of Year
Account 146 – Accounts Receivable from Associate Companies		
TOTAL		
Analysis of Convenience or Accommodation Payments: Total Payments for each associate		
TOTAL PAYMENTS		

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE VI - FUEL STOCK EXPENSES UNDISTRIBUTED

Instructions: Report the amount of labor and expenses incurred with respect to fuel stock expenses during the year and indicate amount attributable to each associate company. Under the section headed "Summary" listed below give and overall report of the fuel functions performed by the service company.

Description	Labor	Expenses	Total
Account 152 - Fuel Stock Expenses Undistributed			
TOTAL			
Summary:			

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE VII - STORES EXPENSE UNDISTRIBUTED

Instructions: Report the amount of labor and expenses incurred with respect to stores expense during the year and indicate amount attributable to each associate company.

Description	Labor	Expenses	Total
Account 163 -Stores Expense Undistributed			
TOTAL			

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE VIII - MISCELLANEOUS CURRENT AND ACCRUED ASSETS

Instructions: Provide detail of items in this account. Items less than $10,000 may be grouped, showing the number of items in each group.		
Description	Balance at Beginning of Year	Balance at Close of Year
Account 174 - Miscellaneous Current and Accrued Assets TOTAL		

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE IX - MISCELLANEOUS DEFERRED DEBITS

Instructions: Provide detail of items in this account. Items less than $10,000 may be grouped, showing the number of items in each group.		
Description	Balance at Beginning of Year	Balance at Close of Year
Account 186 - Miscellaneous Deferred Debits TOTAL		

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE X - RESEARCH, DEVELOPMENT OR DEMONSTRATION EXPENDITURES

Instructions: Provide a description of each material research, development, or demonstration project which incurred costs by the service corporation during the year.	
Description	Amount
Account 188 - Research, Development, or Demonstration Expenditures	
TOTAL	

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XI - PROPRIETARY CAPITAL

Account Number	Class of Stock	Number of Shares Authorized	Par or Stated Value per Share	Outstanding No. of Shares	Close of Period Total Amount
201	Common Stock Issued				

Instructions: Classify amounts in each account with brief explanation, disclosing the general nature of transactions which give rise to the reported amounts.

Description	Amount
Account 211 - Miscellaneous Paid-In Capital	
Account 215 - Appropriated Retained Earnings	
TOTAL	-

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

Instructions:

Give particulars concerning net income or (loss) during the year, distinguishing between compensation for the use of capital owed or net loss remaining from servicing nonassociates per the General Instructions of the Uniform System of Accounts. For dividends paid during the year in cash or otherwise, provide rate percentage, amount of dividend, date declared and date paid.

Description	Balance at Beginning of Year	Net Income Or (Loss)	Dividend Paid	Balance at Close of Year
Account 216 – Unappropriated Retained Earnings				

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XII - LONG-TERM DEBT

Instructions: Advances from associate companies should be reported separately for advances on notes, and advances on open accounts. Names of associate companies from which advances were received shall be shown under the class and series of obligation column. For Account 224 - Other long-term debt, provide the name of creditor company or organization, terms of the obligation, date of maturity, interest rate, and the amount authorized and outstanding.

Name of Creditor	Tem of Obligation Class & Series of Obligation	Date of Maturity	Interest Rate	Amount Authorized	Balance at Beginning of Year	Additions Deductions *	Balance at Close of Year
Account 223 - Advances From Associate Companies Account 224 - Other Long-Term Debt: TOTAL * Give an explanation of deductions:							

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XIII - CURRENT AND ACCRUED LIABILITIES

Instructions: Provide balance of notes and accounts payable to each associate company. Give description and amount of miscellaneous current and accrued liabilites. Items less than $10,000 may be grouped, showing the number of items in each group.

Description	Balance at Beginning of Year	Balance at Close of Year
Account 233 - Notes Payable to Associate Companies		
TOTAL		
Account 234 - Accounts Payable to Associate Companies		
TOTAL		
Account 242 – Miscellaneous and Accrued Liabilities		
TOTAL		

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XIV - NOTES TO FINANCIAL STATEMENTS

Instructions: The space below is provided for important notes regarding the financial statements or any account thereof. Furnish particulars as to any significant contingent assets or liabilities existing at the end of the year. Notes relating to financial statements shown elsewhere in this report may be indicated here by reference.

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XV - COMPARATIVE INCOME STATEMENT

Account	Description	Current Year	Prior Year
	INCOME		
457	Services rendered to associate companies		
458	Services rendered to non associate companies		
421	Miscellaneous income or loss		
	TOTAL INCOME		
	EXPENSE		
920	Salaries and wages		
921	Office supplies and expenses		
922	Administrative expense transferred - credit		
923	Outside services employed		
924	Property insurance		
925	Injuries and damages		
926	Employee pensions and benefits		
928	Regulatory commission expense		
930.1	General advertising expenses		
930.2	Miscellaneous general expenses		
931	Rents		
403	Depreciation and amortization expense		
408	Taxes other than income taxes		
409	Income taxes		
410	Provision for deferred income taxes		
411	Provision for deferred income taxes - credit		
411.5	Investment Tax Credit		
426.1	Donations		
426.5	Other deductions		
427	Interest on long-term debt		
430	Interest on debt to associate companies		
431	Other interest expense		
	TOTAL EXPENSE		
	NET INCOME OR (LOSS)		

