

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 provided for in 18 CFR 366.7. This data collection is not changing.

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

In 1992, Congress enacted the Energy Policy Act of 1992 (EPAAct 1992).¹ EPAAct 1992 was intended, in relevant part, 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 1935's requirements.² The Commission subsequently promulgated rules to implement procedures for determining EWG status; the Commission considered an applicant to be an 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 wholesale.³

Under PUHCA 1935's section 32, EWGs could construct, own, and operate generating facilities anywhere, but could sell power only at wholesale. Retail sales directly to domestic end-users were banned. In order to obtain EWG status, the Commission required the submittal of an application providing information consistent with the requirements of Section 32(a).⁴

Subsequently, the Energy Policy Act of 2005⁵ repealed PUHCA 1935 and enacted the Public Utility Holding Company Act of 2005 (PUHCA 2005).⁶ As a consequence, the Commission now was responsible not only for making determinations as to EWG status,

¹Pub. L. No. 102-486, 100 Stat. 2776 (1992).

²15 USC § 79z-5a (2000).

³ *E.g.*, 18 CFR pt. 365 (1995). The Commission's current EWG regulations are found in 18 CFR 366.1 and 18 CFR 366.7.

⁴*Id.*

⁵Pub. L. No. 109-58, 119 Stat. 594 (2005).

⁶42 U.S.C. §§ 16451 *et seq.* (2012).

but also Foreign Utility Company (FUCO) status.⁷ 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 transactions.

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

While providing for the Commission's regulation of holding companies, PUHCA 2005 also provided an exemption from such regulation for those holding companies that are subject to Commission regulation as holding companies solely due to their holding exempt wholesale generators (EWG) and foreign utility companies (FUCO).⁸ In response to Congress' directive to issue regulations to implement this exemption for companies that would be Commission-regulated holding companies solely due to their ownership of EWGs and FUCOs, the Commission issued Order No. 667.⁹ Order No. 667 replaced the Commission's existing EWG regulations with new procedures, including allowing the filing of notices of self-certification of EWG or FUCO status (in addition to continuing to allow the filing of requests for Commission determinations of EWG or FUCO status).¹⁰ As suggested above, EWG or FUCO status is important because, at Congress' direction, 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 EWGs or FUCOs.¹¹ Accordingly, a process for obtaining EWG or FUCO status is essential in order to, in turn, obtain the Congressionally authorized exemption for their holding companies.

⁷ 42 U.S.C. §§ 16451(6), 16454(a) (2012).

⁸ *Id.*

⁹ *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, 70 FR 75592, FERC Stats. & Regs. ¶ 31,197 (2005), *order on rehearing*, Order 667-A, 71 FR 28446, FERC Stats. & Regs. ¶ 31,213 (2006), *order on rehearing*, Order 667-B, 71 FR 42750, FERC Stats. & Regs. ¶ 31,244 (2006), *order on rehearing*, Order 667-C, 118 FERC ¶ 61,133 (2007). Order No.667 issued on 12/8/2005 in Docket No. RM05-32, and is available in FERC's eLibrary at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10901235>

¹⁰ 18 CFR 366.7(a); *see* Order No. 667, FERC Stats. & Regs. ¶ 31,197 at PP 225-28.

¹¹ 18 CFR 366.3(a)(2) and (3).

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The process provided for was:

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. . . . 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.¹²

However, Order No. 667 did not adopt a prescribed form or specify a particular series of questions that entities must complete in their notices of self-certification. Rather, entities were simply directed to demonstrate in their submittals that they satisfied the definitions of an EWG or a FUCO.

Accordingly the information provided in the self-certifications may vary slightly from entity to entity, based on variations in their facts. 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.

If there is any subsequent material change in facts that may affect an EWG's or FUCO's status as an EWG or a FUCO, the EWG or FUCO is directed to, within 30 days of the material change in facts:¹³

¹² 18 CFR 366.7(a); *see* Order No. 667, FERC Stats. & Regs. ¶ 31,197 at PP 226. 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." *Id.* P 227.

¹³ 18 CFR 366.7(c)

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- (1) Submit a new notice of self-certification or a new petition seeking Commission certification, ;
- (2) File a written explanation why the material change in facts does not affect its status; or
- (3) Notify the Commission that it no longer seeks to maintain its status.

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

The Commission encourages electronic filing of (a) all documents (except for specified exceptions), and (b) online forms to allow “documentless” interventions.

