SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 250

[Release No. 35–26311, File No. S7–17–92]

RIN 3235–AF49

Exemption of Issuance and Sale of Certain Securities by Public Utility and Nonutility Subsidiary Companies of Registered Public Utility Holding Companies; Exemption of Acquisition by Companies in a Registered Public Utility Holding Company System of Certain Securities of Associate Companies; Exemption of Capital Contributions and Open Account Advances, Without Interest, by Parent Companies to Subsidiary Companies

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending rule 52, which exempts certain financing transactions involving the securities of the public utility subsidiary companies of a registered public utility holding company from the requirement of prior Commission approval under the Public Utility Holding Company Act of 1935 (''Act''). As amended, the rule will exempt certain additional types of securities, and will exempt the issuance and sale of certain types of securities of nonutility subsidiary companies of a registered holding company in connection with routine financing transactions. The Commission is also amending rule 45(b)(4) to exempt from the requirement of prior Commission authorization under section 12(b) of the Act and rule 45(a) all capital contributions and open account advances by a parent company to its subsidiary company. These amendments are intended to eliminate unnecessary regulatory and paperwork burdens associated with seeking Commission approval for routine financings by registered holding companies and their subsidiary companies.

EFFECTIVE DATE: June 28, 1995. These amended rules are substantive rules that grant an exemption or relieve restrictions.[1]

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SUPPLEMENTARY INFORMATION: Rule 52 (17 CFR 250.52) exempts from the requirement of prior Commission approval under section 6(a) the issuance and sale of certain specified types of securities by a public utility subsidiary of a registered holding company, subject to the terms and conditions of the rule. Rule 52 also exempts from the requirement of prior Commission authorization under section 9(a) the acquisition by a parent holding company of the securities issued by an existing public utility subsidiary pursuant to the rule. The Commission is amending rule 52 to broaden the types of debt securities that may be issued in reliance upon the exemption and to make the exemption available to nonutility subsidiaries of a registered holding company in connection with routine financing transactions. The Commission is also amending rule 45 (17 CFR 250.45) to exempt from the requirement of prior Commission authorization under section 12(b) of the Act and rule 45(a) capital contributions and open account advances by a parent company to its subsidiary companies. The Commission proposed these amendments by release issued on July 7, 1992.[2]

In a companion release published today in the **Federal Register**, the Commission is inviting public comment on a further amendment to rule 52 that would extend the exemption to all types of securities issued in connection with routine financing transactions, provided that the conditions of the rule are met. The Commission is also proposing a conforming change to rule 45.

Discussion

Rule 52 exempts from the requirement of prior Commission authorization under section 6(a) the issue and sale of certain specified types of securities by public utility subsidiary companies of registered holding companies.[3] The rule also exempts from the requirement of prior Commission authorization under section 9(a)(1) the acquisition by a company in a registered system of any securities issued by an existing public utility subsidiary pursuant to the rule.[4]

At present, the rule applies only with respect to the issuance of common stock, preferred stock, mortgage bonds and notes issued to a parent holding company, where the interest rate and maturity date of the note is designed to parallel a debenture or preferred stock issued by the parent. The issue and sale of such securities must be solely for the purpose of financing the business of the public utility company, and the relevant state commission must have expressly authorized the financing transactions.

Rule 45 prohibits registered holding companies and their subsidiaries from lending or extending credit to, indemnifying, or making any donation or capital contribution to a company in the same holding company system, except in specified circumstances.[5] The rule provides exceptions from the general provision, including an exception under rule 45(b)(4) for capital contributions or open account advances without interest to any subsidiary in an

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[1] 5 U.S.C. 553(d)(1).

[2] Holding Co. Act Release No. 25574 (July 7, 1992), 57 FR 31156 (July 14, 1992) (''Proposing Release'').

[3] Section 6(a) requires Commission approval under the standards of section 7 for the issue and sale of any security of a registered holding company or its subsidiary company.

Section 6(b) authorizes the Commission to exempt from the requirements of section 6(a):

> the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business.

