SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 250 and 259

[Release No. 35–26667; File No. S7–12–95]

RIN 3235–AG46

Exemption of Acquisition by Registered Public-Utility Holding Companies of Securities of Nonutility Companies Engaged in Certain Energy-Related and Gas-Related Activities; Exemption of Capital Contributions and Advances to Such Companies

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting new rule 58 and conforming amendments to rules 45(b) and 52(b) under the Public Utility Holding Company Act of 1935 (''Holding Company Act'' or ''Act''). Rule 58 exempts from the requirement of prior Commission approval a direct or indirect acquisition by a registered holding company or its subsidiary of an interest in an ''energy-related company,'' as defined in the rule, subject to certain limitations and reporting requirements; and by a gas registered holding company or its subsidiary of an interest in a ''gas-related company,'' as defined in the rule, subject to certain reporting requirements. The rule and related rule amendments eliminate unnecessary regulatory limitations on investments in certain businesses that are closely related to the core utility business of the registered system while establishing disclosure and reporting requirements that promote the public interest and serve to protect consumers and investors.

EFFECTIVE DATE: March 24, 1997.

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SUPPLEMENTARY INFORMATION: The Commission today is adopting rule 58 and related amendments to rule 45(b) and rule 52(b) (17 CFR 250.45(b) and 250.52(b)) under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*). The Commission issued a release proposing rule 58 and the amendments to the existing rules on June 20, 1995.[1] Subject to certain conditions, rule 58 provides an exemption, pursuant to section 9(c)(3) of the Act, from the requirement of prior Commission approval under sections 9(a)(1) and 10, for acquisitions by registered holding companies and their subsidiaries of securities of companies engaged in activities with which the Commission is familiar as a result of its administrative experience and which are so closely related to the ordinary course of the utility business as not to require case-by-case analysis under sections 9(a)(1) and 10.

Rule 58 exempts from the requirement of prior approval the acquisition by a registered holding company or its subsidiary company of any securities of an energy-related company, subject to certain limitations and reporting requirements. The rule defines an energy-related company as one that derives, or will derive, substantially all of its revenues from one or more activities specifically enumerated in the rule. The exemption provided by the rule will be available only if the aggregate investment by the registered holding company and its subsidiaries in energy-related companies does not exceed the greater of $50 million or 15% of consolidated capitalization.

Rule 58 also exempts from the requirement of prior approval the acquisition by a gas registered holding company or its subsidiary company of any securities of a gas-related company, subject to certain reporting requirements. The rule defines a gas-related company as one that derives, or will derive, substantially all of its revenues from one or more activities permitted under the Gas Related Activities Act of 1990 (''GRAA'').

Rule 58 requires a registered holding company that seeks to rely upon the rule to file with this Commission and each state commission having jurisdiction over the retail rates of the registered system operating companies a quarterly report disclosing acquisitions pursuant to the rule and certain other information required by proposed Form U–9C–3. The reporting requirements are intended to enable the Commission and the state and local regulatory authorities to monitor acquisitions pursuant to the rule, including any transactions with rule 58 companies involving the operating companies in registered systems.

[1] Holding Co. Act Release No. 26313 (June 20, 1995), 60 FR 33642 (June 28, 1995) (''Proposing Release'').

The Commission is also adopting amendments to rule 45(b) and rule 52(b), which concern financings by registered system companies, in each case to conform the rules to the limitations of rule 58. Rule 45(b) is amended to qualify the exception that the rule creates to the requirement of Commission approval under section 12(b) and rule 45(a) for capital contributions and open account advances without interest to a subsidiary company. As amended, the exception of rule 45(b) is available if the aggregate amount of such financing transactions on behalf of a subsidiary energy-related company conforms to the limitations of rule 58. Rule 52(b) is similarly amended to qualify the exemption that the rule provides from the requirement of prior Commission approval under sections 6(a) and 7 for securities issued by energy-related subsidiary companies to associate companies.

I. Introduction

This rulemaking arises in the broad context of nonutility diversification by registered gas and electric public-utility holding companies. Section 9(a)(1) of the Holding Company Act requires prior Commission approval under the standards of section 10 for a direct or indirect acquisition by a registered holding company of ''any securities'' or ''any interest in any other business,'' *i.e.*, any nonutility interest.[2] Section 10(c)(1) precludes approval of an acquisition that would be ''detrimental to the carrying out of the provisions of section 11.'' Section 11, described in the legislative history of the Act as the ''very heart'' of the Act,[3] requires the Commission to confine the nonutility interests of such companies to those that are ''reasonably incidental, or economically necessary or appropriate to the operations of [an] integrated public-utility system.''[4] The Commission has interpreted the

[2] The Commission has read the latter phrase to encompass any arrangement that entails the acquisition of a substantial interest in a nonutility business undertaking. See, *e.g.*, *Public Service Co. of Oklahoma*, 45 S.E.C. 878, 883–4 (1975).

[3] S. Rep. No. 621, 74th Cong., 1st Sess. (1935) (''Senate Report'') at 11.

[4] Section 11(b)(1) of the Act. Section 11(b)(1) further provides that the Commission may so characterize a nonutility interest that it finds to be ''necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system. * * *''

The interests of investors and consumers and the public interest are the protected interests under the Holding Company Act. The Commission has interpreted the public interest standard of the Act to extend to the interest in a sound gas and electric utility industry. See *Eastern Utilities Assocs.*, Holding Co. Act Release No. 26232 (Feb. 15, 1995).

provisions of section 11 to reflect a Congressional policy against nonutility activities that bear no operating or functional relationship to the utility operations of the registered system.[5] This interpretation was intended to focus the attention of the registered holding company on the needs of its operating utilities, and thereby protect consumers and investors against the risks that might be associated with unrelated businesses.[6]

Section 9(c)(3) of the Act provides an exemption from the requirements of section 9(a)(1) 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 Commission has previously issued orders under section 9(c)(3) exempting from section 9(a)(1) acquisitions of small amounts of securities of local industrial development corporations, affordable housing projects, and venture capital concerns, among others.[7] The Commission has also adopted rule 40(a)(5) under section 9(c)(3) to exempt such acquisitions from the requirements of section 9(a)(1), provided that an affiliate relationship does not result, and subject to certain annual dollar limitations.[8] The Commission has noted that section 9(c)(3) may not be used to circumvent section 11(b)(1)'s prohibition of the acquisition of an interest in a business unrelated to the core utility business.[9]

As noted in the Proposing Release,[10] registered holding companies have filed numerous applications in recent years seeking authorization to engage in nonutility activities that the companies contend complement, or are natural extensions of, the evolving gas and electric industries. In considering these applications, the Commission has attempted to balance the need for regulatory change due to industry developments with the need for continued protection under the Act of the public interest and the interest of investors and consumers.[11] The concept of a functional relationship has been expanded in some cases, in a manner consistent with the purposes and limitations of the Act, and the Commission has permitted some activities that would benefit the registered system in ways less tangible and direct than those considered and approved in orders of previous years. In some cases the Commission approved as part of this development extensive transactions with nonassociate companies and declined to limit the transactions to the particular service territory of the registered system utilities. To this extent, the Commission implicitly correlated the functional relationship test with changes in the industry.[12]

Congress has enacted a number of important legislative measures to facilitate acquisitions by registered holding companies of interests to which section 11 was perceived to create barriers. In some instances, the legislation treated acquisitions of essentially utility interests as nonutility acquisitions for purposes of the Act, so as to avoid the integration requirements of section 11.[13] In other instances, the legislation permitted essentially nonutility activities that were either closely related to core operations or otherwise deemed appropriate for participation by registered holding companies. An example of recent legislation relates to nonutility activities involved in the supply of natural gas.

