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## **Energy Policy Act of 2005, P.L. 109-58: Electricity Provisions**

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# Energy Policy Act of 2005, P.L. 109-58: Electricity Provisions

## Summary

The Energy Policy Act of 2005 (P.L. 109-58), signed by President Bush on August 8, 2005, was the first omnibus energy legislation enacted in more than a decade. Major provisions include tax incentives for domestic energy production and energy efficiency, a mandate to double the nation's use of biofuels, faster procedures for energy production on federal lands, and authorization of numerous federal energy research and development programs. This report describes the electricity provisions. It will not be updated.

Title XII authorizes the Federal Energy Regulatory Commission (FERC) to certify a national electric reliability organization (ERO) to enforce mandatory reliability standards for the bulk power system. All ERO standards must be approved by FERC. The ERO can impose penalties on a user, owner, or operator of the bulk power system for violations of any FERC-approved reliability standard.

The Secretary of Energy is required to conduct a study of electric transmission congestion every three years and may designate a geographic area as being congested. Under certain conditions, FERC is authorized to issue construction permits in congested areas. Permit holders may petition in U.S. District Court to acquire rights-of-way through eminent domain. An applicant for federal authorization to site transmission facilities on federal lands could request that the Department of Energy be the lead agency to coordinate environmental review and other federal authorization. If a federal agency has denied an authorization required by a transmission or distribution facility, the denial could be appealed by the applicant or relevant state to the President.

Section 210 of the Public Utility Regulatory Policies Act (PURPA) had required utilities to purchase power from all qualifying facilities and small power producers at a rate based on the utilities' avoided cost. The Energy Policy Act repeals the PURPA mandatory purchase requirement for new contracts if FERC finds that a competitive electricity market exists and a qualifying facility has adequate access to wholesale markets.

Also repealed is the Public Utility Holding Company Act of 1935 (PUHCA), which restricted the structure of holding companies of investor-owned utilities and provided for Securities and Exchange Commission (SEC) regulation of mergers and diversification proposals. FERC and state regulatory bodies must be given access to utility books and records.

FERC is directed to facilitate price transparency in wholesale electric markets, relying on existing price publishers and providers of trade processing services to the maximum extent possible. However, FERC may establish an electronic information system if it determines that existing price information is not adequate. FERC is given approval authority over the acquisition of securities and the merger, sale, lease, or disposition of facilities under FERC's jurisdiction with a value in excess of \$10 million.

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# Energy Policy Act of 2005, P.L. 109-58: Electricity Provisions

## Introduction

The Energy Policy Act of 2005 (P.L. 109-58), signed by President Bush on August 8, 2005, was the first omnibus energy legislation enacted in more than a decade. Major provisions include tax incentives for domestic energy production and energy efficiency, a mandate to double the nation's use of biofuels, faster procedures for energy production on federal lands, and authorization of numerous federal energy research and development programs. This report describes the electricity provisions.

## Title XII — Electricity

**Sec. 1201.** Short title. This title may be cited as the “Electric Reliability Act of 2005.”

### Subtitle A — Reliability Standards

**Summary of Provisions.** This subtitle is intended to provide federal jurisdiction over activities that are required to support reliability of the U.S. bulk power system. Clarifying the Federal Energy Regulatory Commission's (FERC) authority to establish and regulate an electric reliability organization (ERO) is intended to improve reliability as restructuring of the U.S. bulk power system proceeds.

***Electric Reliability Standards (Sec. 1211).*** This section requires FERC to promulgate rules within 180 days of enactment to create a FERC-certified ERO. The North American Electric Reliability Council (NERC) currently has responsibility for reliability of the bulk power system. NERC has established reliability guidelines but has no enforcement authority. Before enactment of P.L. 109-58, the Federal Power Act<sup>1</sup> gave FERC jurisdiction over unbundled transmission and authority to regulate wholesale rates; however, no authority was provided to regulate reliability. Under this section, the ERO will develop and enforce reliability standards for the bulk power system, including cybersecurity protection. All ERO standards will be approved by FERC. Under this title, the ERO can impose penalties on a user, owner, or operator of a bulk power system that violates any FERC-approved reliability standard. In addition, FERC can order compliance with a reliability standard and can impose a penalty if FERC finds that a user, owner, or operator of a bulk power

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<sup>1</sup> 16 U.S.C. 791a et seq.

system has engaged in or is about to engage in a violation of a reliability standard. This provision does not give an ERO or FERC authorization to order construction of additional generation or transmission capacity.

This provision also requires that FERC establish a regional advisory body if requested by at least two-thirds of the states within a region that have more than half of their electric load served within that region. The advisory body will be composed of one member from each participating state in the region, appointed by the governor of each state, and is able to provide advice to the ERO or FERC on reliability standards, proposed regional entities, proposed fees, and any other responsibilities requested by FERC. The entire reliability provision does not apply to Alaska or Hawaii. The state of New York is authorized to develop rules that would result in greater reliability for New York, as long as those rules do not result in lower reliability for neighboring states.

