docket will be published subsequently in the Order.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Transition areas.

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, REPORTING POINTS, JET ROUTES, AND AREA HIGH ROUTES

Accordingly, 14 CFR part 71 is corrected by making the following correcting amendments

PART 71—[AMENDED]

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.7A, Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is corrected as follows:

Section 71.181 Designation of Transition Areas.

* * * * *

ASO PR TA Puerto Rico, PR

San Juan-Fernando Luis Ribas Dominicci Airport, PR
(lat. 18°27'25" N, long. 66°05'43" W)

That airspace extending upward from 1,200 feet above the surface beginning at lat. 18°50' N, long. 68°00' W; to lat. 18°33' N, long. 64°22' W; to lat. 17°20' N, long. 62°22' W; to lat. 17°29' N, long. 64°54' W; to lat. 17°50' N, long. 65°34' W; to lat. 17°42' N, long. 68°00' W; to the point of beginning; excluding that airspace within Warning Areas W–370, W–371, W–373, W–374, W–428B, and W–428C; and that airspace extending upward from 2,700 feet above the surface beginning at lat. 18°33' N, long. 64°22' W; to lat. 18°25' N, long. 62°52' W; to lat. 17°47' N, long. 62°23' W; to lat. 17°22' N, long. 62°59' W; to lat. 16°58' N, long. 63°00' W; to lat. 17°20' N, long. 64°22' W; to the point of beginning; and that airspace extending upward from 2,700 feet above the surface beginning at lat. 18°45'22.62" N, long. 66°54'58.15" W; to lat. 19°00' N, long. 66°10' W; to lat. 19°00' N, long. 65°45' W; to lat. 18°45' N, long. 64°22' W; to lat. 18°33' N, long. 64°22' W; to the point of beginning; and that airspace extending upward from 5,500 feet MSL within a 100 mile radius of the Fernando Luis Ribas Dominicci Airport, excluding that airspace that coincides with the 1,200 foot and 2,700 foot portions of the Puerto Rico, PR Transition Area.

* * * * *

Issued in Washington, D.C., on February 11, 1993.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 93–3804 Filed 2–12–93; 2:21 pm]

BILLING CODE 4910–13–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 365 and 381

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

[Docket No. RM93–1–000; Order No. 550]

Issued February 10, 1993.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this final rule to establish 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 final rule establishes the filing requirements and ministerial procedures for persons seeking exempt wholesale generator status.

EFFECTIVE DATE: This final rule is effective March 22, 1993.

FOR FURTHER INFORMATION CONTACT: James H. Douglass, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, Telephone: (202) 208–2143.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3308, at 941 North Capitol Street, NE., Washington, DC 20426. The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200, or 2400 baud, full duplex, no parity, 8 data bits and 1 stop bit. The full text of this Notice of Proposed Rulemaking will be available on CIPS for 10 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

Before Commissioners: Elizabeth Anne Moler, Chair; Charles A. Trabandt, Jerry J. Langdon, Martin L. Allday, and Branko Terzic.

Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status. Docket No. RM93–1–000. Order No. 550; Final Rule; Issued February 10, 1993.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is adopting as final an amendment to its regulations pertaining to the filing requirements and ministerial procedures for persons seeking exempt wholesale generator (EWG) status. The final rule will create a new subchapter T, part 365 under title 18, Chapter I of the Code of Federal Regulations for regulations under 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]

II. Background

Section 32(a) of PUHCA requires the Commission to promulgate rules implementing procedures for determining EWG status within 12 months after the date of enactment of the Energy Act.[2]

Section 32 of PUHCA creates a new category of electric entities, known as EWGs, that are exempt from regulation under PUHCA. Section 32(a) of PUHCA requires that applicants for EWG status file an application for a determination of their status by the Commission. The Commission is required to render its determination within 60 days of the receipt of an application. Section 32(a) provides that an applicant that has applied in good faith for a determination by the Commission is deemed an EWG pending the Commission's determination.

An EWG is defined as 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 part of one or more eligible facilities, as defined in section 32(a)(2) of PUHCA, and selling electric energy at wholesale. An EWG may sell power it generates, as well as power

[1] Pub. L. No. 102–486, 106 Stat. 2776 (1992).

[2] The Energy Act was enacted on October 24, 1992.

generated by others.[3] An eligible facility may include interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale. An eligible facility may include a portion of a facility, subject to a limitation on hybrid facilities. If any retail rate associated with a facility was in effect at the time of enactment of the Energy Act, each State commission having retail rate jurisdiction must make certain specified determinations.[4] Certain hybrid facilities, as defined in section 32(d) of PUHCA, may become eligible facilities pursuant to approval of affected State commissions.

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

On November 10, 1992, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing regulations to establish the filing requirements and ministerial procedures for persons seeking EWG status.[5]

Under the proposed rule, a person seeking EWG status (applicant) would file a sworn statement with the Commission. The Commission would review the application and determine whether the sworn statement contains sufficient information to establish that the applicant meets the statutory requirements for EWG status. The proposed rule would require an 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[6] 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) any necessary specific State commission determinations required pursuant to sections 32 (c) and (d) of PUHCA.[7]

The proposed rule specified 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 § 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.

Since there are no rehearing requirements under PUHCA, Commission action under § 365.5 of the proposed rule would be final action and would not be subject to rehearing.

The proposed rule would require the Secretary of the Commission to notify the SEC whenever an application for EWG status is granted. The Secretary would also notify the SEC if an application were to be deemed granted pursuant to § 365.3.

In the NOPR the Commission specifically requested comment concerning whether EWG filings should be subject to public notice and comment procedures and whether to create a separate filing fee category for EWG applications.

IIII. Public Reporting Burden

The final rule requires persons seeking a determination of EWG status to file for a determination by the Commission. The final form of the regulations requires applicants 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 final rule also requires that certain non-public utility EWGs pay filing fees.

The Commission anticipates that respondents will submit only one filing for each determination requested. As of January 29, 1993, the Commission had completed action on five applications. Based on a survey of the five completed applications, the Commission estimates that the reporting burden associated with each application averages approximately eight hours.

The Commission received 14 applications for EWG status during the first three months following enactment of the Energy Act. If applications continue to be filed at the same rate, the Commission projects that it will receive 56 applications annually. Thus, the Commission estimates that the annual reporting burden for the collection of information is 448 hours (56 applications multiplied by eight hours per response for each application).

IV. Discussion

The Commission received 50 comments in response to the Notice of Proposed Rulemaking (NOPR).[8] Most of the commenters support the proposed rule. The Commission will address the major issues raised by the commenters by subject matter.

