

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 Parts 366.1, 366.7, 385.203, and 385.207.

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

In 1992, Congress enacted the Energy Policy Act (EPAAct) of 1992.¹ EPAAct was designed to remove barriers to newcomers who wished to enter the electric supply industry. Specifically, Section 711 of EPAAct amended the Public Utility Holding Company Act of 1935 (PUHCA 1935), by adding a new Section 32 to PUHCA 1935, to create a category of power producers known as exempt wholesale generators (EWGs) whose ownership would not trigger PUHCA's requirements.² The Commission subsequently promulgated rules to implement procedures for determining EWG status. The Commission considered an applicant to be a EWG, if it was a power producer, 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 wholesale³.

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 order to obtain EWG status, the Commission required the submission of an application providing information consistent with the requirements of Section 32(a).

Subsequently, the Energy Policy Act of 2005⁴ repealed PUHCA 1935 and enacted the Public Utility Holding Company Act of 2005 (PUHCA 2005). As a consequence, the

¹Pub. L. 102-486, 100 Stat. 2776.

²*Id.* at 2905.

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

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

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Commission now was responsible not only for making determinations as to EWG status, but also Foreign Utility Company (FUCO) status. Prior to the repeal of PUHCA 1935, while the Commission was responsible for making determinations as to EWG status, the Securities and Exchange Commission (SEC) was responsible for determining whether an entity qualified for FUCO status. With the repeal of PUHCA 1935 and its replacement by PUHCA 2005, that responsibility now rests with the Commission.

FUCOs are companies that own or operate facilities located outside the United States 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. FUCOs also must derive no part of their income, directly or indirectly, from the United States energy markets.

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

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.⁵ 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. 667.⁶

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

⁵ Order No. 667 at P 225-28 and 18 CFR 366.7(a).

⁶ 18 CFR 366.3(a)(2) and (3).

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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.⁷

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."⁸

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"⁹:

A person may file for a Commission determination of exempt wholesale generator status or foreign utility company status¹⁰ by filing a petition for declaratory order pursuant to the Commission's Rules of Practice and Procedure¹¹ 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 specifications¹². Authority to act on uncontested notices of self-certification is delegated to the General Counsel or the General Counsel's designee.¹³

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

7 18 CFR 366.7(a)

8 P 226

9 P 227

10 18 CFR 366.1

11 18 CFR 385.207(a)

12 18 CFR 385.203(d)

13 18 CFR 366.7(b)

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(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.¹⁴

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 (SEC) was the following:

SEC Historical Background

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.¹⁵

Under the SEC regulations, a company obtained FUCO status by the completion and filing of SEC Form U-57.¹⁶ Upon the filing of such notification, a company that met the

¹⁴ 18 CFR 366.7(d)

¹⁵ PUHCA 1935 at Section 33(a)(3)

¹⁶ 17 CFR 250.57; 17 CFR 259.207

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criteria of section 33(a) (3) (A) was deemed a FUCO.¹⁸

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 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 1935.¹⁷

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."¹⁸

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.¹⁹

FERC Current Requirements

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 criteria⁹:

- 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,

¹⁷ 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.

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).

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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.²⁰ 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,²¹ 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 facts²²:

20 Order No. 667 at P 27 (referencing PUHCA 1935 Section 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 CFR 385.204

22 18 CFR 366.7(c)

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- (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 CONSIDERATION OF THE USE OF IMPROVED TECHNOLOGY TO REDUCE BURDEN AND TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN.

The Commission allows the option of filing all documents in its proceedings through its electronic “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 PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2

Commission staff has determined that there is no duplication of information. The information submitted with each filing for EWG or FUCO status is specific to each filing.

5. METHODS USED TO MINIMIZE BURDEN IN COLLECTION 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 the burden for all respondents including small entities.

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED 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 would not

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be able to review pertinent information so as to ensure an applicant is an EWG or FUCO and that a holding company should be exempt from the provisions of PUHCA 2005.

