CINERGY.

Cinergy Corp.
139 East Fourth Street
Rm 25 AT II
P.O. Box 960
Cincinnati, OH 45201-0960
tel 513.287.3601
fax 513.287.3810
jfinnigan@cinergy.com

John J. Finnigan, Jr.
Senior Counsel

VIA OVERNIGHT MAIL

December 30, 2005

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602-0615

Re: Joint Application of Duke Energy Corporation, Duke Energy Holding Corp., Deer Acquisition Corp., Cougar Acquisition corp., Cinergy Corp., The Cincinnati Gas & Electric Company and The Union Light, Heat and Power Company for Approval of a Transfer and Acquisition of Control, Case No. 2005-00228

Dear Ms. O'Donnell:

In Merger Commitment No. 36 of the Agreed Stipulation in this case, ULH&P agreed to continue filing with the Commission copies of SEC Form U-5S (annual report for registered holding companies) and SEC Form U-13-60 (annual report for service companies in registered holding company systems). This merger commitment also states that ULH&P will meet with the Commission to discuss alternative reporting if the Federal Energy Regulatory Commission ("FERC") does not require public utilities to file SEC Form U-5S or SEC Form U-13-60 with the FERC pursuant to FERC's final order in Docket No. RM05-32-000 (Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Energy Policy Act of 2005).

At page 10 of its November 29, 2005 Order in the above-referenced case, the Commission required ULH&P to file a written request for an informal conference to discuss alternative reporting requirements within 30 days of the FERC's final order in Docket No. RM05-32-000, if the FERC did not require continued filing of either report. ULH&P now reports that the FERC issued its final order in Docket No. RM05-32-000 on December 8, 2005 ("Order 665"). ULH&P has enclosed a copy of Order 665 with this letter.

The FERC discusses SEC Form U-13-60 at pp. 52-59 of Order 665. The FERC concluded that it would no longer require service companies to file SEC Form U-13-60. Instead, the FERC ordered service companies to use a new form to file annual reports, known as FERC Form No. 60, which is a streamlined version of SEC Form U-13-60.

The FERC discusses SEC Form U-5S at pp. 59-62 of Order 665. The FERC concluded that it would no longer require holding companies to file SEC Form U-5S,

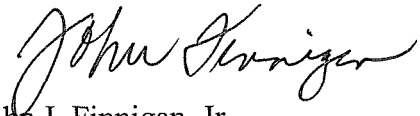
because the information contained in this form was either available in other FERC reports or is no longer relevant or necessary.

Based on the foregoing, ULH&P requests that this Commission order that ULH&P can comply with Merger Commitment No. 36 by filing with the Commission copies of the new FERC Form No. 60.

ULH&P has requested an informal conference in Case No. 2003-00252 for January 10, 2005 at 3:00 p.m. ULH&P respectfully requests that the Commission also schedule an informal conference in this case, to discuss this issue involving Merger Commitment No. 36, to take place at on January 10, 2005 at 3:30 p.m.

Please return two file-stamped copies of this filing in the enclosed return-addressed, stamped envelope. Thank you for your cooperation in this matter.

Sincerely,



John J. Finnigan, Jr.
Senior Counsel

JJF/sew

cc: All counsel of record (w/ enclosure)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 365 and 366

(Docket No. RM05-32-000, Order No. 665)

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.

FOR FURTHER INFORMATION CONTACT:

Brandon Johnson (Legal Information)
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(202) 502-6143

Lawrence Greenfield (Legal Information)
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(202) 502-6415

James Guest (Technical Information)
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(202) 502-6614

SUPPLEMENTARY INFORMATION:

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. 665

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

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[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).

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).

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.

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.

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

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

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

> 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

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

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[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.

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

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

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.

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.

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.

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.

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

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[23] 79 U.S.C. § 79z-5a (2000).

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.

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

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

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[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).

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

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

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[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).

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

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

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

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.

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.

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.

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

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[39] Georgia PSC Comments at 1.

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

[41] Entergy Comments at 3.

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.

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

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

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

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).

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.

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

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[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

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.