A. Notice and Comment Procedures

1. Comments

Twenty-nine commenters support publication of notice of EWG applications in the **Federal Register**. These commenters state that notice in the **Federal Register** is necessary to ensure that interested persons will have an opportunity to comment on EWG applications, and will provide important information to participants competing in the wholesale electric industry. The commenters state that notice should not interfere with the Commission's timely determination of EWG status.

Destec Energy, Inc. (Destec) states that lack of notice may provide a basis for subsequent judicial challenge of EWG determinations.

Environmental Action Foundation, *et al.* (Environmental Action) suggests that the Commission publish an annual report on EWGs in order to provide information to the wholesale electric market.[9]

Several of the commenters state that EWG applicants should include with their filings a notice suitable for publication in the **Federal Register**.

The Electricity Consumers Resource Council (ELCON) states that if notice on an EWG application is published in the **Federal Register**, it should include a factual summary of the application, including information about affiliates of the applicant. ELCON also states that the docket prefix assigned to an application should indicate whether the applicant is an independent power producer or affiliated power producer.

Most of the commenters supporting notice in the **Federal Register** also support providing interested parties an opportunity to comment on EWG applications. These commenters note that interested parties may be able to

[3] 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).

[4] *See* PUHCA section 32(c).

[5] Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, 57 FR 55195 (November 24, 1992), IV FERC Stats & Regs ¶32,490 (1992).

[6] Pursuant to PUHCA section 32(a)(2)(B) an eligible facility may include a portion of a facility.

[7] *See* PUHCA sections 32(c) and 32(d)(2).

[8] A complete list of the commenters is attached as Appendix A.

[9] This suggestion is beyond the scope of this rulemaking. However, the Commission's action here will not prohibit the Commission from publishing an annual report, if the Commission, based on its experience, subsequently determines that an annual report is desirable.

provide the Commission with information concerning whether an application is accurate and whether an applicant meets the statutory requirements for EWG status. At the same time, the Electric Generation Association (EGA) cautions that notice and comment procedures should not be permitted to develop into formal adjudicatory proceedings or to delay the 60-day deadline for Commission action.

Twelve commenters state that State commissions should be provided notice and adequate time to respond to EWG applications.[10] These commenters state that section 32 of PUHCA contemplates State commission involvement in EWG determinations. They note that section 32 specifically requires State commission approval for certain EWG-related transactions. The commenters also note that section 365.3(b) of the proposed rule requires that EWG applicants must show that they have obtained necessary State commission approvals: (1) If a rate or charge for, or in connection with, the construction of a facility, or for electric energy produced by a facility (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 (2) if any portion of an eligible facility is owned or operated by an electric utility company that is an affiliate or associate company of the applicant.

In order for State commission involvement to be effective, these commenters assert that affected State commissions should be notified when an EWG application is filed. The commenters state that EWG applicants should be required to serve a copy of their applications on each affected State commission at the same time that the application is filed with the Commission. The commenters state that an affected State commission should generally include: (1) Each State commission where a generating facility owned and/or operated by the EWG applicant is located; (2) each State commission regulating the retail rates of an electric utility that will purchase power from the EWG, if known at the time of application; (3) each State commission regulating any retail utility that is affiliated with the applicant; (4) each State commission that has authorized the removal of a facility from retail rates and the transfer of the facility to the EWG applicant; (5) each State commission where facilities are located from which the applicant intends to purchase long-term wholesale power.

The commenters state that service of EWG filings on affected State commissions will entail minimal extra copying and mailing costs.

In addition to service of EWG filings on affected State commissions, NARUC also suggests that section 365.5 of the proposed rule should be revised to direct the Secretary of the Commission to notify each affected State commission once the Commission has made an EWG determination.

Atlantic City Electric states that service of EWG filings should also be provided to utilities that may provide transmission for EWGs. Long Island Lighting Company (LILCO) adds that service of EWG filings should also be provided to: (1) Utilities in whose service area an eligible facility is located; (2) utilities interconnected with the applicant; or (3) utilities to which an EWG sells or intends to sell power.

Five commenters oppose publication of notice in the **Federal Register**.[11] These commenters state that the Commission's role is ministerial and that the Commission's review is limited to determining whether an entity satisfies the statutory criteria for EWG status.

NIEP states that an opportunity for notice and comment is not necessary because EWG status only provides an exemption from regulation under PUHCA. NIEP states that EWGs remain subject to other corporate, financial, rate, siting and environmental regulation. NIEP states that intervenors may seek to use comment procedures to raise irrelevant concerns and to thereby delay determinations of EWG status. NIEP states that greater scrutiny of EWG applications is not necessary because applicants have a strong incentive to provide accurate information. An applicant who misrepresents facts contained in a sworn statement in an EWG filing could be subject to criminal penalties.

CMS Energy adds that Congress did not intend, as evidenced by the relatively short 60-day time period for a determination, to authorize notice and comment or subsequent formal hearings.

As an alternative to notice and comment, several commenters state that the Commission could provide notice of EWG determinations by publishing a periodic list of applications that have been granted. Such a list could be similar to the Commission's annual "Qualifying Facilities Report."[12]

Enron and Pentzer state that applicants should not be required to file a copy of their application with the SEC. Enron and Pentzer state that the SEC has no authority to review EWG applications. The commenters state that it is sufficient that the SEC is notified pursuant to section 365.5 of the proposed rule when an EWG application is granted.

Four commenters state that the Commission should publish notice in the **Federal Register** after the Commission has made a determination. Texas Utilities Electric Company (Texas Utilities) states that the notice should include a description of the applicant and any eligible facilities granted EWG status. Texas Utilities suggests that section 365.3 of the proposed rule should be modified to require the Secretary of the Commission to publish notice in the **Federal Register** at the same time that the Secretary notifies the SEC of a determination.

2. Commission Ruling

The final rule incorporates provisions for limited public notice of and comment on EWG applications. The Commission will publish notice of EWG applications in the **Federal Register** and will permit comments or interventions pursuant to Rules 211 and 214 of the Commission's Rules of Practice and Procedure.[13]

While there is no requirement in section 32 of PUHCA for the Commission to provide notice and comment, neither is there any prohibition on the Commission's discretion to do so. Based on the comments, the Commission believes that public notice and comment will help to ensure that applications are accurate and will provide important information for participants in the wholesale electric market.

At the same time, the Commission adheres to its initial goal of developing as streamlined an EWG process as is feasible. Therefore, the Commission intends to limit the comments that may be submitted on EWG applications to information concerning the adequacy or

[10] Arkansas Public Service Commission (Arkansas Commission), Atlantic City Electric Company (Atlantic City Electric), Destec, Environmental Action, Idaho Public Utilities Commission, Michigan Public Service Commission Staff (Michigan Commission Staff), Missouri Public Service Commission (Missouri Commission), National Association of Regulatory Utility Commissioners (NARUC), New York State Department of Public Service (New York Department), Public Service Commission of Nevada, Public Service Commission of Wisconsin, and Public Utilities Commission of California (California Commission).