Unless circumstances calling an entity's status as an EWG or FUCO change later, applicants only need to file once in order to obtain the benefits of EWG and FUCO status. The Commission's requirements for submission are thus the minimum that can be imposed on an applicant.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE 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 THE AGENCY: SUMMARIZE PUBLIC COMMENTS AND THE AGENCY'S RESPONSE TO THESE COMMENTS

In accordance with OMB requirements²³, the Commission published a 60-day notice²⁴ and a 30-day notice²⁵ to the public regarding this information collection on November 17, 2014 and February 17, 2015 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

No payments or gifts have been made to 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 confidential treatment to the extent permitted by law pursuant²⁶. The Commission will review each request for confidential treatment on a case-by-case basis.

²³ 5 CFR 1320.8(d)

²⁴ 79 FR 68424

²⁵ 80 FR 8301

²⁶ 18 CFR 388.112(a)(1)

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11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE, SUCH AS SEXUAL BEHAVIOR AND ATTITUDES, RELIGIOUS BELIEFS, AND OTHER MATTERS THAT ARE COMMONLY CONSIDERED PRIVATE

This collection does not contain any questions of a sensitive nature.

12. ESTIMATED BURDEN OF COLLECTION OF INFORMATION

The currently approved public reporting burden for the FERC-598 information collection is:

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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

The revised burden amounts presented in this clearance package for the FERC-598 renewal are detailed in the response to Question #15 below.

13. ESTIMATE OF THE TOTAL ANNUAL COST BURDEN TO RESPONDENTS

There are no non-labor costs currently associated with the FERC-598 information collection.

All of the costs in this collection are associated with burden hours (labor) and described in either Question #12 or Question #15.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT

The estimated annualized cost to the Federal Government for FERC-598 as related to information collection requirements follows:

	Number of Employees (FTE)	Estimated Annual Federal
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		Cost
FERC-598 Analysis and Processing of filings ²⁷	0.75	\$109,980
PRA ²⁸ Administrative Cost ²⁹		\$5,092
FERC Total		\$115,072

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

The FERC-598 information collection burden estimate increased by two responses and 12 burden hours (annually) from the previous clearance period. The revised estimate is due to a slight flux in the number of entities that are predicted to self-certify as an EWG or FUCO. The average annual hourly burden per response remains unchanged.

The Commission currently estimates the annual public reporting burden for the information collection as:

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	Number of Respondents (1)	Annual Number of Responses per Respondent (2)	Total Number of Responses (1)*(2)=(3)	Average Burden & Cost Per Response³⁰ (4)	Total Annual Burden Hours & Total Annual Cost (3)*(4)=(5)	Cost per Respondent (\$) (5)÷(1)
EWGs/FUCOs	102	1	102	6 \$423	612 \$43,146	\$423

FERC-598	Total Request	Previously Approved	Change due to Adjustment in Estimate	Change Due to Agency Discretion

27 Based upon FERC’s 2014 FTE average salary plus benefits (\$146,591)

28 Paperwork Reduction Act of 1995 (PRA)

29 The PRA Administrative Cost is a Federal Cost associated with preparing, issuing, and submitting materials necessary to comply with the Paperwork Reduction Act (PRA) for rulemakings, orders, or any other vehicle used to create, modify, extend, or discontinue an information collection. This average annual cost includes requests for extensions, all associated rulemakings, and other changes to the collection.

30 The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * \$70.50 per Hour = Average Cost per Response. The cost per hour figure is the FERC average salary plus benefits. Subject matter experts found that industry employment costs closely resemble FERC’s regarding the FERC-598 information collection.

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Annual Number of Responses	102	100	2	0
Annual Time Burden (Hr)	612	600	12	0
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.

16. TIME SCHEDULE FOR THE PUBLICATION OF DATA

There is no data published as a result of this collection.

17. DISPLAY OF THE EXPIRATION DATE

The expiration date is displayed in a table posted on ferc.gov at <http://www.ferc.gov/docs-filing/info-collections.asp>.

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 EWG and FUCO filing.