If the penalties employed by the ERO are not successful, then FERC has the authority to enforce penalties for entities that do not comply with reliability standards. Establishing this new relationship between FERC and the ERO could have the potential to improve coordination between market functions and reliability functions.

## **Subtitle B — Transmission Infrastructure Modernization**

**Siting of Interstate Electric Transmission Facilities (Sec. 1221).** The Secretary of Energy is required to conduct a study of electric transmission congestion every three years. Based on the findings, the Secretary of Energy may designate a geographic area as being congested. Under certain conditions, FERC is authorized to issue construction permits. Under new Section 216(d) of the Federal Power Act (FPA), affected states, federal agencies, Indian tribes, property owners, and other interested parties will have an opportunity to present their views and recommendations with respect to the need for, and impact of, a proposed construction permit. However, there is no requirement for a specific comment period. New FPA Section 216(e) will allow permit holders to petition in U.S. District Court to acquire rights-of-way through the exercise of the right of eminent domain. Any exercise of eminent domain authority would be considered to be takings of private property for which just compensation is due. New FPA Section 216(g) does not state whether property owners would be required to reimburse compensation if the rights-of-way were transferred back to the owner.

An applicant for federal authorization to site transmission facilities on federal lands could request that the Department of Energy be the lead agency to coordinate environmental review and other federal authorization. Once a completed application is submitted, all related environmental reviews are required to be completed within one year unless another federal law makes that impossible. FPA Section 216(h) gives the Department of Energy (DOE) new authority to prepare environmental documents and appears to give DOE additional decision-making authority for rights-of-way and siting on federal lands. This would appear to give DOE input into the decision process for creating rights-of-way. Review under Section 503 of the Federal

Land Policy and Management Act<sup>2</sup> could be streamlined by relying on prior analyses. If a federal agency has denied an authorization required by a transmission or distribution facility, the denial could be appealed by the applicant or relevant state to the President. The President is required to issue a decision within 90 days of the appeal's filing. With congressional approval, states may enter into interstate compacts for the purposes of siting transmission facilities and the Secretary of Energy could provide technical assistance. This section does not apply to the Electric Reliability Council of Texas (ERCOT).

**Third-Party Finance (Sec. 1222).** The Western Area Power Administration (WAPA) and the Southwestern Power Administration (SWPA) are able either to continue to design, develop, construct, operate, maintain, or own transmission facilities within their regions or to participate with other entities for the same purposes if the Secretary of Energy designates the area as a National Interest Electric Transmission Corridor and if the facility will reduce congestion or is needed to accommodate projected increases in demand for transmission capacity. The project is required to be consistent with the needs identified by the appropriate Regional Transmission Organization or Independent System Operator. Under certain circumstances, the Secretary of Energy, acting through WAPA and/or SWPA, may design, develop, construct, operate, maintain, or own an electric power transmission facility in the WAPA and SWPA region. No more than \$100 million from third-party financing may be used during fiscal years 2006 through 2015. Before enactment, the enabling statutes for power marketing administrations could have restricted third-party financing, construction, operation, and maintenance of transmission facilities.<sup>3</sup>

**Advanced Transmission Technologies (Sec. 1223).** FERC is directed to encourage deployment of advanced transmission technologies.

**Advanced Power System Technology Incentive Program (Sec. 1224).** A program is established to provide incentive payments to owners or operators of advanced power generation systems. Subject to the availability of funds, 1.8 cents per kilowatt-hour will be paid to the owner or operator of a qualifying advanced power system technology facility. For facilities that the Secretary of Homeland Security and the Secretary of Energy determine are "qualifying security and assured power facilities," an additional 0.7 cents per kilowatt-hour will be paid to the owner or operator of such a facility. Under the incentive program, the first 10,000,000 kilowatt-hours produced in any facility in a fiscal year are eligible for the incentives. Eligible systems include advanced fuel cells, turbines, or hybrid power systems. For FY2006 through FY2012, an annual appropriation of \$10 million is authorized.

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<sup>2</sup> 43 U.S.C. 1763.

<sup>3</sup> 16 U.S.C. 460 (SWPA) and 43 U.S.C. 485 (WAPA).

## Subtitle C — Transmission Operation Improvements

**Open Nondiscriminatory Access (Sec. 1231).** FERC is authorized to require, by rule or order, unregulated transmitting utilities (power marketing administrations, state entities, and rural electric cooperatives) to charge rates comparable to what they charge themselves and require that the terms and conditions of the sales be comparable to those required of other utilities. Before enactment of P.L. 109-58, under the Federal Power Act (Section 201(f)), federal power marketing administrations, state entities, and rural electric cooperatives were not subject to FERC's rate-making. Under this provision, exemptions are established for utilities selling less than 4 million megawatt-hours of electricity per year, for distribution utilities, and for utilities that own or operate transmission facilities that are not necessary to facilitate a nationwide interconnected transmission system. This exemption can be revoked to maintain transmission system reliability. FERC is not authorized to order states or municipalities to take action under this section if such action would constitute a private use under Section 141 of the Internal Revenue Code of 1986. FERC may remand transmission rates to an unregulated transmitting utility if the rates do not comply with this section. FERC is not authorized to order an unregulated transmitting utility to join a Regional Transmission Organization or other FERC-approved independent transmission organization. (This section is often referred to as "FERC-lite.")

