

functions and activities of investment trusts and investment companies, the corporate structures, and investment policies of such trusts and companies, the influence exerted by such trusts and companies upon companies in which they are interested, and the influence exerted by interests affiliated with the management of such trusts and companies upon their investment policies, and to report the results of its study and its recommendations to the Congress on or before January 4, 1937.”

#### TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

#### § 79z-5. Hiring and leasing authority of Commission

The provisions of section 78d(b) of this title shall be applicable with respect to the power of the Commission—

- (1) to appoint and fix the compensation of such employees as may be necessary for carrying out its functions under this chapter, and
- (2) to lease and allocate such real property as may be necessary for carrying out its functions under this chapter.

(Aug. 26, 1935, ch. 687, title I, §31, 49 Stat. 837; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972; Pub. L. 101-550, title I, §104(a), Nov. 15, 1990, 104 Stat. 2713.)

#### AMENDMENTS

1990—Pub. L. 101-550 amended section generally. Prior to amendment, section related to appointment and compensation of employees.

1949—Act Oct. 28, 1949, substituted “Classification Act of 1949” for “Classification Act of 1923”.

#### REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

#### TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

#### § 79z-5a. Exempt wholesale generators

##### (a) Definitions

For purposes of this section—

##### (1) Exempt wholesale generator

The term “exempt wholesale generator” means any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates as defined in section 79b(a)(11)(B) of this title, 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. No person shall be deemed to be an exempt wholesale generator under this section unless such person has applied to the Federal Energy Regulatory Commission for a determination under this paragraph. A person applying in good faith for such a determination shall be

deemed an exempt wholesale generator under this section, with all of the exemptions provided by this section, until the Federal Energy Regulatory Commission makes such determination. The Federal Energy Regulatory Commission shall make such determination within 60 days of its receipt of such application and shall notify the Commission whenever a determination is made under this paragraph that any person is an exempt wholesale generator. Not later than 12 months after October 24, 1992, the Federal Energy Regulatory Commission shall promulgate rules implementing the provisions of this paragraph. Applications for determination filed after the effective date of such rules shall be subject thereto.

##### (2) Eligible facility

The term “eligible facility” means a facility, wherever located, which is either—

- (A) used for the generation of electric energy exclusively for sale at wholesale, or
- (B) used for the generation of electric energy and leased to one or more public utility companies; *Provided*, That any such lease shall be treated as a sale of electric energy at wholesale for purposes of sections 824d and 824e of title 16.

Such term shall not include any facility for which consent is required under subsection (c) of this section if such consent has not been obtained. Such term includes interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale. For purposes of this paragraph, the term “facility” may include a portion of a facility subject to the limitations of subsection (d) of this section and shall include a facility the construction of which has not been commenced or completed.

##### (3) Sale of electric energy at wholesale

The term “sale of electric energy at wholesale” shall have the same meaning as provided in section 824(d) of title 16.

##### (4) Retail rates and charges

The term “retail rates and charges” means rates and charges for the sale of electric energy directly to consumers.

##### (b) Foreign retail sales

Notwithstanding paragraphs (1) and (2) of subsection (a) of this section, retail sales of electric energy produced by a facility located in a foreign country shall not prevent such facility from being an eligible facility, or prevent a person owning or operating, or both owning and operating, such facility from being an exempt wholesale generator if none of the electric energy generated by such facility is sold to consumers in the United States.

##### (c) State consent for existing rate-based facilities

If a rate or charge for, or in connection with, the construction of a facility, or for electric energy produced by a facility (other than any portion of a rate or charge which represents recovery of the cost of a wholesale rate or charge) was in effect under the laws of any State as of October 24, 1992, in order for the facility to be

considered an eligible facility, every State commission having jurisdiction over any such rate or charge must make a specific determination that allowing such facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law; *Provided*, That in the case of such a rate or charge which is a rate or charge of an affiliate of a registered holding company:

(A) such determination with respect to the facility in question shall be required from every State commission having jurisdiction over the retail rates and charges of the affiliates of such registered holding company; and

(B) the approval of the Commission under this chapter shall not be required for the transfer of the facility to an exempt wholesale generator.