In 1990, Congress enacted the Gas Related Activities Act to permit a gas registered holding company to engage in transportation, marketing, storage and other nonutility gas-related activities that are not functionally related to the company's business.[14] The GRAA provides that an acquisition of an interest in a company that engages in certain gas-related activities, including storage, transportation and wholesale sales, is deemed to meet the requirements of section 11(b)(1) of the Act. The GRAA further provides that an acquisition of an interest in a company that engages in other activities relating to the supply of natural gas is deemed to meet the requirements of section 11(b)(1), if the Commission finds that the acquisition is in the interest of consumers of the holding company system and is not detrimental to those consumers or to the proper functioning of the registered system.[15]

In 1992, Congress acted to permit both gas and electric registered holding companies to acquire interests in cogeneration and small power production facilities, wherever located,

[5] See *generally Michigan Consolidated Gas Co.*, 44 S.E.C. 361, 363–66 (1970), *aff'd*, 444 F.2d 913 (D.C. Cir. 1971) (rejecting proposed investment in low income housing projects). See also *CSW Credit, Inc.*, Holding Co. Act Release No. 25995 (Mar. 2, 1994) (rejecting proposed expansion of transactions with nonassociate companies by subsidiary engaged in factoring of utility accounts receivable). By its terms, section 11 applies only to registered holding companies. The Commission has never determined the limits on diversification by exempt holding companies.

[6] Section 11 was intended ''simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible.'' Senate Report at 11. As an historical matter, the statute led to the refashioning of the structure and the business practices of an entire industry. See, *e.g.*, Joel Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* (rev. ed. 1995).

[7] *See, e.g., Hope Gas, Inc.,* Holding Co. Act Release No. 25739 (Jan. 26, 1993) and *Georgia Power Co.,* Holding Co. Act Release No. 25949 (Dec. 15, 1993) (securities of local venture capital companies); *Georgia Power Co.,* Holding Co. Act Release No. 26220 (Jan. 24, 1995) and *East Ohio Gas Co.,* Holding Co. Act Release No. 25046 (Feb. 27, 1990) (securities of affordable housing partnerships); *Potomac Edison Co.,* Holding Co. Act Release No. 25312 (May 14, 1991) (shares of for-profit economic development corporation).

[8] Under rule 40(a)(5), a holding company or subsidiary may acquire up to $5 million annually of the securities of economic development companies created under special state laws promoting economic development, and up to $1 million annually in local industrial or nonutility enterprises.

[9] Michigan Consolidated Gas Co., 44 S.E.C. at 366.

[10] 60 FR at 33643.

[11] The Commission in some instances imposed percentage, geographic or other limitations upon transactions on behalf of nonassociate companies. These limitations were intended to ensure that the particular nonutility interest would continue to benefit the integrated system primarily and thereby conform to the functional relationship requirement.

[12] The Commission took a more flexible approach to functional relationship in *Southern Co.,* Holding Co. Act Release No. 26211 (Dec. 30, 1994). In that case, Southern proposed to develop a communications system to provide services to both system companies and nonassociates. While only a small additional investment in the system was required to facilitate nonassociate transactions, a majority of the revenues from the system could ultimately be derived from these transactions. The Commission approved the proposal, stating that the relative investment for associate and nonassociate purposes is relevant to a determination of a functional relationship. Alternatively, the Commission found a functional relationship existed because the nonutility interest being acquired (1) would involve the sale or lease of products or skills of some complexity developed by the holding company at considerable expense for the benefit of its utility subsidiaries and not readily available to the rest of the public from other sources; (2) would generally require little or no further investment by the holding company; and (3) would permit the amortization of product development expenses with little or no risk (citing *Jersey Central Power & Light Co.,* Holding Co. Act Release No. 24348 (Mar. 18, 1987), as approved in *CSW Credit, Inc.,* note 5 above).

[13] Under the Public Utility Regulatory Policies Act of 1978 (''PURPA''), 16 U.S.C. 824a–3, and related legislation, a registered holding company can acquire an interest in ''qualifying facilities'' (''QFs''), as defined in the regulations under PURPA, that are unrelated to its core utility operations. See also the Energy Policy Act of 1992, discussed below.

[14] Pub. L. No. 101–572, 104 Stat. 2810 (Nov. 15, 1990), codified as a note to section 11 of the Act.

[15] *See, e.g., Columbia Gas System,* Holding Co. Act Release No. 25802 (Apr. 22, 1993) (authorizing subsidiary to engage in marketing of natural gas). Section 2(b) of the GRAA requires the Commission to determine whether the proposed activities will benefit both the retail and the wholesale utility customers of the registered system.

and to market and broker electric power through affiliated exempt wholesale generators (''EWGs''). [16] In 1992, Congress also enacted legislation to promote the development of alternative powered vehicles as a part of a national energy policy to reduce automobile emissions. The legislation permits gas registered holding companies to engage in activities related to vehicular natural gas, as defined. [17]

As a result of Congressional action, combined with initiatives of the Federal Energy Regulatory Commission (''FERC'') and the state and local ratemaking authorities, the pace of change in the gas and electric utility industry is accelerating. Today, the gas industry is largely deregulated and the electric industry is undergoing a similar process. [18] In addition to increasing competition at the wholesale level, retail electric competition is developing more rapidly than anticipated, due to state efforts. [19] Utilities and other suppliers of energy appear poised to compete in retail markets. [20] As a result of these developments, the contemporary gas and electric industries no longer focus solely upon the traditional production and distribution functions of a regulated utility, but are instead evolving toward a broadly based, competitive, energy services business. [21]

As discussed previously, the Commission has sought to respond to developments in the industry by expanding its concept of a functional relationship in a manner consistent with the purposes and limitations of the Act. In several recent filings, the Commission has been requested to reconsider some administrative restrictions employed in the past. In approving these requests, the Commission determined, as required by the Act, that its action would not be detrimental to the interests protected under the Act. The Commission suggested that various considerations, including developments in the industry, the Commission's familiarity with the particular nonutility activities at issue, the absence of significant risks inherent in the particular venture, the specific protections provided for consumers and the absence of objections by the relevant state regulators, made it unnecessary to adhere rigidly to the types of administrative measures discussed above.[22] Further, a 1995 Commission staff report recommended that the Commission replace the use of bright-line limitations with a more flexible standard that would take into account the risks inherent in the particular venture and the specific protections provided for consumers.[23]

Finally, after the issuance of the Proposing Release, Congress enacted legislation amending the Act to permit registered holding companies, without prior Commission approval under sections 9(a)(1) and 10, to participate in a broad range of telecommunications activities through a special purpose subsidiary, an ''exempt telecommunications company'' (''ETC'').[24] Once an entity is certified as an ETC by the Federal Communications Commission, acquisition and retention by a registered holding company of an interest in the entity is exempt from substantive requirements under the Holding Company Act.[25] As a result of this legislation, the provisions of proposed rule 58 concerning telecommunications activities are no longer needed.

The Commission believes that the realities of the contemporary gas and electric industries, and its experience in the administration of sections 9 and 10 of the Act, permit a recognition that certain activities are an integral part of the contemporary utility business, and so may be deemed to be activities ''in the ordinary course of business'' of a registered holding company within the meaning of section 9(c)(3) of the Act. Rule 58 identifies such activities. The rule is variously subject to qualifications and limitations that are intended to ensure that acquisitions pursuant to the rule are appropriate in the ordinary course of business, as contemplated by section 9(c)(3), are consistent with prior orders under section 9(a)(1) and 10, and are not detrimental to the protected interests.[26]

II. Proposed Rule 58

Rule 58 is intended to facilitate investments by registered holding companies in energy-related and gas-related companies. Acquisitions pursuant to the rule are considered to be

[16] Energy Policy Act, Pub. L. 102–486, 106 Stat. 2776 (1992). These activities of EWGs are limited primarily to the sale of electric power for resale.