**Federal Utility Participation in Regional Transmission Organizations (Sec. 1232).** Federal utilities (power marketing administrations or the Tennessee Valley Authority) are authorized to participate in regional transmission organizations. A law allowing federal utilities to study formation and operation of a regional transmission organization is repealed (16 U.S.C. 824n).

**Native Load Service Obligation (Sec. 1233).** This section amends the Federal Power Act to clarify that a load-serving entity is entitled to use its transmission facilities or firm transmission rights to serve its existing customers before it is obligated to make its transmission capacity available for other uses. FERC is not able to change any approved allocation of transmission rights by an Regional Transmission Organization (RTO) or Independent System Operator (ISO) approved prior to January 1, 2005. A government entity that owns transmission facilities used predominantly to support its own water pumping facilities is provided protections for transmission service to such facilities comparable to protections provided to load-serving entities. This section does not apply to ERCOT and does not apply to load-serving entities located within the service area of the Tennessee Valley Authority. Within one year of enactment, FERC is required to issue a rule or order on long-term transmission rights and organized markets.

Section 201 of the Federal Power Act gives FERC jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." Section 205 of the Federal Power Act prohibits utilities from granting "undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage" (16 U.S.C. 824). The new language of this section is intended to clarify that reserving transmission for existing customers (native load) is not considered unduly discriminatory.

**Study on the Benefits of Economic Dispatch (Sec. 1234).** The Secretary of Energy, in consultation with the states, is required to issue an annual report to Congress and the states on the current status of economic dispatch. Economic dispatch is defined as “the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities.”

**Protection of Transmission Contracts in the Pacific Northwest (Sec. 1235).** FERC does not have the authority to require electric utilities in the Pacific Northwest to convert firm transmission rights to tradable or financial rights. The area of the Pacific Northwest is the region defined in Section 3 of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C.839a) or a portion of a state included in the geographic area proposed for a Regional Transmission Organization in FERC Docket No. RT01-35.

**Sense of Congress Regarding Locational Installed Capacity Mechanism (Sec. 1236).** It is the sense of Congress that FERC should carefully consider the objections of the states to a proposed locational installed capacity mechanism in New England. The objections include that a locational installed capacity mechanism would not provide adequate assurance that necessary electric generation capacity or reliability will be provided and it would impose a high cost on consumers.

## **Subtitle D — Transmission Rate Reform**

**Transmission Infrastructure Investment (Sec. 1241).** Within one year of enactment, FERC is required to establish a rule to create incentive-based, including performance-based, transmission rates. The rule is to promote reliable and economically efficient electric transmission and generation, provide for a return on equity that attracts new investment in transmission, encourage use of technologies that increase the transfer capacity of existing transmission facilities, and allow for the recovery of all prudently incurred costs that are necessary to comply with mandatory reliability standards and those that would result from transmission siting and construction on a National Interest Electric Transmission Corridor. FERC is directed to implement incentive rate-making for utilities that join a Regional Transmission Organization.

**Funding New Interconnection and Transmission Upgrades (Sec. 1242).** FERC may approve a participant funding plan for new transmission or for new generator interconnection if the plan results in rates that are just and reasonable, not unduly discriminatory or preferential, and otherwise consistent with sections 205 and 206 of the Federal Power Act.

## **Subtitle E — Amendments to the Public Utility Regulatory Policies Act (PURPA)<sup>4</sup>**

**Net Metering and Additional Standards (Sec. 1251).** For states that have not considered implementation and adoption of net metering standards, within two years of enactment, state regulatory authorities are required to begin considering whether to implement net metering. This process must be completed within three years of enactment. Net metering service is defined as service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility (e.g., solar or small generator) and delivered to local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period. During the same time frame, states must consider whether to implement a standard to require electric utilities to develop a plan to minimize dependence on one fuel source. In addition, states must consider whether to implement a requirement that electric utilities develop and implement a 10-year plan to increase the efficiency of fossil fuel generation.

**Smart Metering (Sec. 1252).** For states that have not considered implementation and adoption of a smart metering standard, state regulatory authorities are required issue a decision within 18 months of enactment on whether to implement a standard for time-based rate schedules for electric utility customers. Customers using time-based rate schedules must be provided with a time-based meter capable of allowing utility customer to receive the time-based rate. This section amends the Public Utility Regulatory Policies Act of 1978<sup>5</sup> (PURPA) and requires the Secretary of Energy to provide consumer education on advanced metering and communications technologies, to identify and address barriers to adoption of demand response programs, and to issue a report to Congress not later than 180 days after enactment that identifies and quantifies the benefits of demand response. The Secretary of Energy must provide technical assistance to regional organizations to identify demand response potential and to develop demand response programs to respond to peak demand or emergency needs. FERC is directed to issue an annual report, by region, to assess demand response resources.

