

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 365 and 366

(Docket No. RM05-32-000)

Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public
Utility Holding Company Act of 2005

(September 16, 2005)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Pursuant to Title XII, Subtitle F of the Energy Policy Act of 2005 (EPAct 2005), the Federal Energy Regulatory Commission (Commission) proposes to issue rules implementing the repeal of the Public Utility Holding Company Act of 1935, and the enactment of the Public Utility Holding Company Act of 2005, EPAct 2005. The Commission also proposes to remove its exempt wholesale generator rules, 18 CFR Part 365 (2005), as they are no longer necessary. The Commission seeks public comment on the rules proposed herein.

DATES: Comments are due **[insert date 21 days after publication in the FEDERAL REGISTER]**. Reply comments are due **[insert date seven days after comment date]**.

ADDRESSES: Comments and reply comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. Commenters unable to file comments electronically must send an original and 14 copies of their comments and reply comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888

First Street, N.E., Washington, DC, 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments and reply comments.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Repeal of the Public Utility Holding
Company Act of 1935 and Enactment of
the Public Utility Holding Company Act of
2005

Docket No. RM05-32-000

NOTICE OF PROPOSED RULEMAKING

(September 16, 2005)

Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005)¹ was signed into law. In relevant part, it repeals the Public Utility Holding Company Act of 1935 (PUHCA 1935)² and enacts the Public Utility Holding Company Act of 2005 (PUHCA 2005),³ which, with one exception not relevant here, will become effective six months from the date of enactment.⁴ Sections 1266, 1272, and 1275 of EPAct 2005 direct the Commission to issue certain rules and to provide detailed recommendations to Congress on technical and conforming amendments to federal law within four months after the date of enactment.⁵ In addition, EPAct 2005 directs the Commission to issue a final rule

¹ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

² 15 U.S.C. §§ 79a et seq. (2000).

³ EPAct 2005 at §§ 1261 et seq.

⁴ Id. at § 1274(a).

⁵ Id. at §§ 1266, 1272, 1275.

exempting certain entities from the federal access to books and records provisions of EPOA 2005 within 90 days of the effective date of Subtitle F.

2. The Commission proposes to add a new Subchapter U and Part 366 to Title 18 of the Code of Federal Regulations to implement Title XII, Subtitle F of EPOA 2005 and to remove Subchapter T and Part 365 of Title 18 of the Code of Federal Regulations, and intends to issue final rules (as well as to submit the required report to Congress) within four months.⁶ The Commission seeks comments on its proposals for the required rules discussed below.

3. Section 1264 of PUHCA 2005 concerns Commission access to the books and records of holding companies and other companies in holding company systems, and section 1275 of PUHCA 2005 concerns the Commission's authority to review and authorize the allocation of costs for non-power goods or administrative or management services. We note that the federal books and records access provision, section 1264, and the non-power goods and services provision, section 1275, of PUHCA 2005 supplement the Commission's existing ratemaking authority under the Federal Power Act (FPA) to

⁶ A related section of EPOA 2005, section 1289, involving, among other things, holding company acquisitions of securities, will be addressed in another rulemaking proceeding.

Moreover, we recognize that the repeal of PUHCA 1935 and section 318 of the FPA 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 Securities and Exchange Commission (SEC). If the Commission determines that it is necessary or appropriate to revise or supplement its current regulations under section 204 of the FPA (16 U.S.C. § 824c (2000)), 18 CFR Part 34 (2005), we will do so in a separate rulemaking proceeding.

protect customers against improper cross-subsidization or encumbrances of public utility assets⁷ and similarly our ratemaking authority under the Natural Gas Act (NGA).⁸ These provisions of PUHCA 2005 also supplement the Commission's broad authority under FPA section 301 and NGA section 8 to obtain the books and records of regulated companies and any person that controls or is controlled by such companies if relevant to jurisdictional activities.⁹ Further, with respect to the electric industry, the Congress has enhanced our already significant authorities over public utility mergers, acquisitions and dispositions of jurisdictional facilities.¹⁰ We believe that our existing FPA and NGA authorities, in combination with our enhanced authority over public utility mergers, acquisitions, and dispositions of jurisdictional facilities, and our new PUHCA 2005 authority, provide a sound framework to protect customers. To the extent that additional rulemakings or orders may be needed to protect customers adequately, the Commission will take appropriate actions in the future.