[17] See Articles IV, V and VI, Energy Policy Act of 1992, Pub. L. 102–486, 106 Stat. 2777 (1992) (codified as a note to section 2). These legislative developments are discussed at greater length in the Proposing Release. 60 FR at 33644.

[18] See generally The Regulation of Public-Utility Holding Companies, Report of the Division of Investment Management, Securities and Exchange Commission (June 1995) (''Report''), at 19–22, 26–27 (surveying recent regulatory and other developments in the electric and gas industries). Among other things, the Report notes that following the Energy Policy Act, the FERC has engaged in a series of initiatives to encourage the development of competitive energy markets. Id. at 23. More recently, on April 24, 1996, the FERC adopted Order No. 888, FERC Stats. & Regs. ¶ 31,036, which represents a major step in the effort to increase competition in the generation and transmission segments of the electric industry.

[19] See, e.g., ''State Regulators Debate Taking a Stand on National Retail Wheeling Legislation'', *Energy Report* (March 4, 1996) (describing state initiatives and possible support for federal legislation establishing retail wheeling). At the state level, for instance, New Hampshire has adopted a pilot program under which each New Hampshire utility must allow customers representing three percent of peak load to have access to alternative suppliers of electricity for two years, beginning on or about May 28, 1996. Order of the New Hampshire Public Utilities Commission on the Retail Competition Pilot Program Establishing Final Guidelines and Requiring Compliance Filings (Order No. 22,033, dated Feb. 28, 1996). Other states, such as Massachusetts, Rhode Island and Illinois, are also implementing or considering programs to promote retail competition.

[20] The Commission has authorized registered holding companies to engage, through nonutility subsidiaries, in the retail marketing of electric power in specific states that have implemented plans and programs for competition in retail electric markets, see, e.g., *Eastern Utilities Assocs.*, Holding Co. Act Release No. 26519 (May 23, 1996) (authorizing retail sales of electric power pursuant to pilot programs in New Hampshire and Massachusetts) and, more recently, has authorized retail marketing of both electric power and natural gas on a nationwide basis, subject to compliance with applicable state law. *SEI Holdings, Inc.*, Holding Co. Act Release No. 26581 (Sept. 26, 1996).

[21] The Commission acknowledged these developments in the Proposing Release, 60 FR at 33643, and, again, in a recent order authorizing a gas registered holding company to acquire an interest in a partnership formed to engage in the wholesale brokering and marketing of natural gas, electricity and other fuels. *Consolidated Natural Gas Co.*, Holding Co. Act Release No. 26512 (Apr. 30, 1996). The order noted the growing competition among various companies, including exempt holding companies, as well as stand-alone utilities and other companies not subject to the Act, to meet increasing customer demand for a full range of energy options.

[22] See, *e.g., Consolidated Natural Gas Co.*, Holding Co. Act Release No. 26512 (approving wholesale marketing and brokering of natural gas, electricity and other fuels, without percentage limitations); *Eastern Utilities Assocs.*, Holding Co. Act Release No. 26232 (removing percentage limitation previously placed upon demand-side management and energy management services business of registered holding company); *Southern Co.*, Holding Co. Act Release No. 26211 (considering, in assessment of a functional relationship, the relative investment for associate and nonassociate companies).

[23] Report at 81–87, 91–92.

[24] Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56 (1996) (''Telecommunications Act''), codified as section 34 of the Act.

[25] The Telecommunications Act does not provide that ETCs themselves are exempt from regulation under the Act. See section 34. However, the law contemplates that the role of the Commission will consist largely of monitoring telecommunications investments of registered holding companies. The Commission is authorized to require reporting of investments in, and activities of, ETCs that are likely to have a material impact on the financial or operational condition of a registered holding company. See section 34(f).

[26] As noted in the Proposing Release, rule 58 is intended largely to encompass investments in companies engaged in activities of the same or substantially similar character as those approved in previous orders of the Commission under sections 9(a)(1) and 10. 60 FR at 33648.

''appropriate in the ordinary course of business'' within the meaning of section 9(c)(3), and are thus exempt from the requirement of prior Commission approval under sections 9(a)(1) and 10.

The Commission received comment letters from, or on behalf of, eleven registered holding companies, one exempt holding company, one industry trade association, and one local regulatory authority.[27] With the exception of the Council of the City of New Orleans (''New Orleans''), all commenters support adoption of the rule[28] and, in many cases, propose additional changes to expand the rule.[29] New Orleans opposes adoption of the rule,[30] and requests, in the alternative, a more restrictive rule. The comments received on various aspects of the rule are discussed below. The Commission is adopting rule 58 and the conforming amendments to rules 45 and 52 substantially as proposed, but with a number of clarifications.

A. Investments in Energy-Related Companies

Rule 58(a)(1) exempts from the requirement of prior Commission approval under sections 9(a)(1) and 10, pursuant to section 9(c)(3), the acquisition by a registered holding company or its subsidiary company of securities of an ''energy-related company;'' provided, that aggregate investment (as defined) in such companies does not exceed the greater of 15% of consolidated capitalization or $50 million. Investments made prior to effectiveness of the rule are excluded for purposes of calculating the investment limitations.

The Proposing Release defines an ''energy-related company'' in terms of the activities in which it may engage. Specifically, as proposed, the rule would define an energy-related company as one that engages in: (1) One or more of various categories of specific activities set forth in the rule, described below, and (2) such other nonutility activities as the Commission may from time to time approve by order upon application under sections 9 and 10, and, so doing, designate as energy-related for purposes of the rule. Rule 58 requires that an energy-related company at all times derive substantially all of its revenues from the activities designated in the rule.

The energy-related activities specified in subsection (b)(1) of the rule as proposed were:

(1) The rendering of energy conservation and demand-side management services;

(2) The development and commercialization of electrotechnologies related to energy conservation, storage and conversion, energy efficiency, waste treatment, greenhouse gas reduction, and similar innovations;

(3) The manufacture, conversion, sale and servicing of electric and compressed natural gas powered vehicles and ownership and operation of related refueling and recharging equipment;

(4) The sale, installation, and servicing of electric and gas appliances for residential, commercial and industrial heating and lighting;

(5) The brokering and marketing of energy commodities, including but not limited to electricity or natural or manufactured gas;

(6) The production, conversion, and distribution of thermal energy products, such as process steam, heat, hot water, chilled water, air conditioning, compressed air and similar products; alternative fuels; and renewable energy resources;

(7) The sale of technical, operational, management, and other similar kinds of services and expertise, developed in the course of utility operations in such areas as power plant and transmission system engineering, development, design and rehabilitation; construction; maintenance and operation; fuel procurement, delivery and management; environmental licensing, testing and remediation; and other similar areas;

(8) The ownership or operation of QFs, and facilities necessary or incidental thereto, including thermal energy utilization facilities purchased or constructed primarily to enable the qualifying facility to satisfy the useful thermal output requirements under PURPA;

(9) The ownership or operation of fuel procurement, transportation, handling and storage facilities, scrubbers, and resource recovery and waste water treatment facilities;

(10) The production, transportation, distribution or storage of all forms of energy other than electricity and natural or manufactured gas;

(11) The development and commercialization of technologies or processes that utilize coal waste by-products as an integral component of such technology or process; and

(12) The ownership, sale, leasing or licensing of the use of telecommunications facilities and equipment (such as fiber optic lines, coaxial cable, or other communications capacity, towers and tower sites and other similar properties).

