Comments

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

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

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

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

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

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

[231] FirstEnergy Comments at 19.

[232] Energy East Comments at 14-15.

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

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

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

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

the Commission's authority.[234]

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

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

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

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

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

the utility to a parent.[238]

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

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

[239] NASUCA Comments at 11-12.

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

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

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

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

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

[242] Arkansas PSC Comments at 24-32.

[243] Emera Comments at 7.

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

Commission Determination

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

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

[245] MBIA Insurance Comments at 25.

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

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

9. Additional Conforming or Technical Amendments

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

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

a. Amendments of Definitions

Comments

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

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

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

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[246] Oklahoma Corporation Commission Comments at 7.

[247] Morgan Stanley Comments at 10.

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

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

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[248] Id.

[249] Emera proposes the following definition:

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

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

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

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

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[250] Emera proposes following definition:

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

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

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

Commission Determination

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

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

[252] Dominion Comments at 26-27.

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

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

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

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

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

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

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

b. Other Proposed Amendments

Comments

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

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

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

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

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

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

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

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

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

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

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[257] PacifiCorp Comments at 6.

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

[259] FirstEnergy Comments at 8.

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

Commission Determination

262. EEI recommends an amendment to section 3(c)(8) of the Investment Company Act of 1940, which provides that a company subject to regulation under PUHCA 1935 shall not be an "investment company" as defined in and regulated under the Investment Company Act of 1940.[261] While such companies can file with the SEC and seek exemption from the Investment Company Act of 1940 by claiming that they fall within other exemptions, EEI notes that an amendment to section 3(c)(8) would allow such companies to avoid having to make such filings with the SEC. The Investment Company Act of 1940, however, is not a statute with which the Commission has experience, and the amendment is not essential for the Commission to carry out its responsibilities under PUHCA 2005 or any other statute the Commission administers. Consequently, the Commission will bring this issue to the attention of Congress, but will not make any recommendation.

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[260] Id. at 21-22.

[261] 15 U.S.C. § 80a-3(c)(8) (2000).

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

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

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

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

Information Collection Statement

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

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

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

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[262] 5 CFR 1320.11 (2005).

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

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

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

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

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

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

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

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

Environmental Analysis

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

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

Regulatory Flexibility Act Certification

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

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

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

[265] 5 U.S.C. § 603 (2000).

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

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

Document Availability

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

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

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

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

Effective Date and Congressional Notification

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

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

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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

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

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

SUBCHAPTER T - - [Removed and Reserved]

Part 365 - - [Removed]

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

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

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

Part 366 - - Public Utility Holding Company Act Of 2005

Subpart A – PUHCA 2005 Definitions and Provisions

366.1 Definitions.

366.2 Commission access to books and records.

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

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

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

366.6 Previously authorized activities.

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

Subpart B – PUHCA 2005 Accounting and Recordkeeping

366.21 Accounts and records of holding companies.

366.22 Accounts and records of service companies.

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

Subpart A – PUHCA 2005 Definitions and Provisions

§ 366.1 Definitions.

For purposes of this part:

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

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

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

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

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

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

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

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

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

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

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

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

company operating in the United States.

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

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

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

Holding company.

(1) In general. The term "holding company" means--

(i) Any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company; and

(ii) Any person, determined by the Commission, after notice and opportunity for hearing, to exercise directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the

management or policies of any public-utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this subtitle upon holding companies.

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

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

(A) Held as collateral for a loan;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Any person, the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this subtitle upon subsidiary companies of

holding companies.

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

§ 366.2 Commission access to books and records.

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

(1) the United States;

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

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

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

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

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

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

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

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

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

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

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

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

(2) Exempt wholesale generators; or

(3) Foreign utility companies.

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

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

(i) Mutual funds,

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

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

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

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

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

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

(5) Electric power cooperatives;

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

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

(1) Single-state holding company systems as defined in § 366.1;

(2) Holding companies that own generating facilities that total 100 MW or less in size and are used fundamentally for their own load or for sales to affiliated end-users; or

(3) Investors in independent transmission-only companies.

(d) Commission authority to exempt additional persons and classes of transactions. The Commission shall exempt a person or classes of transaction from the requirements of § 366.2 if, upon individual application as described in paragraph (e) of this section or upon the motion of the Commission--

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

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

(e) Other requests for exemptions and waivers. Any person seeking an exemption or waiver that is not covered by paragraphs (b) or (c) of this section, shall file a petition for declaratory order pursuant to § 385.207(a) justifying its request for exemption. Any person seeking such an exemption or waiver shall bear the burden of demonstrating that such an exemption is warranted.