Congress intended ''to exempt the issue of securities by subsidiary companies in cases where holding company abuses are unlikely to exist.'' H.R. Conf. Rep. No. 1903, 74th Cong., 1st Sess. 66–67 (1935). See generally Holding Co. Act Release No. 25058 (Mar. 19, 1990), 55 FR 11362 (Mar. 28, 1990) (adopting rule 52), and Holding Co. Act Release No. 25573 (July 7, 1992), 57 FR 31120 (July 14, 1992) (amending rule 52).

[4] Section 9(a)(1) in pertinent part requires prior approval under the standards of section 10 for an acquisition of securities by a registered holding company or its subsidiary company. Section 9(c)(3) provides a limited exception from this requirement for the acquisition of:

> such commercial paper and other securities, within such limitations, as the Commission may by rules and regulations or order prescribe as appropriate in the ordinary course of business of a registered holding company or subsidiary company thereof and as not detrimental to the public interest or the interest of investors or consumers.

The exemption under rule 52 does not apply to the issuance of securities to form a new public utility subsidiary of a registered holding company. See rule 52(c).

[5] Rule 45 was adopted under section 12(b), which provides that:

> It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, to lend or in any manner extend its credit to or indemnify any company in the same holding-company system in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Rule 45(a) requires the filing of a declaration and an order of the Commission permitting the declaration to become effective in order for a registered holding company or its subsidiary to engage in these transactions.

aggregate amount of up to $50,000 in any calendar year, after deducting payments during the year.

On July 7, 1992, the Commission proposed amendments to rules 52 and 45(b)(4) under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79 *et seq.*).[6] The amendments would (a) broaden the types of debt securities that may be issued by public utility subsidiaries in reliance upon rule 52, (b) extend the exemption under rule 52 to nonutility subsidiaries of registered holding companies, (c) revise the conditions of rule 52 applicable to intrasystem loan transactions, and (d) remove the annual dollar limitation from rule 45(b)(4).

The Commission received comments submitted by or on behalf of seven registered holding companies[7] and by the Council of the City of New Orleans and the National Association of Regulatory Utility Commissioners (''NARUC''). While the registered holding companies generally support adoption of the proposed amendments, New Orleans and NARUC generally oppose the amendments. New Orleans urged that, in the event the amendments are adopted, several additional conditions, including incorporation of a consolidated debt/equity ratio applicable to sales of securities by nonutility subsidiaries, should be included. The Commission had invited comment on the need for such a limitation in its notice of proposed rulemaking. The objections of New Orleans and NARUC are discussed in greater detail in section 5, below.

1. Issue and Sale of Securities by Public Utility Subsidiaries

Rule 52 currently exempts the issue and sale by a public utility subsidiary of any common stock, preferred stock, mortgage bond or note issued to a parent holding company. The rule currently has limited usefulness. With respect to intrasystem loan transactions, the exemption is available only for notes issued to a parent holding company with interest rates and maturity dates that parallel those of the holding company's debentures or preferred stock. This condition prevents the use of the exemption in connection with other common forms of intrasystem financing, such as unsecured short-term and long-term loans, money pool arrangements, and the like, the terms of which are not matched to an actual debenture or preferred stock issued by the acquiring company.[8] In addition, because none of the registered electric utility holding companies currently issues debentures and preferred stocks, their subsidiaries do not benefit from the exemption at all in connection with down-stream loans. The Commission proposed to amend the rule to extend the exemption to all types of debt instruments, including bonds, notes and other forms of indebtedness issued by the subsidiary, having interest rates and maturities designed to parallel the effective cost of capital of the purchaser.[9] All of the holding companies submitting comments support a change that would extend the benefits of rule 52 to all types of indebtedness.

The Commission believes it is appropriate to expand the exemption of rule 52 to include all types of debt securities[10] that may be issued by utility subsidiaries, as proposed. The Commission believes that this expanded exemption is appropriate in view of the continuing requirement of express approval by the state commission of the state in which the public utility is organized and doing business. In 1935, few states exercised jurisdiction over public utility financing. Today, most do, although the extent of such jurisdiction varies greatly.[11] Rule 52 will not apply to utility financings if a state does not regulate financing, nor to a utility in a state which regulates securities sales generally if such state chooses not to regulate a particular type of security, such as short-term debt. CSW and CNG ask the Commission to interpret section 6(b) to permit an extension of the exemption under rule 52 to utility debt issuances where the relevant state government has determined that such issuances need not be reviewed by the state utility commission. Similarly, GPU suggests an expansion of rule 52 to guaranties issued by a holding company where no state commission approval is required. The Commission declines to adopt these suggestions, as section 6(b) does not appear to offer a basis for such action.