The rule as proposed also specifically provided a means for the Commission to add additional activities to the definition upon application in the future.

1. Definition of ''Energy-Related Company''

a. General. The Commission received a substantial number of comments concerning the definition of ''energy-related company.'' Several commenters assert that the definition should not consist of enumerated categories of specific activities, but should instead be broad and general.[31] Although this approach would offer greater flexibility,

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[27] The registered holding companies that submitted comments are Allegheny Power System, Inc. (''Allegheny''), American Electric Power Company, Inc. (''AEP''), Central and South West Corporation (''CSW''), Cinergy Corp. (''Cinergy''), The Columbia Gas System, Inc. (''Columbia''), Consolidated Natural Gas Company (''Consolidated''), Eastern Utilities Associates (''EUA''), Entergy Corporation (''Entergy''), General Public Utilities Corporation (''GPU''), Northeast Utilities (''Northeast'') and The Southern Company (''Southern''). The exempt holding company that submitted comments is Wisconsin Energy Corporation (''Wisconsin Energy''), and the industry association is the American Gas Association (''AGA''). The local regulator that submitted comments is the Council of the City of New Orleans. Copies of the comments are available for inspection in File No. S7–12–95 in the Commission's public reference room.

[28] See, *e.g.,* Comments of AEP (the rule would reduce regulatory burdens on registered systems and permit them to compete in the energy industry); and Columbia (the rule eliminates unnecessary and costly regulatory burdens on registered systems). Some commenters also note that, beyond adoption of rule 58, the Commission should provide registered holding companies with the flexibility to engage in utility-related businesses without limitation. See, *e.g.,* Comments of AGA (section 11 should be broadly interpreted to permit gas systems to enter into any business involving production, transmission, dissemination or marketing of any form of consumable energy or any business or operation based on the facilities, resources or expertise from the company's operations); and CSW (restrictions on diversification prevent registered systems from engaging in businesses that would benefit customers and investors and impede efficient evolution of the electric utility industry).

[29] For example, one commenter notes that the rule should generally be more flexible, so as to accommodate changes that may arise as the restructuring of the electric industry continues. Comments of Wisconsin Energy. The Commission notes, however, that various issues, such as those that surround the possible disaggregation of utility assets and horizontal integration of utility functions, are beyond the scope of a rule that is intended to exempt nonutility interests that are commonplace today and closely related to the core utility business. The Commission continues to examine the issues raised by industry restructuring, and will undertake any necessary or appropriate rulemaking or other administrative action in the future.

[30] New Orleans opposes the rule on many grounds. Among other things, New Orleans asserts that the rule constitutes ''deregulation of nonutility investment by registered holding companies [that] is unlawful and not in the public interest.'' It further asserts that the rule does not adequately protect consumers from ''diversification risks and failures which are well known and documented in this industry.'' New Orleans states that only the Commission has the authority to regulate diversification and that it has a ''duty to protect consumers'' in this area. Comments of New Orleans at 3–4.

[31] Comments of AGA, Columbia and Consolidated. Suggested definitions would include any company engaged in a business based on or developed from the facilities, resources, technology or expertise of the registered system's operations (Comments of AGA and Columbia); and any company engaged in a business involving the production, transmission, dissemination or marketing of any form of consumable energy (Comments of AGA).

the Commission believes that it is not consistent with the requirements of section 9(c)(3) of the Act. As discussed previously, that section provides an exemption only for acquisitions of securities that are made in the ordinary course of business of the registered system and that are not detrimental to the protected interests. Rule 58 is intended to encompass activities with which the Commission is familiar as a result of its administrative experience and that appear to be so closely related to the ordinary course of the contemporary utility business as not to require case-by-case analysis pursuant to sections 9(a)(1) and 10. For this reason, the Commission is retaining enumerated categories in the rule as adopted.

Similarly, the Commission notes that the enumerated categories of specific energy-related activities in rule 58 are exhaustive, rather than illustrative. In order for a direct or indirect acquisition of securities by a registered holding company or its subsidiary to qualify for the exemption provided by the rule, the company in which the interest is acquired must be engaged almost exclusively in the type of activities specified in the rule. A registered holding company will continue to apply to the Commission for prior approval of any acquisitions concerning activities that fall outside the categories identified by the rule as energy-related. Further, as discussed below, to the extent that a company engages in activities in addition to those permitted under rule 58, an application will also be required.

New Orleans suggests that the definition should include a requirement that the permitted activity be functionally related to the system's utility business under sections 10 and 11.[32] Such a requirement is unnecessary for several reasons. First, a finding of a functional relationship is not required in order to qualify for an exemption under section 9(c)(3).[33] Moreover, even though a finding of a functional relationship under section 11(b)(1) is not required in this context, each of the activities permitted under the rule as adopted has in many instances been found, by order upon application under sections 9(a)(1) and 10, to satisfy the statutory requirements, including those of section 11(b)(1).

One commenter objects to the requirement that an energy-related company derive "substantially all" of its revenues from activities designated as "energy-related," and suggests that the rule should instead require that a company derive merely a stated portion, *e.g.,* at least 30%, from such activities.[34] The Commission notes, however, that this measure would permit registered holding companies to make sizeable investments in companies engaged primarily in novel, unspecified nonutility businesses. The Commission believes its authority to create such a broad exemption by rule under section 9(c)(3) is subject to question.[35] The Commission declines, therefore, to adopt this suggestion. Any acquisition of an interest in a nonutility business that does not derive substantially all of its revenues from one or more of the activities set forth in the categories of the rule will continue to require prior Commission approval by order upon application.

New Orleans objects to the proposed provision of the rule creating a procedure for designating additional activities to be energy-related by order upon application under section 10.[36] New Orleans asserts that new activities and investments should be approved only pursuant to rulemaking, so that all parties have an opportunity to evaluate and comment upon the relationship of the new activity to the core utility business and the potential effects on ratepayers.

In proposing this mechanism for updating the rule, the Commission intended that all procedural requirements applicable to agency rulemaking would be observed in connection with the proposed designation by order of additional activities as energy-related for purposes of rule 58, including in particular the requirements related to public notice and opportunity to comment.[37] On reconsideration, however, the Commission has determined that this provision could result in increased administrative burdens for both the registered holding companies seeking approval of new activities and the Commission staff.

If rulemaking is undertaken in the context of consideration of an application for approval of a specific nonutility investment, adherence to required procedures, including an extended comment period for the rulemaking and consideration of all views submitted, could delay approval of the proposed transaction that is the subject of the application. Further, repetitive paperwork in connection with the rulemaking aspects of each such application could consume extensive staff resources. Accordingly, this feature of proposed rule 58 has not been retained.[38] The Commission believes, however, that future expansion of the scope of the rule, to reflect additional nonutility activities found by the Commission to satisfy the standards of the Act, is essential to achieve the rule's intended flexibility. The Commission intends to evaluate periodically the coverage of the rule in light of existing Commission orders under sections 9 and 10 of the Act, and initiate rulemaking proceedings to reflect any appropriate changes.

One commenter suggests that the definition of energy-related company be expanded to include companies that derive substantially all of their revenues from the listed activities, either directly or indirectly.[39] The requested revision would permit a registered holding company system to use one or more intermediate subsidiaries (*i.e.,* "project parents") to invest in energy-related companies, yet retain the benefit of the exemption afforded by the rule.[40] The Commission believes that this suggestion is consistent with the intent of the rule as proposed. Use of an intermediate subsidiary could further insulate the holding company and its other subsidiaries, including utility subsidiaries, from any direct losses that could occur with respect to rule 58 investments. At the same time, this measure would offer greater flexibility in the structuring of these investments.