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

(a) Notification of holding company status. Companies that meet the definition of a holding company as provided by § 366.1 as of February 8, 2006, shall notify the Commission of their status as a holding company no later than March 10, 2006. Holding companies formed after February 8, 2006, shall notify the Commission of their status as a holding company, no later than 30 days after their formation. Notifications shall be made by submitting FERC-65 (notification of holding company status), which contains the following: the identify of the holding company and of the public utilities and natural gas companies in the holding company system; the identity of service companies or special-purpose subsidiaries providing non-power goods and services; the identity of all affiliates and subsidiaries; and their corporate relationship to each other. This filing will be for informational purposes and will not be noticed in the Federal Register, but will be available on the Commission's website.

(b) FERC-65A (exemption notification) and petitions for exemption.

(1) Persons or companies seeking exemption from the requirements of PUHCA 2005 and the Commission's regulations thereunder under § 366.3(a), or one of the class exemptions adopted under § 366.3(b), may do so by filing FERC-65A (exemption notification). These filings will be noticed in the Federal Register; persons or companies that file FERC-65A must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). Persons or companies that file FERC-65A in good faith shall be deemed to have a temporary exemption upon filing. If the Commission has taken no action within 60 days after the date of filing FERC-65A, the exemption shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information or for further consideration of the request; in such case, the claim for exemption will remain temporary until such time as the Commission has determined whether to grant or deny the exemption. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee, and authority to act on uncontested FERC-65A filings is delegated to the Director of the Office of Markets, Tariffs and Rates or to the Director of the Office of Markets, Tariffs and Rates' designee.

(2) Persons or companies that do not qualify for exemption pursuant to § 366.3(a) or § 366.3(b) may seek an individual exemption from this subchapter. They may not do so by means of filing FERC-65A and instead must file a petition for declaratory order as required under § 366.3(e). Such petitions will be noticed in the Federal Register; persons or companies that file a petition must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). No temporary

exemption will attach upon filing and the requested exemption will be effective only if approved by the Commission. Persons or companies may also seek exemptions for classes of transactions by filing a petition for declaratory order.

(c) FERC-65B (waiver notification) and petitions for waiver.

(1) Persons or companies seeking a waiver of the Commission's regulations under PUHCA 2005 pursuant to § 366.3(c) may do so by filing FERC-65B (waiver notification). FERC-65B will be noticed in the Federal Register; persons or companies that file FERC-65B must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). Companies that file FERC-65B in good faith shall be deemed to have a temporary exemption upon filing. If the Commission has taken no action within 60 days after the date of filing of FERC-65B, the waiver shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information or for further consideration of the request; in such case, the waiver will remain temporary until such time as the Commission has determined whether to grant or deny the waiver. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee, and authority to act on uncontested FERC-65B filings is delegated to the Director of the Office of Markets, Tariffs and Rates or the Director of the Office of Markets, Tariffs and Rates' designee.

(2) Persons or companies that do not qualify for waiver pursuant to § 366.3(c) may seek an individual waiver from this subchapter. They may not do so by means of filing FERC-65B and instead must file a petition for declaratory order pursuant as required under § 366.3(e). Such petitions will be noticed in the Federal Register; persons or

companies that file a petition must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). No temporary waiver will attach upon filing and the requested exemption will be effective only if approved by the Commission. Persons or companies may also seek waivers for classes of transactions by filing a petition for declaratory order.

(d) Revocation of exemption or waiver.

(1) If a person or company that has been granted an exemption or waiver under paragraphs (b) or (c) of this section fails to conform with any material facts or representations presented in its submittals to the Commission, such company or company may no longer rely upon FERC-65A, FERC-65B, or a Commission determination granting the exemption or waiver.

(2) The Commission may, on its own motion or on the motion of any person, revoke the exemption or waiver granted under paragraphs (b) or (c) of this section, if the person or company fails to conform to any of the Commission's criteria under this part for obtaining the exemption or waiver.