**Cogeneration and Small Power Production Purchase and Sale Requirements (Sec. 1253).** Section 210 of PURPA required utilities to purchase power from qualifying facilities and small power producers at a rate based on the utilities' avoided cost, the cost they would have incurred to generate the additional power themselves, as determined by utility regulators.<sup>6</sup> This section repeals the mandatory purchase requirement under Section 210 of PURPA for new contracts if FERC finds that a competitive electricity market exists and a qualifying facility has access to independently administered, auction-based, day-ahead, real-time wholesale markets and long-term wholesale markets. Qualifying facilities also need to have access to transmission and interconnection services provided by a FERC-approved

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<sup>4</sup> P.L. 95-617

<sup>5</sup> P.L. 95-617.

<sup>6</sup> 16 U.S.C. 824a-3.

regional transmission entity that provides nondiscriminatory treatment for all customers. Ownership limitations under PURPA are repealed.

**Background and Analysis.** The oil embargoes of the 1970s created concerns about the security of the nation’s electricity supply and led to enactment of the Public Utility Regulatory Policies Act of 1978. For the first time, utilities were required to purchase power from outside sources, or “qualifying facilities.” The purchase price was set at the utilities’ avoided cost. PURPA was established in part to augment electric utility generation with more efficiently produced electricity and to provide equitable rates to electric consumers.

In addition to PURPA, the Fuel Use Act of 1978 (FUA) helped qualifying facilities (QFs) become established.<sup>7</sup> Under FUA, utilities were not permitted to use natural gas to fuel new generating facilities. QFs, which are by definition not utilities, were able to take advantage of then-abundant natural gas as well as new generating technology, such as combined-cycle plants that use hot gases from combustion turbines to generate additional power. These technologies lowered the financial threshold for entrance into the electricity generation business and shortened the lead time for constructing new plants. FUA was repealed in 1987, but by that time, QFs and small power producers had gained a portion of the total electricity supply.

This influx of QF power challenged the cost-based rates that previously guided wholesale transactions. Before implementation of PURPA, FERC approved wholesale interstate electricity transactions based on the seller’s costs to generate and transmit the power. Because nonutility generators typically do not have enough market power to influence the rates they charge, FERC began approving certain wholesale transactions whose rates were a result of a competitive bidding process. These rates are called market-based rates.

This first incremental change to traditional electricity regulation started a movement toward a market-oriented approach to electricity supply. Following the enactment of PURPA, two basic issues stimulated calls for further change: whether to encourage nonutility generation and whether to permit utilities to diversify into nonregulated activities.

The Energy Policy Act of 1992 (EPACT)<sup>8</sup> removed several regulatory barriers for entry into electricity generation to increase competition of electricity supply. However, EPACT does not permit FERC to mandate that utilities transmit exempt wholesale generator (EWG) power to retail consumers (commonly called “retail wheeling” or “retail competition”), an activity that remains under the jurisdiction of state public utility commissions. PURPA began to shift more regulatory responsibilities to the federal government, and EPACT continued that shift away from the states by creating new options for utilities and regulators to meet electricity demand.

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<sup>7</sup> P.L. 95-620.

<sup>8</sup> P.L. 102-486.

Proponents of the PURPA repeal — primarily investor-owned utilities (IOUs) located in the Northeast and in California — argued that their state regulators’ “misguided” implementation of PURPA in the early 1980s had forced them to pay contractually high prices for power they did not need. They argued that, given the current environment for cost-conscious competition, PURPA was outdated. Investor-owned utility interests strongly supported the repeal of Section 210 of PURPA, contending that PURPA’s mandatory purchase obligation was anticompetitive and anticonsumer.<sup>9</sup>

Opponents of mandatory purchase requirement repeal (independent power producers, industrial power customers, most segments of the natural gas industry, the renewable energy industry, and environmental groups) had many reasons to support PURPA as it stood. Mainly, their argument was that PURPA introduced competition in the electric generating sector and, at the same time, helped promote wider use of cleaner, alternative fuels to generate electricity. Since the electric-generating sector is not yet fully competitive, they argued, repealing PURPA would decrease competition and impede the development of the renewable energy industry. Additionally, opponents of the PURPA repeal argued that it would result in less competition and greater utility monopoly control over the electric industry. Some state regulators had expressed concern that repealing Section 210 would prevent them from deciding matters currently under their jurisdiction.

**Interconnection (Sec. 1254).** Each state regulatory authority, if it has not already done so, and each nonregulated utility must consider establishing an interconnection standard for on-site generating facilities that request to be connected to the local distribution facilities. Interconnection services will be offered according to the Institute of Electrical and Electronics Engineers (IEEE) Standard 1547 for Interconnecting Distributed Resources with Electric Power Systems. Consideration of the standard is to commence not later than one year after enactment and be completed not later than two years after the date of enactment.

