

Docket No. RM93-1-000

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 CFR Part 365]

Filing Requirements and Ministerial Procedures
for Persons Seeking Exempt Wholesale Generator Status

(Docket No. RM93-1-000)

(November 10, 1992)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing regulations implementing section 32 of the Public Utility Holding Company Act of 1935, as added by section 711 of the Energy Policy Act of 1992. The proposed regulations would establish the filing requirements and ministerial procedures for persons seeking exempt wholesale generator status.

DATES: An original and 14 copies of written comments on the proposed rule must be filed with the Commission by [insert date 30 days after date of publication in the Federal Register]. All comments should reference Docket No. RM93-1-000.

ADDRESS: Comments should be addressed to:

Office of the Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

FOR FURTHER INFORMATION CONTACT:

James H. Douglass
Office of the General Counsel
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426
Telephone: (202) 208-2143

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Filing Requirements and) Docket No. RM93-1-000
Ministerial Procedures for)
Persons Seeking Exempt)
Wholesale Generator Status)

NOTICE OF PROPOSED RULEMAKING

(November 10, 1992)

I. INTRODUCTION

The Federal Energy Regulatory Commission (Commission) is issuing a Notice of Proposed Rulemaking (NOPR) seeking comment on proposed regulations implementing section 32 of the Public Utility Holding Company Act of 1935 (PUHCA), as added by section 711 of the Energy Policy Act of 1992 (Energy Act). 1/ The proposed rule pertains to the filing requirements and ministerial procedures for persons seeking exempt wholesale generator (EWG) status.

Section 32(a) of PUHCA defines an EWG, and provides that in order to qualify as an EWG, an applicant must file for a determination by the Commission. The Commission is required to render its determination of whether a person is an EWG within 60 days of the receipt of an application.

An EWG is a person determined by the Commission to be engaged directly, or indirectly through one or more affiliates, and exclusively in the business of owning and/or operating all or

1/ Pub. L. No. 102-486, 106 Stat. 2776 (1992). PUHCA section 32 permits an electric utility company or public utility holding company to indirectly own and/or operate electric generating facilities that are not integrated with their utility systems.

part of eligible facilities, as defined in PUHCA section 32, and selling electric energy at wholesale. An EWG may sell power it generates, as well as power generated by others. 2/ An eligible facility may include transmission facilities used for interconnection purposes to effect wholesale power sales. If any retail rate associated with a facility was in effect at the time of enactment of the Energy Act, 3/ each State commission having retail rate jurisdiction must authorize the facility to be an eligible facility. Certain hybrid facilities, as defined in PUHCA section 32, may become eligible facilities pursuant to approval of affected State commissions.

Section 32(a) provides that an applicant that has applied in good faith for a determination of EWG status is deemed an EWG until the Commission makes such determination.

The Commission is required to notify the Securities and Exchange Commission (SEC) whenever it determines that a person is an EWG.

The Commission is required to promulgate rules implementing the procedure for determining EWG status within one year of the date of enactment of the Energy Act.

The Commission invites interested parties to comment on the matters raised in the proposed rule.

2/ The Joint Explanatory Statement of the Committee of Conference provides: "The definition of an EWG has been drafted to permit an EWG to sell wholesale power that it has not generated itself." H.R. Conf. Rep. No. 1018, 102nd Cong., 2d. Sess. 388 (1992).

3/ The Energy Act was enacted on October 24, 1992.

II. PUBLIC REPORTING BURDEN

The proposed rule, if adopted, would require persons seeking a determination of EWG status to file for a determination by the Commission. Applicants would be required to file with the Commission: (1) a sworn statement attesting to any facts presented to demonstrate eligibility for EWG status, and attesting to any representation otherwise offered to demonstrate eligibility for EWG status; (2) a brief description of the facility or facilities which are or will be eligible facilities; and (3) any necessary State commission orders.

The Commission is submitting the proposed reporting requirements to the Office of Management and Budget (OMB) and requesting that one hour be placed on the OMB inventory of information collections. Because of the recent enactment of the Energy Act and the undetermined number of persons who may seek EWG status, the Commission is unable to provide estimates of either the number of persons affected or the amount of time required to comply with the proposed rule.

III. DISCUSSION

The Energy Act amends PUHCA to create a category of power producers known as exempt wholesale generators (EWGs). Persons seeking to become an EWG must file an application with the Commission. Persons that are granted EWG status will not be considered electric utility companies under section 2(a)(3) of PUHCA, and will be exempt from regulation under PUHCA. 4/ The

4/ PUHCA Section 32(e).

proposed rule would establish the filing requirements and ministerial procedures for persons seeking EWG status.

The proposed rule would create a new Subchapter T, Part 365 under Title 18, Chapter I of the Code of Federal Regulations.

The terms used in the proposed rule would have the same meaning as they have under PUHCA, as amended by the Energy Act, except that the term "Commission" would refer to the Federal Energy Regulatory Commission.

The Commission requests comments in this rulemaking concerning whether to create a separate fee category for applications for EWG status. Until the Commission issues a final rule in this proceeding, the Commission will not require applicants seeking a determination of EWG status to pay a filing fee.