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[32] As discussed above, the Commission has interpreted the provisions of section 11 of the Act, referenced in section 10(c)(1), to reflect a Congressional policy against nonutility activities that bear no operating or functional relationship to the utility operations of the registered system. See generally *Michigan Consolidated Gas Co.,* 44 SEC 361 at 363–65.

[33] The Commission has determined that a transaction need not satisfy the standards of section 11(b)(1) in order to qualify for exemption under section 9(c)(3), but that section 9(c)(3) may not be used to circumvent the requirements of section 11(b)(1) generally. Id. at 366 ("Section 9(c)(3) cannot be employed to evade the proscription of section 11(b)(1) prohibiting the acquisition by a gas utility company of an interest in a business unrelated to its business"); but see *id.* at 369 ("the majority unduly constricts the scope of the section 9(c)(3) exemption when it holds that to be entitled to such exemption a transaction must also meet the standards of section 11(b)(1)") (Commissioner Owens, concurring in part and dissenting in part) and 370 (Commissioner Smith, dissenting).

[34] Comments of CSW.

[35] As noted previously, the Commission has found that section 9(c)(3), under which rule 58 is adopted, may not be used to circumvent the requirements of section 11(b)(1) of the Act.

[36] This mechanism was provided in subsection (b)(1)(xiii) of the proposed rule.

[37] See *e.g.,* the relevant provisions of the Administrative Procedure Act, 5 U.S.C. 553, and the Commission's rules of practice, 17 CFR 201.192.

[38] A similar provision in the definition of "gas-related company" has also been eliminated.

[39] Comments of GPU.

[40] The provisions of the Act that permit use of intermediate holding companies in connection with investment in exempt wholesale generators reflect the same concept. See section 32(a)(1).

Accordingly, the rule, as adopted, is modified to incorporate the concept of indirect investment in energy-related companies through project parents.[41]

The Commission notes, however, that any such intermediate subsidiary, like the underlying energy-related companies, must derive ''substantially all'' of its revenues from the permitted activities. If the company will engage in other activities, directly or indirectly, prior Commission approval of an investment interest in such company will be required.

b. Categories of energy-related activities. The Proposing Release invited specific comment on whether the proposed rule should include additional kinds or categories of energy-related activities. One commenter suggests that customer financing for other energy-related activities should be a separate category of permitted activity for an energy-related company.[42] The Commission notes that customer financing has been approved in a number of cases involving activities that are designated as energy-related under rule 58, and agrees that it may be an appropriate activity for some energy-related companies. However, this type of activity is better addressed in the context of rule 48, as discussed below. The Commission therefore declines to include customer financing as an energy-related activity under rule 58.

Another commenter suggests that any nonutility business in which the applicable state commission would allow a regulated utility or exempt holding company to engage or invest should be a permitted activity for energy-related companies.[43] That a state commission permits utilities or holding companies that are subject to its jurisdiction to engage in a given nonutility activity can be a strong indication that the activity is appropriate, and, in a given case, it may be persuasive evidence that some of the standards of the Act have been satisfied. However, that a state commission has approved a type of investment does not necessarily mean that it is in the ordinary course of business of a registered holding company or its subsidiary for purposes of section 9(c)(3). The Commission does not believe that rule 58 should incorporate such state determinations as a general matter, without any indication as to the nature of the approved activities or the relevant state law standards. Thus, the Commission will continue to review any such activity on a case-by-case basis, giving due consideration to the views of state regulators toward the activity in question.

As proposed, the rule did not indicate clearly whether an interest in an energy-related company engaging in an enumerated activity could be acquired pursuant to the rule by companies in electric holding company systems, gas holding company systems, or both. As adopted, rule 58(b)(1) has been clarified in this regard to limit the exemption solely to those activities that are considered to be in the ordinary course of the type of utility business in which a particular holding company system is engaged.[44] Any proposal by a registered holding company system to acquire an interest in a company engaged in nonutility activities of a type not exempt under the rule for that type of registered system may be the subject of an application for Commission approval under sections 9(a) and 10.[45]

Many commenters suggest specific changes or additions to the categories of permitted activities set forth in the definition. A number of comments request clarifications and propose additions to the list of activities permitted for an energy related company. Some, but not all, comments and revisions to the categories of permitted activities are discussed below.

(1)Subsection (b)(1)(i): Energy and demand-side management services. This category of activities was defined in the Proposing Release to include the rendering of energy conservation and demand-side management services.[46] The Commission has previously considered and approved by order under sections 9(a)(1) and 10 a broad range of activities relating to the business of energy management and demand-side management, including the following: Energy audits; facility design and process enhancements; construction, maintenance and installation of, and training client personnel to operate, energy conservation equipment; design, implementation, monitoring and evaluation of energy conservation programs; development and review of architectural, structural and engineering drawings for energy efficiencies; design and specification of energy consuming equipment; and general advice on programs.[47] Upon additional consideration, the Commission has concluded that ''energy conservation services'' may not be broad enough to cover the types of activities intended to be exempted under this category. The term ''energy management services'' more accurately reflects the scope of the exempted activity.[48] The rule as adopted is revised accordingly. Apart from this clarification, the subsection is adopted as proposed.[49]

Companies in both electric and gas registered systems may acquire interests in companies engaging in the activities specified in this subsection.

(2) Subsection (b)(1)(ii): development and commercialization of electrotechnologies.

As used in the rule, electrotechnologies relate to energy conservation, storage and conversion, energy efficiency, waste treatment, greenhouse gas reduction and similar innovations.[50] The Commission has, on many occasions, approved investments by electric registered system companies in technologies related to the electric utility business.[51] Because the Commission has not yet considered proposals by registered gas system companies to engage in activities related to such technologies, the Commission is not prepared at this time to deem these activities to be appropriate in the ordinary course of the utility business of such systems. Accordingly, the Commission is revising the rule to

[41] This concept is also reflected in the definition of a gas-related company.

[42] Comments of Northeast.

[43] Comments of CSW.

[44] Holding company systems engaged in both the electric and gas utility business will be considered, for purposes of the rule, to be engaged only in one type of utility business, as determined by the type of operations that constitute the holding company's primary utility business.

[45] For example, an electric registered holding company system would be required to file an application and obtain authorization to acquire an interest in a company engaged in ownership and operation of refueling equipment for natural gas-powered vehicles. While acquisition of an interest in such a company could be exempt under rule 58 for a gas registered holding company system, it is not in the case of an electric registered holding company.

[46] No comments were received on this subsection.

[47] See, e.g., *Eastern Utilities Assocs.,* Holding Co. Act Release No. 26232 (Feb. 15, 1995); and *Northeast Utilities,* Holding Co. Act Release No. 25114–A (July 27, 1990).

[48] See, e.g., *New England Electric System,* Holding Co. Act Release No. 22719 (Nov. 19, 1982).

[49] This subsection is intended to encompass all consumer-oriented activities that represent components of a holding company system's demand-side management and integrated-resource planning functions, or that are intended to reduce customer energy costs or lead to efficient use of energy resources by affecting energy consumption. Customer financing is not encompassed by this subsection.

[50] No comments were received on this category of activities.