In proposing the amendment to rule 52, the Commission contemplated that the effective cost of capital for debt securities which have recently been issued by the purchasing associate company will be the coupon rate of interest plus all expenses, including, but not limited to, underwriters' compensation, discounts, and fees and commissions associated with the issue and sale of such debt; and that, in the event the purchasing associate company has not recently issued debt securities, the effective cost of capital may be tied to an appropriate index such as, but not limited to, the Federal Funds' rate or a published bond index. The Commission invited comment on whether other factors should be considered in determining the effective cost of capital of the purchasing associate company.

APS suggests that filing fees, listing fees, counsel and accountants' fees, Blue Sky survey fees, and transfer agent fees should also be considered.[12] The Commission agrees that all ordinary and necessary costs of a debt offering should be considered.

CNG recommends that the Commission permit use of an appropriate index to determine the effective cost of capital if the associate company has issued debt securities in circumstances where the financing terms are not comparable to the terms of the intrasystem loan.[13] We believe that the language of the final rule is flexible enough to permit use of a published rate or index in these circumstances.

2. Issue and Sale of Securities by Nonutility Subsidiaries

In the Proposing Release, the Commission noted the large volume of debt securities sold by nonutility subsidiaries of registered holding companies. The Commission proposed

[6] See the Proposing Release.

[7] The registered holding companies submitting comments were American Electric Power Company, Inc., Allegheny Power System, Inc. (''APS''), Consolidated Natural Gas Company (''CNG''), Central and South West Corporation (''CSW''), Eastern Utilities Associates, General Public Utilities Corporation (''GPU''), and New England Electric System.

[8] As noted in the Proposing Release, the omission of common intrasystem financing transactions is of particular concern to the registered gas systems. Unlike registered electric systems, these systems typically issue and sell debt to the public at the parent company level and fund their subsidiaries' operations by means of capital contributions, open account advances, money pool arrangements, purchases of common stock, and short- and long-term loans.

[9] The Commission noted that it has permitted numerous declarations to become effective for the issuance and sale of such securities on this basis. See, e.g., Consolidated Natural Gas Co., Holding Co. Act Release No. 25339 (June 28, 1991), 49 SEC Docket 449 (July 16, 1991), and Holding Co. Act Release No. 25110 (June 29, 1990), 46 SEC Docket 1124 (July 17, 1990) (cost to subsidiaries of borrowing from parent registered holding company tied to Federal Funds' rate for short-term debt and published bond index for long-term debt).

[10] In the Proposing Release, the Commission sought comment on whether rule 52 should be extended to cover guaranties. However, the rule as amended today will specifically exclude guaranties. As discussed below, the Commission is requesting comment in a companion release to be published today on the question of whether rule 52 should be further amended to cover issuance of all types of securities, including guaranties.

[11] See National Association of Regulatory Utility Commissioners Compilation of Utility Regulatory Policy in the United States and Canada, 1993–94 Compilation (NARUC 1994), Tables 59A and B (state jurisdiction with respect to the issue and sale of securities by public-utilities).

[12] APS at 1.

[13] CNG at 2.

to amend rule 52 to encompass nonutility as well as utility subsidiaries. So doing, the Commission noted that absent further amendment of the rule, routine gas intrasystem financings would remain subject to the requirement of prior approval.[14]

Section 6(b) provides that the Commission shall exempt the issue and sale of a security of a nonutility subsidiary of a registered holding company for the purpose of financing the subsidiary's business, subject to such terms and conditions as the Commission deems appropriate in the public interest or for the protection of investors or consumers. In enacting section 6(b), Congress intended the Commission ''to exempt the issue of securities by subsidiary companies in cases where holding company abuses are unlikely to exist.[15]