Pursuant to a Notice of Proposed Rulemaking issued in Docket No. RM92-17-000 on October 15, 1992, the Commission has requested public comment concerning the broader issue of annual charges and filing fees. Elimination of Certain Filing Fees in Parts 346 and 381, 57 Fed. Reg, 48,005 (Oct. 21, 1992), IV FERC Stats & Regs # 32,488 (1992). EWGs that become public utilities will be charged annual charges under Part 382 of the existing regulations, and thus the cost of administering section 32 for public-utility EWGs will be recovered. Therefore, the Commission's preliminary view is that a separate filing fee category should be created applicable only to EWGs that will not, upon the sale of electric energy at wholesale, become public utilities as defined in

section 201(e) of the Federal Power Act, 16 U.S.C. 824(e), i.e. non-public utility EWGs. Such a filing fee structure would be similar to that presently applicable to requests for certification of qualifying status for cogeneration facilities and small power production facilities. See 18 CFR 381.505. Comments received in this rulemaking concerning whether EWG applicants should be charged a filing fee and, if so, the specifics of such fee, will be placed in the record in Docket No. RM92-17-000.

Under the proposed rule, applicants would file sworn statements with the Commission. The Commission would review the applications and determine whether the sworn statements contain sufficient information to establish that the applicant meets the statutory requirements for EWG status. The proposed rule would require a person seeking EWG status (applicant) to file: (1) a sworn statement attesting to any facts presented to demonstrate eligibility for EWG status, and attesting to any representation otherwise offered to demonstrate eligibility for EWG status; (2) a brief description of the facility or facilities which are or will be eligible facilities ^{5/} owned and/or operated by the applicant and related transmission interconnection components, any lease arrangements involving the facility and any public utility companies, and any electric utility company that is an affiliate company or associate company of the applicant; and (3)

5/ Pursuant to PUHCA section 32 an eligible facility may include a portion of a facility.

any necessary specific State commission determinations required under PUHCA sections 32(c) and (d). 6/

As of November 6, 1992, the Commission has received three applications for EWG status. See Commonwealth Atlantic Limited Partnership, Docket No. EG93-1-000; Doswell Limited Partnership, Docket No. EG93-2-000; Hartwell Energy Limited Partnership, Docket No. EG93-3-000. While the Secretary has noticed these filings, see 18 C.F.R. # 2.1 (1992), there is no requirement in the Energy Act that the Commission do so. Further, the Commission intends to limit its consideration of any submissions that might be made in response to such notices to the limited purpose of determining the adequacy of the factual representations made to satisfy the statutory criteria. Given the narrow focus of the Commission's inquiry under section 32, it would not be appropriate to allow persons to raise issues that fall outside the purview of the statutorily-fixed determination, e.g., by objecting to the financeability of a facility or to the environmental consequences of its being built or operated. (Cf. Sugarloaf Citizens Association v. FERC, 959 F.2d 508 (4th Cir. 1992).) Accordingly, the Commission requests comments concerning whether EWG applications should be noticed and if so, what purpose such notice would serve under the ministerial responsibilities of the Commission established in section 32(a)(1) of PUHCA as created by section 711 of the Energy Act.

6/ See PUHCA Sections 32(c) and 32(d)(2).

The proposed rule specifies that the Commission must act within 60 days of receipt of an application. Applications that do not meet the requirements of the proposed rule set forth in proposed section 365.3 will be rejected. Under the proposed rule, if the Commission does not act within 60 days, the application is deemed to have been granted.

Section 711 of the Energy Act amends PUHCA, not the Federal Power Act. Since there are no rehearing requirements in PUHCA, Commission action under proposed section 365.5 will be final action and will not be subject to rehearing.

The rule requires the Secretary of the Commission to notify the SEC whenever an application for EWG status is granted.

IV. REGULATORY FLEXIBILITY CERTIFICATION STATEMENT

The Regulatory Flexibility Act 7/ requires rulemakings to either contain a description and analysis of the impact the rule will have on small entities or to certify that the rule will not have a significant economic impact on a substantial number of small entities. The proposed rule codifies the filing requirements contained in section 32 of PUHCA. The filing requirements are minimal and will not have a significant economic impact on small entities. Moreover, persons that qualify for EWG status will enjoy the substantial benefit of being exempt from regulation under PUHCA. Consequently, the Commission certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

7/ 5 U.S.C. 601-612.

V. ENVIRONMENTAL STATEMENT

Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment. 8/ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. 9/ No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural or that does not substantially change the effect of legislation or regulations being amended. 10/ The proposed rule does not substantially change the effect of the underlying legislation. Accordingly, no environmental consideration is necessary.

VI. INFORMATION COLLECTION STATEMENT

The Office of Management and Budget's (OMB) regulations 11/ require that OMB approve certain information collection requirements imposed by an agency. The information collection requirements in this proposed rule would require certain information from persons seeking EWG status.

8/ Regulations Implementing National Environmental Policy Act, 52 Fed. Reg. 47,897 (Dec. 17, 1987), FERC Stats. and Regs. # 30,783 (1987).

9/ 18 CFR 380.4.