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

(a) Commission review. In the case of non-power goods or administrative or management services provided by an associate company organized specifically for the purpose of providing such goods or services to any public utility in the same holding company system, at the election of the system (the public utility holding company, together with its subsidiary companies) or a state commission having jurisdiction over the public utility, the Commission shall review and authorize the allocation of the costs for

such goods or services to the extent relevant to that associate company. Such election to have the Commission review and authorize cost allocations shall remain in effect until further Commission order.

(b) Exemptions. Any holding company system whose public utility operations are confined substantially to a single state is exempt from the requirements of paragraph (a) of this section. A holding company system's public utility operations will be deemed confined substantially to a single state if the holding company system does not derive more than 13 percent of its public-utility revenues from outside a single state. A holding company system or state commission may, pursuant to this subsection, seek a Commission determination that a holding company's public utility operations are confined substantially to a single state by filing a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure (§ 385.207(a)). Any holding company system or state commission seeking such a determination shall bear the burden of demonstrating that such determination is warranted.

(c) Other classes of transactions. Either upon petition for declaratory order or upon its own motion, the Commission may exclude from the scope of Commission review and authorization under paragraph (a) of this section any class of transactions that the Commission finds is not relevant to the jurisdictional rates of a public utility. Any holding company system or state commission seeking to obtain such a determination under this subsection shall file a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure justifying its request for exemption (§ 385.207(a)). Any holding company system or state commission seeking such an

exemption shall bear the burden of demonstrating that such determination is warranted.

(d) Nothing in paragraphs (a)-(c) of this section shall affect the authority of the Commission under the Federal Power Act (16 U.S.C. 791 et seq.), the Natural Gas Act (15 U.S.C. 717 et seq.), or other applicable law, including the authority of the Commission with respect to rates, charges, classifications, rules, regulations, practices, contracts, facilities, and services.

§ 366.6 Previously authorized activities.

(a) General. Unless otherwise provided by Commission rule or order, a person may continue to engage in activities or transactions authorized under the Public Utility Holding Company Act of 1935 prior to the effective date of the Public Utility Holding Company Act of 2005, February 8, 2006, until the later of the date such authorization expires or December 31, 2007, so long as that person continues to comply with the terms of such authorization. If any such activities or transactions are challenged in a formal Commission proceeding, the person claiming prior authorization shall be required to provide at that time the full text of any such authorization (whether by rule, order, or letter) and the application(s) or pleading(s) underlying such authorization (whether by rule, order, or letter).

(b) Financing Authorizations. Holding companies that intend to rely on financing authorization orders or letters issued by the Securities and Exchange Commission must file these orders or letters with the Commission within 30 days after the effective date of the Public Utility Holding Company Act of 2005, February 8, 2006; any reports or other submissions that, pursuant to such financing authorizations, previously were filed with

the Securities and Exchange Commission must instead be filed with the Commission, effective February 8, 2006. For the purposes of this section, compliance with the terms of such financing authorizations includes the requirement to notify the Commission of any financing transactions that a holding company engages in pursuant to such financing authorization.

§ 366.7 Procedures for obtaining exempt wholesale generator and foreign utility company status. (a) Self-certification notice procedure. An exempt wholesale generator or a foreign utility company, or their representative, may file with the Commission a notice of self-certification demonstrating that it satisfies the definition of exempt wholesale generator or foreign utility company. In the case of exempt wholesale generators, the person filing a notice of self-certification under this section must also file a copy of the notice with the state regulatory authority of the state in which the facility is located. Notices of self-certification will be published in the Federal Register. Persons that file such notices must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). A person filing a notice of self-certification in good faith will be deemed to have temporary exempt wholesale generator or foreign utility company status. If the Commission takes no action within 60 days from the date of filing of the notice of self-certification, the self-certification shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information, or for further consideration of the request; in such cases, the person's exempt wholesale generator or foreign utility company status will remain temporary until such time as the Commission has determined whether to grant or deny

exempt wholesale generator or foreign utility company status. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee, and authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.

(b) Optional procedure for Commission determination of exempt wholesale generator status or foreign utility company status. A person may file for a Commission determination of exempt wholesale generator status or foreign utility company status under § 366.1 by filing a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure (§ 385.207(a)), justifying its request for exemption. Persons that file petitions must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). Authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.

(c) Revocation of status.

(1) If an exempt wholesale generating facility or a foreign utility company fails to conform with any material facts or representations presented by the applicant in its submittals to the Commission, the notice of self-certification of the status of the facility or Commission order certifying the status of the facility may no longer be relied upon.