In the past, the Commission has granted exemptions for nonutility financings by order on a case-by-case basis. The Commission, in 1989, also considered an exemption by rule for such financings. In the release proposing the original rule 52, the Commission deferred action, citing its concern ''with the adverse consequences that potential growth of debt in the nonutility subsidiary companies could have for the holding-company system and the public utility subsidiaries.'' [16]

Our experience since that time suggests to the Commission that a case-by-case approach to nonutility financings is no longer necessary. In addition, the extensive reporting requirements imposed on registered holding company systems by the Act and other federal securities laws, and the level of scrutiny of reporting companies by investors and by the financial community suggest that the rule may appropriately encompass nonutility as well as utility subsidiaries. All of the registered holding companies submitting comments support expansion of the rule to exempt routine nonutility subsidiary financings.

GPU, noting the widespread use of partnership interests and other types of securities in nonutility financing, particularly in the context of project finance, recommends the inclusion of such securities in rule 52(b).[17] Because the Commission is proposing a further amendment to rule 52 to extend the exemption of the rule to all types of securities issued by subsidiary companies of a registered holding company, so long as the other conditions of the rule are met, we do not think it necessary to address the status of partnership interests separately at this time.[18]

In the Proposing Release, the Commission invited comment on whether, to avoid excess leveraging, the availability of the exemption for security issuances of nonutility subsidiaries should be conditioned upon a requirement that an issuance not cause the consolidated debt/equity ratio of the holding company system to exceed 65/30.[19] None of the commenting holding companies support such a measure. Most observe that market forces affecting the parent holding company's common stock, as well as the desire to maintain credit quality ratings on public utility debt, will effectively deter management from over-leveraging the holding company capital structure.[20]

GPU notes that financing of independent power project subsidiaries is typically non-recourse to other companies in the holding company system, so that including such debt in a consolidated capitalization ratio would overstate the exposure of the registered system. GPU also states that the use of a consolidated debt/equity ratio would not be consistent with the Commission's approval of higher debt ratios in numerous project financing applications.[21] New Orleans, however, supported by NARUC, believes that such a consolidated capitalization ratio is necessary if proposed rule 52(b) is adopted, which, as previously indicated, these commenters oppose.

Total investment by registered holding companies in nonutility subsidiaries, to date, has not been significant in amount. As of December 31, 1994, the registered holding companies had invested only $1.1 billion (1.4% of over $80 billion of total capitalization) in all energy-related businesses, exclusive of exempt wholesale generators, foreign utility companies and gas holding company transportation and supply operations.

The Commission has concluded that it is unnecessary to condition an exemption under rule 52(b) upon the maintenance of a consolidated debt/equity ratio of 65/30.[22] We agree with the arguments of the holding companies in this respect. We also note that the Commission will continue to have jurisdiction over securities sales by registered holding companies. The Commission will thus be able to monitor, on a continuing basis, the effects of holding company financing on the consolidated capital structure of the registered system.

Because rule 52(c) currently exempts only acquisitions of securities issued and sold by a public utility subsidiary, the Commission proposed to amend rule 52 to extend the exemption to acquisitions of securities of nonutility subsidiaries as well. The Commission is adopting the proposed amendment. Paragraph (c) of the rule, with this change, becomes paragraph (d).

In a separate release, the Commission is today seeking comment on a rule that would allow registered holding companies to diversify through new or existing subsidiaries into certain categories of ''energy-related'' businesses, subject to financial and other limitations. In this connection, the Commission intends to revisit rule 52(d) to conform or limit its scope.

3. Capital Contributions and Open Account Advances, Without Interest, to Subsidiary Companies

Rule 52, as amended, does not provide an exemption for certain other common intrasystem financing transactions. For example, a capital contribution from a registered holding company to any of its subsidiary companies is regulated as an intercompany loan under section 12(b)

[14] The Commission noted that the nonutility operations of registered gas holding companies rival in size the utility operations, largely because the Act does not include transmission assets in the definition of a gas utility company.

[15] H. R. Conf. Rep. No. 1903, 74th Cong., 1st Sess. 66–67 (1935).

[16] Holding Co. Act Release No. 24891 (May 17, 1989), 54 FR 22314 (May 23, 1989) (proposing rule 52).

