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

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.

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.

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.

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.

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

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

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

[72] Energy East Comments at 10.

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

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[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.

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."

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.

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.

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.

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.

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.

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

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[85] NARUC Comments at 2.

[86] FPL Group Comments at 4.

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

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,

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[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.

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.

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.

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.

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[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

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.

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.

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.

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

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[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. Nontraditional Utilities With No Captive Customers or Non-Utilities

Comments

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

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.

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.

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

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

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[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.

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

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[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

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.

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

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.

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

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