**(d) Hybrids**

(1) No exempt wholesale generator may own or operate a portion of any facility if any other portion of the facility is owned or operated by an electric utility company that is an affiliate or associate company of such exempt wholesale generator.

(2) **ELIGIBLE FACILITY.**—Notwithstanding paragraph (1), an exempt wholesale generator may own or operate a portion of a facility identified in paragraph (1) if such portion has become an eligible facility as a result of the operation of subsection (c) of this section.

**(e) Exemption of EWGS**

An exempt wholesale generator shall not be considered an electric utility company under section 79b(a)(3) of this title and, whether or not a subsidiary company, an affiliate, or an associate company of a holding company, an exempt wholesale generator shall be exempt from all provisions of this chapter.

**(f) Ownership of EWGS by exempt holding companies**

Notwithstanding any provision of this chapter, a holding company that is exempt under section 79c of this title shall be permitted, without condition or limitation under this chapter, to acquire and maintain an interest in the business of one or more exempt wholesale generators.

**(g) Ownership of EWGS by registered holding companies**

Notwithstanding any provision of this chapter and the Commission's jurisdiction as provided under subsection (h) of this section, a registered holding company shall be permitted (without the need to apply for, or receive, approval from the Commission, and otherwise without condition under this chapter) to acquire and hold the securities, or an interest in the business, of one or more exempt wholesale generators.

**(h) Financing and other relationships between EWGS and registered holding companies**

The issuance of securities by a registered holding company for purposes of financing the acquisition of an exempt wholesale generator, the guarantee of securities of an exempt wholesale generator by a registered holding company, the entering into service, sales or construction contracts, and the creation or maintenance of any other relationship in addition to that described

in subsection (g) of this section between an exempt wholesale generator and a registered holding company, its affiliates and associate companies, shall remain subject to the jurisdiction of the Commission under this chapter: *Provided*, That—

(1) section 79k of this title shall not prohibit the ownership of an interest in the business of one or more exempt wholesale generators by a registered holding company (regardless of where facilities owned or operated by such exempt wholesale generators are located), and such ownership by a registered holding company shall be deemed consistent with the operation of an integrated public utility system;

(2) the ownership of an interest in the business of one or more exempt wholesale generators by a registered holding company (regardless of where facilities owned or operated by such exempt wholesale generators are located) shall be considered as reasonably incidental, or economically necessary or appropriate, to the operations of an integrated public utility system;

(3) in determining whether to approve (A) the issue or sale of a security by a registered holding company for purposes of financing the acquisition of an exempt wholesale generator, or (B) the guarantee of a security of an exempt wholesale generator by a registered holding company, the Commission shall not make a finding that such security is not reasonably adapted to the earning power of such company or to the security structure of such company and other companies in the same holding company system, or that the circumstances are such as to constitute the making of such guarantee an improper risk for such company, unless the Commission first finds that the issue or sale of such security, or the making of the guarantee, would have a substantial adverse impact on the financial integrity of the registered holding company system;

(4) in determining whether to approve (A) the issue or sale of a security by a registered holding company for purposes other than the acquisition of an exempt wholesale generator, or (B) other transactions by such registered holding company or by its subsidiaries other than with respect to exempt wholesale generators, the Commission shall not consider the effect of the capitalization or earnings of any subsidiary which is an exempt wholesale generator upon the registered holding company system, unless the approval of the issue or sale or other transaction, together with the effect of such capitalization and earnings, would have a substantial adverse impact on the financial integrity of the registered holding company system;

(5) the Commission shall make its decision under paragraph (3) to approve or disapprove the issue or sale of a security or the guarantee of a security within 120 days of the filing of a declaration concerning such issue, sale or guarantee; and

(6) the Commission shall promulgate regulations with respect to the actions which would be considered, for purposes of this subsection, to have a substantial adverse impact on the financial integrity of the registered holding

company system; such regulations shall ensure that the action has no adverse impact on any utility subsidiary or its customers, or on the ability of State commissions to protect such subsidiary or customers, and shall take into account the amount and type of capital invested in exempt wholesale generators, the ratio of such capital to the total capital invested in utility operations, the availability of books and records, and the financial and operating experience of the registered holding company and the exempt wholesale generator; the Commission shall promulgate such regulations within 6 months after October 24, 1992; after such 6-month period the Commission shall not approve any actions under paragraph (3), (4) or (5) except in accordance with such issued regulations.