[11] American Gas Association, CMS Energy Corporation (CMS Energy), Cogeneration Partners Group (Cogen Partners), National Independent Energy Producers (NIEP), and Pentzer Energy Services, Inc. (Pentzer).

[12] *See supra*, n.9.

[13] 18 CFR 385.211, 385.214.

accuracy of the factual representations made to satisfy the statutory criteria for EWG status. The Commission will not permit interventions or comments to delay EWG determinations. Given the narrow focus of the Commission's inquiry, the Commission will not consider comments that raise issues that fall outside the purview of the statutorily-fixed determination, *e.g.*, comments that object to a facility's financing arrangements or to the environmental consequences of a facility's construction or operation. *Cf.* Sugarloaf Citizens Association v. FERC, 959 F.2d 508 (4th Cir. 1992). Furthermore, the Commission will deny intervention to parties that raise issues which are irrelevant to the Commission's determination. Finally, the Commission will not entertain requests for hearing.

The final rule adds a new subsection (c) to § 365.3 of the proposed rule concerning the form of notice. Section 365.3(c) specifies the form and contents of a notice suitable for publication in the **Federal Register** that applicants *must* submit with their applications. The contents of the notice include a brief description of the applicant and the facility or facilities which are or will be eligible facilities owned and/or operated by the applicant, including reference and citation to any applicable State commission determinations.

The final rule does not establish separate docket prefixes for affiliated and non-affiliated EWG applicants as suggested by ELCON. The rule already requires that EWG applicants provide sufficient information to evaluate relevant affiliation issues. The Commission believes that establishing separate docket prefixes based on affiliation could be confusing, administratively burdensome, and might delay the Commission's processing of applications. For example, the question of whether a person seeking an EWG determination is an affiliate of an electric utility company under PUHCA is not always readily apparent. *See* 15 U.S.C. 79b(a)(11) (1988). If ELCON's suggestion were adopted, the Commission might have to expend considerable staff resources before a docket prefix could even be assigned to a particular application. This, in turn, could delay notice to the public and provide the Commission with little time to consider the application within the 60-day statutory period.

The final rule requires applicants to serve a copy of the EWG application on the SEC and affected State commissions. Although service of applications on the SEC and State commissions is not required by law, section 32 of PUHCA specifically contemplates a role for the SEC and State commissions insofar as certain eligible facilities are concerned (*see* PUHCA sections 32(c) and (d). It also contemplates that the SEC be aware of EWG determinations. The Commission sees no reason not to inform these agencies of pending EWG applications at an early stage, particularly since the copying and mailing costs associated with serving filings on the SEC and affected State commissions will be minimal. An affected State commission is defined as each: (1) State commission [14] of each state in which a generating facility owned and/or operated by the applicant is or will be located; (2) State commission regulating the retail rates of an electric utility that will purchase power from the applicant; and (3) State commission regulating a retail utility that is affiliated with the applicant.

The final rule does not require that special notice of EWG applications be provided to utilities or that special notice of determinations be provided to utilities or State commissions. The general notice and comment procedures established by the rule, including publication of notice of each EWG application in the **Federal Register**, will provide utilities and all other interested persons with sufficient ability to monitor filings and to effectively participate in EWG proceedings. Moreover, the Commission will continue to publish each determination in FERC Reports.

B. Filing Fees and Annual Charges

1. Comments

Four commenters state that the Commission should not charge filing fees for EWG applications.[15] These commenters state that the ministerial nature of the Commission's review should not require the use of significant Commission resources. If filing fees are assessed, UtiliCorp suggests that the Commission should charge more for contested cases.

Mission Energy Company (Mission) states that EWGs should not be assessed annual charges. Mission states that an exemption from annual charges is justified because: (1) The nature of EWG activities and holdings is limited; (2) EWGs contribute to competition in the wholesale electric utility industry; (3) Congress has demonstrated an intent to limit regulatory burdens on the development of EWGs; and (4) the Commission is unlikely to have substantial continuing oversight of EWGs.

Fourteen commenters state that the Commission should charge EWG applicants a filing fee and/or annual charges.[16] Many of the commenters state that it is not appropriate for other regulated entities to subsidize the cost of reviewing EWG applications. Therefore, the commenters suggest that EWG applicants should pay a filing fee sufficient to recover the cost of reviewing the application.

Florida P&L states that non-public utility EWGs should also be charged a fee when they submit rate filings.[17]

Arizona Public Service states that filing fees should only be applicable to EWGs that will not become public utilities, as defined in section 201(e) of the Federal Power Act (FPA), 16 U.S.C. 824(e) (1988), upon the sale of electric energy at wholesale, *i.e.*, non-public utility EWGs.

Environmental Action states that the Commission should waive filing fees when the fee would cause undue financial hardship.[18]

Southwestern states that EWGs that are public utilities as defined by the FPA should be subject to annual charges on the same basis as other public utilities.[19]

Southern states that EWGs that are "qualifying small power producers" or "qualifying cogenerators" as those terms are defined in section 3 of the FPA, 16 U.S.C. 796 (1988), should be treated as EWGs that are not public utilities and should not be subject to annual charges.

2. Commission Ruling

The final rule creates a separate filing fee category applicable only to non-public utility EWGs, *i.e.*, EWGs that will not become public utilities upon the

[14] *See* 15 U.S.C. 79b(26)(1988).

[15] Destec, UtiliCorp United Inc. (UtiliCorp), NIEP, and Pentzer.

[16] Allegheny Power System (Allegheny), Arizona Public Service Company (Arizona Public Service), Atlantic City Electric, Cogen Partners, Department of Energy, Detroit Edison, EGA, El Paso Electric Company, Environmental Action, Florida Power & Light Company (Florida P&L), Mission, New England Power Company (NEPCO), Southern Company Services, Inc. (Southern), and Southwestern Public Service Company (Southwestern).

[17] However, the Commission notes that non-public utility EWGs are not jurisdictional under the FPA and thus they will *not* submit rate filings to the Commission.

[18] There is no need to address this issue at this time. EWG applicants may request waiver of the applicable filing fee at the time of filing pursuant to the Commission's regulations. *See* 18 CFR 381.106.

[19] EWGs that fall within the requirements of section 201(e) of the FPA will be subject to the FPA requirements applicable to public utilities. EWGs that do not fall within the requirements of section 201(e), *e.g.*, EWGs owning and/or operating only eligible facilities located and selling intra-ERCOT, will be non-public utility EWGs

sale of electric energy at wholesale.[20] Since non-public utility EWGs will not pay annual charges, the Commission believes that filing fees are necessary in order to recover the appropriate cost of administering section 32 on behalf of non-public utility EWGs. The new filing fee category will be created by adding a new subpart H to Part 381 of the Commission's rules.[21]

EWGs that do become public utilities will be assessed annual charges under part 382 of the Commission's existing rules. Thus, the cost of administering section 32 for public-utility EWGs will be recovered through annual charges. The final rule does not incorporate Mission's request that EWGs be exempt from annual charges.

