

**Supporting Statement for****FERC-598 Self Certification for Entities Seeking  
Exempt Wholesale Generator Status or Foreign Utility Company Status  
(Three Year Extension Requested through February 29, 2012)**

The Federal Energy Regulatory Commission (Commission) requests the Office of Management and Budget (OMB) to review and extend its approval of FERC-598 "Self Certification for Entities Seeking Exempt Wholesale Generator or Foreign Utility Company Status" through February 29, 2012. FERC-598 is an existing data collection (OMB Control No. 1902-0166). Current OMB approval for FERC-598 expires February 28, 2009.

**A. JUSTIFICATION****1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY**

In 1992 Congress enacted the Energy Policy Act (EPAAct) of 1992.<sup>1</sup> The Act was designed to allow newcomers to enter the electric supply industry. Specifically, Section 711 of EPAAct amended the Public Utility Holding Company Act of 1935 (PUHCA) to create a category of power producers known as exempt wholesale generators (EWGs) which were exempt from PUHCA requirements. The Commission in response to provisions of EPAAct finalized rules to implement procedures for determining exempt wholesale generator status. Specifically, Title VII of the Act encouraged competitive wholesale generation of electricity by creating a new category of EWGs, free from the restrictions of PUHCA. The Commission considered an applicant to be a EWG, if it was an independent power producer, engaged directly, or indirectly through one or more affiliates as defined in PUHCA Section 2(a) (ii) (B), and exclusively in the business of owning and/or operating all or part of one or more eligible facilities, and selling electric energy at wholesale.

Under PUHCA Section 32, EWGs could construct, own, and operate generating facilities anywhere but may sell power only on a wholesale basis. Retail sales directly to domestic end-users were banned. However, EWGs located outside the U.S. were permitted to engage in retail sales.

The Commission in RM93-1-000 issued a final rule concerning the filing requirements of persons seeking EWG status. In order to obtain the EWG status, the Commission required the submission of an application for determination consistent with

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<sup>1</sup> Public Utility Regulatory Policies Act of 1978, Pub. L. 102-486, 100 Stat. 2776.

the requirements of Section 32(a). Under the rule, applicants for EWG status were required to file with the Commission and serve on the Securities and Exchange Commission and any affected State Commission:

- a sworn statement attesting to the applicant's eligibility for EWG status;
- a brief description of the proposed eligible facility or facilities owned and/or operated by the applicant, including information on related interconnection components, lease arrangements, and any electric utility affiliate or associate of the applicant; and
- any necessary state commission determinations required under PUHCA sections 32(c) and (d).

On December 8, 2005, the Commission issued Order No. 667, a final rule “Repealing the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005”<sup>2</sup> which implemented Title XII, Subtitle F of the Energy Policy Act of 2005.<sup>3</sup> Subtitle F repealed the Public Utility Holding Company Act of 1935, as amended (PUHCA 1935),<sup>4</sup> and enacted PUHCA 2005 as of February 8, 2006. Prior to the repeal of PUHCA 1935, the Securities and Exchange Commission (SEC) was responsible for determining whether an entity qualified for FUCO status. With the repeal of PUHCA 1935, that responsibility now rests with the Commission. Order No. 667 set forth the procedural requirements for entities seeking FUCO (as well as exempt wholesale generator (EWG)) status.

Under EAct 2005, FUCOs are companies that own and operate facilities used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas outside of the United States. FUCOs derive no part of their income, directly or indirectly, from the United States energy markets.<sup>5</sup> The

EAct 2005 definitions for EWG and FUCO are identical to those set forth in PUHCA 1935. EAct 2005 requires that these terms “have the same meanings as in section 32, 33, [of PUHCA 1935], as those sections existed on the day before the effective date of

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2 70 Fed. Reg. 75,592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005).

3 Pub. L. No. 109-58, 119 Stat. 594 (2005) (EAct 2005).

4 15 U.S.C. §§ 79a *et seq.* (2000) (PUHCA 1935).

5 See EAct 2005 § 1262(6) (citing PUHCA 1935 § 33). EWGs are companies engaged directly, or indirectly through one or more affiliates, and exclusively in the business of owning and/or operating all or part of one or more “eligible facilities” and selling electric energy at wholesale. See *id.* (citing PUHCA 1935 § 32).