Definitions

4. The Commission proposes to largely incorporate in section 366.1 of its regulations the text of section 1262 of EAct 2005, which contains the definitions of relevant terms used in PUHCA 2005 and in our proposed regulations.

⁷ 16 U.S.C. §§ 824d-e (2000).

⁸ 15 U.S.C. §§ 717c-d (2000).

⁹ 16 U.S.C. § 825 (2000); 15 U.S.C. § 717g (2000).

¹⁰ EAct 2005 at § 1289.

Books and Records Requirements

5. Sections 1264(a) and (b) of EPAct 2005 generally provide that each holding company and each associate company of a holding company, as well as each affiliate of a holding company or any subsidiary company of a holding company, shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records (books and records) as the Commission determines are relevant to the costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of public utility or natural gas company customers with respect to jurisdictional rates. Moreover, section 1264(c) empowers the Commission to examine the books and records of any company in a holding company system, or any affiliate thereof, that the Commission determines are relevant to the costs incurred by a public utility or natural gas company within such holding company system and necessary or appropriate for the protection of public utility or natural gas company customers with respect to jurisdictional rates. Finally, section 1264(d) forbids any member, officer, or employee of the Commission from divulging any fact or information that has come to his or her knowledge during the course of the examination of such books and records, except as may be directed by the Commission or a court of competent jurisdiction.¹¹

¹¹ There are comparable confidentiality provisions in the FPA and the NGA for public utility books and records and natural gas company books and records. 16 U.S.C. § 825 (2000); 15 U.S.C. § 717g (2000).

6. The Commission proposes to incorporate largely without modification the text of section 1264 by adding section 366.2 to the Commission's regulations. Moreover, the Commission proposes to adopt certain accounting, cost-allocation, recordkeeping, and related rules promulgated by the SEC for holding companies and their service companies, as they existed on the date of enactment of EAct 2005, specifically 17 C.F.R. sections 250.1,¹² 250.26, 250.27, 250.80, 250.93, 250.94, 259.5S, and 259.313 and 17 C.F.R. Parts 256 and 257.¹³ The Commission seeks comments, however, as to whether there are provisions of these SEC rules that the Commission should not adopt and also whether the Commission should adopt any additional accounting, cost-allocation, recordkeeping and related rules to carry out its statutory duties under PUHCA 2005. The Commission also seeks comments concerning which SEC reporting requirements the Commission should retain, and which ones it should not. Finally, in proposing to adopt the above-specified SEC regulations, the Commission does not intend to broaden their applicability beyond the types of companies to which they now apply. Commenters may address whether this scope of applicability is appropriate and may propose any regulatory text needed to implement it.

¹² The Commission does not intend to reimpose the registration requirement contained in 17 CFR 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 EAct 2005.

¹³ These provisions, generally speaking, specify accounting, cost allocation, and recordkeeping requirements applicable to SEC-regulated holding companies and service companies.

Exemption Authority

7. Section 1266(a) of EAct 2005 directs the Commission to issue a final rule within 90 days after the effective date of Subtitle F exempting from the requirements of section 1264 of EAct 2005 any person that is a holding company, solely with respect to one or more:

- (1) qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§ 2601 *et seq.* (2000));
- (2) exempt wholesale generators; or
- (3) foreign utility companies.

8. Section 1266(b) further directs the Commission to exempt a person or transaction from the requirements of section 1264 if, upon application or sua sponte:

- (1) the Commission finds that the books and records of a person are not relevant to the jurisdictional rates of a public utility or natural gas company; or
- (2) the Commission finds that a class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company.

9. PUHCA 2005 requires the Commission to exempt any person that falls within the classes designated by section 1266(a) from the requirements of section 1264, and therefore, the Commission proposes to adopt such an exemption. At this time, the Commission does not propose to categorically exempt classes of entities or transactions described in section 1266(b) from the requirements of section 1264. Rather, we propose to rely on case-by-case applications for additional exemptions until we have gained

further experience subsequent to the repeal of PUHCA 1935. However, we seek comment on whether the Commission should exempt classes of transactions involving mutual fund passive investors or other groups of passive investors from the new federal books and records access requirements.