[17] GPU at 3.

[18] Filings with the Commission to date suggest that the kinds and types of securities issued by nonutility subsidiaries, such as independent power subsidiaries, will vary more than those issued by public utility subsidiaries.

[19] The Commission noted that this condition is drawn from section 7(d)(1), which requires the Commission, in reviewing an issuance of securities, to consider whether the security is reasonably adapted to the security structure of the company issuing the security and the other companies in the registered holding company system. Under that section, the Commission generally has required a registered holding company system and its public utility subsidiaries to maintain a 65/30 debt/common equity ratio, the balance generally being preferred equity. Such a debt/equity capitalization requirement was included in rule 52, as originally adopted, as applied to securities issued by public utility subsidiaries, but was eliminated in 1992.

[20] The Commission also notes the emphasis placed upon these considerations in many comments received in response to our request for comment concerning the modernization of regulation under the Act. See Holding Co. Act Release No. 26153 (Nov. 2, 1994), 59 FR 55573 (Nov. 8, 1994).

[21] GPU at 3–4.

[22] As in the case of a debt instrument issued by a public utility subsidiary pursuant to the rule, the interest rates and maturity dates of any debt security issued by a nonutility subsidiary to an associate company would be required to parallel the effective cost of capital of the associate company. See the discussion *supra*, at 6–7, 8–9.

and rule 45.[23] Open account advances that do not bear interest are also subject to these provisions.

To facilitate these transactions, the Commission proposed to amend rule 45(b)(4), which exempts up to $50,000 in capital contributions and open account advances, without interest, made to any subsidiary during a calendar year, to remove the dollar limitation of the rule.[24] All of the registered holding companies submitting comments support this change. New Orleans proposes that, if rule 45(b)(4) is amended, it should exempt capital contributions or open account advances subject to an aggregate limitation of $1,000,000 per year.

As the Commission noted in the Proposing Release, the legislative history of the Act makes clear that the Congress, while concerned with holding company abuses, recognized that ''[d]own-stream loans * * * may be legitimate sources of credit * * *,'' and concluded that ''the subject is one in which the rule-making power of the Commission is required to meet a host of varying circumstances.'' [25] Capital contributions and open account advances, without interest, are routine transactions which serve to transfer funds from the parent to its subsidiary. The amounts and types of securities issued by any registered holding company, which remain subject to prior approval by the Commission, must be justified by reference to the need for capital infusions by its subsidiaries, both utility and nonutility. Financing requests must be supported by capital budget projections covering the authorization period. The Commission believes that its ability to supervise intrasystem financing through these means will not be compromised by removal of the dollar limitation in rule 45(b)(4). Accordingly, the Commission declines to incorporate an aggregate dollar limitation in the rule as adopted.[26]

4. Issuance of Other Securities

Finally, the Commission sought comment on whether the amendments to rules 45 and 52 should be extended to exempt financing transactions involving other securities, in particular, guaranties of debt securities issued by other subsidiary companies.[27] Because guaranties are securities under the Act,[28] their issuance and sale are subject to the declaration requirement of section 6, unless exempted under section 6(b). At present, rule 52 does not extend to the issuance and sale of guaranties.

In addition, the guaranty by a subsidiary company of debt securities issued by another subsidiary company is subject to section 12(b) and rule 45 thereunder. Rule 45, with exceptions not relevant here, prohibits the issuance of guaranties by a subsidiary company without the filing of a declaration.[29]

As previously indicated, we are publishing a companion release inviting comment on a further amendment to rule 52 to exempt the issuance of all types of securities. Accordingly, there is no need to address guaranties separately at this time.

5. Comments by the City of New Orleans and NARUC

New Orleans opposes any expansion of the exemptions from the Commission's pre-approval requirement for financings provided by rules 45(b)(4) and 52 which, the city contends, would ''widen the existing regulatory gap between federal and state and local regulators.'' [30] New Orleans urges that, if the amendments are adopted, several additional conditions need to be incorporated. Certain of these additional conditions, or limitations on the availability of the exemptions, have been discussed above. New Orleans states that these conditions are generally necessary to protect public utility subsidiaries of registered holding companies and their customers from the financial effects of financing transactions, particularly in the context of nonutility ventures that are not otherwise subject to effective state oversight.

