

FERC-598 (OMB Control No. 1902-0166)

Supporting Statement for
**FERC-598 Self Certification for Entities Seeking
Exempt Wholesale Generator Status or Foreign Utility Company Status**

The Federal Energy Regulatory Commission (Commission or FERC) requests that the Office of Management and Budget (OMB) review and approve **FERC-598 Self Certification for Entities Seeking Exempt Wholesale Generator Status or Foreign Utility Company Status**, for a three year period. FERC-598 (OMB Control No. 1902-0166) is an existing Commission data collection (filing requirements), as stated by 18 Code of Federal Regulations, Part 40.

The Commission estimates the annual reporting burden for FERC-598 will be 600 total hours (an average of 6 hours per respondent).

A. Justification

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

In 1992 Congress enacted the Energy Policy Act (EPAct) of 1992.¹ EPAct was designed to allow newcomers to enter the electric supply industry. Specifically, Section 711 of EPAct 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 finalized rules to implement procedures for determining exempt wholesale generator status in response to provisions of EPAct. 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 wholesale².

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.

In RM93-1-000, the Commission issued a final rule concerning the filing

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

² 18 CFR 366.1; 15 USC § 79z-5a(a)(2)-(4), 79z-5a(b)-(d)

FERC-598 (OMB Control No. 1902-0166)

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 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”³ which implemented Title XII, Subtitle F of the Energy Policy Act of 2005.⁴ Subtitle F repealed the Public Utility Holding Company Act of 1935, as amended (PUHCA 1935),⁵ 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, Foreign Utility Companies (FUCO) 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.⁶ 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 PUHCA 2005Error: Reference source not found.”

2. HOW, BY WHOM, AND FOR WHAT PURPOSE IS THE INFORMATION

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

⁴ Pub. L. No. 109-58, 119 Stat. 594 (2005) (EAct 2005).

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

⁶ See EAct 2005 § 1262(6) (citing PUHCA 1935 § 33). EWGs are companies engaged directly, or indirectly though 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).

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.⁷ This type of EWG or FUCO status is important because 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 within Order No. 667.⁸

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 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."⁹

⁷ Order No. 667 at P 225-28 and 18 CFR 366.7(a).

⁸ 18 CFR 366.3(a)(2) and (3).

⁹ 18 CFR 366.7(a)

FERC-598 (OMB Control No. 1902-0166)

However, order No. 667 did not 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 "...we believe that such a self-certification of EWG and FUCO status will be adequate in the vast majority of cases."¹⁰

Order No. 667 also established an optional procedure for Commission determination of EWG or FUCO status "...for entities that require a higher degree of legal certainty as to their status"¹¹:

A person may file for a Commission determination of exempt wholesale generator status or foreign utility company status¹² by filing a petition for declaratory order pursuant to the Commission's Rules of Practice and Procedure¹³ 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 prescribed specifications¹⁴. Authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.¹⁵

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 company, if the facility or company fails to conform to any of the Commission's criteria under this part.¹⁶

As described above, the Commission assumed responsibility for determining

10 P 226

11 P 227

12 18 CFR 366.1

13 18 CFR 385.207(a)

14 18 CFR 385.203(d)

15 18 CFR 366.7(b)

16 18 CFR 366.7(d)

FERC-598 (OMB Control No. 1902-0166)

whether an entity qualified for FUCO status. The Self-Certification process for FUCOs under PUHCA 1935 as administered by the Securities and Exchange Commission (SEC) 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.¹⁷

Under the SEC regulations, a company obtained FUCO status by the completion and filing of SEC Form U-57.¹⁸ Upon the filing of such notification, a company that met the criteria of section 33(a) (3) (A) was deemed a FUCO. Error: Reference source not found

SEC Form U-57 required the following information:

- The name and business address of the entity claiming FUCO status;
- Description of the entity's facilities;
- The identity of each person that holds five percent or more of voting securities of the FUCO (to the extent known) along with a description of the amount and nature of the interest;
- The names of any domestic associate public-utility company and, if applicable, its holding company, and a description of the relationship between the FUCO and such company, as well as the purchase price paid by any such domestic

¹⁷ PUHCA 1935 at Section 33(a)(3)

¹⁸ 17 CFR 250.57; 17 CFR 259.207

FERC-598 (OMB Control No. 1902-0166)

- associate public utility company for its interest; and
- For entities that have (or propose to have) a domestic associate public utility company, a copy of the state certification required under section 33(a)(2) of PUHCA 1935.¹⁹

The SEC Form U-57 was required to be signed by an officer of the filing company.

The company was required to file an amended SEC Form U-57 to the extent a company needed to change its FUCO designation under the SEC Regulations. To the extent an entity no longer met the requirements of FUCO status (or no longer required FUCO status), the SEC had to be notified within 45 days. “Such notice would be appropriate, for example, if a company obtained foreign utility company status prior to submitting a bid which proved unsuccessful.”²⁰

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.²¹

The only substantive requirement the Commission imposes on FUCOs is 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 criteriaError: Reference source not found:

- 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

19 PUHCA 1935 at Section 33(a)(2). Under PUHCA 1935, FUCOs are exempt from the SEC regulations only if the state commission(s) having jurisdiction over the retail rates of public utility companies associated or affiliated with the FUCO certifies that it has the authority and resources to protect ratepayers of such companies.

20 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).

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

FERC-598 (OMB Control No. 1902-0166)

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.²² 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,²³ the Commission would expect the applicant to provide basic information for an initial pleading, including:

- 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.