Under this structure, the Commission will recover the cost of administering the statute through annual charges for public utility EWGs and filing fees for non-public utility EWGs.

C. Compliance and Enforcement

1. Comments

Nineteen commenters state that the Commission should specify how it will monitor continuing compliance by EWGs with the statutory requirements for EWG status.[22] Some of the commenters state that the Commission's authority to make an initial EWG determination implies that the Commission also has the authority to review whether an entity continues to conform to the requirements of EWG status. Environmental Action states that although PUHCA does not contain a specific complaint procedure like that contained in section 206 of the FPA, the Commission should not determine that it has no continuing authority to review EWGs. Environmental Action suggests that the Commission's determination should be viewed as a continuing responsibility.

Several of the commenters state that the Commission should specify a mechanism for interested parties to inform the Commission of new facts or changed conditions that may affect the continuing validity of an EWG determination. Further, the commenters state that the Commission should specify what action it intends to take if an EWG fails to continue to adhere to the statutory requirements for EWG status.

A few commenters suggest that the Commission should issue a determination revoking EWG status when appropriate, for instance, if a State commission revokes its earlier consent to an EWG-related transaction.[23] NARUC suggests that the Commission should adopt a complaint or protest procedure for interested parties who seek to challenge the continuing validity of an EWG determination.

EEI suggests that an EWG applicant should be required to affirm that it will continue to adhere to the requirements of EWG status and that it will inform the Commission if it no longer meets the statutory requirements.

EEI also recommends that continued compliance be assured by revising § 365.3(a)(1)(A) of the proposed rule to include the phrase "and will always be." The amended provision suggested by EEI would read as follows:

> [T]he applicant is and will always be 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.

EEI and SDG&E suggest that every EWG should be required to file an annual statement that it continues to satisfy the statutory requirements. SDG&E also suggests that the Commission should treat an EWG determination as a declaratory order. Thus, SDG&E states that any subsequent change in facts underlying the Commission's determination would render the original determination invalid and require a new filing.

Atlantic City Electric and Florida P&L recommend that the Commission require each EWG to make a periodic filing certifying that it continues to comply with the statutory requirements for EWG status. Alternatively, Florida P&L states that the Commission could condition each EWG determination on an applicant's continued compliance with the statutory requirements for EWG status.

ELCON and LILCO state that the Commission should require EWGs to report any material change in circumstance that could affect EWG status. ELCON further suggests that after a material change in circumstances, EWGs should be granted 30 days to prepare a new filing reflecting the change in circumstances.

2. Commission Ruling

An EWG determination is based on the facts that are presented to the Commission. Any material variation from those facts may render an EWG determination invalid.[24] If there is any material change in facts that may affect an EWG's eligibility for EWG status under section 32, the EWG must within 60 days: apply for a new determination of EWG status; file a written explanation of why the material change in facts does not affect the EWG's status; or notify the Commission that it no longer seeks to maintain EWG status. This requirement is incorporated in § 365.7 of the final rule.

The Commission also notes that any violations of PUHCA may be reported directly to the SEC pursuant to section 18 of PUHCA. For instance, section 18(a) of PUHCA provides, in part, as follows:

> The Commission [SEC], in its discretion may investigate any facts, conditions, practices, or matters which it may deem necessary or appropriate to determine whether any person has violated or is about to violate any provision of this title, or any rule or regulation thereunder. . . .

15 U.S.C. 79r (1988). Furthermore, section 18(e) provides that the SEC may bring an action in the United States district courts to enforce compliance with PUHCA. *Id.*

[20] This would include foreign EWGs, EWGs owning only eligible facilities located and selling intra-ERCOT, in Hawaii, in Alaska, in Puerto Rico, etc.

[21] The Commission will establish an initial fee of $1,000 for non-public utility EWG applications. Based upon the Commission's costs during the first quarter of FY 93, when the Commission acted on the first four EWG applications, the Commission could establish a fee approximately two and one-half times larger than the fee the Commission establishes herein. However, the Commission believes that the costs incurred on the first four applications are not representative of the cost of processing future non-public utility EWG applications for the following reasons. First, of the four applications acted on in the first quarter, only one, Costanera Power Corp., 61 FERC ¶ 61,335 (1992) (Docket No. EG93-4-000), involved a non-public utility EWG. Second, and more importantly, this rulemaking will significantly simplify the process of obtaining an EWG determination and consequently the cost of processing EWG applications. Therefore, it would be inappropriate to base the filing fee on applications processed before the rule is in place.

[22] Arkansas Commission, Atlantic City Electric, Detroit Edison, Edison Electric Institute (EEI), ELCON, Environmental Action, Florida P&L, LG&E Energy Corp. (LG&E Energy), LILCO, Michigan Commission Staff, Missouri Commission, NARUC, NEPCO, New York Department, New York State Electric & Gas Corporation, *et al.*, Pennsylvania Power & Light Company (Pennsylvania Power), California Commission, San Diego Gas & Electric Company (SDG&E) and Texas Utilities.

[23] *See* PUHCA sections 32 (c) and (d).

[24] This is analogous to qualifying facility determinations. *See, e.g.*, CMS Midland, Inc., *et al.*, 50 FERC ¶61,098 at 61,277 (1990), *reh'g denied*, 56 FERC ¶61,177 (1991) *appeal filed*, No. 91-13-66 (D.C. Cir.). The Commission notes that in Docket No. RM92-12-000, *infra* note 27, the Commission has proposed a streamlined procedure to deal with minor changes to a facility that may affect qualifying facility status. Given the infancy of the Commission's implementation of PUHCA section 32, the Commission does not believe that a need for similar action with respect to EWG filings has been demonstrated. If such need later becomes apparent, the Commission can address it at a later time.

D. Section 365.5—Applications Deemed Granted

1. Comments

Section 365.5 of the proposed rule provides that 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. Five commenters state that the Commission should issue a written determination for each application.[25]

LG&E Energy states that deeming an application to have been granted through inaction may not be adequate for the purpose of securing financing for eligible facilities.

LG&E Energy states that the Energy Act requires an affirmative determination and does not authorize the Commission to permit its inaction to constitute a determination. Accordingly, LG&E Energy states that the Commission should issue an order for each EWG determination.

NARUC asks whether the Secretary of the Commission would notify the SEC when an entity is deemed to be an EWG. NARUC states that there must be some mechanism for informing the SEC and State commissions when an entity is deemed to be an EWG. NARUC states that if the Commission is unable to act on an EWG application within 60 days, it should deny the application without prejudice to refiling. A new 60-day time period would begin upon refiling.