10/ 18 CFR 380.4(a)(2)(ii).

11/ 5 CFR 1320.12, as authorized by P.L. 96-511, 44 U.S.C. Chapter 35, the Paperwork Reduction Act of 1980.

The information collection requirement affected by the proposed rule is FERC-598 "Certification for Entities Seeking Exempt Wholesale Generator Status." The Commission would use the information collected to determine whether an application meets the statutory requirements for EWG status. The information will assist the Commission in carrying out the provisions of section 32 of PUHCA and section 711 of the Energy Act. The respondents providing the information will consist of persons owning and/or operating eligible facilities.

The Commission is submitting notification of the proposed rule to OMB. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 941 North Capitol Street, N.E., Washington, DC 20426 [Attention: Michael Miller, Information Policy and Standards Branch, (202) 208-1415]. Comments on the requirements of the proposed rule can also be sent to the Office of Information and Regulatory Affairs of OMB [Attention: Desk Officer for Federal Energy Regulatory Commission].

VII. PUBLIC COMMENT PROCEDURES

The Commission invites interested persons to submit written comments on the matters proposed in this Notice of Proposed Rulemaking. An original and 14 copies of the comments must be filed with the Commission no later than [insert date 30 days after date of publication in the Federal Register]. Comments should be submitted to the Office of the Secretary, Federal

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Energy Regulatory Commission, 825 North Capitol Street, N.E.,
Washington, DC 20426, and should refer to Docket No. RM93-1-000.

All written comments will be placed in the Commission's
public files and will be available for inspection in the
Commission's Public Reference Room at 941 North Capitol Street
N.E., Washington, DC 20426, during regular business hours.

List of Subjects

18 CFR Part 365

Electric power
Exempt wholesale generators
Reporting and recordkeeping requirements

In consideration of the foregoing, the Commission proposes
to add Subchapter T, Part 365 to Title 18, Chapter I of the Code
of Federal Regulations, as set forth below.

By direction of the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

SUBCHAPTER T - REGULATIONS UNDER SECTION 32 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

PART 365 -- FILING REQUIREMENTS AND MINISTERIAL PROCEDURES FOR PERSONS SEEKING EXEMPT WHOLESALE GENERATOR STATUS

Sec.

- 365.1 Purpose.
- 365.2 Definitions.
- 365.3 Contents of application and procedure for filing.
- 365.4 Effect of Filing.
- 365.5 Commission action.
- 365.6 Notification of Commission Action to the Securities and Exchange Commission.

Authority: Public Utility Holding Company Act of 1935, 15 U.S.C. 79; 106 Stat. 2776 (1992).

365.1 Purpose.

The purpose of Part 365 is to implement section 32 of the Public Utility Holding Company Act of 1935, as added by section 711 of the Energy Policy Act of 1992.

365.2 Definitions.

(a) For the purpose of this part terms will have the same meaning as defined in the Public Utility Holding Company Act of 1935, as amended by the Energy Policy Act of 1992, except as provided in subsection (b).

(b) For the purpose of this part:

(1) "Commission" means the Federal Energy Regulatory Commission; and

(2) "Receipt of an application" means the date that the Commission receives the application and the applicable filing fee, if any.

365.3 Contents of application and procedure for filing.

(a) A person seeking status as an exempt wholesale generator (applicant) must file with the Commission, and serve on the Securities and Exchange Commission, the following:

(1) A sworn statement attesting to any facts or representations presented to demonstrate eligibility for EWG status, including:

(A) A representation that the applicant is engaged directly, or indirectly through one or more affiliates, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale; and

(B) Any exceptions for foreign sales of power at retail.

(2) A brief description of the facility or facilities which are or will be eligible facilities owned and/or operated by the applicant including:

(A) The related transmission interconnection components;

(B) Any lease arrangements involving the facilities and public utility companies; and

(C) Any electric utility company that is an affiliate company or associate company of the applicant.

(b) If a rate or charge for, or in connection with, the construction of a facility described in (a)(2), or for electric energy produced by a facility described in (a)(2) (other than any portion of a rate or charge which represents recovery of the cost of a wholesale rate or charge), was in effect under the laws of any State on October 24, 1992, or if any portion of a facility described in (a)(2) is owned or operated by an electric utility company that is an affiliate or associate company of the applicant, the applicant must also file a copy of a specific determination from every State commission having jurisdiction over any such rate or charge, or if the rate or charge is a rate or charge of an affiliate of a registered holding company, a specific determination from every State commission having jurisdiction over the retail rates and charges of the affiliates of the registered holding company, that allowing the facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law.

365.4 Effect of Filing.

A person applying in good faith for a Commission determination of exempt wholesale generator status will be deemed to be an exempt wholesale generator from the date of receipt of the application until the date of Commission action pursuant to # 365.5.

365.5 Commission action.

If the Commission has not issued an order granting or denying an application within 60 days of receipt of the application, the application will be deemed to have been granted.

365.6 Notification of Commission action to the Securities and Exchange Commission.

The Secretary of the Commission will notify the Securities and Exchange Commission whenever a person is determined to be an exempt wholesale generator.