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

ANALYSIS OF BILLING ASSOCIATE COMPANIES - ACCOUNT 457

Name of Associate Company	Direct Costs Charged	Indirect Costs Charged	Compensation For Use Of Captital	Total Amount Billed
	457-1	457-2	457-3	

TOTAL

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

ANALYSIS OF BILLING NONASSOCIATE COMPANIES - ACCOUNT 458

Instruction: Provide a brief description of the services rendered to each nonassociate company:

Name of Associate Company	Direct Costs Charged	Indirect Costs Charged	Compensation For Use Of Captital	Total Amount Billed
	458-1	458-2	458-3	

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XVI - ANALYSIS OF CHARGES FOR SERVICE - ASSOCIATE AND NONASSOCIATE COMPANIES

Instruction: Total cost of service will equal for associate and nonassociate companies the total amount billed under their separate analysis of billing schedules.

Acct.	Description of Items	Associate Company			Nonassociate Company			Total Charges For Services		
		Direct Cost	Indirect Cost	Total Cost	Direct Cost	Indirect Cost	Direct Cost	Direct Cost	Indirect Cost	Total Cost
920	Salaries and wages									
921	Office supplies and expenses									
922	Administrative expense transferred - credit									
923	Outside services employed									
924	Property insurance									
925	Injuries and damages									
926	Employee pensions and benefits									
928	Regulatory commission expense									
930.1	General advertising expenses									
930.2	Miscellaneous general expenses									
931	Rents									
403	Depreciation and amortization expense									
408	Taxes other than income taxes									
409	Income taxes									
410	Provision for deferred income taxes									
411	Provision for deferred income taxes - credit									
411.5	Investment Tax Credit									
426.1	Donations									
426,5	Other deductions									
427	Interest on long-term debt									
430	Interest on debt to associate companies									
431	Other interest expense									
	TOTAL EXPENSE									
	Compensation for Use of Equity Capital									
	Interest on Debt to Associate Companies									
	TOTAL COST OF SERVICE									

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XVII - SCHEDULE OF EXPENSE DISTRIBUTION BY DEPARTMENT OR SERVICE FUNCTION

Instruction:

Indicate each department or service function. (See Instruction 01-3 General Structure of Accounting System: Uniform System of Accounts).

Account	Description of Items	Total Amount	Overhead	Department or Service Function
920	Salaries and wages			
921	Office supplies and expenses			
922	Administrative expense transferred – credit			
923	Outside services employed			
924	Property insurance			
925	Injuries and damages			
926	Employees pensions and benefits			
928	Regulatory commission expenses			
930.1	General advertising expenses			
930.2	Miscellaneous general expenses			
931	Rents			
403	Depreciation and amortization expenses			
408	Taxes other than income taxes			
409	Income taxes			
410	Provision for deferred taxes			
411	Provision for deferred taxes – credit			
411.5	Investment tax credit			
426.1	Donations			
426.5	Other deductions			
427	Interest on long-term debt			
430	Interest on debt to associated companies			
431	Other interest expense			

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

DEPARTMENTAL ANALYSIS OF SALARIES

Name of Department Indicate each department or service function	Departmental Salary Expense Included in Amounts Billed to Others				Number of Personnel End of Year
	Total Amount	Parent Company	Other Associates	Nonassociates	
TOTAL					

ANNUAL REPORT OF _____

For the Year Ended _____

MISCELLANEOUS GENERAL EXPENSES - ACCOUNT 930.2

Instructions:

Provide a listing of the amount included in Account 930.2, "Miscellaneous General Expenses" classifying such expenses according to their nature. Payments and expenses permitted by Section 321 (b)(2) of the Federal Election Campaign Act, as amended by Public Law 94-283 in 1976 (2 U.S.C. 441(b)(2)) shall be separately classified.

Description	Amount
TOTAL	

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SCHEDULE XVIII - NOTES TO STATEMENT OF INCOME

Instructions:

The space below is provided for important notes regarding the statement of income or any account thereof. Furnish particulars as to any significant increase in services rendered or expenses incurred during the year. Notes related to financial statements shown elsewhere in this report may be indicated here by reference.

ANNUAL REPORT OF _____

For the Year Ended _____

ORGANIZATION CHART

ANNUAL REPORT OF _____

For the Year Ended _____

METHODS OF ALLOCATION

ANNUAL REPORT OF _____

For the Year Ended _____

ANNUAL STATEMENT OF COMPENSATION FOR USE OF CAPITAL BILLED

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000

ANNUAL REPORT OF _____

For the Year Ended _____

SIGNATURE CLAUSE

Pursuant to the requirements of the Public Utility Holding Company Act of 2005 and the rules and regulations of the Federal Energy Regulatory Commission issued thereunder, the undersigned company has duly caused this report to be signed on its behalf by the undersigned officer thereunto duly authorized.

_____

(Name of Reporting Company)

_____

(Signature of Signing Officer)

_____

(Printed Name and Title of Signing Officer)

Date: _____

20051208-4005 Issued by FERC OSEC 12/08/2005 in Docket#: RM05-32-000