Environmental Action states that section 32 of PUHCA only "deems" an entity an EWG for the 60-day period between filing and a determination. Environmental Action states that the Commission is without authority to deem an entity an EWG following the 60-day period. Environmental Action states that the Commission must make an actual determination.

Mission supports § 365.5 as proposed in the NOPR. Mission states that § 365.5 eliminates regulatory uncertainty that could arise if an application is not acted upon within 60 days. Mission states that § 365.5 promotes administrative efficiency by eliminating the need to issue a specific written determination in every case.

2. Commission Ruling

The final rule does not amend § 365.5 of the proposed rule. As Mission states, § 365.5 eliminates the need to issue a formal Commission determination in every case.

Contrary to Environmental Action's argument, the fact that an entity is deemed an EWG following expiration of the 60-day period does not mean that the Commission has not made a determination. The commission clarifies that applications where the Secretary issues a notice that the application is deemed granted will have been determined by the Commission to be an EWG. The notification of the Commission's determination will be by Secretary notice, as opposed to a formal Commission determination. This is similar to the procedure employed by the Commission in denying rehearing by operation of law.

However, the Commission agrees with NARUC that notice should be provided when a person is deemed to be an EWG. Therefore, the Secretary will issue a notice whenever an applicant is deemed to be an EWG.[26] The Secretary will also specifically notify the SEC whenever an applicant is deemed to be an EWG.

E. Affiliation

1. Comments

Section 365.3(a)(2)(C) of the proposed rule requires an EWG applicant to disclose "any electric utility company that is an affiliate company or associate company of the applicant." Eight commenters state that this information is not relevant to the review of an EWG application.[27] The commenters state that information about affiliates may be relevant in cases involving affiliate transactions. However, the commenters state that section 32 of PUHCA permits electric utilities, exempt holding companies and registered holding companies to own and/or operate EWGs.

The commenters note that § 365.3(b) of the proposed rule separately requires an applicant to disclose if any portion of an eligible facility is owned or operated by an electric utility company that is an affiliate or associate company of the applicant. Since other information about affiliates is irrelevant, the commenters suggest that § 365.3(a)(2)(C) of the proposed rules be deleted.

Pennsylvania Power supports retention of § 365.3(a)(2)(C) in order to ensure that EWGs do not engage in reciprocal arrangements and that all required State commission authorizations in the case of affiliate transactions or hybrid facilities have been submitted.

The Michigan Commission Staff states that each EWG applicant should be required to disclose in its sworn statement its affiliation with any exempt holding companies, registered holding companies, and retail electric utilities. The Michigan Commission Staff states that this information is necessary to verify the applicant's compliance with the statutory requirements.

2. Commission Ruling

The Commission will adopt § 365.3(a)(2)(C) as proposed. The Commission believes that certain information concerning affiliation is necessary to review the accuracy of applications, particularly whether an applicant has obtained any necessary State commission authorizations. The disclosure of affiliation required by § 365.3(a)(2)(C) of the rule will provide additional assurance that the applicant has complied with the requirements of § 365.3(b) of the rule and section 32(c) of PUHCA.

F. Affirmation

1. Comments

EGA states that the Commission should eliminate the requirement that applicants submit sworn statements. EGA notes that applicants for qualifying facility status are not required to submit sworn statements.[28] EGA states that a material misrepresentation in an application will void the Commission's determination.

Mission does not oppose the requirement that EWG applicants file a sworn statement affirming that the applicant complies with the statutory requirements for EWG status. However, Mission states that the signature of an authorized representative of the applicant demonstrates sufficient authentication for the purpose of certifying qualifying facilities. If the Commission adopts this recommendation, Mission states that the Commission should clarify who may sign an application as an authorized representative.

2. Commission Ruling

The Commission does not believe that the requirement of affirmation will impede the preparation of EWG applications. Affirmation provides additional assurance that an application

[25] Allegheny, Environmental Action, LG&E Energy, Missouri Commission, and NARUC.

[26] The Secretary will also notify the applicant and any intervenors whenever an applicant is deemed to be an EWG. Thus, State commissions or others that evidence an interest in a proceeding by intervening will be notified whenever an applicant is deemed to be an EWG.

[27] American Gas Association, Baltimore Gas and Electric Company (BG&E), CMS Energy, EGA, Florida P&L, Mission, Southern, and Utility Working Group.

[28] The Commission has proposed changes in its qualifying facility regulations in this regard. *See* Docket No. RM92-12-000, Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, 57 FR 55176, 55181; 57 FR 58168, Proposed Form No. 556, Part A. 1d.

is accurate. However, pursuant to Mission's request, the Commission clarifies that any representative legally authorized to bind an applicant may execute the application and that this can provide sufficient authentication for EWG application purposes.

G. EWGs and Qualifying Facilities

1. Comments

Several commenters submitted comments about the relationship between EWGs and qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA).[29] Enron and LG&E Energy state that the Commission should clarify that a facility may be both a qualifying facility under PURPA and an eligible facility under section 32 of PUHCA.

Enron also asks the Commission to clarify that one part of a facility may be a qualifying facility, while another part of the same facility may be an eligible facility and be owned and/or operated by an EWG.

The American Paper Institute, Inc. (American Paper) asks the Commission to clarify that owners of hydroelectric facilities between 30 and 80 MW in size, which are not presently exempt from regulation under PUHCA as qualifying facilities, may apply for exemption as EWGs.

Bald Eagle Power Company Inc. (Bald Eagle) states that the Commission should grant qualifying facility status to EWGs that use only renewable energy sources. Bald Eagle claims that it makes no sense to grant qualifying facility status to cogeneration facilities that have no production limits, while denying qualifying facility status to generators who use renewable energy sources if they exceed small power producer limits.

2. Commission Ruling

The purpose of this rulemaking is to promulgate filing regulations and ministerial producers for EWG applications. This proceeding is not intended to answer each and every question that may be presented concerning EWGs and PUHCA section 32. Accordingly, the Commission declines to rule on these questions in this proceeding. These questions can be addressed in individual applications.

H. Exclusivity

1. Comments

Section 32(a)(1) of PUHCA requires that an applicant be engaged "exclusively" in the business of owning and/or operating one or more eligible facilities, including certain transmission facilities, and in selling electric energy at wholesale. Section 365.3(a)(1)(A) of the proposed rule requires that the applicant represent that it "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." [emphasis added]

American Paper and Enron state that the Commission should clarify that a cogenerator that is not a qualifying facility may be an EWG even though it also sells steam or heat. American Paper states that this interpretation is consistent with the public interest as recognized by the policies embodied in PURPA with respect to cogenerators and qualifying facilities. American Paper states that it would be unnecessarily burdensome for a cogenerator to create separate subsidiaries for different functions at the same facility.

