

130 FERC ¶ 61,071  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Material Changes in Facts that Require  
Notifications Under Commission Regulations  
Under the Public Utility Holding Company  
Act of 2005

Docket No. PL09-2-001

ORDER DENYING REQUEST FOR CLARIFICATION

(Issued January 28, 2010)

**I. Background**

1. The Commission issued an order in this docket on November 20, 2008 in which it clarified certain filing requirements set forth in its regulations under the Public Utility Holding Company Act of 2005 (PUHCA 2005).<sup>1</sup> These regulations require persons that meet the definition of a holding company set forth at 18 C.F.R. § 366.1 (2009) to notify the Commission of their status as a holding company no later than 30 days after they become a holding company.<sup>2</sup> These regulations also provide exemptions from, or waivers of, requirements that apply to holding companies.<sup>3</sup> The companies that receive these exemptions or waivers are required to notify the Commission of any material change in facts that may affect the exemption or waiver within 30 days of the change.<sup>4</sup>

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<sup>1</sup> *Material Changes in Facts that Require Notifications Under Commission Regulations Under the Public Utility Holding Company Act of 2005*, 125 FERC ¶ 61,208 (2008) (November 20 Order); *see* 42 U.S.C. §§ 16451 *et seq.* (2006); 18 C.F.R. Part 366 (2009).

<sup>2</sup> 18 C.F.R. § 366.4(a)(1) (2009).

<sup>3</sup> *Id.* § 366.3.

<sup>4</sup> *Id.* § 366.4(d).

2. When notifying the Commission of the change, the company must also (i) submit a new request for an exemption or waiver, i.e., a FERC-65A, FERC-65B, or a petition for a declaratory order granting an exemption or waiver; (ii) file a written explanation why the material change in facts does not affect the exemption or waiver; or (iii) notify the Commission that it no longer seeks to maintain its exemption or waiver.<sup>5</sup>

3. The Commission's regulations require notification of only those material changes in facts that may affect an exemption or waiver, but they do not otherwise state when a notification is required. In the November 20 Order, the Commission clarified that if a holding company that has previously filed an exemption or waiver notification, i.e., a FERC-65A or FERC-65B, or that has received an exemption or waiver through a declaratory order, becomes a holding company with respect to an *additional* public-utility company or holding company of any public-utility company (i.e., obtains the power to vote 10 percent or greater of the voting securities of the *additional* company), that holding company should file with the Commission a notification of material change in facts that describes the additional public-utility company or holding company of any public-utility company and that otherwise complies with the requirements of section 366.4(d)(1) of the Commission's regulations by selecting one of the three possible courses of action described above. The Commission also stated that this filing should be made *whether or not* a change has occurred with respect to the basis on which the exemption or waiver was granted. The Commission explained that the FERC-65 filing requirements are intended, in part, to serve an informational purpose,<sup>6</sup> and the addition of a new subsidiary company that is a public-utility company or a holding company of a public-utility company represents a material fact that should be reported to the Commission.

## II. Request for Clarification

4. FPL Group, Inc. (FPL Group) filed a request for clarification of the November 20 Order. FPL Group states that it filed a waiver notification, FERC-65B, based on the fact that its public utility company operations were confined substantially to the State of Florida, and Florida Power & Light Company was the sole public-utility company owned by FPL Group that was not exempt from the provisions of Part 366 of the Commission's regulations. FPL Group explained in its FERC-65B that it also owned merchant generating companies that were electric utility companies under PUHCA 2005, but those entities were either qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 or exempt wholesale generators (EWGs) under PUHCA 2005. The Commission granted FPL Group's requested waiver as a single state holding company

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<sup>5</sup> *Id.* § 366.4(d); *see id.* §§ 366.3(d), 366.4(b)-(c).