**2. HOW, BY WHOM, AND FOR WHAT PURPOSE IS THE INFORMATION TO BE USED AND THE CONSEQUENCES OF NOT COLLECTING THE INFORMATION**

As noted above, Order No. 667 replaced the Commission’s existing EWG regulations with new procedures for filing notices of self-certification of EWG or FUCO status and for requests for Commission determinations of EWG or FUCO status.<sup>7</sup> Such EWG or FUCO status is important because, in Order No. 667, the Commission granted exemptions from the regulatory accounting, record-retention, reporting and “books and records” access requirements for companies that are “holding companies” solely with respect to owning one or more EWG or FUCO.<sup>8</sup>

As set forth in Order No. 667:

An exempt wholesale generator or a foreign utility company, or their representative, may file with the Commission a notice of self-certification demonstrating that it satisfies the definition of exempt wholesale generator or foreign utility company. . . . Notices of self-certification will be published in the Federal Register. Persons that file such notices must include a form of notice suitable for publication in the Federal Register in accordance with the specifications in

§385.203(d). A person filing a notice of self-certification in good faith will be deemed to have temporary exempt wholesale generator or foreign utility company status. If the Commission takes no action within 60 days from the date of filing of the notice of self-certification, the self-certification shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information, or for further consideration of the request; in such cases, the person’s exempt wholesale generator or foreign utility company status will remain temporary until such time as the Commission has determined whether to grant or deny exempt

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<sup>6</sup> *Id.*

<sup>7</sup> See Order No. 667 at P 225-28 and 18 C.F.R. § 366.7(a).

<sup>8</sup> See *id.* at 18 C.F.R. § 366.3(a)(2) and (3).

wholesale generator or foreign utility company status. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee, and authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.<sup>9</sup>

Order No. 667 did not, however, adopt a form or specific set of requirements that entities must include in their notices of self-certification. The Commission stated generally in Order No. 667 that “[w]e believe that such a self-certification of EWG and FUCO status will be adequate in the vast majority of cases.”<sup>10</sup>

Order No. 667 also established an optional procedure for Commission determination of EWG or FUCO status “[f]or entities that require a higher degree of legal certainty as to their status.”<sup>11</sup>

A person may file for a Commission determination of exempt wholesale generator status or foreign utility company status under § 366.1 by filing a petition for declaratory order pursuant to Rule 207(a) of the Commission's Rules of Practice and Procedure (§ 385.207(a)), justifying its request for exemption. Persons that file petitions must include a form

of notice suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d). Authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.<sup>12</sup>

Order No. 667 also provides partial guidance on the revocation of previously-granted EWG or FUCO status:

(1) If an exempt wholesale generating facility or a foreign utility company fails to conform with any material facts or representations presented by the applicant in its submittals to the Commission, the notice of self-certification of the status of the facility or Commission order certifying the status of the facility may no longer be relied upon.

(2) The Commission may, on its own motion or on the application of any person, revoke the status of a facility or

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<sup>9</sup> *Id.* at 18 C.F.R. § 366.7(a).

<sup>10</sup> *Id.* at P 226.

<sup>11</sup> *Id.* at P 227.

<sup>12</sup> *Id.* at 18 C.F.R. § 366.7(b).

company, if the facility or company fails to conform to any of the Commission's criteria under this part.<sup>13</sup>

As described above, the Commission assumed responsibility for determining whether an entity qualified for FUCO status. The Self-Certification process for FUCOs under PUHCA 1935 as administered by the Securities and Exchange Commission was the following:

PUHCA 1935 defined a FUCO as any company that:

(A) owns or operates facilities that are not located in any State and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, if such company—

(i) derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, within the United States; and

(ii) neither the company nor any of its subsidiary companies is a public utility company operating in the United States; and

(B) provides notice to the [SEC], in such form as the [SEC] may prescribe, that such company is a foreign utility company.<sup>14</sup>

Under the SEC's regulations, a company obtained FUCO status by the completion and filing of SEC Form U-57.<sup>15</sup> Upon the filing of such notification, a company that met the criteria of section 33(a) (3) (A) was deemed a FUCO.<sup>16</sup>

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<sup>13</sup> *Id.* at 18 C.F.R. § 366.7(c).

<sup>14</sup> PUHCA 1935 at § 33(a)(3).

<sup>15</sup> 17 C.F.R. § 250.57 (2005); *see also id.* at § 259.207 (implementing SEC Form U-57).

<sup>16</sup> *Id.* at § 250.57(a).



appropriate, for example, if a company obtained foreign utility company status prior to submitting a bid which proved unsuccessful.”<sup>18</sup>

The SEC’s regulations required that a copy of the SEC Form U-57 be filed with the state or federal commission having jurisdiction over the retail rates of any domestic associate public-utility company.<sup>19</sup>

The only substantive requirement the Commission imposes on FUCOs is stated in 18 C.F.R. § 366.7(a), where the applicant must “demonstrat[e] that it satisfies the definition” of a FUCO. Accordingly, the self-certification must include a statement that the company claiming FUCO status meets the statutory criteria, that is:

- The company owns or operates facilities that are not located in any State;
- Such facilities are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light or power;
- The company derives no income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, within the United States; and
- Neither the company nor any of its subsidiary companies is a “public utility company” operating in the United States, *i.e.*, is not an electric utility company or gas utility company.