## **Subtitle F — Repeal of the Public Utility Holding Company Act of 1935 (PUHCA)<sup>10</sup>**

**Short Title (Sec. 1261).** This subtitle is to be cited as the “Public Utility Holding Company Act of 2005.”

**Definitions (Sec. 1262).** This section establishes definitions for the following terms: affiliate, associate company, commission, company, electric utility company, exempt wholesale generator and foreign utility company, gas utility company, holding company, holding company system, jurisdictional rates, natural gas company, person, public utility, public-utility company, state commission, subsidiary company, and voting security.

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<sup>9</sup> U.S. Congress. House of Representatives. *The Energy Policy Act of 2005*. Hearings before the Committee on Energy and Commerce, Subcommittee on Energy and Air Quality. Serial No. 109-1. February 10 and February 16, 2005.

<sup>10</sup> 15 U.S.C. 79 et seq.

**Repeal of the Public Utility Holding Company Act of 1935 (Sec. 1263).** The Public Utility Holding Company Act of 1935 (PUHCA) is repealed.

***Background and Analysis.*** In general, PUHCA set forth the structure of holding companies by prohibiting all holding companies that were more than twice removed from the operating subsidiaries. It also federally regulated holding companies of investor-owned utilities and provided for Securities and Exchange Commission (SEC) regulation of mergers and diversification proposals. Registered holding companies of subsidiaries were required to have SEC approval prior to issuing securities; all loans in intercompany financial transactions were regulated by the SEC. A holding company could have been exempt from PUHCA if its business operations and those of its subsidiaries occurred within one state or with a contiguous state.

Historically, electricity service was defined as a natural monopoly, meaning that the industry has (1) an inherent tendency toward declining long-term costs, (2) high threshold investment, and (3) technological conditions that limit the number of potential entrants. In addition, many regulators have considered unified control of generation, transmission, and distribution as the most efficient means of providing service. As a result, most people (about 75%) are currently served by a vertically integrated, investor-owned utility.

As the electric utility industry has evolved, however, there has been a growing belief that the historic classification of electric utilities as natural monopolies has been overtaken by events and that market forces can and should replace some of the traditional economic regulatory structure. For example, the existence of utilities that do not own all of their generating facilities, primarily cooperatives and publicly owned utilities, has provided evidence that vertical integration has not been necessary for providing efficient electric service. Moreover, recent changes in electric utility regulation and improved technologies have allowed additional generating capacity to be provided by independent firms rather than utilities.

The Public Utility Holding Company Act and the Federal Power Act of 1935 (Title I and Title II of the Public Utility Act) established a regime of regulating electric utilities that gave specific and separate powers to the states and the federal government. A regulatory bargain was made between the government and utilities. In exchange for an exclusive franchise service territory, utilities must provide electricity to all users at reasonable, regulated rates.

State regulatory commissions address intrastate utility activities, including wholesale and retail rate-making. State authority currently tends to be as broad and as varied as the states are diverse. At the least, a state public utility commission will have authority over retail rates, and often over investment and debt. At the other end of the spectrum, the state regulatory body will oversee many facets of utility operation. Despite this diversity, the essential mission of the state regulator in states that have not restructured is the establishment of retail electric prices. This is accomplished through an adversarial hearing process. The central issues in such cases are the total amount of money the utility will be permitted to collect and how the burden of the revenue requirement will be distributed among the various customer classes (residential, commercial, and industrial).

Under the FPA, federal economic regulation addresses wholesale transactions and rates for electric power flowing in interstate commerce. Federal regulation follows state regulation and is premised on the need to fill the regulatory vacuum resulting from the constitutional inability of states to regulate interstate commerce. In this bifurcation of regulatory jurisdiction, federal regulation is limited and conceived to supplement state regulation. FERC has the principal functions at the federal level for the economic regulation of the electric utility industry, including financial transactions, wholesale rate regulation, transactions involving transmission of unbundled retail electricity, interconnection and wheeling of wholesale electricity, and ensuring adequate and reliable service. Before enactment of P.L. 109-58, in order to prevent a recurrence of the abusive practices of the 1920s (e.g., cross-subsidization, self-dealing, pyramiding), SEC regulated utilities' corporate structure and business ventures under PUHCA.

The electric utility industry has been in the process of transformation. During the past two decades, there has been a major change in direction concerning generation. First, improved technologies have reduced the cost of generating electricity as well as the size of generating facilities. Prior preference for large-scale — often nuclear or coal-fired — powerplants has been supplanted by a preference for small-scale production facilities that can be brought on-line more quickly and cheaply, with fewer regulatory impediments. Second, technological advances have lowered the entry barrier to electricity generation and permitted nonutility entities to build profitable facilities.