(2) The Commission may, on its own motion or on the application of any person, revoke the status of a facility or company, if the facility or company fails to conform to any of the Commission's criteria under this part.

Subpart B – Accounting and Recordkeeping

§ 366.21 Accounts and records for holding companies.

(a) General. Unless otherwise exempted or granted a waiver by Commission rule or order, every holding company shall maintain and make available to the Commission books, accounts, memoranda, and other records of all of its transactions in sufficient detail to permit examination, audit and verification, as necessary and appropriate for the protection of utility customers with respect to jurisdictional rates, of the financial statements, schedules and reports required to be filed with the Commission or issued to stockholders.

(b) Unless otherwise exempted or granted a waiver by Commission rule or order, beginning January 1, 2007, all holding companies must comply with the Commission's record-retention requirements for public utilities and licensees or for natural gas companies, as appropriate (Parts 125 and 225). Until December 31, 2006, holding companies registered under the Public Utility Holding Company Act of 1935 (16 U.S.C. 79a et seq.) may follow either the Commission's record-retention rules for public utilities and licensees or for natural gas companies, as appropriate (Parts 125 and 225), or the Security and Exchange Commission's record-retention rules in 17 C.F.R. Part 257.

(c) Nothing in this section shall relieve any company subject thereto from compliance with the requirements as to recordkeeping and record-retention that may be prescribed by any other regulatory agency.

§ 366.22 Accounts and records of service companies.

(a) Record-retention requirements.

(1) General. Unless otherwise exempted or granted a waiver by Commission rule or order, beginning January 1, 2007, every service company shall maintain and make available to the Commission such books, accounts, memoranda, and other records in such manner and preserve them for such periods, as the Commission prescribes in Parts 125 and 225 in sufficient detail to permit examination, audit, and verification, as necessary and appropriate for the protection of utility customers with respect to jurisdictional rates.

(2) Transition period. Until December 31, 2006, service companies in holding company systems registered under the Public Utility Holding Company Act of 1935 (16 U.S.C. §§ 79a et seq. (2000)) may follow either the Commission's record-retention requirements in Parts 125 and 225 or the Securities and Exchange Commission's record-retention rules in 17 C.F.R. Part 257.

(3) Nothing in this section shall relieve any service company subject thereto from compliance with requirements as torecord-retention that may be prescribed by any other regulatory agency.

(b) Accounting requirements.

(1) General. Unless otherwise exempted or granted a waiver by Commission rule or order, beginning January 1, 2007, every service company that is not a special-purpose company (e.g., a fuel supply company or a construction company) shall maintain and make available to the Commission such books, accounts, memoranda, and other records

as the Commission prescribes in Parts 101 and 201, in sufficient detail to permit examination, audit, and verification, as necessary and appropriate for the protection of utility customers with respect to jurisdictional rates. Every such service company shall maintain and make available such books, accounts, memoranda, and other records in such manner as are prescribed in Parts 101 and 201, and shall keep no other records with respect to the same subject matter except:

(i) records other than accounts;

(ii) records required by federal or state law;

(iii) subaccounts or supporting accounts which are not inconsistent with the accounts required either by the Uniform System of Accounts in Parts 101 and 201 ; and

(iv) such other accounts as may be authorized by the Commission.

(2) Transition period. Until December 31, 2006, service companies in holding company systems registered under the Public Utility Holding Company Act of 1935 (16 U.S.C. 79a et seq.), as described in subparagraph (1), may follow either the Commission's Uniform System of Accounts in Parts 101 and 201 or the Securities and Exchange Commission's Uniform System of Accounts in 17 C.F.R. Part 256.

(3) Nothing in this section shall relieve any service company subject thereto from compliance with requirements as to accounting that may be prescribed by any other regulatory agency.

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

(a) General. Unless otherwise exempted or granted a waiver by Commission rule or order, every service company in a holding company system that is not a special-purpose company (e.g., a fuel supply company or a construction company) that provides non-power goods or services to a Commission-jurisdictional public utility or natural gas company shall file with the Commission by May 1, 2006 and by May 1each year thereafter, a report, FERC Form No. 60, for the prior calendar year.. Every such report shall be submitted on the FERC Form No. 60 then in effect and shall be prepared in accordance with the instructions incorporated in such form. For good cause shown, the Commission may extend the time within which any such report is to be filed or waive the requirements applicable to any such report. The authority to act on motions for extensions of time to file any such reports or to waive the requirements applicable to any such reports, including granting or denying such motions, in whole or in part, is delegated to the Chief Accountant or the Chief Accountant's designee.