[51] See, e.g., *American Electric Power Co.,* Holding Co. Act Release No. 25424 (Dec. 11, 1991) (acquisition of an interest in a company that develops, manufactures and markets efficient light bulbs); and *Allegheny Power System, Inc.,* Holding Co. Act Release No. 26085 (July 14, 1994) (investments in technologies related to power conservation and storage, conservation and load management, environmental and waste treatment, and power-related electronic systems and components).

clarify that only electric registered holding companies and their subsidiaries are permitted to acquire companies that engage in the activities in this subsection. The subsection is otherwise adopted as proposed.

(3) Subsection (b)(1)(iii): electric and gas vehicles. As proposed, this subsection included manufacture, conversion, sale and servicing of electric and compressed natural gas powered vehicles, and ownership and operation of related refueling and recharging equipment.[52] The Commission has determined that the subsection should be expanded to include ownership, operation, sale, installation and servicing of refueling, recharging and conversion equipment and facilities relating to electric- and gas-powered vehicles,[53] but should not extend to manufacture of such equipment and facilities or to manufacture, conversion and sale of the vehicles themselves.[54] The Commission has revised the subsection as adopted to make clear its intended scope.

In addition, the Commission believes, based on existing precedent, that it is appropriate to limit the described activities to those appropriate for gas registered system companies and electric registered system companies, respectively. The rule as adopted is revised to reflect this limitation.

(4) Subsection (b)(1)(iv): appliance sales. As proposed, this subsection included the sale, installation and servicing of electric and gas appliances for residential, commercial and industrial heating and lighting. Comments included suggestions that this category extend to leasing[55] and customer financing arrangements;[56] and that the equipment at issue include other energy-consuming devices[57] and equipment used for energy generation, both within and outside the system's service territory.[58]

The Commission finds that it is appropriate to expand the types of equipment addressed by the rule to include other types of energy-consuming devices.[59] Historically, the Commission approved the activities addressed in this subsection to encourage consumption of electricity and gas, to promote competition among fuels and, more recently, to further energy conservation.[60] The rule as adopted has been revised, consistent with these precedents, to include electric and gas appliances, equipment that promotes technologies that use gas or electricity and equipment that enables use of gas or electricity as an alternate fuel. Companies in both electric and gas holding company systems may acquire interests in companies engaging in the activities specified in this subsection.

The Commission declines to adopt the suggestion that the rule exempt sale, installation and servicing of generation equipment. These activities may involve issues of broader concern, which lie outside the ambit of this rulemaking.

(5) Subsection (b)(1)(v): brokering and marketing of energy commodities.

This subsection covers the brokering and marketing of energy commodities, including but not limited to electricity and natural or manufactured gas. One commenter proposes that this subsection should be expanded to cover energy-related commodities and should specify that it covers other combustible fuels in addition to electricity and gas.[61] The Commission does not believe there is a basis to include ''energy-related commodities'' in this context. However, the subsection is revised in the adopted rule to include other combustible fuels.[62]

As proposed, this subsection did not indicate the markets in which the permitted activities could be carried out. The Commission's existing orders in this area extend primarily to wholesale markets.[63] However, the Commission has authorized retail electric marketing activities in states with established retail wheeling programs,[64] and, more recently, authorized retail marketing activities with respect to both electric power and natural gas, throughout the United States, subject to compliance with applicable state statutes, regulations and orders with respect to such sales.[65] In view of these precedents, and in light of the rapid development of competition in retail markets, as discussed above, this subsection is intended to cover activities in both wholesale and retail markets that are in compliance with applicable law.

This subsection, as proposed, also did not indicate whether a registered holding company could acquire an interest in a company dealing in all energy commodities or only in electric power or natural gas, as appropriate. At the time the Proposing Release was issued, the Commission's previous orders had, for the most part, limited participation in gas marketing and brokering activities to gas holding company systems, and electric marketing and brokering activities to electric holding company systems. Since that time, however, the Commission has considered and approved several proposals by registered holding companies to engage in the brokering and marketing of energy commodities, including but not limited to electricity and natural or manufactured gas.[66] The rule as adopted permits companies in both electric and gas systems to acquire interests in

[52] No comments were received on this subsection.

[53] The Commission has issued orders authorizing broader involvement with respect to such activities than that reflected in the rule as proposed. See, *e.g., Columbia Gas System,* Holding Co. Act Release No. 26295 (May 23, 1995) (authorizing the sale, ownership, operation, installation and servicing of natural gas refueling equipment and sale of equipment and facilities for use in vehicle conversion); and *Consolidated Natural Gas Co.,* Holding Co. Act Release No. 25615 (Aug. 27, 1992) (same).

[54] The Commission has not yet approved these types of activities by order under sections 9(a) and 10.

[55] Comments of Consolidated and Northeast. Because the term ''sale,'' as defined in section 2(a)(23) of the Act, encompasses dispositions by lease, the Commission believes that no change to the subsection is needed.

[56] Comments of Northeast. Northeast also raised the question of customer financing in a broader context, suggesting the addition to the rule of a category concerning the financing of other energy-related activities. The Commission has determined to address this issue in the context of rule 48, as discussed below.

[57] Comments of CSW.

[58] Comments of Northeast.

[59] Prior orders in this area under sections 9(a)(1) and 10 permit the sale, installation, servicing and/or financing of significantly broader categories of equipment than appliances for heating and lighting. See, *e.g., Consolidated Natural Gas Co.,* Holding Co. Act Release No. 26234 (Feb. 23, 1995).

[60] See *e.g., Cities Service Co.,* 15 S.E.C. 962 (1944); *General Public Utilities Corp.,* Holding Co. Act Release No. 15184 (Feb. 9, 1965); and Louisiana Power & Light Co., Holding Co. Act Release No. 25445 (Dec. 26, 1991).

[61] Comments of Consolidated.

[62] Other combustible fuels would include, for example, coal, oil, wood chips, oil shale, isobutane and propane.

[63] See, *e.g., Consolidated Natural Gas Co.,* Holding Co. Act Release No. 26512 (Apr. 30, 1996) (approving wholesale marketing of energy commodities, but reserving jurisdiction over retail marketing activities until such time as state programs permitting such activities are implemented).

[64] See, *e.g., Eastern Utilities Assocs.,* Holding Co. Act Release No. 26519 (May 23, 1996) (participation in retail electric pilot programs in New Hampshire and Massachusetts); and New England Electric System, Holding Co. Act Release No. 26520 (May 23, 1996) (same).

[65] *SEI Holdings, Inc.,* Holding Co. Act Release No. 26581 (Sept. 26, 1996). The Commission noted that industry trends and competitive pressures make it important for registered system companies to be poised to compete in new markets as they are created, and that such participation appears to promote the goals of U.S. energy policy, including increased competition and lower utility rates.

[66] *Consolidated Natural Gas Co.*, Holding Co. Act Release No. 26512 (Apr. 30, 1996); *UNITIL Corp.,* Holding Co. Act Release No. 26527 (May 31, 1996); and *SEI Holdings, Inc.,* Holding Co. Act Release No. 26581 (Sept. 26, 1996). Other companies in both electric and gas holding company systems are also seeking similar authorizations. *See, e.g., National Fuel Resources, Inc.,* File No. 70–8651.

companies engaging in the activities described in this subsection.

One commenter recommends that the Commission revise the subsection to clarify that it concerns both regulated and unregulated activities.[67] Since rule 58 addresses only the acquisition of securities of nonutility companies engaged in specified activities, this comment is not reflected in the rule.

Several commenters suggest that the specified activities should include ''risk management activities'' [68] and ''market hedging tools.'' [69] The Commission has, in several instances, considered such activities in connection with the brokering and marketing of energy commodities. [70] In each case, the order was conditioned on representations that hedging tools would be used only to minimize risks associated with contracts for purchase or sale of energy commodities and would not be used to engage in speculation. Such activities are a means of limiting the risks associated with marketing of energy commodities and, subject to compliance with the limitations noted above, may be engaged in as part of the activities covered by this subsection.