LG&E Energy asks the Commission to clarify whether incidental business activities such as the sale of excess steam, or the sale of transmission service along a radial line serving the eligible facility, would violate the exclusivity requirement. Enron Gas Services Corp. urges the Commission to clarify that the sale of excess gas does not violate the exclusivity requirement.

American Paper states that independent industrial generators who also engage in other non-electric utility business would be excluded from EWG status by a literal interpretation of section 32(a)(1) of PUHCA. American Paper states that such a literal interpretation would frustrate the purpose of the Energy Act by inhibiting the growth of competition in the electric utility industry. American Paper suggests that the Commission should clarify that exclusivity applies only to the extent that an applicant is engaged in business that would otherwise cause it to be considered the owner or operator of an electric utility company under section 2(a)(3) of PUHCA. American Paper states that it is reasonable to conclude that Congress meant the exclusivity prohibition to apply only to business activities that would cause an entity to be subject to regulation under PUHCA. American Paper also states that it would be unnecessarily burdensome for industrial independent power producers to create separate subsidiaries for different functions at the same facility.

ELCON states that the Commission should interpret the statute so that the exclusivity requirement applies to sales of electricity at wholesale, and does not apply to incidental business activities such as the sale of steam or waste products or the ownership of fuel handling facilities.

2. *Commission Ruling*

As with the preceding discussion concerning EWGs and qualifying facilities, the matters raised by the commenters concerning exclusivity are outside the scope of this proceeding. The Commission will defer ruling on these questions until they are presented in an EWG application.

I. Deficient Applications

1. Comments

Enron and Pentzer state that the Commission should provide for reconsideration of denials of EWG status. In the alternative, Pentzer states that the Commission should promptly notify applicants of deficiencies and permit the applicant to amend its filing. Enron states that the Commission should clarify that denials of EWG status are without prejudice to refiling with additional supporting information.

LG&E Energy asks whether the Commission will issue a deficiency letter when an application fails to provide all of the information necessary to make an EWG determination. If so, LG&E Energy asks how the issuance of a deficiency letter will affect the 60-day deadline for a determination.

NIEP suggests that if an application is considered incomplete, FERC should inform the applicant within ten days. If the applicant responds within another ten days, NIEP states that the 60-day clock should not be tolled. If the applicant does not respond within ten days, NIEP states that the 60-day clock should start over when a complete application is filed. Environmental Action states that each deficiency requiring an amended filing should toll the 60-day clock.

2. Commission Ruling

The Commission will not issue deficiency letters. The absolute 60-day deadline for Commission action does not leave adequate time for review of deficiency responses.[30] The Commission will either grant or deny an application within the 60-day time period. The 60-day time period will begin on the date that an application, including any required filing fee, is received by the Secretary. However, if the Commission denies an application,

[29] 16 U.S.C. 2611 *et seq.* (1988). *See* 18 CFR Part 292.

[30] For the same reason, the Commission will not permit amendments to filings.

under either the FPA or PUHCA. Enron states that section 32 of PUHCA does not implicate the FPA and therefore an EWG determination would presumably not be subject to FPA judicial review procedures. *See* 16 U.S.C. 8251 (1988). Likewise, EWG determinations would presumably not be subject to judicial review under PUHCA because the judicial review procedures established for PUHCA refer only to judicial review of orders issued by the SEC. *See* 15 U.S.C. 79x (1988).

Enron states that EWG determinations may be subject to review under the Administrative Procedure Act (APA). However, Enron states that the APA contains no time limit for filing petitions for review. Under these circumstances, Enron states that an EWG applicant could never be certain that its EWG determination is final and no longer subject to review. Enron states that this lack of regulatory certainty could adversely affect project financing.

Enron suggests that the Commission either: (1) Interpret PUHCA judicial review provisions (including the 60-day time limit for filing a petition for review) to apply to EWG determinations, or; (2) find that EWG determinations are not subject to judicial review since the Commission's action is merely ministerial.

2. Commission Ruling

The Commission does not interpret section 24 of PUHCA, which refers to orders issued by the SEC, as providing judicial review of FERC EWG determinations. However, the Commission notes that judicial review is provided under section 25 of PUHCA. Section 25, as codified at 15 U.S.C. 79y, provides, in part, that:

> The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder.

K. Miscellaneous Issues

Section 365.3(b) of the proposed rule provides, among other things, that an applicant must submit certain State commission approvals if a retail rate or charge associated with the construction of a generating facility, or for electric energy produced by a facility, is a "rate or charge of an affiliate of a registered holding company." The Cogeneration Partners Group suggests that the Commission should clarify that this portion of § 365.3(b) is only applicable to companies that are registered holding companies by virtue of their ownership of electric utility companies, and not solely by reason of their ownership of gas utility companies.

The statute makes no distinction between entities that are registered holding companies by virtue of their ownership of electric utility companies and entities that are registered holding companies by virtue of their ownership of gas utility companies. Therefore, § 365.3(b) of the final rule applies to any registered holding company.

Four commenters state that an entity that has attained EWG status may wish to own or operate an additional facility.[31] These commenters suggest that the Commission should identify procedures for an existing EWG to apply for a determination whether an additional facility is an eligible facility. EEI and Texas Utilities state that the procedures for new facilities should be abbreviated. Environmental Action states that a separate filing should be required each time an EWG acquires a new facility in order to determine whether the new facility is an eligible facility. Pentzer states that the Commission should clarify that an initial EWG determination is sufficient to cover subsequent acquisition or operation of other eligible facilities.

As noted above, an EWG determination is based on the facts presented to the Commission. Accordingly, if an EWG, for example, wishes to own or operate additional facilities, but seeks to maintain its status as an EWG, it must file another application with the Commission. The Commission will review the application on the same basis as it reviewed the initial application.

LG&E Energy notes that § 365.3(a)(2) of the proposed rule would require that each application include a brief description of the facility or facilities which are or "will be" eligible facilities. LG&E Energy asks whether an applicant could obtain EWG status for a facility that is not yet planned as long as the applicant properly attests that any such future facility will be an eligible facility.

EGA states that developers of eligible facilities often must obtain determination of EWG status prior to construction in order to secure financing. EGA further states that when the Commission grants a determination of EWG status for eligible facilities that are not yet built, it is reasonable to expect that the final structure of the transaction may differ from that proposed in the original EWG application. In this event, the Commission should specify that an EWG need only file a revised application where deviations from the original proposed transaction are material to the applicant's EWG status.

Applicants may request a determination of EWG status for facilities that have not been built. However, each determination is based on the facts presented in the application. Any subsequent material departure from the facts presented in the original application may render a determination invalid.