10. Finally, we note that, although a person that is a holding company solely with respect to exempt wholesale generators or qualifying facilities will be exempted from the federal access to books and records provisions in section 1264, many exempt wholesale generators and qualifying facilities may nevertheless be public utilities under section 201 of the FPA¹⁴ and remain subject to the Commission's authority with regard to their books and records under section 301 of the FPA, unless otherwise waived.¹⁵ An exemption from the requirements of section 1264 is not an exemption from FPA section 301, NGA section 8, or any other requirements of the FPA and the NGA.

Allocation of Costs of Non-Power Goods or Services

11. Section 1275(b) of EPAct 2005 provides that, in the case of non-power goods or administrative or management services provided by an associate company organized specifically for the purpose of providing such goods or services to any public utility in

¹⁴ 16 U.S.C. § 824(e) (2000).

¹⁵ Id. at § 825.

the same holding company system, at the election of certain holding company systems¹⁶ or a state commission having jurisdiction over the public utility, the Commission, after the effective date of PUHCA 2005, shall review and authorize an allocation of costs for such goods and services to the extent relevant to that associate company.

Section 1275(b) thus grants to certain holding company systems and state commissions a right to obtain Commission review and authorization of such cost allocations, and we propose to reflect this statutory provision in new section 366.4(b) of our regulations.

12. We note that, irrespective of the new section 1275(b) of PUHCA 2005, with the repeal of PUHCA 1935 and the elimination of SEC review of the allocation of costs for non-power goods and services, we have authority under sections 205 and 206 of the FPA and sections 4 and 5 of the NGA to review the rate recovery in jurisdictional rates of such associate and affiliated company non-power goods and services costs, either upon application under section 205 of the FPA or section 4 of the NGA or upon complaint or our own motion under section 206 of the FPA and section 5 of the NGA, and we also

¹⁶ Section 1275(b) provides that the Commission will exempt any company in a holding company system whose public utility operations are confined substantially to a single state. We interpret this to mean that holding company whose public utility operations are confined substantially to a single state may not, under this provision, elect to require the Commission to review and authorize an allocation of costs for non-power goods and services. This is discussed, *infra*, in paragraphs 15-17.

have the authority to review and or require the filing of cost allocation agreements with the Commission since they are contracts affecting jurisdictional rates.¹⁷

13. The Commission seeks comments as to whether, in light of the repeal of PUHCA 1935, holding companies that prior to the repeal of PUHCA 1935 were registered holding companies should be required to file such cost allocation agreements with the Commission under section 205 of the FPA and section 4 of the NGA.

14. In addition, we note that 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, but it does not do so where such non-power goods and services are provided to gas utility companies and natural gas companies. We invite comments as to 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).

15. Finally, we note that the SEC and state commissions previously have been primarily responsible for determining allocations of costs for non-power goods and

¹⁷ 16 U.S.C. §§ 824d-e (2000); accord 15 U.S.C. §§ 717c-d (2000); see generally EPCAct 2005 at § 1275(c) (stating that nothing in section 1275 affects the authority of the Commission under other applicable law). While the scope of our jurisdiction over wholesale sales of natural gas is more limited than our jurisdiction over wholesale sales of electric energy, and our rate review may differ in certain respects, such reviews could be undertaken under sections 4 or 5 of the NGA.

Separately, we note that we are in discussions with the SEC regarding the transfer of books and records pursuant to section 1273 of EPCAct 2005.

services among the various 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, and, for at least a decade, we have imposed this lower of cost or market standard as a condition for approval of mergers that result in the creation of a new registered holding company.¹⁸ We invite comments as to 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 we should instead adopt the SEC at cost standard.

Single-State Holding Company Systems and Other Classes of Transactions

16. Section 1275(d) of EAct 2005 directs the Commission to issue rules no later than four months after the date of enactment of EAct 2005 to exempt from the requirements of section 1275 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. We invite comments on how the Commission should define “confined substantially to a single state.”

¹⁸ See Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 FR 68595 (Dec. 18, 1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 at 30,124-25 (1996) (Merger Policy Statement), reconsideration denied, Order No. 592-A, 62 FR 33341 (June 19, 1997), 79 FERC ¶ 61,321 (1997).

