
Docket No. RM05-32-000

Issued September 16, 2005

On September 16, 2005, the Federal Energy Regulatory Commission (the “Commission”) issued a Notice of Proposed Rulemaking (“NOPR”) to promulgate rules implementing the repeal of the Public Utility Holding Company Act of 1935 (“PUHCA 35”), and the enactment of the Public Utility Holding Company Act of 2005 (“PUHCA 2005”). Under the Energy Policy Act of 2005 [Pub. L. No. 109-58, 119 Stat. 594 (2005)] (“EPAct 2005”), PUHCA 2005 is primarily a “books and records access” statute and does not give the Commission any new substantive authorities, other than the requirement in Section 1275 of EPAct 2005. Furthermore, PUHCA 2005 does not give the Commission authority to pre-approve holding company activities. In this NOPR, the Commission is requesting comments on rules relating to its authority to (i) review books and records of holding companies and their affiliates, and (ii) review and authorize the allocation of costs for non-power goods, administrative services, and management services.

Comments are due no later than October 14, 2005, with reply comments due no later than October 21, 2005.

Examination of Books and Records

Section 1264 of EPAct 2005 requires holding companies and their affiliates to maintain and make available books, accounts, memoranda, and other records (collectively “Books and Records”) that the Commission determines are relevant to the costs incurred with respect to jurisdictional rates. Section 1264 also empowers the Commission to examine such Books and Records, and forbids any member, officer, or employee of the Commission from divulging such information except as directed by a court or the Commission.

The Commission proposes to: (i) incorporate, with slight modification, the text of Section 1264 by adding Section 366.2 to the Commission’s regulations, and (ii) adopt the following Securities and Exchange Commission (“SEC”) rules for accounting, cost-allocation and
recordkeeping for holding companies and their service companies: 17 C.F.R. Sections 250.1, 250.26, 250.27, 250.80, 250.93, 250.94, 259.5S, and 259.313 and 17 C.F.R. Parts 256 and 257.1

The Commission seeks comments on the following:

(i) are there any provisions of the SEC rules that will be adopted that the Commission should not adopt;

(ii) should the Commission adopt any additional accounting, cost-allocation, record keeping and related rules to carry out its statutory duties under PUHCA 2005;

(iii) which SEC reporting requirements should the Commission retain, and which ones it should not; and

(iv) in light of the Commission’s intention not to broaden the applicability of the provisions listed in clauses (i) through (iii) beyond the types of companies to which they now apply, whether this scope of applicability is appropriate and what regulatory text may be needed to implement the rules.

Exemption From Books and Records Requirements

Section 1266 of EPAct 2005 directs the Commission to exempt from the requirements of Section 1264 of EPAct 2005 any person that is a holding company if it meets the requirements to be one of the following entities: (i) qualifying facilities (“QFs”); (ii) exempt wholesale generators (“EWGs”); or (iii) foreign utility companies (“FUCOs”).

Also exempt from Section 1264 will be persons or transactions that, upon application to the Commission or upon the Commission’s own determination, the Commission finds: (i) that the Books and Records of such person are not relevant to the jurisdictional rates of a public utility or natural gas company; or (ii) that such transaction is in a class of transactions that is not relevant to the jurisdictional rates of a public utility or natural gas company. The Commission proposes to adopt the exemptions for QFs, EWGs and FUCOs, but does not propose to exempt categorically classes of entities or transactions.

The Commission proposes to rely on case-by-case applications for additional exemptions and accordingly seeks comment on:

Allocation of Costs for Non-Power Goods or Services

Section 1275(b) of EPAct 2005 grants to certain holding company systems and state commissions a right to obtain Commission review and authorization of cost allocations for non-power goods, administrative services, and management services provided by special purpose associate companies. The Commission proposes to reflect this provision in the new Section 366.4(b) of its regulations. In addition, Section 1275(b) provides for Commission review and authorization of cost allocations for non-power goods or services provided by service companies to public utilities which are not gas utility companies or natural gas companies.

The SEC and state commissions previously have been primarily responsible for determining allocations of costs for non-power goods and services among associate companies in registered holding company systems, and these allocations have been made on an “at cost” basis. By contrast, the Commission’s long-standing policy is that registered holding company special purpose subsidiaries must provide non-power goods and services to a public utility regulated by the Commission at the lower of cost or market price. For at least a decade, the Commission has imposed this standard as a condition for approval of mergers that result in the creation of new registered holding companies.

The Commission seeks comments on the following:

(i) in light of the repeal of PUHCA 1935, should holding companies that prior to the repeal of PUHCA 1935 were registered holding companies be required to file such cost allocation agreements with the Commission under Section 205 of the Federal Power Act (“FPA”), and Section 4 of the Natural Gas Act (“NGA”);

(ii) whether the Commission should recommend an amendment clarifying that holding company systems and state commissions having jurisdiction over gas utility companies and natural gas companies in the holding company systems are included within the scope of Section 1275(b); and

(iii) whether the Commission should apply the lower of cost or market standard for the allocation of costs for non-power goods and services, or if it should adopt the SEC “at cost” standard.

