

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 365 and 366

(Docket No. RM05-32-003, Order No. 667-C)

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

(Issued February 20, 2007)

AGENCY: Federal Energy Regulatory Commission

ACTION: Final Order; Order Denying Rehearing

SUMMARY: By this order, the Federal Energy Regulatory Commission denies
rehearing of Order No. 667-B. Order No. 667-B addressed requests for clarification and
rehearing of prior orders that implemented repeal of the Public Utility Holding Company
Act of 1935 and enactment of the Public Utility Holding Company Act of 2005.

EFFECTIVE DATE: This order is effective on **[insert date 30 days after date of
publication in the FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005 Docket No. RM05-32-003

ORDER NO. 667-C

ORDER DENYING REHEARING

(Issued February 20, 2007)

1. Subtitle F of Title XII of the Energy Policy Act of 2005 (EPAct 2005) repealed the Public Utility Holding Company Act of 1935 (PUHCA 1935) and enacted the Public Utility Holding Company Act of 2005 (PUHCA 2005).¹ In Order No. 667, the Federal Energy Regulatory Commission (Commission) issued regulations to implement Subtitle F.² In Order No. 667-A, the Commission denied rehearing in part and granted rehearing

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

² Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667, 70 FR 75592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005).

in part of Order No. 667.³ In Order No. 667-B, the Commission granted clarification in part, denied rehearing in part and granted rehearing in part of Order No. 667-A.⁴ In the present order, we deny rehearing of Order No. 667-B.

2. American Public Power Association together with National Rural Electric Cooperative Association (APPA/NRECA) and Florida Municipal Power Agency together with Seminole Electric Cooperative, Inc. (FMPA/Seminole) raise one issue on rehearing of Order No. 667-B: whether PUHCA 2005's accounting, record retention and reporting requirements should apply to a holding company system whose traditional utility operations are confined substantially to one state but that holds significant interests in out-of-state exempt wholesale generators (EWGs), foreign utility companies (FUCOs), and qualifying facilities (QFs). They assert that these requirements should apply because, they claim, regulators would not otherwise have access to relevant accounts and records and therefore would be unable to prevent inappropriate cross-subsidization or other misallocations of costs within the holding company system. We deny rehearing as discussed below.

³ Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667-A, 71 FR 28446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213 (2006).

⁴ Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667-B, 71 FR 42750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006).

Background

3. Under the Commission's regulations under PUHCA 2005, a "single-state holding company system" is eligible for waiver of the Commission's PUHCA 2005 accounting, record retention and reporting requirements.⁵ In Order No. 667-A, the Commission defined "single-state holding company system" as a system that derives no more than 13 percent of its "public-utility company" revenues from outside a single state.⁶ In Order No. 667-B, the Commission clarified that revenues from EWGs, FUCOs or QFs do not constitute public-utility company revenues for purposes of determining status as a single-state holding company system.⁷ As a result, a single-state holding company system as defined in Order Nos. 667-A and 667-B may hold interests in EWGs, FUCOs and QFs without, by virtue of those interests, being subject to the Commission's PUHCA 2005 accounting, record retention and reporting requirements.

4. The Commission reasoned that this approach follows the approach taken under section 3(a) of PUHCA 1935, which exempted a holding company from plenary oversight under PUHCA 1935 if the holding company's traditional utility operations were largely confined to one state.⁸ The exemption in section 3(a) reflected Congress'

⁵ 18 CFR 366.3(c)(1).

⁶ Order No. 667-A, FERC Stats. & Regs. ¶ 31,213 at P 28.

⁷ Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 at P 20.

⁸ 15 U.S.C. 79c(a); see 15 U.S.C. 79z-5a and 79z-5b.

assessment that other state and federal corporate and rate regulation was sufficient to protect against abuse in those circumstances. Further, the 13 percent standard adopted by the Commission in Order Nos. 667-A and B to determine who qualifies for the single state holding company waiver was the same standard applied by the SEC under PUHCA 1935, thus resulting in no more onerous regulatory requirements than those in place under PUHCA 1935. In Order No. 667-B, the Commission found that other state and federal regulation continues to be sufficient to protect against abuse, without subjecting a holding company system to the Commission's PUHCA 2005 accounting, record retention and reporting requirements due to the holding company system's ownership of out-of-state EWGs, FUCOs and QFs.⁹

Requests for Rehearing

5. APPA/NRECA and FMPA/Seminole envision a holding company system whose traditional utility operations are confined to one state but that has EWGs, FUCOs and QFs in multiple jurisdictions. They assert that, if such a holding company system is not subject to the Commission's PUHCA 2005 accounting, record retention and reporting requirements, regulators will have insufficient access to the holding company system's accounts and records and therefore will be unable to protect against misallocations of costs and other potential abuses within the holding company system.

⁹ Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 at P 20-22.

Decision

6. In adopting the SEC's 13 percent of revenue standard (and exclusion of EWGs, FUCOs and QFs from consideration in the 13 percent of revenue calculation) for purposes of determining who qualifies for the single state holding company waiver of the Commission's PUHCA 2005 accounting, record retention and reporting requirements, the Commission sought to be consistent with the general intent of Congress, in repealing PUHCA 1935, to remove unnecessary regulatory burdens and not to create new ones in PUHCA 2005. Furthermore, APPA/NRECA and FMPA/Seminole have presented no convincing argument that other state and federal regulation will be insufficient to protect against abuse in the circumstances envisioned by APPA/NRECA and FMPA/Seminole, without imposition of the Commission's PUHCA 2005 accounting, record retention and reporting requirements. The Commission will still have full access under the FPA to the accounts and records of the traditional public utility within the holding company system (i.e., the utility with captive customers and traditional regulated rates) and of the holding company and any other company controlled by the holding company, insofar as they relate to transactions with or the business of the public utility.¹⁰ From those accounts and records, the Commission will be able to discern whether the public utility is attempting to

¹⁰ 16 U.S.C. 824d-e, 825; Order No. 667, FERC Stats. & Regs. ¶ 31,197 at P 3-6; accord 15 U.S.C. 717c-d, 717g (identifying Commission authority with respect to natural gas companies).

recover, from its captive customers, costs that are properly attributable to other businesses within the holding company system.

7. Moreover, with respect to state regulatory authority access to books and records of holding companies and their associate and affiliate companies, nothing in our waivers affects section 1265 of PUHCA 2005, which expressly provides for such access.¹¹ We add that no state regulatory authority has suggested that it has insufficient authority in the circumstances envisioned.

8. For these reasons, we deny rehearing.

The Commission orders:

APPA/NRECA's and FMPA/Seminole's requests for rehearing are hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹¹ 42 U.S.C. 16453. The Federal Power Act, in particular section 201(g), 16 U.S.C. 824(g), also grants state regulatory authorities certain access to books and records.