17. While section 1275(d) states that single-state holding company systems are exempt from the “requirements” of section 1275, we note that section 1275 does not impose any requirements on holding company systems, but rather grants holding company systems and relevant state commissions the right to obtain Commission review and authorization of cost allocations. Instead, the only requirements in section 1275 are directed toward the Commission, in particular that “the Commission shall review and authorize” cost allocations if asked to do so by the holding company system or the relevant state commission. Based on the structure of section 1275, we believe that 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. Accordingly, we propose 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.¹⁹ The Commission invites comments on this interpretation of section 1275(d).

18. We believe that a similar interpretation applies with respect to the other classes of transactions that may be exempted pursuant to section 1275(d), namely, that an exemption under section 1275(d) forecloses Commission review under section 1275(b).

¹⁹ This interpretation pertains only to review and authorization of cost allocations for non-power goods and services under section 1275 of EPAAct 2005. As discussed earlier, we view the ability of the Commission to review rate recovery in jurisdictional rates under sections 205 and 206 of the FPA and sections 4 and 5 of the NGA as a separate matter.

In section 366.4(c) of the Commission's regulations, we propose 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 we determine are not relevant to the jurisdictional rates of a public utility.

19. The Commission seeks comments as to other classes of transactions that, pursuant to section 1275(d), should be exempted from the requirements of section 1275.

Previously Authorized Activities

20. Section 1271 of EAct 2005 states essentially that a person may continue to engage in activities or transactions authorized by rule or order as of the date of enactment of EAct 2005 if that person continues to comply with the terms of the authorization, and 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 any such activities are challenged in a formal Commission proceeding, the person claiming prior authorization shall be required to provide 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).

Exempt Wholesale Generators and Foreign Utility Companies

21. EAct 2005 repeals PUHCA 1935 in its entirety, including section 32, which requires the Commission to make exempt wholesale generator determinations on a case-by-case basis, upon application. Although the definitional section of PUHCA 2005 references section 32 of PUHCA 1935, the Congress nevertheless repealed section 32 in

its entirety and did not re-enact that provision in the new PUHCA 2005. The Commission believes that the most reasonable interpretation of EAct 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 exempt wholesale generator status in the future (i.e., after the effective date of PUHCA 2005). Rather, we believe that the most reasonable interpretation of the statute is that only those entities that are holding companies with respect to persons granted exempt wholesale generator status before the repeal of PUHCA 1935 will qualify for an exemption from the new federal books and records access requirements under proposed section 366.3(a)(2) of the Commission's regulations. Accordingly, we propose to remove Part 365 of the Commission's regulations, which set forth the filing requirements and ministerial procedures for persons seeking exempt wholesale generator status under section 32 of PUHCA 1935, and we invite comments on whether we should do so.

22. We note that the benefit of exempt wholesale generator status under PUHCA 1935 was that entities that the Commission determined to have met the definition of exempt wholesale generator were exempted from the myriad requirements of PUHCA 1935. The principal benefit of being an exempt wholesale generator under PUHCA 2005 is exemption from the new federal books and records access requirements. To the extent that these new federal books and records access requirements add to the Commission's existing very broad books and records access authority under FPA section 301 and NGA section 8, our interpretation serves to err on the side of greater customer protection.

23. In any event, as previously noted, entities that qualified as exempt wholesale generators under PUHCA 1935 were not exempted from the Commission's authority under the FPA if they met the FPA definition of "public utility," including the very broad access to books and records provisions of FPA section 301. Nor will they be exempt from these FPA provisions as a result of PUHCA 2005.

24. In addition, we note that Congress repealed section 33 of PUHCA 1935, which addresses foreign utility companies. As with exempt wholesale generators, we believe that Congress intended to limit the exemption for persons that are holding companies with respect to foreign utility companies to those attaining foreign utility company status before repeal of PUHCA 1935. The Commission seeks comments as to this interpretation of EAct 2005.