If there is any material change in facts that may affect an exempt Wholesale generator's or foreign utility company's status as an exempt wholesale generator or a foreign utility company, the exempt wholesale generator or foreign utility company shall within 30 days of the material change in facts²⁴:

- (1) Submit a new notice of self-certification or a new petition for declaratory order, pursuant to paragraphs (a) or (b) of this section , as appropriate;
- (2) File a written explanation why the material change in facts does not affects its status; or
- (3) Notify the Commission that it no longer seeks to maintain its exempt wholesale generator or foreign utility company status

3. DESCRIBE ANY CONSIDERATIONS OF THE USE OF IMPROVED

²² Order No. 667 at P 27 (referencing PUHCA 1935 Section 33(a)(2))

²³ 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 CFR 385.204

²⁴ 18 CFR 366.7(c)

FERC-598 (OMB Control No. 1902-0166)

**INFORMATION TECHNOLOGY TO REDUCE BURDEN AND
TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN**

The Commission allows the option of filing all documents in 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 via eFiling. All respondents to the FERC-598 use eFiling to submit their responses to this information collection.

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. 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 United States Code (USC) Title 35.

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

The Commission allows the option of filing all documents in proceedings through the eFiling interface as a means of reducing burden for respondents including small entities.

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 opts to not file electronically, they would have to submit an original and two copies which satisfy the requirements in section 1320.5(d)(2)(iii). While the Commission encourages applicants to submit their filings electronically, this is the applicant's option.

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

In accordance with OMB requirements²⁵, the Commission published a 60-day notice²⁶ and a 30-day notice²⁷ to the public regarding this information collection on 3 Jan 2012 and 20 Mar 2012 respectively. Within the public notice, the Commission noted that it would be requesting a three-year extension of the public reporting burden with no change to the existing requirements concerning the collection of data. No comments were received.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to FERC-598 respondents.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

The Commission does not consider the information collected in FERC-598 filings to be confidential. However, the Commission will consider specific requests for

²⁵ 5 CFR 1320.8(d)

²⁶ 77 FR 97

²⁷ 77 FR 16214

FERC-598 (OMB Control No. 1902-0166)

confidential treatment to the extent permitted by law pursuant²⁸. The Commission will review each request for confidential treatment on a case-by-case basis.

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

There are no questions of a sensitive nature that are considered private in the FERC-598.

12. ESTIMATED BURDEN OF COLLECTION OF INFORMATION

The Commission estimates the Public Reporting Burden for this information collection as:

FERC-598 (IC12-3-000): Self Certification for Entities Seeking Exempt Wholesale Generator or Foreign Utility Company Status					
EWG or FUCO	Number of Respondents (A)	Number of Responses Per Respondent (B)	Total Number of Responses (A)x(B)=(C)	Average Burden Hours per Response (D)	Estimated Total Annual Burden (C)x(D)
	100	1	100	6	600

Provided below is a table that outlines the differences between the total requested annual time burden and the previously approved annual time burden.

FERC-598	Total Request	Previously Approved	Change due to Adjustment in Estimate	Change Due to Agency Discretion
Annual Number of Responses	100	0	-99	199
Annual Time Burden (Hr)	600	0	-594	1194
Annual Cost Burden (\$)	0	0	0	0

The format, labels, and definitions of the table above follow the ROCIS system’s “ICR Summary of Burden” for the meta-data.

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

²⁸ 18 CFR 388.112(a)(1)

FERC-598 (OMB Control No. 1902-0166)

	Annual Burden Hours (1)	Estimated Hourly Cost (\$) (2)	Estimated Total Annual Cost to Respondents (\$) (1) X (2)
FERC-598	600	\$68.4480769 ²⁹	\$41,068.85

The total estimated annual cost to respondents is \$41,068.85. The Commission bases the total estimated annual cost upon the annual burden hours (600) and estimated hourly cost (\$68.4480769). FERC based the figure of \$68.4480769 upon the 2012 average FERC employee salary (\$143,540). FERC use \$143,540 to represent the cost to respondents because for certain collections FERC assumes that the typical respondent burden in the industry resembles FERC’s costs of performing the same function (if the Commission were similarly tasked). Since FERC has ready access to FERC salary costs per year, FERC uses the average employee salary to provide an estimated annual cost figure. The cost per respondent is \$410.69. There are no start-up costs because FERC-598 is an existing information collection.

The respondent burden includes the total time, effort, and financial resources respondents spend to assemble and file the information. The cost estimate is based on salaries (plus benefits) for professional and support staff.

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

	Number of Employees (FTEs)	Estimated Annual Federal Cost
Data Clearance Cost	N/A ³⁰	\$1575
FTE	0.75	\$106,779
FERC Total	N/AError: Reference source not found	\$108,354

The Commission bases its estimate of the cost to the Federal Government on salaries for professional and clerical support. For the data clearance cost, the Commission bases this cost upon the calculation of the 2011 FTE of \$142,372 and an average of 24 hours per clearance.

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

²⁹ \$142,372 (2011 FTE average salary)/2080 hours/year = \$68.4480769 per hour

³⁰ Not applicable

FERC-598 (OMB Control No. 1902-0166)

The estimated burden for the FERC-598 information collection decreased as a result of a lower number of respondents during the applicable time period. This decrease is due to the downturn of the national economic climate. Current economic factors cause financial institutions to less easily lend money. Since EWGs and FUCOs tend to be project financed with bank loans, FERC expects that the economic downturn resulted in a decrease in the overall number of respondents.

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

The data collected for this reporting requirement is not used for statistical purposes. Therefore, the Commission does not use as stated in item (i) of the certification to OMB "effective and efficient statistical survey methodology." The information collected is case specific to each information collection.