One argument for additional PUHCA change was made by electric utilities that wanted to further diversify their assets. Under PUHCA, a holding company could acquire securities or utility assets only if the SEC found that such a purchase would improve the economic efficiency and service of an integrated public utility system. It was argued that reform to allow diversification would improve the risk profile of electric utilities in much the same way as in other businesses: the risk of any one investment is diluted by the risk associated with all investments. Utilities also argued that diversification would lead to better use of underutilized resources (due to the seasonal nature of electric demand). Utility holding companies that were exempt from SEC regulation argued that PUHCA discouraged diversification because the SEC could have repealed their exempt status if exemption would be “detrimental to the public interest.”<sup>11</sup>

State regulators expressed concerns that increased diversification could lead to abuses, including cross-subsidization — a regulated company subsidizing an unregulated affiliate. Cross-subsidization was a major argument against the creation of exempt wholesale generators (EWGs) and reemerged as an argument against further PUHCA change. In the case of electric and gas companies, nonutility ventures that are undertaken as a result of diversification may benefit from the regulated utilities' allowed rate of return. Moneymaking nonutility enterprises would contribute to the overall financial health of a holding company. However,

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<sup>11</sup> U.S. Congress, House of Representatives. *The Energy Policy Act of 2005*. Hearings before the Committee on Energy and Commerce, Subcommittee on Energy and Air Quality. Serial No. 109-1. February 10 and February 16, 2005.

unsuccessful ventures could harm the entire holding company, including utility subsidiaries. In this situation, opponents feared that utilities would not be penalized for failure in terms of reduced access to new capital, because they could increase retail rates.

Several consumer and environmental public interest groups, as well as state legislators, expressed concerns about the PUHCA repeal. Such groups argued that the repeal could only exacerbate market power abuses in what they viewed as a monopolistic industry where true competition does not yet exist.

**Federal Access to Books and Records (Sec. 1264).** Holding companies and their affiliates are required to make available to FERC books and records of affiliate transactions that FERC determines are relevant to costs incurred by a public utility or natural gas company within the holding company system to protect ratepayers with respect to FERC jurisdictional rates. Federal officials are required to maintain confidentiality of such books and records. Before enactment, registered holding companies and subsidiary companies were required to preserve accounts, cost-accounting procedures, correspondence, memoranda, papers, and books that the SEC deemed necessary or appropriate in the public interest or for the protection of investors and consumers.

**State Access to Books and Records (Sec. 1265).** A jurisdictional state commission may make a reasonably detailed written request to a holding company or any associate company for access to specific books and records. The states must safeguard against unwarranted disclosure to the public of any trade secrets or sensitive commercial information. Response to such a request is mandatory. Compliance with this section is enforceable in U.S. District Court. This section does not apply to an entity that is considered to be a holding company solely by reason of ownership of one or more qualifying facilities.

Before enactment, the Federal Power Act allowed state commissions to examine the books, accounts, memoranda, contracts, and records of a jurisdictional electric utility company, an exempt wholesale generator that sells to such electric utility, and an electric utility company or holding company that is an associate company or affiliate of an exempt wholesale generator. In issuing such an order for information, a state commission was not required to specify which books, accounts, memoranda, contracts, and records it was requesting.

**Exemption Authority (Sec. 1266).** FERC is directed to promulgate rules within 90 days from the effective date of this section to exempt qualifying facilities, exempt wholesale generators, and foreign utilities from the federal access to books and records provision (Section 1264). FERC is also required to exempt books, accounts, memoranda, and other records that are not relevant to the jurisdictional rates of a public utility or natural gas company. Any class of transactions that is not relevant to the jurisdictional rates of a public utility or natural gas company is also exempt.

**Affiliate Transactions (Sec. 1267).** FERC retains the authority to prevent cross-subsidization and to assure that jurisdictional rates are just and reasonable. FERC and state commissions retain jurisdiction to determine whether associate

company activities could be recovered in rates. Before enactment of the new energy law, the Federal Power Act required that jurisdictional rates were just and reasonable and prohibited cross-subsidization.<sup>12</sup>

**Applicability (Sec. 1268).** Except as specifically noted, this subtitle does not apply to the U.S. government, a state, or any political subdivision of the state, or foreign governmental authority operating outside the United States.

**Effect on Other Regulations (Sec. 1269).** FERC or state commissions are not precluded from exercising their jurisdiction under otherwise applicable laws to protect utility customers.

**Enforcement (Sec. 1270).** FERC is given the authority to enforce provisions under sections 306-317 of the Federal Power Act. Before enactment, the Securities and Exchange Commission had the authority to investigate and enforce provisions of the Public Utility Holding Company Act of 1935.

**Savings Provisions (Sec. 1271).** Persons may continue to participate in legal activities in which they have been engaged or are authorized to engage in on the effective date of this act. This subtitle would not limit the authority of FERC under the Federal Power Act or the Natural Gas Act.<sup>13</sup> Tax treatment for exchanges of stock or securities under section 1081 of the Internal Revenue Service Code, *Nonrecognition of Gain or Loss on Exchanges or Distributions in Obedience to Orders of the SEC*, is not affected due to the repeal of PUHCA.

**Implementation (Sec. 1272).** Not later than four months after enactment, FERC is required to promulgate regulations necessary to implement this subtitle (excluding section 1265, which relates to state access to books and records) and submit to Congress recommendations for technical or conforming amendments to federal law necessary to carry out this subtitle.