<sup>6</sup> *Id.* § 366.4(a)(2).

because less than seven percent of FPL Group's revenues come from outside a single state.<sup>7</sup>

5. FPL Group notes in its request for clarification that the waiver it received is the waiver applicable to a single-state holding company system, which under the Commission's regulations is a holding company whose holding company system derives no more than 13 percent of its public-utility company revenues from outside a single state.<sup>8</sup> FPL Group also notes that revenues derived from the operations of QFs, EWGs or foreign utility companies under PUHCA 2005 (FUCOs) are not considered out-of-state revenues for these purposes.<sup>9</sup> FPL Group argues that because the revenues of any QFs, EWGs, and FUCOs it may have acquired since filing its initial FERC-65B are irrelevant to application of the 13 percent standard for single-state holding company systems, the acquisition of additional such entities would not represent "any material change in facts that may affect an exemption or waiver" that would require a filing.<sup>10</sup>

6. FPL Group maintains, however, that the November 20 Order is unclear whether the Commission intends to require an updated filing (1) for any additional public-utility company, including a QF, EWG, or FUCO, or (2) only where the revenues of an additional public-utility company would affect application of the 13 percent standard. FPL Group requests that the Commission clarify that the November 20 Order requires an updated filing only for the latter, i.e., only with regard to the creation or acquisition of a public-utility company "whose revenues are relevant to application of the 13 [percent] threshold."<sup>11</sup> It maintains that this clarification would be consistent with the general principle of requiring an updated filing only for a material change that may affect an exemption or waiver.

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<sup>7</sup> *FPL Group, Inc.*, 116 FERC ¶ 61,135 (2006), *reh'g denied*, 120 FERC ¶ 61,156 (2007). Under the Commission's regulations, a holding company system will be deemed to be a single-state holding company system if the holding company system derives no more than 13 percent of its public-utility company revenues from outside a single state. For purposes of this waiver, revenues derived from EWGs, foreign utility companies and QFs will not be considered public-utility company revenues. 18 C.F.R. § 366.3(c)(1) (2009).

<sup>8</sup> *See* 18 C.F.R. § 366.3(c)(1) (2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 366.4(d)(1).

<sup>11</sup> FPL Group Clarification Request at 2.

### III. Discussion

7. We deny FPL Group's request. We consider the November 20 Order to have spoken directly to the point that FPL Group raises. We intended, in the case of an acquisition of an additional public-utility company or an additional holding company of a public-utility company, that the acquisition of any such company would warrant a filing. Specifically, we stated in the November 20 Order:

If a holding company that has previously filed an exemption or waiver notification . . . or that has received an exemption or waiver through a declaratory order, becomes a holding company with respect to an *additional* public-utility company . . . (i.e., obtains the power to vote 10 percent or greater of the voting securities of an *additional* company), that holding company should file with the Commission a notification of material change in facts that describes the additional public-utility company . . . . This filing should be made *whether or not* a change has occurred with respect to the basis on which the exemption or waiver was granted.<sup>12</sup>

8. In short, the November 20 Order requires FPL Group to make a filing even when the FPL Group concludes that the change does not affect the basis on which FPL Group originally received its waiver, i.e., does not cause it to receive more than 13 percent of its public-utility company revenues from outside a single state. The Commission noted in the November 20 Order that “the FERC-65 filing requirements are intended, in part, to serve an informational purpose.”<sup>13</sup> The Commission concluded, in light of this fact, that “the addition of a new subsidiary company that is a public-utility company or holding company of a public-utility company represents a material fact that should be reported to the Commission.”<sup>14</sup> When dealing with a change in a material fact, the assessment of how it affects the waiver should be explained in the filing, but the need for the filing when a public-utility company or a holding company of a public-utility company is acquired does not depend on the conclusion of that assessment. Indeed, the Commission's regulations anticipate this approach, in that the options they present to the

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<sup>12</sup> November 20 Order, 125 FERC ¶ 61,208 at P 5 (emphasis in original).

<sup>13</sup> *Id.* (referencing 18 C.F.R. § 366.4(a)(2) (2009)).

<sup>14</sup> *Id.*

filing company include the option of providing “a written explanation [of] why the material change in facts does not affect the exemption or waiver. . . .”<sup>15</sup>

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>15</sup> 18 C.F.R. § 366.4(d)(ii) (2009).