(6) *Subsection (b)(1)(vi): Thermal energy products.* This subsection addresses the production, conversion and distribution of thermal energy products,[71] alternative fuels and renewable energy resources. The Commission received one comment, suggesting that sale of such products and servicing of thermal energy facilities should be added to the permitted activities.[72] The rule as adopted has been revised to include these suggestions. The rule has also been revised to limit availability of this subsection to electric registered holding company systems.

(7) *Subsection (b)(1)(vii): sale of services and expertise.* This section addresses the sale of technical, operational, management and other kinds of services and expertise developed in the course of utility operations.[73] Commenters offer various requests for expansion of this category.

One registered holding company suggests that the category should also include development, production, marketing and financing of such services and expertise.[74] The Commission notes, however, that the subsection is intended to address services and expertise that exist as a result of system utility operations. The development and production of such services and expertise, solely for the purpose of sale, are outside its scope. In addition, the marketing of such services and expertise is implicit in the concept of sale, and thus need not be specifically mentioned. As discussed below, the Commission believes that customer financing is better addressed in the context of rule 48. The Commission declines to adopt these proposed revisions to the rule.

Two commenters suggest that expertise and services developed in the course of nonutility operations should also be included.[75] While expertise related to some nonutility services may be appropriate for inclusion in the activities covered by the rule, the Commission believes that there is not yet an adequate basis for including them, and will continue to consider proposals on a case-by-case basis.

A registered holding company suggests an expansion of this category to include the sale of excess goods and assets.[76] The Commission declines to adopt this suggestion with respect to sale of utility assets and resources by a nonutility company, primarily because those activities could involve significant consumer protection issues, and could also raise restructuring issues that are beyond the scope of the rule. Some sales of excess nonutility assets and resources may be a legitimate activity for rule 58 companies, but the Commission does not believe that there is, as yet, an adequate basis for inclusion of such activities in the rule. Consideration of these types of activities will continue to be done on a case-by-case basis.

Another registered holding company proposes that this category of the rule be expanded to include the sale of administrative services and equipment related to services and expertise.[77] The Commission notes, however, that administrative services, to the extent they are within the scope of management services, need not be expressly addressed. In addition, as discussed above, sales by a nonutility subsidiary company of equipment used in utility operations, even equipment related to the service being sold, could raise consumer protection issues. Accordingly, the Commission declines to accept these suggestions.

Commenters also suggest that the list of examples of the types of services and expertise covered by this subsection be expanded.[78] As discussed previously, the rule is intended to encompass the types of activities that may be considered to be in the ordinary course of business of a registered holding company. In this regard, the Commission has taken into account its experience in administering sections 9(a)(1) and 10 of the Act. To the extent that the commenters request the inclusion of activities with which the Commission has little or no familiarity, it is appropriate to continue case-by-case review. Accordingly, the Commission declines to modify the adopted rule as these commenters request.

It should also be noted in this regard that only those type of services and expertise that are uniquely utility-related are intended to fall within this category of activity. Activities that are more generic are not intended to be a permitted activity for energy-related companies.[79]

The Commission notes in connection with this subsection that any use by a system nonutility company of personnel or other resources of an associate public-utility company raises issues under section 13 of the Act and rules thereunder [80] relating to pricing of

[67] Comments of CSW. Unregulated activities are stated to be those that are for the benefit of shareholders.

[68] Comments of CSW.

[69] Comments of Cinergy.

[70] *See, e.g., SEI Holdings, Inc.,* Holding Co. Act Release No. 26581 (Sept. 26, 1996); *Consolidated Natural Gas Co.,* Holding Co. Act Release No. 25926 (Nov. 16, 1993); and *Consolidated Natural Gas Co.,* Holding Co. Act Release No. 26512.

[71] Examples given in the rule include process steam, heat, hot water, chilled water, air conditioning, compressed air and similar products.

[72] Comments of GPU.

[73] Examples cited in the proposed rule include power plant and transmission system engineering, development, design and rehabilitation; construction; maintenance and operation; fuel procurement, delivery and management; environmental licensing, testing and remediation; and other similar areas. The activities contemplated by the rule do not extend to any that would render a company a public-utility company under the Act. See section 2(a)(3), (4) and (5).

[74] Comments of Consolidated.

[75] Comments of AGA and Columbia.

[76] Comments of CSW.

[77] Comments of Northeast.

[78] Comments of Consolidated (gas exploration, development, transmission or storage system design); CSW (waste management activities); GPU (consulting and training); Cinergy (revenue security and employee safety); and Northeast (distribution system engineering, development design and rehabilitation, environmental services, and transportation and fleet services).

[79] For instance, expertise in billing and customer service may be developed in the course of utility operations. These types of activities are not, however, uniquely utility-related and, thus, are not encompassed by this subsection.

[80] Section 13 prohibits registered holding companies from entering into or performing any contract for service, construction or the sale of goods with any associate utility or service company, except as may be permitted by rule in special circumstances or in the ordinary course of business. Section 13 also provides that subsidiaries of registered holding companies, in entering into or performing any such contracts, must comply with any limitations imposed by the Commission as necessary or appropriate to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated

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intrasystem transactions. Persons engaging in these activities and relying upon the exemption provided by the rule are advised to consider these requirements.

Companies in both electric and gas registered systems may acquire interests in companies engaging in the activities specified in this subsection. As adopted, this subsection has been revised only to the extent necessary to eliminate redundant language.

(8) *Subsection (b)(1)(viii): ownership and operation of QFs.* This subsection, as proposed, included ownership or operation of QFs and of facilities necessary or incidental thereto.[81] The Commission received one comment on this provision, proposing that development of QFs also be included in the rule.[82] The Commission has approved project development activities in connection with QFs in a number of cases.[83] Such activities are implicit in the subsection as proposed, and the subsection has been revised to include them specifically.

After careful review of the precedent in this area under sections 9(a)(1) and 10, the Commission has also determined that it is appropriate to make clear that this subsection is intended to include ownership and operation of only the types of incidental facilities that are required in order to meet the requirements of PURPA.[84] Subsection (viii), as adopted, has been revised accordingly.

Companies in both electric and gas registered systems may acquire interests in companies engaging in the activities specified in this subsection.

(9) *Subsection (b)(1)(ix): fuel facilities, scrubbers, and resource recovery and waste water treatment facilities.* As proposed, this subsection included ownership and operation of fuel procurement, transportation, handling and storage facilities, scrubbers, and resource recovery and waste water treatment facilities.[85] One registered holding company suggests that servicing of such facilities should also be permitted.[86] The subsection has been revised expressly to permit such activity.

Another registered holding company suggests that this subsection should be expanded to permit use of excess system assets, such as office equipment and space and excess space in billing envelopes.[87] The Commission believes that this request is more appropriately directed to subsection (b)(1)(vii) and has addressed it in that context.

The Commission orders on which inclusion of these activities is based relate to generation of electricity. As a result, the rule's exemption for the acquisition of a company that engages in activities described in this subsection is available only for companies in electric registered systems.[88]

(10) *Subsection (b)(1)(x): production, transportation, distribution or storage of other forms of energy.* The activities in this subsection concern all forms of energy other than electricity and natural or manufactured gas. Commenting registered holding companies suggest that the permitted activities should also include the sale of these forms of energy,[89] as well as all activities in the supply chain concerning them, including development, exploration, research and testing.[90] The commenters further propose that the subsection specifically include sources of energy.[91]

The Commission has concluded that the activities in this proposed subsection duplicate in many respects the activities included in other subsections of the rule as adopted.[92] Accordingly, this subsection has been eliminated in the final rule.