**Transfer of Resources (Sec. 1273).** The Securities and Exchange Commission is required to transfer all applicable books and records to FERC.

**Effective Date (Sec. 1274).** Six months after enactment, this subtitle will take effect. This effective date does not apply to Section 1282 (implementation). If any FERC rule-making that modifies the standards of conduct governing entities that own, operate, or control facilities for transmission of electricity in interstate commerce or transportation of natural gas in interstate commerce takes effect prior to the effective date of this section, any action taken by a public utility company or utility holding company to comply with the FERC requirements will not subject these companies to any regulatory requirement under PUHCA.

**Service Allocation (Sec. 1275).** FERC is required to review and authorize cost allocations for nonpower goods or administrative or management services provided by an associate company that was organized specifically for the purpose of

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<sup>12</sup> 16 U.S.C. 791a et seq.

<sup>13</sup> 15 U.S.C. 717 et seq.

providing such goods or services. This section does not preclude FERC or state commissions from exercising their jurisdiction under other applicable laws with respect to review or authorization of any costs. FERC is required to issue rules within four months of enactment to exempt from the section any company and holding company system if operations are confined substantially to a single state.

**Authorization of Appropriations (Sec. 1276).** Necessary funds to carry out this subtitle are authorized to be appropriated.

**Conforming Amendments to the Federal Power Act (Sec. 1277).** The Federal Power Act is amended to reflect the changes to the Public Utility Holding Company Act of 1935.

## **Subtitle G — Market Transparency, Enforcement, and Consumer Protection**

**Electricity Market Transparency (Sec. 1281).** FERC is directed to facilitate price transparency in wholesale electric markets. FERC may prescribe rules to provide on a timely basis information about the availability and prices of wholesale electric energy and transmission service to FERC, state commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public. FERC is directed to rely on existing price publishers and providers of trade processing services the maximum extent possible. However, FERC may establish an electronic information system if it determines that existing price information is not adequate. Any rules promulgated by FERC will exempt from disclosure any information that would be detrimental to the operation of an effective market or jeopardize system security. Within 180 days of enactment, FERC must enter into a memorandum of understanding (MOU) with the Commodity Futures Trading Commission to ensure coordination of information requests to markets.

Entities with a de minimis market presence are not required to comply with the reporting requirements of the section. No one will be subject to civil penalties for any violation of the reporting requirements that occur more than three years before the date on which the person has provided notice of the proposed penalty. This would not apply to entities that have engaged in fraudulent market manipulation activities. The section does not apply to the area of the Electric Reliability Council Texas.

**False Statements (Sec. 1282).** The Federal Power Act is amended to expressly prohibit any entity from willingly and knowingly reporting false information to a federal agency relating to the price of electricity sold at wholesale or the availability of transmission capacity.

Existing mail fraud laws, in part, apply to use of the mail for the purpose of executing, or attempting to execute, a scheme or artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representations, or promises. Wire fraud statutes cover use of wire, radio, or television communication in interstate or foreign commerce to transmit or to cause to be transmitted, any writings, science, signals, pictures, or sounds for the purpose of executing a scheme or artifice to

defraud, or to obtain money or property by means of false or fraudulent pretenses, representations, or promises.

**Market Manipulation (Sec. 1283).** Amends the Federal Power Act to expressly prohibit any entity, in connection with the purchase or sale of FERC jurisdictional electric energy or transmission services, from directly or indirectly using any manipulative or deceptive device or contrivance.

**Enforcement (Sec. 1284).** The Federal Power Act is amended to allow electric utilities to file complaints with FERC and to allow complaints to be filed against transmitting utilities. Criminal and civil penalties under the Federal Power Act are increased. Criminal penalties may not exceed \$1 million and/or five years' imprisonment. In addition, a fine of \$25,000 may be imposed. A civil penalty not exceeding \$1 million per day per violation may be assessed for violations of sections 211, 212, 213, or 214 of the Federal Power Act. Before enactment of the new energy law, criminal penalties could not have exceeded \$5,000 and/or two years' imprisonment. An additional fine of \$500 could have been imposed. A civil penalty not exceeding \$10,000 per day per violation could have been assessed for violations of sections 211, 212, 213, or 214 of the Federal Power Act.

**Refund Effective Date (Sec. 1285).** Section 206(b) of the Federal Power Act is amended to allow the effective date for refunds to begin at the time of the filing of a complaint with FERC, but not later than five months after such a filing. If FERC does not make its decision within the time frame provided, FERC would be required to state its reasons for not acting in the provided time frame for the decision.

**Refund Authority (Sec. 1286).** Any entity that is not a public utility (including an entity referred to under Section 201(f) of the Federal Power Act) and enters into a short-term sale of electricity is subject to the FERC refund authority. A short-term sale includes any agreement to the sale of electric energy at wholesale that is for a period of 31 days or less. This section does not apply to electric cooperatives or any entity that sells less than 8 million megawatt-hours of electricity per year. FERC is given refund authority over voluntary short-term sales of electricity by Bonneville Power Administration if the rates charged are unjust and unreasonable. FERC is given authority over all power marketing administrations and the Tennessee Valley Authority to order refunds to achieve just and reasonable rates. Before enactment, Section 201(f) of the Federal Power Act exempted government entities from FERC rate regulation.