(b) Transition period. Service companies in holding company systems exempted from the requirements of the Public Utility Holding Company Act of 1935 (16 U.S.C. 79a et seq.) need not file an annual report, FERC Form No. 60, for calendar years 2005 and 2006.

Appendix 1 List of commenters

Acronym	Name
AGL Resources	AGL Resources Inc.
Alcoa	Alcoa Inc.
	Allegheny Energy Inc.
Alliant	Alliant Energy Corporation
Ameren	Ameren Services Company
AEP	American Electric Power Service Corporation
AGA	American Gas Association
American National Power	American National Power, Inc.
APGA	American Public Gas Association
APPA/NRECA	American Public Power Association/National Rural Electric Cooperative Association
	American Transmission Company LLC
Cooperatives	Arizona Electric Power Cooperative, Inc./Southwest Transmission Cooperative, Inc./Sierra Southwest Cooperative Services, Inc.
Arkansas PSC	Arkansas Public Service Commission
Barclays	Barclays Global Investors, N.A.
Barrick	Barrick Goldstrike Mines Inc.
Black Hills	Black Hills Corporation
CEOB	California Electricity Oversight Board
Calpine	Calpine Corporation
	Capital Research and Management Company
Cinergy	Cinergy Corporation
	City of Redding, California
Santa Clara	City Santa Clara, California
Chairman Barton	Congressman Joe Barton
ConEd	Consolidated Edison Company of New York, Inc.
Coral Power and Shell WindEnergy	Coral Power, LLC and Shell WindEnergy Inc.
Detroit Edison	Detroit Edison Company
Dominion	Dominion Resources, Inc.
Duke Energy	Duke Energy Corporation
EEI	Edison Electric Institute
EPSA	Electric Power Supply Association
ELCON	Electricity Consumers Resource Council/American Iron and Steel Institute/American Chemistry Council/Portland Cement Association
Emera	Emera Incorporated
Energy East	Energy East Corporation
Entergy	Entergy Services, Inc.
E.ON/LG&E	E.ON AG and LG&E Energy LLC

Energy	
Exelon	Exelon Corporation
FirstEnergy	FirstEnergy Service Company
FPL Group	FPL Group, Inc.
Georgia PSC	Georgia Public Service Commission
Goldman Sachs	The Goldman Sachs Group, Inc.
IURC	Indiana Utility Regulatory Commission
	International Transmission Company
	Investment Advisor Association
	Investment Company Institute
Kentucky PSC	Kentucky Public Service Commission
Keyspan	Keyspan Corporation
MBIA	MBIA Insurance Corporation
MGTC	MGTC Inc.
MidAmerican	MidAmerican Energy Holdings Company
Missouri PSC	Missouri Public Service Commission
Mittal Steel	Mittal Steel USA ISG, Inc.
Morgan Stanley	Morgan Stanley Capital Group Inc.
NARUC	National Association of Regulatory Utility Commissioners
NASUCA	National Association of State Utility Consumer Advocates
National Fuel	National Fuel Gas Company
National Grid	National Grid USA
NiSource	NiSource Inc.
Northeast Utilities	Northeast Utilities Service Company
	PG&E Corporation
Ohio PUC	Public Utilities Commission of Ohio
Oklahoma Corporation	Oklahoma Corporation Commission
	Pacificorp
	Pepco Holding, Inc./Potomac Electric Power Company/Atlantic City Electric Company/Delmarva Power & Light Company/Conectiv Energy Supply, Inc./PEPCO Energy Services Inc./PHI Service Company and other system companies.
	Portland General Electric Company
PPL	PPL Companies
	PPM Energy, Inc.
Progress Energy	Progress Energy, Inc.
Public Citizen	Public Citizen Inc.
Wisconsin PSC	Public Service Commission of Wisconsin
	Questar Corporation
	Scottish Power
	Southern Company Services, Inc.
TANC	Transmission Agency of Northern California

	Tri-State Generation/Transmission Association, Inc.
Utility Workers	Utility Workers Union of American
	WGL Holdings, Inc. and Washington Gas & Light Company
Xcel	Xcel Energy Services Inc.

Appendix 2 FERC Form No. 60