

**UNITED STATES OF AMERICA
BEFORE THE
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
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Docket No. RM05-32-000

**Comments of the Electricity Consumers Resource Council (“ELCON”),
the American Iron and Steel Institute (“AISI”),
the American Chemistry Council (“ACC”)
and the Portland Cement Association (“PCA”)**

The Electricity Consumers Resource Council (ELCON), the American Iron and Steel Institute (“AISI”), the American Chemistry Council (“ACC”) and the Portland Cement Association (“PCA”) (collectively “Industrial Consumers”) appreciate the opportunity to submit comments in response to the Commission’s September 16, 2005, Notice of Proposed Rulemaking on proposed rules implementing the repeal of the Public Utility Holding Company Act of 1935 (“the 1935 Act”), and the enactment of the Public Utility Holding Company Act of 2005 (“PUHCA 2005”).

Industrial Consumers support the Commission’s efforts in this NOPR. The proposed rules appropriately incorporate the new statutory requirements and solicit comments that should assist the Commission in preparing recommendations to Congress on technical and conforming amendments to federal law, as directed by the Energy Policy Act of 2005 (“EPAAct 2005”).

I. Summary of the NOPR

PUHCA 2005 will place oversight of holding company systems within the Commission’s authority. It is primarily a “books and records access” statute and does not give FERC the

authority to pre-approve holding company activities, nor does it give the Commission any new substantive authority other than the requirement to review and determine certain non-power goods and services cost allocations among holding company members upon request.

A. Section 1264 Books and Records Authority

PUHCA 2005 supplements the Commission's existing broad authority 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.

Section 1264 generally provides that each holding company, affiliate, associated company and subsidiary shall make available to FERC those books and records that the Commission determines are relevant to the costs incurred by a public utility or natural gas company as necessary or appropriate for the protection of public utility or natural gas company customers with respect to jurisdictional rates. (§ 1264(a) and (b)). These provisions also empower the Commission to examine the books and records of any company in a holding company system, or any affiliate, that the Commission determines are relevant to the costs incurred by the utility within the holding company system as necessary or appropriate for the protection jurisdictional customers (§ 1264(c)).

B. Allocation of Costs of Non-Power Goods or Services

Under § 1275(b), holding company systems and state commissions may request that FERC authorize cost allocations 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. FERC notes that apart from this new grant of authority, it continues to exercise authority under FPA §§ 205 and

206 and NGA §§ 4 and 5 to review the rate recovery in jurisdictional rates of such associate and affiliated company non-power goods and services costs.

C. Exempt Wholesale Generators

Because the EAct 2005 repeals the 1935 Act in its entirety, including the section authorizing FERC to make EWG determinations, FERC proposes to eliminate 18 CFR Part 365 of its regulations, which set forth the procedures for EWG determination under the 1935 Act. Under PUHCA 2005, EWGs would be eligible to retain the benefit of exemption from the books and records access requirements, except to the extent that they are subject to Commission authority with respect to books and records under FPA § 301 or NGA § 8. FERC further indicates that only foreign utility companies which attained such status under the 1935 Act § 33 will be exempt from PUHCA 2005 books and records requirements.

D. Cross-Subsidization and Encumbrances of Utility Assets

FERC states that, with respect to the electric sector, policies are already in place that protect against cross-subsidization occurring as a result of wholesale power sales or sales of non-power goods and services between affiliates in a holding company system; however, the Commission seeks comment on the need to promulgate additional rules or to adopt additional policies to protect against inappropriate cross-subsidization or encumbrances of utility assets.

E. Reporting and Information Collection

FERC states that it does not intend to impose new or additional reporting burdens above and beyond what was required pursuant to SEC oversight, but does propose to retain certain reporting requirements.

II. Industrial Consumers Comments on the NOPR

A. Access To Books And Records

Industrial Consumers commend the Commission for its efforts and believe the proposed rules are appropriate particularly in view of the fact that the purpose of the access to books and records provision is to enable FERC to ensure that there is no improper cross-subsidization of non-utility operations or assets. The SEC has similarly remarked on the importance for regulators to have access to utility company books and records:

Utilities are also engaging to a greater extent in energy-related nonutility business and are competing in these diversified activities. The increasingly competitive atmosphere in utility and utility-related markets will likely result in functional reorganization of traditional utility operations, as companies seek to separate their various functions in order to compete more freely in the deregulated and unregulated segments of the industry, and centralization of support functions of the utility business to reduce costs. These developments have the potential to increase significantly the number of affiliate transactions in ... holding company systems and, correspondingly, to increase the opportunities for cross-subsidization and the need for rate regulators to have access to information on these transactions.