During the notice period inviting comment on the proposed amendments to rules 45(b)(4) and 52, Congress passed the Energy Policy Act of 1992.[31] Title VII of the Energy Policy Act amended the Act to permit investments by registered holding companies in ''exempt wholesale generators'' (''EWGs'') and ''foreign utility companies'' (''FUCOs''), defined in new sections 32 and 33, respectively.[32] Those sections exempt EWGs and FUCOs from all provisions of the Act, including sections 6(a), 7 and 12(b), which would otherwise apply to securities and guaranties issued and sold by such entities. However, these sections do not exempt issuance and sale of securities by a registered holding company in cases where the proceeds will be used for EWG or FUCO investments, and these financing transactions continue to require Commission approval under sections 6(a) and 7. Under section 32, Congress directed the Commission to promulgate rules with respect to actions which would be considered to ''have a substantial adverse impact on the financial integrity of the registered holding company system'' to ensure that actions (*e.g.*, financings, guaranties, etc.) by any registered holding company in respect of EWGs would not have any adverse impact on any utility subsidiary or its customers or on effective state regulation.[33] Similarly, under section 33, Congress directed the Commission to promulgate rules regarding registered holding companies' acquisitions of interests in FUCOs which shall provide for the protection of the customers of associate public utility companies and the financial integrity of the holding company system.[34]

The Commission had not yet initiated the rulemaking effort under new sections 32 and 33 when it proposed the additional amendments to rules 45(b)(4) and 52. In part for that reason, NARUC and New Orleans both urged the Commission to delay any action on the proposed rules pending development of consumer protection measures in the broader context of investments in EWGs and FUCOs, which, for purposes of the

[23] Section 12(b) and rule 45(a) generally require prior Commission approval for a registered holding company or its subsidiary company to ''lend or in any manner extend its credit to or indemnify any company in the same holding-company system.''

[24] Rule 45(b)(4) exempts ''[c]apital contributions or open account advances, without interest, to any subsidiary: *Provided,* That after giving effect to the transaction the total net amount which such subsidiary will have received during the calendar year as a result of such transactions will not exceed $50,000 (after deducting payments during the year regardless of the date of the advances).'' The rule contained the $50,000 limitation when adopted in 1941. Holding Co. Act Release No. 2694 (Apr. 21, 1941).

[25] S. Rep. No. 621, 74th Cong., 1st Sess. 34–5 (1935).

[26] We also intend to revisit rule 45(b)(4) in the context of any rulemaking on nonutility diversification.

[27] Section 12(a) prohibits the guaranty by subsidiary companies of debt issued by a registered holding company.

[28] See section 2(a)(16) (definition of security).

[29] At present, rule 45(b)(6) exempts certain guaranties ''in the ordinary course of business.'' The rule by its terms does not apply to a guaranty of a subsidiary's indebtedness for borrowed money.

[30] New Orleans, Executive Summary, at 4–5.

[31] P.L. 102–486, 106 Stat. 2776 (1992).

[32] An EWG is defined in section 32(a) of the Holding Company Act as any person determined by the Federal Energy Regulatory Commission to be engaged exclusively in the business of owning and/or operating all or part of one or more facilities that are used for the generation of electric energy, exclusively for sale at wholesale or leased to a utility, and selling electric energy at wholesale. A FUCO is defined in section 33(a) as any person that owns or operates facilities outside the United States used for the generation, transmission or distribution of electric energy for sale or for the distribution at retail of natural or manufactured gas, that derives no part of its income from such utility activities in the United States and is not a public utility company operating in the United States, and that provides notice to the Commission.

[33] See section 32(h)(6).

[34] See section 33(c)(1).