**Consumer Privacy and Unfair Trade Practices (Sec. 1287).** The Federal Trade Commission is authorized to issue rules to prohibit *slamming* and *cramming*. Slamming occurs when an electric utility switches a customer's electric provider without the consumer's knowledge. Cramming occurs when an electric utility adds additional services and charges to a customer's account without permission of the customer. If the Federal Trade Commission determines that a state's regulations provide equivalent or greater protection, then the state regulations would apply in lieu of regulations issued by the Federal Trade Commission.

**Authority of Court to Prohibit Individuals from Serving As Officers, Directors, and Energy Traders (Sec. 1288).** The court is allowed to prohibit

any person who is found to have violated Section 221 of the Federal Power Act (Prohibition on Filing False Information) from acting as an officer or director of an electric utility or engaging in the business of purchasing or selling FERC jurisdictional electric energy or transmission services.

**Merger Review Reform (Sec. 1289).** The Federal Power Act is amended to give FERC approval authority over the acquisition of securities and the merger, sale, lease, or disposition of facilities under FERC's jurisdiction with a value in excess of \$10 million. FERC is required to give state public utility commissions and governors reasonable notice in writing of the acquisition of securities and the merger, sale, lease, or disposition of facilities under FERC's jurisdiction. FERC must approve the proposed change of control, acquisition, disposition, or consolidation if it finds that the proposed transaction is consistent with the public interest and will not result in cross-subsidization of a nonutility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless it is consistent with the public interest. If FERC does not act within 180 days of an application, the application will be deemed granted unless FERC finds that further consideration is required. This section takes effect six months after enactment. Before enactment, under section 203(a) of the Federal Power Act, FERC review of asset transfers applied to transactions valued at \$50,000 or more.

**Relief for Extraordinary Violations (Sec. 1290).** This section applies to contracts for wholesale electricity within the Western Interconnection prior to June 20, 2001, for which FERC has found that the wholesale power sellers manipulated that electricity market, resulting in unjust and unreasonable rates, and FERC has revoked the seller's authority to sell at market-based rates. For these contracts, FERC may determine whether termination payments for power not delivered by the seller are unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest. This applies only to cases still pending before FERC and not previously settled.

## **Subtitle H — Definitions**

**Definitions (Sec. 1291).** The definitions for electric utility and transmitting utility under the Federal Power Act are amended. Definitions for the following terms are added to the Federal Power Act: electric cooperative, regional transmission organization, independent system operator, and transmission organization.

Section 201(f) of the Federal Power Act is amended to add that, in addition to a political subdivision of a state, an electric cooperative that receives financing under the Rural Electrification Act of 1936 or an electric cooperative that sells less than 4,000,000 MW-hours of electricity per year is not subject to FERC rate regulation.

## **Subtitle I — Technical and Conforming Amendments**

**Conforming Amendments (Sec. 1295).** The Federal Power Act is amended to conform with this section.

## Subtitle J — Economic Dispatch

**Economic Dispatch (Sec. 1298).** FERC is directed to convene regional boards to study “security constrained economic dispatch.” A member of FERC will chair each regional joint board, composed of a representative from each state. Within one year of enactment, FERC is required to submit a report to Congress on the recommendations of the joint regional boards. This section does not define “security constrained economic dispatch,” but it generally means a dispatch system that ensures that all normal and contingency limits of the system are simultaneously met under a base case with one contingency: the loss of a critical network element (n-1 security analysis).

## Title XVIII — Studies

**Effect of Electrical Contaminants Unreliability of Energy Production Systems (Sec. 1822).** Within 180 days after enactment, the Secretary of Energy will enter into a contract with the National Academy of Sciences (Academy), under which the Academy will determine the effect that electrical contaminants may have on the reliability of energy production systems, including nuclear energy.

**Final Action on Refunds for Excessive Charges (Sec. 1824).** FERC is directed to complete its investigation into the unjust and unreasonable charges incurred by California during the 2000-2001 electricity crisis. A report to Congress will be submitted by December 31, 2005, that describes FERC’s actions and a timetable for further actions. This was submitted to Congress on December 27, 2005.<sup>14</sup>

**Study the Benefits of Economic Dispatch (Sec. 1832).** The Secretary of Energy, in consultation with the states, must study economic dispatch and issue an annual report to Congress and the states. Economic dispatch is defined as “the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities.”

**Transmission System Monitoring (Sec. 1839).** Within six months after enactment, the Secretary of Energy and FERC will study and report to Congress on what would be involved in providing all transmission system owners and Regional Transmission Organizations with real-time transmission line operating status.

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<sup>14</sup> This report is available at [<http://www.ferc.gov/legal/maj-ord-reg/fed-sta/ene-pol-act.asp>]. Website last checked by CRS on January 24, 2006.