In addition, Order No. 667 requires that, in order to qualify for the FUCO exemption under PUHCA 2005, the state commission(s) having jurisdiction over the retail rates of a public utility that is an associate company or affiliate of the entity seeking FUCO status must certify that it has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise that authority.<sup>20</sup> The Commission expects applicants to file with the Commission a copy(ies) of the state certification(s) as part of the FUCO self-certification.

In addition, under the Commission’s general filing regulations,<sup>21</sup> the Commission would expect the applicant to provide basic information for an initial pleading, including:

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18 Adoption of Rules, Forms and Form Amendments Relating to Exempt Wholesale Generators and Foreign Utility Companies, SEC Release No. 35-25886, 1993 SEC LEXIS 2444 at \*78 (Sept. 23, 1993).

19 See SEC Form U-57 at Instruction 2(a).

20 Order No. 667 at P 27 (referencing PUHCA 1935 at § 33(a)(2)).

21 Under Rule 204 of the Commission’s Rules of Practice and Procedure, any person seeking a certification must file an “application” to obtain that authorization or permission. 18 C.F.R. § 385.204 (2005).

- The name and business address(es) of applicant and the entity(ies) claiming FUCO status (if different from the applicant);
- The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

The information submitted to the Commission is a written application for  
determination

of status as an EWG or FUCO. Accordingly the information provided in the self-certifications may vary. The Commission reviews the applications to determine whether the applicant meets the statutory requirements for EWG or FUCO status and for consistency with PUHCA 2005. The Commission limits its consideration to the purpose of determining the adequacy of the factual representations made to satisfy the statutory criteria.

**3. DESCRIBE ANY CONSIDERATIONS OF THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN AND TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN**

On November 15, 2007, the Commission issued a Final Rule, RM07-16-000, Order No. 703, "Filing via the Internet" 73 Fed. Reg. 65659 (November 23, 2007) revising its regulations for implementing the next version of its system for filing documents via the Internet, eFiling 7.0. This Final Rule allows the option of filing all documents in Commission proceedings through the eFiling interface except for specified exceptions, and of utilizing online forms to allow "documentless" interventions in all filings.

With the advent of eFiling 7.0, the Commission has expanded its ability to receive electronic filings through its eFiling and eLibrary systems and now includes these self-certification filings. As part of the self-certification filing, forms of notice suitable for publication in the Federal Register are submitted on a 3 1/2 diskette. EWG and FUCO applications may be submitted electronically with the Commission.

**4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSES DESCRIBED IN INSTRUCTION NO. 2**

The Commission's staff has determined that there is no duplication of information. The information submitted with each filing is specific to each application for



determination of EWG or FUCO status. As described above, the Commission assumed responsibility from the SEC for filings for self-certification for FUCOs. In its adoption of SEC forms, the Commission tried to streamline where possible many of the reporting requirements and eliminate any duplication with information collected in the Commission's existing information collections. All of the Commission's collections of information are subject to analysis including the potential for duplication by staff from the Commission's Office of Deputy Chief Information Officer. This office, established under the Office of the Executive Director and Chief Information Officer of the Commission, is a separate entity whose function is to administer the provisions of 44 U.S.C. Title 35.

**5. METHOD USED TO MINIMIZE BURDEN IN COLLECTIONS OF INFORMATION INVOLVING SMALL ENTITIES**

The minimization of impact on small businesses is not applicable. The burden will vary between respondents, even though the application is specific and uniform for all respondents. The information collected is unique to the applicant and therefore, there is neither a set format nor form.

**6. CONSEQUENCE TO FEDERAL PROGRAM IF INFORMATION WERE COLLECTED LESS FREQUENTLY**

If the Commission did not collect this information, it would not be carrying out its responsibilities as specified by the statutory provisions of PUHCA 2005 and be able to review pertinent information as to why an applicant should be exempt from the provisions of PUHCA 2005.

The Commission's requirements for submission are the minimum that can be imposed on an applicant. The applicants only need to file once in order to obtain the benefits of EWG and FUCO status.

**7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO INFORMATION COLLECTION**

The requirements meet all of OMB's section 1320.5 requirements. However, if an applicant decides to not file electronically, they would have to submit an original and fourteen copies which would exceed the requirements in section 1320.5(d). This is the applicant's option and the Commission encourages applicants to submit their filings electronically. The distribution of multiple hard copies of a filing has been essential so that the required technical reviews and analyses can proceed simultaneously and efficiently.