EGA and ELCON suggest that the Commission should clarify the definition of certain terms used in the statute. EGA states that the Commission should clarify the meaning of "eligible facility," "exclusively in the business of," and "exclusively for sale." ELCON states that the Commission should clarify the meaning of "owning," "operating," and "facility . . . used for the generation of electric energy exclusively for sale at wholesale."

As noted above, the purpose of this rulemaking is to establish the filing requirements and procedures to be used for EWG applications. The Commission does not intend to prematurely rule on substantive issues relating to the definition of certain terms, beyond what is necessary to permit the initial administration of the statute.

Section 365.3(a)(2)(B) requires an EWG applicant to submit a brief description of any lease arrangements involving the eligible facility and a public utility company.

Mission states that the specific terms of any lease arrangements involving an eligible facility and public utility companies are not relevant to the review of an EWG application. Therefore, Mission states that § 365.3(a)(2)(B) should be deleted.

EGA states that section 2(a)(5) of PUHCA defines public utility companies as either electric utility companies or gas utility companies. EGA suggests that the Commission should review § 365.3(a)(2)(B) to apply only to leases involving an eligible facility and electric utility companies.

The final rule retains § 365.3(a)(2)(B). The information about leases required by § 365.3(a)(2)(B) of the rule will provide assurance that the applicant has complied with section 32(a)(2)(B) of PUHCA relating to facilities that are leased to a public utility company. The Commission believes that this information is appropriate regardless of whether the public utility company is a gas utility company or electric utility company in that Congress drew no

[31] EEI, Environmental Action, Pentzer, and Texas Utilities.

complied with section 32(a)(2)(B) of PUHCA relating to facilities that are leased to a public utility company. The Commission believes that this information is appropriate regardless of whether the public utility company is a gas utility company or electric utility company in that Congress drew no distinction in the statute, but rather used the term "public utility companies."[32]

BG&E and EGA state that the Commission should specify in the final rule that no environmental assessment or environmental impact statement is necessary for EWG filings or Commission determinations of EWG status.

The Commission agrees that its ministerial role under section 32 of PUHCA does not require the preparation of environmental assessments or environmental impact statements. *See* Sugarloaf Citizens Association v. FERC, 959 F.2d 508 (4th Cir. 1992) (qualifying facility certifications do not require preparation of environmental impact statement).

In addition to the information required in the proposed rule, several commenters[33] state that the Commission should also require that EWG applicants submit certain other information with their filings, including: (1) A description of the eligible facility, including location; (2) a description of wholesale purchasers who will be served by the eligible facility; (3) a description of the corporate structure of the applicant and any affiliates; (4) whether the costs of the eligible facility are reflected in retail rates; and (5) a description of all owners of the eligible facility. Arizona Public Service and Allegheny state that this information will be useful for the planning needs of electric utilities in whose service areas eligible facilities may be located.

The final rule will require that EWG filings include a brief description of the eligible facility or facilities. The additional information requested by several commenters does not appear to be necessary for the Commission to determine whether an applicant has satisfied the statutory criteria required for EWG status.

Section 365.3(b) of the proposed rule requires certain State commission approvals if certain retail rates or charges "for, or in connection with the construction" of an eligible facility were "in effect under the laws of any State on October 24, 1992." Arizona Public Service states that the Commission should clarify that this subsection applies only to existing facilities, as is required by section 32(c) of PUHCA. The Commission agrees with Arizona Public Service that this subsection applies only to facilities that were reflected in retail rates on October 24, 1992.

Enron states that the Commission should clarify the definition of when a facility has been included in retail rates. For instance, Enron suggests that § 365.3(b) should apply when system-wide rates include costs associated with the eligible facility. The statute is clear in this regard. If any cost for a facility was reflected in retail rates as of October 24, 1992, whether in base rates, fuel adjustment charges, construction-work-in-progress, or otherwise, State commission approval is required. Enron states that the Commission should permit two or more affiliates involved in the ownership and/or operation of the same project to make a single application for EWG status. Such a policy would avoid the unnecessary cost of duplicative proceedings.

The Commission addressed this issue in Costanera Power Corporation, 61 FERC ¶ 61,335 (1992) (*Costanera*). In Costanera the Commission stated that section 32(a)(1) of PUHCA requires a "person" seeking EWG status to apply for a determination by the Commission. The Commission further stated that section (2)(a)(1) of PUHCA defines "person" as an individual or company. 15 U.S.C. 79b(a)(1) (1988). Therefore, the Commission concluded that to the extent that applicants are separate companies as defined by section 2(a)(2) of PUHCA, 15 U.S.C. 79b(a)(2) (1988), each must file a separate application.

Section 32 of PUHCA states that an eligible facility includes "interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale." Atlantic City Electric states that additional clarification is necessary to delineate interconnecting facilities owned by an EWG and facilities owned by a transmitting utility. Atlantic City Electric states that the Commission should only consider transmission facilities owned by an EWG when reviewing an EWG application.

The Commission agrees with Atlantic City Electric that transmission facilities that are not owned by an EWG applicant are not relevant to the Commission's determination.

V. Regulatory Flexibility Certification Statement

The Regulatory Flexibility Act[34] 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 final 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 final rule will not have a significant economic impact on a substantial number of small entities.

VI. 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.[35] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[36] 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.[37] The final rule does not change the effect of the underlying legislation. Accordingly, no environmental consideration is necessary.

VII. Information Collection Statement

The Office of Management and Budget's (OMB) regulations[38] require that OMB approve certain information collection and recordkeeping requirements imposed by an agency. The information collection requirements affected by the final rule are FERC–598 (Determinations for Entities Seeking Exempt Wholesale Generator Status) and FERC–582 (Oil, Gas and Electric Fees and Annual Charges). (1902–0132).

The final rule requires that persons who voluntarily request a determination of EWG status provide certain information to the Commission. The

[32] *See* 15 U.S.C. 79b(a)(5) (1988).

[33] Allegheny, Arizona Public Service, Destec and Environmental Action.

[34] 5 U.S.C. 601–612.

[35] Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. and Regs. ¶ 30,783 (1987).

[36] 18 CFR 380.4.

[37] 18 CFR 380.4(a)(2)(ii).

[38] 5 CFR 1320.12, as authorized by P.L. 96–511, 44 U.S.C. Chapter 35, the Paperwork Reduction Act of 1980.

Commission would use the information collected from the applicant to determine whether the applicant meets the statutory requirements for EWG status. The Commission's Office of Financial Management would also use the data collected to compute filing fees and annual charges.

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

VIII. Effective Date

This final rule is effective March 22, 1993.

List of Subjects

18 CFR Part 365

Electric power, Exempt wholesale generators, Reporting and recordkeeping requirements.