Cross-Subsidization and Encumbrances of Utility Assets

25. 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 EAct 2005 that the Commission review and determine certain non-power goods and services cost allocations among holding company members upon request. Nor does it give the Commission authority to pre-approve holding company activities.²⁰

Accordingly, outside the context of reviewing a holding company transaction requiring approval under section 203 of the FPA or a proposed issuance of securities under

²⁰ We note, however, that section 1289 of EAct 2005 amends section 203 of the FPA to grant the Commission expanded approval authority with respect to mergers and the acquisitions of securities by holding companies within certain holding company systems.

section 204 of the FPA, the Commission will continue to rely primarily on its ratemaking authorities under sections 205 and 206 of the FPA and sections 4 and 5 of the NGA to protect jurisdictional customers against inappropriate cross-subsidization or encumbrances of utility assets on an ongoing basis.

26. The Commission already has in place, pursuant to the FPA and NGA, certain reporting requirements regarding money pools and cash management activities that affect jurisdictional companies.²¹ Further, in the electric area, we have policies that protect against cross-subsidization occurring as a result of wholesale power sales between affiliates in a holding company system as well as sales of non-power goods and services between such affiliates.²² We seek comment on 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 our authorities under the FPA and NGA. Comments should specify what additional rules may be needed and the statutory basis for such rules. For example, if it has the authority to do so, should the Commission issue rules regarding public utility holding company diversification into non-utility businesses? Would the

²¹ Regulation of Cash Management Practices, Order No. 634, 68 FR 40500 (Jul. 8, 2003), III FERC Stats. & Regs. ¶ 31,145 (June 26, 2003), Order No. 634-A, 68 FR 61993 (Oct. 31, 2003), III FERC Stats. & Regs. ¶ 31,152 (2003).

²² See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124-25. See also Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at 62,062-65 (1994); LG&E Power Marketing Inc., 68 FERC ¶ 61,247 at 62,121-24 (1994).

Commission have authority to promulgate such rules under its FPA or NGA ratemaking authority? 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? We seek comment on these and any other related issues in order to determine whether, in addition to the regulations being proposed herein under PUHCA 2005, the Commission may need to consider promulgating separate, additional rules under the FPA or the NGA.

Additional Conforming or Technical Amendments

27. Section 1272 of EAct 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 invites comments as to what technical and conforming amendments the Commission should include in this submission to Congress.

Information Collection Statement

28. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.²³ However, the Commission is carrying out an express statutory mandate spelled out in EAct 2005. Moreover, insofar as the Commission is carrying over and applying requirements that the SEC previously has applied, we note that the proposed regulations do not impose any new or additional reporting burdens. On the contrary, to the extent that the

²³ 5 CFR 1320.11 (2005).

Commission's proposed regulations eliminate certain SEC regulations concerning accounting, cost-allocation, recordkeeping, and related rules, they reduce the information collection burden on regulated entities.

29. In particular, we are adopting the following information collections currently implemented by the SEC: Form U13-60 "Annual Report for the period by a reporting company"; Form U5S "Annual Report for Public Utility Holding Company"; Rule 26 "Financial Statement and Recordkeeping Requirements for registered holding companies and subsidiaries"; Part 257 "Preservation and Destruction of Records of Registered Public Utility Holding Companies and of Mutual and Subsidiary Service Companies".

30. The Commission also proposes to eliminate the requirements contained under its own regulations in 18 CFR Part 365. The corresponding information collection is FERC-598 "Determinations for Entities Seeking Wholesale Generator Status".

Action: Revision of currently approved collections of information

OMB Control Nos.: Currently the above information collections have the following control numbers- 3235-0153, 32353235-0164, 3235-0182, 3235-0183, 3235-0306 and 1902-0166.

Frequency of Responses: Several of the information collections having annual submissions while other information collections require that records be maintained.

Necessity of the Information: The proposed rule implements new accounting, cost allocation, recordkeeping, and related 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 EAct 2005.

31. 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: oir_submission@omb.eop.gov.)

Environmental Analysis

32. 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.²⁴ 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

²⁴ 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).

information gathering, analyses and dissemination, and involve accounting.²⁵ These proposed rules, if finalized, carry out EPCRA 2005 and involve information gathering and analysis, and involve accounting and therefore fall under this exception; consequently, no environmental consideration is necessary.

Regulatory Flexibility Act Certification

33. 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.²⁶ Most public utilities to which the rules proposed herein, if finalized, would apply do not fall within the RFA's definition of small entity.²⁷ Consequently, the rules proposed herein, if finalized, will not have "a significant economic impact on a substantial number of small entities."

²⁵ 18 CFR 380.4(a)(3), (5), (16) (2005).