Act, are nonutilities. However, since that time, several related rules have been promulgated under the new provisions, and others are pending.[35] Those rules were intended to carry out the Congressional mandates under sections 32 and 33.[36] We note that those rules are subject to a pending challenge by NARUC and others.[37]

The City of New Orleans recommends that the Commission consider the proposed amendments in light of the Congressional mandates under sections 32 and 33. We do not believe this measure is necessary. As indicated, those provisions exempt EWGs and FUCOs from all provisions of the Act, and the rules adopted under those sections are intended to provide a means to ensure that investments by the holding company and activities of the exempt subsidiaries have not adversely affected the holding company or its utility customers. The proposed amendments to rules 45(b)(4) and 52, in contrast, exempt only public utility financing that has been reviewed and approved by state commissions, and financing by nonutility subsidiaries (other than EWGs and FUCOs) that is non-recourse to the holding company or any utility subsidiary. As a result, the activities exempted by the proposed rule amendments are not nearly so far-reaching as the EWG and FUCO provisions, and do not have the same need for additional consumer protection. Further, and this distinction appears critical, the acquisition by a registered holding company of an interest in a new nonutility business, and any other actions related thereto, such as the organization of a separate subsidiary to conduct that business, the initial capitalization thereof, intrasystem guaranties and any arrangements for the sale of goods and services to the new subsidiary, are, in the absence of any other applicable exemption, subject to the pre-approval process required under applicable provisions of the Act, as well as to ongoing reporting requirements and other requirements of the Act regarding maintenance of books and records, audits, inspections and the like. State commissions, consumer groups and other interested parties have the opportunity to express their views regarding the likely effects of nonutility ventures on consumers and other protected interests and to propose safeguards appropriate in order to protect these interests in connection with this pre-approval process.[38]

In addition to the modifications to the proposed rules mentioned elsewhere in this release, New Orleans recommends that the rules, if adopted, should require prior approval of a holding company's cost of capital by each state and local commission which regulates the parent. The Commission understands this request to involve approval by a commission in each of the states in which the holding company's public utility subsidiaries operate.[39] Because the rules do not exempt holding company financings from our approval, we see no useful purpose to be achieved by requiring a multistate determination of a holding company's cost of capital. The Commission is specifically obligated by section 7(d) to consider the reasonableness of the fees, commissions and other expenses of a securities issuance which would be relevant to the determination of a holding company's effective cost of capital in connection with our consideration of any holding company financing applications.

New Orleans' suggestion that rule 52, as proposed to be amended, also be conditioned upon a requirement for state commission approval in every state in a holding company's service territory for any guaranty is likewise misplaced.[40] As previously stated, the rules do not exempt registered holding companies from the requirement to obtain Commission approval in connection with issuing any guaranty.

In summary, we do not believe that the proposed amendments to rules 45(b)(4) and 52 will compromise our ability to protect consumers and investors, and we do not find that the additional conditions and restrictions proposed by New Orleans are necessary for this purpose. We are therefore adopting the proposed amendments to rules 45(b)(4) and 52 substantially in the form proposed.

Conclusion

The Commission believes that the registered holding-company systems should have a greater ability to engage in routine financings without the regulatory burden of prior Commission authorization, and that this may be done without jeopardizing the interests the Act is designed to protect. The rule amendments adopted today are consistent with those two objectives.

Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the Commission has certified that the proposed amended rules will not, if adopted, have a significant economic impact on a substantial number of small entities. The Commission did not receive any comments with respect to the Chairman's certification.

Costs and Benefits

Amended rule 52 will substantially decrease regulatory compliance costs for the registered holding companies. In calendar years 1993 and 1994, 122 applications would not have been filed, had the proposed amended rule 52 been in place. Estimated savings per application would have been approximately $30,000 including the $2,000 filing fee per application, and related legal, accounting, and management costs. Thus, for 122 applications filed in calendar years 1993 and 1994, the aggregate savings would have been approximately $3,660,000 or $1,830,000, respectively, per year. Moreover, the reduction in Commission staff hours associated with reviewing and analyzing these applications would have been approximately 5,700 hours per year (2.5 staff years). The only cost to the registered holding companies in complying with the amended rule will be the cost of completing a Form U–6B–2 after the issue or sale of any security. It is estimated that approximately one hour will be required to complete each form at an estimated cost of $100 per hour. Assuming 61 financing applications per year, the cost of compliance reporting would approximate $6,100 per year.

Paperwork Reduction Act

The proposed amended rules are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 79 *et seq.*) and have been submitted to the Office of Management and Budget for approval to use them through July 31, 1997. Final action is expected by June 23, 1995.