**(i) Application of chapter to other eligible facilities**

In the case of any person engaged directly and exclusively in the business of owning or operating (or both owning and operating) all or part of one or more eligible facilities, an advisory letter issued by the Commission staff under this chapter after October 24, 1992, or an order issued by the Commission under this chapter after October 24, 1992, shall not be required for the purpose, or have the effect, of exempting such person from treatment as an electric utility company under section 79b(a)(3) of this title or exempting such person from any provision of this chapter.

**(j) Ownership of exempt wholesale generators and qualifying facilities**

The ownership by a person of one or more exempt wholesale generators shall not result in such person being considered as being primarily engaged in the generation or sale of electric power within the meaning of sections 796(17)(C)(ii) and 796(18)(B)(ii) of title 16.

**(k) Protection against abusive affiliate transactions**

**(1) Prohibition**

After October 24, 1992, an electric utility company may not enter into a contract to purchase electric energy at wholesale from an exempt wholesale generator if the exempt wholesale generator is an affiliate or associate company of the electric utility company.

**(2) State authority to exempt from prohibition**

Notwithstanding paragraph (1), an electric utility company may enter into a contract to purchase electric energy at wholesale from an exempt wholesale generator that is an affiliate or associate company of the electric utility company—

(A) if every State commission having jurisdiction over the retail rates of such electric utility company makes each of the following specific determinations in advance of the electric utility company entering into such contract:

(i) A determination that such commission has sufficient regulatory authority, resources and access to books and records of the electric utility company and any relevant associate, affiliate or subsidiary

company to exercise its duties under this subparagraph.

(ii) A determination that the transaction—

(I) will benefit consumers,

(II) does not violate any State law (including where applicable, least cost planning),

(III) would not provide the exempt wholesale generator any unfair competitive advantage by virtue of its affiliation or association with the electric utility company, and

(IV) is in the public interest; or

(B) if such electric utility company is not subject to State commission retail rate regulation and the purchased electric energy:

(i) would not be resold to any affiliate or associate company, or

(ii) the purchased electric energy would be resold to an affiliate or associate company and every State commission having jurisdiction over the retail rates of such affiliate or associate company makes each of the determinations provided under subparagraph (A), including the determination concerning a State commission's duties.

**(l) Reciprocal arrangements prohibited**

Reciprocal arrangements among companies that are not affiliates or associate companies of each other that are entered into in order to avoid the provisions of this section are prohibited.

(Aug. 26, 1935, ch. 687, title I, § 32, as added Pub. L. 102-486, title VII, § 711, Oct. 24, 1992, 106 Stat. 2905.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (c)(B) and (e) to (i), was in the original "this Act" and was translated as reading "this title", meaning title I of act Aug. 26, 1935, ch. 687, known as the Public Utility Holding Company Act of 1935, to reflect the probable intent of Congress.

PRIOR PROVISIONS

A prior section 32 of act Aug. 26, 1935, ch. 687, was renumbered section 35 and is classified to section 79z-6 of this title.

STATE AUTHORITIES; CONSTRUCTION

Nothing in this section to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of this title.

**§ 79z-5b. Treatment of foreign utilities**

**(a) Exemptions for foreign utility companies**

**(1) In general**

A foreign utility company shall be exempt from all of the provisions of this chapter, except as otherwise provided under this section, and shall not, for any purpose under this chapter, be deemed to be a public utility company under section 79b(a)(5) of this title, notwithstanding that the foreign utility company may be a subsidiary company, an affiliate, or an associate company of a holding company or of a public utility company.