**8. DESCRIBE EFFORTS TO CONSULT OUTSIDE OF THE AGENCY, SUMMARIZE PUBLIC COMMENTS AND THE AGENCY'S RESPONSE TO THESE COMMENTS**

In general, all Commission data collections are established in accordance with Commission rules and/or regulations that have been adopted by the Commission in rulemaking proceedings. Notice of such proposed rules and related data collections is published in the Federal Register, thereby allowing all applicants, state commissions, federal agencies, and other interested parties an opportunity to submit pertinent comments, or other suggestions concerning the application. There is no information collected from state or local governments.

In accordance with OMB requirements in 5 CFR 1320.8(d), the Commission published a notice in the Federal Register requesting comments on the need for this collection of information (73 FR 70339, November 20, 2008). The Commission did not receive any comments in response to this notice on this collection of information.

**9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS**

Not applicable. The Commission does not provide compensation or remuneration to applicants who apply to the Commission for EWG or FUCO status.

**10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS**

All data collections are considered to be public information, and therefore not confidential. However, an applicant may request, under the Commission's regulations at 18 CFR 388.112, confidential treatment of some or all of the FERC-598 filing. Each request will be reviewed on a case-by-case basis.

**11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE THAT ARE CONSIDERED PRIVATE**

The Commission neither requests nor requires information of a sensitive nature. This includes questions concerning sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

**12. ESTIMATED BURDEN OF COLLECTION OF INFORMATION**

Based on the survey of completed applications, the Commission estimates that the reporting burden associated with this collection of information is as follows:

Estimated number of respondents	199
Estimated number of responses	1
Estimated annual number of responses	199
Estimated number hours per response	6
Total estimated annual burden	1,194 hours

**13. ESTIMATE OF TOTAL ANNUAL COSTS (BURDEN TO RESPONDENTS)**

Cost to the respondents for FERC-598 is \$72,549 (Total respondent burden for filing resources or 672 hours/yr. divided by person year 2080 hr/yr. x average salary year of \$126, 384 (includes salary and benefits)). The average cost per applicant is \$365.

**14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT**

The cost to the Federal Government is estimated to be as follows:

<u>Operation:</u>	
Forms review and clearance	\$ 1,830
Analysis of Data (.75 FTE at \$126,384)	<u>\$ 94,788</u>
Total cost in one year of operation	\$ 96,618

**15. REASONS FOR CHANGE IN BURDEN INCLUDING THE NEED FOR ANY INCREASE**

FERC issued Final Rule RM05-32-000 in response to enactment of the Energy Policy Act of 2005. The regulations fulfilled FERC’s responsibilities to implement rules implementing the repeal of the Public Utility Holding Company Act of 1935 and the enactment of Public Utility Holding Company Act of 2005, EPAct 2005. FERC removed its existing exempt wholesale generator rules, 18 C.F.R. Part 365 as they were no longer necessary. In response to comments that FERC received, it decided that in interpreting PUHCA 2005, FERC can permit new wholesale sellers to obtain Exempt Wholesale Generator status (EWG). Therefore, FERC allowed EWGs and now FUCOs (foreign utility companies) to use self certification for their exemption. The Commission estimated that 27 EWGs would file under the new self certification procedures. That number has increased to 122 EWGs who have filed for self certification. The remainder of the 199 entities or 77 entities are FUCOs. The Commission has experienced an

increase of 95 entities over its original estimate who are responding to changes to the Commission's regulations and are now using the self certification process for EWGs and 77 entities who are now subject to the Commission's regulations due to the passage of Energy Policy Act 2005, specifically PUHCA 2005.

#### **16. TIME SCHEDULE FOR PUBLICATION OF DATA**

There are no tabulating, statistical or tabulating analysis or publication plans for the collection of information. As noted above, copies of the filing are published in the Federal Register. The data are used for regulatory purposes only.

#### **17. DISPLAY OF AN EXPIRATION DATE**

It is not appropriate to display the expiration date for OMB approval of the information collection pursuant to Title XII, Subtitle F of the Energy Policy Act of 2005. As described above, Order No. 667 did not establish a form mandating the format and/or types of information that must be provided as part of the self-certification. Therefore, the information is not collected on a standard, printed form which would avail itself to this display. Rather, applicants prepare and submit applications that reflect the specific circumstances related to their facilities. However, because notices of these filings will be published in the Federal Register, both EWGs and FUCOs must include in their submission a form of notice suitable for publication in the Federal Register.

#### **18. EXCEPTIONS TO THE CERTIFICATION STATEMENT**

There is an exception to the Paperwork Reduction Act Submission Certification. Because the data collected for this reporting requirement is not used for statistical purposes, the Commission does not use as stated in item 19(i) "effective and efficient statistical survey methodology." The information collected is case specific to each respondent. And as noted in item no. 17 above, the expiration date is not displayed because the applications are not contained on a standard printed form. However, the OMB control number is cited in the Commission's regulations.

#### **B. Collections of Information Employing Statistical Methods.**

This is not a collection of information employing statistical methods.