Several years ago with the advent of eFiling 7.0, the Commission expanded its ability to receive electronic filings through its eFiling and eLibrary systems and included 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 this regulatory requirement and specific to each filing.

5. METHODS USED TO MINIMIZE BURDEN IN COLLECTION OF INFORMATION INVOLVING SMALL ENTITIES

The Commission provides the option of electronic filing – rather than paper submittals hand-delivered to the Commission or mailed – as a means of reducing the burden for respondents, including small entities.

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY

If the Commission did not collect this information at all, it would not be able to carry out its responsibilities as specified by section 1266(a) of PUHCA 2005; it would not be able to ensure that an entity is an EWG or FUCO and that a holding company should accordingly be exempt from the provisions of PUHCA 2005.

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For most entities this, filing is a one-time filing. Unless circumstances related to an entity's status as an EWG or FUCO change later, applicants need only file once in order to obtain the benefits of EWG and FUCO status. The Commission's requirements for submittal are thus the minimum that the Commission can impose while still complying with section 1266(a) of PUHCA 2005.

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 requirements,¹⁴ the Commission published a 60-day Notice¹⁵ in the Federal Register to give the public and other entities an opportunity to comment. The Commission received no comments on the 60-day notice (for which the public comment period closed on 2/9/2018).

The Commission issued a 30-day Notice¹⁶ on 2/13/2018, which will be published in the Federal Register on 2/21/2018, requesting public comment.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

No payments or gifts are 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. The Commission will review each request for confidential treatment (which must be made pursuant to 18 CFR 388.112(a)(1)) on a case-by-case basis.

11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A

¹⁴ 5 CFR 1320.8(d)

¹⁵ 82 FR 58191, 12/11/2017

¹⁶ The 30-day Notice is posted in FERC's eLibrary at

<https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14821150> .

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 estimated annual burden and cost¹⁷ for the FERC-598 information collection follows

FERC-598 (Self Certification for Entities Seeking Exempt Wholesale Generator or Foreign Utility Company Status)				
Number of Respondents (EWG and FUCOs) (A)	Annual No. of Responses Per Respondent (B)	Total Number of Responses (A)x(B)=(C)	Average Burden Hours & Cost (\$) per Response (D)	Estimated Total Annual Burden Hrs. & Cost (\$) (C)x(D)=E
147	1	147	6 hrs.; \$459	882 hrs.; \$67,473

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 Questions #12 and #15.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT

The estimate of the cost for analysis and processing of filings is based on salaries for professional and clerical support.

The Paperwork Reduction Act (PRA) Administrative Cost is the average annual FERC cost associated with preparing, issuing, and submitting materials necessary to comply with the PRA for rulemakings, orders, or any other vehicle used to create, modify, extend, or discontinue an information collection. It also includes the cost of publishing the necessary notices in the Federal Register.

¹⁷ Subject matter experts found that industry employment costs (for salary plus benefits) for the FERC-598 information collection closely resemble the Commission's. FERC's 2017 average annual salary plus benefits per FTE (full-time equivalent) is \$158,754 (or \$76.50 per hour).

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The estimated average annual cost to FERC follows.

	Number of Employees (FTE)	Estimated Annual Federal Cost
FERC-598 Analysis and Processing of filings ¹⁸	0.75	\$119,066 (rounded)
PRA Administrative Cost		\$5,723
FERC Total		\$124,789

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

Based on the average number of actual filings received during the last two years, the FERC-598 information collection estimate increased by 45 responses and 270 total burden hours (annually) from the previous 3-year clearance period. The revised estimates are due to normal industry fluctuations (e.g., companies entering or leaving the field) in the average number of annual EWG and FUCO filings.

The average annual burden per response and reporting requirements remain unchanged.

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

FERC-598	Total Request	Previously Approved	Change due to Adjustment in Agency Estimate	Program Change Due to Agency Discretion
Annual Number of Responses	147	102	+45	0
Annual Time Burden (Hr.)	882	612	+270	0
Annual Cost Burden (\$)	0	0	0	0

(The format, labels, and definitions of the table above follow the reginfo.gov and ROCIS system's "ICR Summary of Burden" for the meta-data.)

16. TIME SCHEDULE FOR THE PUBLICATION OF DATA

The data are not collected for publication.

17. DISPLAY OF THE EXPIRATION DATE

¹⁸ Based upon FERC's 2017 average annual salary plus benefits per FTE (full-time equivalent) of \$158,754.

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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

There are no exceptions.