Statutory Authority

The Commission is amending rules 45 and 52 pursuant to sections 6, 9, 12 and 20 of the Public Utility Holding Company Act of 1935.

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[35] See Holding Co. Act Release No. 25886 (Sept. 23, 1993), 58 FR 51488 (Oct. 1, 1993).

[36] Rule 53 provides standards for the Commission to determine whether to approve the issue or sale of a security by a registered holding company, in cases where the proceeds of the financing will be used to acquire an EWG. Rule 54 provides that the effect of EWG and FUCO operations on the registered system will not be considered in determining whether to approve any other transactions under the Holding Company Act, if the standards of rule 53 are satisfied. 17 CFR 250.53 and 250.54.

[37] *National Association of Regulatory Utility Commissioners, et al.* v. *Securities and Exchange Commission,* U.S. Court of Appeals for the District of Columbia Circuit, No. 93–1778.

[38] Further, the amended rules do not create any new exemption from the pre-approval process for guaranties by a registered holding company of the securities or other obligations of any subsidiary.

[39] New Orleans at 15.

[40] New Orleans at 16.

List of Subjects in 17 CFR Part 250

Electric utilities, Holding companies, Natural gas, Reporting and recordkeeping requirements, Securities.

Text of Final Rules

For the reasons set forth in the preamble, Part 250 of chapter II, title 17, of the Code of Federal Regulations is amended as follows:

PART 250—GENERAL RULES AND REGULATIONS, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

1. The authority citation for part 250 continues to read as follows:

Authority: 15 U.S.C. 79c, 79f(b), 79i(c)(3), 79t, unless otherwise noted.

2. Section 250.45 is amended by revising paragraph (b)(4) to read as follows:

§ 250.45 Loans, extensions of credit, donations and capital contributions to associate companies.

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(b) *Exceptions.* * * *

(4) Capital contributions or open account advances, without interest, by a company to its subsidiary company.

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3. Section 250.52 is revised to read as follows:

§ 250.52 Exemption of issue and sale of certain securities.

(a) Any registered holding-company subsidiary which is itself a public utility company shall be exempt from section 6(a) of the Act (15 U.S.C. 79f(a)) and rules thereunder with respect to the issue and sale of any common stock, preferred stock, bond, note or other form of indebtedness, of which it is the issuer (excluding any guaranty and other form of assumption of liability on the obligations of another) if:

(1) The issue and sale of such security are solely for the purpose of financing the business of such public utility subsidiary company;

(2) The issue and sale of such security have been expressly authorized by the state commission of the state in which such subsidiary company is organized and doing business; and

(3) The interest rates and maturity dates of any debt security issued to an associate company are designed to parallel the effective cost of capital of that associate company.

(b) Any subsidiary of a registered holding company which is not a holding company, a public utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company or an investment company shall be exempt from section 6(a) of the Act (15 U.S.C. 79f(a)) and rules thereunder with respect to the issue and sale of any common stock, preferred stock, bond, note or other form of indebtedness, of which it is the issuer (excluding any guaranty and other form of assumption of liability on the obligations of another) if:

(1) The issue and sale of such security are solely for the purpose of financing the existing business of such subsidiary company; and

(2) The interest rates and maturity dates of any debt security issued to an associate company are designed to parallel the effective cost of capital of that associate company.

(c) Within ten days after the issue or sale of any security exempt under this section, the issuer or seller shall file with the Commission a Certificate of Notification on Form U–6B–2 (17 CFR 259.206) containing the information prescribed by that form. However, with respect to exempt financing transactions between associate companies which involve the repetitive issue or sale of securities or are part of an intrasystem financing program involving the issuance and sale of securities not exempted by this section, the filing of information on Form U–6B–2 may be done on a calendar quarterly basis.

(d) The acquisition by a company in a registered holding company system of any security issued and sold by any associate company, pursuant to this section, is exempt from the requirements of section 9(a) of the Act (15 U.S.C. 79i(a)); provided that the exemption granted by this paragraph (d) shall not apply to any transaction involving the issue and sale of securities to form a new subsidiary company of a registered holding company.

Dated: June 20, 1995.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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