See SEC, *The Regulation of Public-Utility Holding Companies*, June 1995, at 106-107. *See also* Testimony of David K. Owens on behalf of the Edison Electric Institute before the Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce, Mar. 13, 2003, at 12 (“[Books and records] access . . . provides regulators with the ability to protect utilities and their consumers from improper cross-subsidization, including the use of utility debt to finance non-utility activities”).

As representatives of the interests of large industrial end users, Industrial Consumers applaud the Commission’s intent to prevent companies from engaging in abusive affiliate transactions that ultimately harm consumers. Industrial Consumers reiterate here what they have

stated elsewhere: few issues are as important to us as the assurance that rates for recovering the cost of public utilities are just and reasonable.

B. EWGs

PUHCA 2005 clearly specifies that EWGs are to be exempt from its provisions. Section 1262(6) adopts, through incorporation by reference, PUHCA 1935's definition of exempt wholesale generator. Section 1266(a)(2) then requires the Commission "to exempt from the requirements of section 1264 (relating to Federal access to books and records) any person that is a holding company, solely with respect to 1 or more . . . exempt wholesale generators." Nowhere does the statute state that entities classified as EWGs prior to the effective date of PUHCA 2005 are to be treated more favorably than entities that may be constructed or otherwise qualify as EWGs, after the effective date.

The Commission should follow the plain meaning of the statute and avoid disparate treatment of existing and new EWGs. Under the EPAct of 1992, industrials were permitted to seek EWG status and to sell power at wholesale. The Commission's proposal to cease making EWG determinations will result in disparate treatment of a new industrial facility that sells any portion of power at wholesale to a utility. An industrial that obtained EWG status prior to the repeal of the 1935 Act would be exempt from the books and records requirements, while the new entity, though similarly situated, would not.

Industrial Consumers recognize, and the Commission notes in the NOPR, that Section 301 of the FPA grants the Commission certain access to books and records of EWGs and other utilities. However, this also was the case under PUHCA 1935. In PUHCA 2005, Congress determined that EWGs should continue to be exempt so as not to subject them to duplicative and more expansive regulation.

Accordingly, the Commission should not arbitrarily abrogate the plain meaning of the statute. Part 365 of the regulations should be retained. The Commission should continue to grant EWG status to qualified applicants in the future, and as the statute specifies, EWGs are to be exempt from PUHCA 2005's books and records provisions.

C. Cost Allocation Methodology

The Commission seeks specific comments on whether allocations of costs for non-power goods and services among the various associate companies in registered holding company systems should continue to be made "at cost," as was the practice under SEC oversight, or at the lower of cost or market, as is the practice of the Commission. Industrial Consumers fully support continued use of FERC's practice of using the lower of cost or market to determine allocations of cost for non-power goods and services. This method is most consistent with the Commission's mandate to protect consumers.

III. Description of Commentor Groups

The Electricity Consumers Resource Council ("ELCON") is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. The member companies of ELCON consume approximately five percent of all electricity in the United States.

The American Iron and Steel Institute ("AISI") is the principal trade association of the North American steel industry. Its member companies account for about seventy percent of the new steel production in the United States. The steel industry is one of the most energy-intensive

sectors in the United States; the cost of electricity may constitute as much as twenty percent of the manufacturing cost of a steel mill product.

The American Chemistry Council (“ACC”) is a nonprofit trade association whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals in the United States. The manufacturing processes on many ACC member companies are highly energy-intensive. In addition, the chemical industry uses a substantial amount of self-generated electricity. Total electricity used by the industry (purchases plus self-generated) represents approximately eighteen percent of industrial electricity consumption in the United States and approximately six percent of national electricity consumption.

The Portland Cement Association (“PCA”) represents cement companies in the United States and Canada. Because of the high temperature required for cement manufacturing, the industry is energy-intensive. According to the Department of Energy, U.S. cement production accounts for 0.33 percent of energy consumption.

IV. Notices and Communications

Notices and communications with regard to these proceedings should be addressed to:

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Respectfully submitted,

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