²⁶ 5 U.S.C. § 603 (2000).

²⁷ 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 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 CFR 121.201 (2005).

Comment Procedures

34. The Commission invites interested persons to submit comments and reply comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[insert date 21 days after publication in the FEDERAL REGISTER]**. Reply comments are due **[insert date seven days after comment date]**. Comments and reply comments must refer to Docket No. RM05-32-000, and must include the commenter's name, the organization he or she represents, if applicable, and his or her address.

35. Comments and reply comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters who are not able to file comments and reply comments electronically must send an original and 14 copies of their comments and reply comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington, D.C. 20426.

36. All comments and reply comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

Document Availability

37. 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.

38. 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.

39. 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).

List of subjects in 18 C.F.R. Parts 3 and 365

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

By direction of the Commission.

Magalie R. Salas,
Secretary.

In consideration of the foregoing, under the authority of EPAAct 2005, the Commission proposes to amend 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, 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

§ 366.1 Definitions.

§ 366.2 Commission access to books and records.

§ 366.3 Exemption from Commission access to books and records.

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

§ 366.5 Previously authorized activities.

§ 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.

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.

Exempt wholesale generator and foreign utility company. The terms “exempt wholesale generator” and “foreign utility company” have the same meanings as in sections 32 and 33, respectively, of the Public Utility Holding Company Act of 1935 (15 U.S.C. §§ 79z-5a, 79z-5b (2000)), as those sections existed on August 7, 2005, the day before the effective date of the Energy Policy Act of 2005, August 8, 2005.

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.

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 within 12 months in the ordinary course of business as a broker, dealer, or underwriter with the bona fide intention of effecting distribution 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 or established 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.

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.

§ 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.

(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.

(e) Accounting, cost allocation, recordkeeping, and related rules. Each holding company and each associate company, affiliate, and subsidiary thereof is to maintain its books, accounts, memoranda, and other records in the manner specified in the accounting, cost-allocation, and related rules contained in 17 C.F.R. 250.1, 250.26, 250.27, 250.80, 250.93, 250.94, 259.5S, and 2.59.313 and 17 C.F.R. Parts 256 and 257.

§ 366.3 Exemption from Commission Access to Books and Records.

(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 of this chapter:

(1) Qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§ 2601 et seq. (2000));

(2) Exempt wholesale generators; or

(3) Foreign utility companies.

(b) Commission Authority to Exempt Additional Entities and Classes of Transactions. The Commission shall exempt a person or transaction from the requirements of § 366.2 of this chapter if, upon application 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.

(c) Any person seeking an exemption under this provision, shall file a petition for declaratory order pursuant to § 385.207(a) of this chapter justifying its request for exemption. Any person seeking such an exemption shall bear the burden of demonstrating that such an exemption is warranted.

§ 366.4 Allocation of Costs for Non-Power Goods and Services

(a) For purposes of this section, the term “public utility” has the meaning given the term in section 201(e) of the Federal Power Act (16 U.S.C. § 824(e) (2000)).

(b) 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 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.

(c) Exemptions. Any company in a single-state holding company system is exempt from paragraph (b) of this section. A holding company system or state commission may, pursuant to this subsection, seek a Commission determination regarding single-state holding company system status by filing a petition for declaratory order pursuant to Rule 207(a) of the Commission’s Rules of Practice and Procedure

(§ 385.207(a) of this chapter). Furthermore, any holding company system or state commission seeking such a determination shall bear the burden of demonstrating that such determination is warranted.

(d) 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 (b) 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) of this chapter). Furthermore, any holding company system or state commission seeking such an exemption shall bear the burden of demonstrating that such determination is warranted.

(e) Nothing in paragraphs (b)-(d) of this section shall affect the authority of the Commission under the Federal Power Act (16 U.S.C. §§ 791 et seq. (2000)), the Natural Gas Act (15 U.S.C. §§ 717 et seq. (2000)), or other applicable law, including the authority of the Commission with respect to rates, charges, classifications, rules, regulations, practices, contracts, facilities, and services.

§ 366.5 Previously Authorized Activities

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 2005 prior to the date of enactment of Energy Policy Act of 2005, August 8, 2005,

for the period of time provided in such authorization, 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 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).