1 The Commission does not intend to reimpose the registration requirement contained in 17 C.F.R. 250.1. Instead, the Commission proposes to replace the registration requirement with a requirement that all entities falling within the definition of “holding company” in PUHCA 2005 notify the Commission of their status as a holding company and whether they qualify for exemption pursuant to Section 1266 of EPAct 2005.
Single-State Holding Company Systems

Under Section 1275(d) of EPAct 2005, any company in a holding company system whose public utility operations are confined substantially to a single state ("Single-State Holding Company Systems") and any other class of transactions that the Commission finds are not relevant to the jurisdictional rates of a public utility will be exempt from Section 1275.

The Commission states that, based on the structure of Section 1275, the most reasonable interpretation of the exemption for Single-State Holding Company Systems in Section 1275(d) is that Congress intended to deny Single-State Holding Company Systems and relevant state commissions the right to obtain Commission review of cost allocations pursuant to Section 1275. The Commission therefore proposes to reflect this limitation by excluding Single-State Holding Company Systems from the scope of Commission review under Section 366.4(b) of the Commission’s regulations.

The Commission also states that it held a similar interpretation to the other classes of transactions that may be exempted pursuant to Section 1275(d), i.e., an exemption under Section 1275(d) forecloses Commission review under Section 1275(b). The Commission proposes, in Section 366.4(c) of its regulations, to establish a procedure by which the Commission, either upon petition for declaratory order or upon its own motion, may exclude from the scope of Commission review and authorization under Section 366.4(b) any class of transactions that it determines are not relevant to the jurisdictional rates of a public utility.

The Commission seeks comments on the following:

(i) how should the Commission define “confined substantially to a single state;”

(ii) its interpretation of Section 1275(d) that Congress intended to deny Single-State Holding Company Systems and relevant state commissions the right to obtain Commission review of cost allocations pursuant to Section 1275; and

(iii) what other classes of transactions, pursuant to Section 1275(d), should be exempted from the requirements of Section 1275.

Previously Authorized Activities

Section 1271 of EPAct 2005 provides that a person may continue to engage in activities or transactions authorized by rule or order as of the date of enactment of EPAct 2005 if that person continues to comply with the terms of the authorization. The Commission proposes to reflect this statutory provision in Section 366.5 of the Commission’s regulations. In addition, the Commission proposes to require that, if there are challenges to any such activities in a formal Commission proceeding, the person claiming prior authorization shall provide the full text of any such authorization (whether by rule, order, or letter) and the application(s) or pleading(s) underlying such authorization.

EWGs and FUCOs

EPAct 2005 repeals PUHCA 1935 in its entirety, including Section 32, which requires the Commission to make EWG determinations on a case-by-case basis. Although the definitional Section of PUHCA 2005 references Section 32 of PUHCA 1935, Congress repealed Section 32 in its entirety and did not re-enact that provision in PUHCA 2005. The Commission states that the most reasonable interpretation of EPAct 2005, given the omission of Section 32 in the new PUHCA 2005, is that Congress did not intend the Commission to continue to make case-by-case determinations of EWG status and that only those entities that are holding companies with respect to persons granted EWG status before the repeal of PUHCA 1935 will qualify for an exemption from the new Books and Records access requirements under proposed Section 366.3(a)(2) of the Commission’s regulations.

EPAct 2005 also repeals Section 33 of PUHCA 1935, which addresses FUCOs. As with EWGs, the Commission interprets Congress’ intention as limiting the exemption for persons that are holding companies with respect to FUCOs to those attaining FUCO status before the repeal of PUHCA 1935.

The Commission seeks comments on the following:

(i) whether it should remove Part 365 of the Commission’s regulations based upon the previous analysis; and

(ii) its interpretation of Congress’ intention regarding FUCOs.

Cross Subsidization and Encumbrances of Utility Assets

The Commission has, pursuant to the FPA and NGA, certain reporting requirements regarding money pools and cash management activities that affect jurisdictional companies. In the electric area, the Commission’s policies protect against wholesale power and non-power goods and services cross-subsidization occurring between affiliates in a holding company system.
The Commission seeks comments on the following:

(i) whether, in light of the repeal of PUHCA 1935, the Commission needs to promulgate additional rules or to adopt additional policies to protect against inappropriate cross-subsidization or encumbrances of utility assets, pursuant to its authorities under the FPA and NGA; and

(ii) what additional rules may be needed and what are the statutory bases for such rules.

Commentators should bear in mind the following:

(i) if it has the authority to do so, should the Commission issue rules regarding public utility holding company diversification into non-utility businesses;

(ii) would the Commission have authority to promulgate such rules under its FPA or NGA ratemaking authority; and

(iii) should the Commission modify its existing cash management rules to apply not only to public utilities, natural gas companies, and oil pipelines, but also to include public utility holding companies.

Additional Amendments

Section 1272 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.

The Commission seeks comments on:

what technical and conforming amendments the Commission should include in this submission to Congress.

Issues not addressed in this NOPR

The repeal of PUHCA 1935 will give the Commission jurisdiction under Section 204 of the FPA over certain issuances of securities and assumptions of liabilities by companies within holding company systems that are currently subject to the jurisdiction of the SEC. The Commission declined to propose new rules relating to this authority, but stated that in the event it determines that it is necessary to revise or supplement current regulations, it would do so in a separate rulemaking proceeding.

The Commission also declined to propose new rules related to mergers and acquisitions of public utilities and dispositions of jurisdictional assets, stating that its authority under the FPA, NGA, and EPAct 2005 provide sufficient authority. As with the issuance of securities, the Commission states that it would propose rules in a future rulemaking proceeding if it deemed such rulemaking to be necessary.