18 CFR Part 381

Electric power, Exempt wholesale generators, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission is amending title 18, chapter I of the Code of Federal Regulations to add a new subchapter T, part 365, and to add a new subpart H to existing part 381, as set forth below.

By the Commission.

Lois D. Cashell,

Secretary.

1. A new subchapter T, consisting of part 365 is added, as follows:

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.
365.7 Procedure for notifying Commission of material change in facts.

Authority: Pub. L. 102–486, 106 Stat. 2776 (15 U.S.C. 79).

§ 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 paragraph (b) of this section.

(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; and

(3) *Affected State commission* means the State commission of each state in which a generating facility owned and/or operated by the applicant is located; each State commission regulating the retail rates of an electric utility that will purchase power from the applicant, if known at the time of application; and, each State commission regulating a retail utility that is affiliated with the applicant.

§ 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 and any affected State commission, the following:

(1) A sworn statement, by a representative legally authorized to bind the applicant, attesting to any facts or representations presented to demonstrate eligibility for EWG status, including:

(i) 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

(ii) 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:

(i) The related transmission interconnection components;

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

(iii) 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 paragraph (a)(2) of this section, or for electric energy produced by a facility described in paragraph (a)(2) of this section (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 paragraph (a)(2) of this section 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.

(c) Applications for exempt wholesale generator status must also include a copy of a notice of the application suitable for publication in the **Federal Register**. The notice must state the applicant's name, the date of the application, and a brief description of the applicant and the facility or facilities which are or will be eligible facilities owned and/or operated by the applicant. The applicant must also submit a copy of its notice on a 3½" diskette in ASCII format. Each diskette must be clearly marked with the name of the applicant and the words "notice of filing." The notice must be in the following form:

(Name of Applicant)
Docket No. EG–

Notice of Application for Commission Determination of Exempt Wholesale Generator Status

On (date application was filed), (name and address of applicant) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

[Brief description of the applicant and the facility or facilities which are or will be eligible facilities owned and/or operated by the applicant, including reference and citation to any applicable State commission determinations.]

Any person desiring to be heard concerning the application for exempt

wholesale generator status should file a motion to intervene or comments with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application. All such motions and comments should be filed on or before _____and must be served on the applicant. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

§ 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.

§ 365.7 Procedure for notifying Commission of material change in facts.

If there is any material change in facts that may effect an EWG's eligibility for EWG status under section 32 of the Public Utility Holding Company Act of 1935, the EWG must within 60 days: apply for a new determination of EWG status; file a written explanation of why the material change in facts does not affect the EWG's status; or notify the Commission that it no longer seeks to maintain EWG status.

PART 381—FEES

2. The authority citation for part 381 continues to read as follows:

Authority: 15 U.S.C. 717–717w; 16 U.S.C. 791–828c; 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; and 49 U.S.C. 1–27.

3. Part 381 is amended to add subpart H, consisting of § 381.801 as follows:

SUBPART H—FEES APPLICABLE TO THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

§ 381.801 Applications for exempt wholesale generator status.

The fee established for applications for exempt wholesale generator status under section 32 of the Public Utility Holding Company Act of 1935 and subchapter T, part 365 of this chapter, applicable to applicants who will not become public utilities as defined in section 201(e) of the Federal Power Act upon the sale of electric energy at wholesale, is $1,000. The fee must be submitted in accordance with subpart A of this part.

Appendix A

Note: This appendix will not appear in the Code of Federal Regulations.

Commenters

1. Allegheny Power System
2. American Gas Association
3. American Paper Institute, Inc.
4. Arizona Public Service Company
5. Arkansas Public Service Commission
6. Atlantic City Electric Company
7. Bald Eagle Power Company Inc.
8. Baltimore Gas and Electric Company
9. City of Colorado Springs, Colorado
10. CMS Energy Corporation
11. Cogeneration Partners Group
12. Cogenerators of Southern California
13. Colorado Association of Municipal Utilities
14. Department of Energy
15. Destec Energy, Inc.
16. Detroit Edison
17. Edison Electric Institute
18. Electric Generation Association
19. Electricity Consumers Resource Council
20. El Paso Electric Company
21. Enron Gas Services Corp.
22. Enron Power Corp.
23. Environmental Action Foundation, *et al.* (Consisting of Environmental Action Foundation, Union of Concerned Scientists, Geothermal Resources Association, American Public Power Association, Toward Utility Rate Normalization, Electric Consumers Resource Council, Consumer Federation of America, Indiana Consumer Counsel, Missouri Office of the Public Counsel, State of Ohio Office of the Consumer Counsel, Commonwealth of Pennsylvania Office of the Consumer Advocate and Utah Committee of Consumer Services)
24. Florida Power & Light Company
25. Idaho Public Utilities Commission
26. Imperial Irrigation District
27. LG&E Energy Corp.
28. Long Island Lighting Company
29. Michigan Public Service Commission Staff
30. Mission Energy Company
31. Missouri Basin Municipal Power Agency
32. Missouri Public Service Commission
33. National Association of Regulatory Utility Commissioners
34. National Independent Energy Producers
35. Natural Gas Supply Association
36. New England Power Company
37. New York State Department of Public Service
38. New York State Electric & Gas Corporation, *et al.* (consisting of New York State Electric & Gas Corporation and Niagara Mohawk Power Corporation)
39. Pennsylvania Power & Light Company
40. Pentzer Energy Services, Inc.
41. Public Service Commission of Nevada
42. Public Service Commission of Wisconsin
43. Public Utilities Commission of California
44. San Diego Gas & Electric Company
45. Southern Company Services, Inc.
46. Southwestern Public Service Company
47. Texas Utilities Electric Company
48. Utah Municipal Power Agency
49. UtiliCorp United Inc.
50. Utility Working Group

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DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 218

Collection of Royalties, Rentals, Bonuses and Other Monies Due the Federal Government

CFR Correction

In title 30 of the Code of Federal Regulations, parts 200-699, revised as of July 1, 1992, on page 105, in § 218.51, the last three sentences of paragraph (a)(1) were inadvertently removed. The entire text of paragraph (a)(1) should read as follows:

§ 218.51 Method of payment.

(a) *Payment of royalties.* (1) All payors whose aggregate royalty payment obligation to MMS on the payment due date totals $10,000 or more must make royalty payment by Electronic Funds Transfer (EFT) using the Federal Reserve Communications System (FRCS) link to the Financial Management Service Fedwire Deposit System (FDS), unless otherwise directed by MMS. Bills for Royalty-In-Kind (RIK) Oil and Bills for Collection of additional royalties owed as the result of audits are considered to be royalty payment obligations subject to the requirements of this paragraph. Early payment by other than EFT of a portion of the aggregate royalty payment obligation to avoid remittance by EFT on the payment due date is not permitted. Such early payments are permitted regardless of amount, but must be remitted by EFT.

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