(11) Subsection (b)(1)(xi): coal waste by-products. This subsection includes development and commercialization of technologies or processes that utilize coal waste by-products as an integral component. Two registered holding companies comment on this subsection and request that it be expanded to include all waste products and by-products of generation of electricity and natural gas production, as well as investments in facilities and equipment used in processes to improve wastes and by-products or convert them into useful goods.[93] The Commission notes that, to date, it has considered only cases involving coal waste products and by-products of electric generation,[94] and this subsection is adopted as proposed.

Only companies in electric holding company systems may acquire an interest in a company engaged in the activities in this subsection.

(12) Subsection (b)(1)(xii): telecommunications facilities. This subsection addresses the ownership, sale, leasing or licensing of the use of telecommunications facilities and equipment. The Commission received numerous comments on the advisability and scope of this part of the rule.[95] In view of the passage in 1996 of the Telecommunications Act, legislation that exempts from the requirement of prior Commission approval the acquisition and retention by a registered holding company of interests in companies engaged in a broad range of telecommunications activities and businesses, these activities are not included in the adopted rule.

2. Limitation on Investment

As noted above, the exemption of rule 58 is available so long as aggregate

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among such companies. Rules 85 through 92, adopted under section 13, specify the situations in which such transactions are permitted and generally provide that, with some exceptions, such contracts must be performed at cost.

[81] Such facilities are stated to include thermal energy utilization facilities purchased or constructed primarily to enable the QF to satisfy the useful thermal output requirements under PURPA and regulations thereunder.

[82] Comments of GPU.

[83] *See, e.g., Southern Co.,* Holding Co. Act Release No. 26212 (Dec. 30, 1994); and *Allegheny Power System, Inc.,* Holding Co. Act Release No. 26229 (Feb. 3, 1995).

[84] The Commission has authorized registered holding companies to invest in an 18 acre thermal host greenhouse, *Central and South West Corp.,* Holding Co. Act Release No. 25399 (Nov. 1, 1991), and an integrated carbon dioxide plant steam host, *Central and South West Corp.,* Holding Co. Act Release Nos. 25477 (Feb. 18, 1992) and 25983 (Jan. 31, 1994). In each instance, the Commission found that the incidental facility was necessary to the operation of the QF. The Commission believes that it is appropriate for the subsection of the rule to extend to investments in any type of incidental facility that is needed for a facility to attain QF status.

[85] This subsection is not intended to encompass ownership or operation of any facilities that would cause an energy-related company to become an electric utility company under the Act. See section 2(a)(3).

[86] Comments of GPU.

[87] Comments of Northeast.

[88] Many activities related to procurement, transportation and storage of natural gas for sale are permitted for gas-related companies, as discussed below.

[89] Comments of GPU.

[90] Comments of AGA, CSW and Columbia.

[91] Comments of CSW.

[92] For instance, subsection (v) covers marketing of energy commodities; subsection (vi) covers production and sale of thermal energy products, alternative fuels and renewable energy resources; subsection (ix) covers ownership or operation of fuel procurement, transportation, handling and storage facilities; and subsection (x) covers utilization of certain waste by-products of the generation of electricity. In addition, as discussed below, production of other fuels may be a permitted activity for gas-related companies under some circumstances.

[93] Comments of Allegheny and Southern.

[94] *See Jersey Central Power & Light Co.,* Holding Co. Act Release No. 24373 (April 16, 1987) (investment in company developing a waste coal-fired generating unit); *American Electric Power Co.,* Holding Co. Act Release No. 26014 (March 30, 1994) (acquisition of securities of subsidiary that develops backfill material using fly ash, a coal waste by-product); and *New England Electric System,* Holding Co. Act Release No. 26277 (April 26, 1995) (investment in a venture that installs equipment to separate unburned carbon from coal ash).

[95] Registered holding companies generally commented that this section should be expanded to cover a broader range of telecommunication services and products. Comments of CSW, Entergy and GPU. New Orleans, however, commented that this subsection should be eliminated as not in the public interest due to possible cross-subsidization problems and lack of relationship to the core utility business.

investment by a registered holding company and its subsidiaries in energy-related companies does not exceed the greater of 15% of consolidated capitalization or $50 million. As proposed, investments in such companies made pursuant to Commission order prior to the effective date of the rule would be excluded for purposes of calculating the limitation. In the Proposing Release, the Commission requested specific comment on (1) whether the proposed investment limitation is reasonable under the circumstances; (2) whether a different measure of financial capacity, such as consolidated retained earnings, should be used instead; and (3) whether it is appropriate to exclude prior investments for purposes of the rule.

a. *Need for a limitation.* Some commenters consider an investment limitation to be unnecessary. They note that the types of energy-related businesses specified in the rule are closely related to the utility industry [96] and that competitive markets and the financial condition of any particular registered holding company establish prudent limits on diversification.[97] They state, further, that the Commission can monitor the effects of diversification through its review of holding company financing,[98] and they note that consumers are protected against potential cross-subsidization by various factors, including the at-cost rules under section 13 of the Act,[99] rate regulation and the companies' need to be competitive.[100] Several commenters, however, state that if the Commission determines that a limitation is appropriate, the proposed limitation is reasonable.[101] These commenters consider a more restrictive standard to be unnecessary.[102]

The Commission continues to believe that it is appropriate to limit the aggregate investment of a registered holding company in energy-related companies pursuant to the rule. Section 9(c)(3) by its terms contemplates that the Commission will condition rules thereunder upon such limitations as it may prescribe as appropriate in the ordinary business of a registered holding company or its subsidiary company and not detrimental to the public interest or the interest of investors or consumers. An aggregate limitation upon investments pursuant to the rule is appropriate to ensure that acquisitions of interests in energy-related companies are not so material as to depart from the statutory concept of transactions in the ordinary course of business or to raise the possibility of detriment to the protected interests.[103] The Commission may revisit the need for an investment limitation in rule 58 in the future, after gaining experience with the use and effects of the exemption provided by the rule.

b. *Basis for calculation of the limitation.* New Orleans asserts that either consolidated retained earnings or consolidated equity is preferable to consolidated capitalization as a means to measure shareholder funds that are not needed to meet the registered system's utility service obligations.

The commenting registered holding companies oppose a standard based on consolidated retained earnings. They note that such earnings can vary significantly as a result of factors that do not affect financial health, such as accounting changes and other nonrecurring items.[104] They also assert that consolidated retained earnings are primarily an indicator of ability to raise new capital economically, and, to this extent, lack relevance for the purpose of setting a limitation upon investment under the rule.[105]

The registered holding companies generally support a standard based on consolidated capitalization, because, in their view, it offers flexibility [106] and a meaningful measure of system financial integrity.[107] These commenters explain that a flexible standard is appropriate because the activities encompassed by the exemption of the rule are closely related to the utility business and have been reviewed and approved by order of the Commission.[108]

The Commission recently considered a question of the appropriate basis for an investment limitation in the context of EWGs. Rule 53, adopted under section 32 of the Act, provides a safe harbor for approval of proposals to issue securities related to investments in EWGs.[109] To qualify for the rule's safe harbor, the aggregate investment of the registered holding company system in EWGs and foreign utility companies (''FUCOs'') cannot exceed 50% of the system's consolidated retained earnings. In adopting rule 53, the Commission determined that retained earnings was an appropriate standard against which to measure the safe harbor limitation on these exempt investments.

Although the Commission has found a standard based on consolidated retained earnings to be appropriate in the context of rule 53, it does not follow that it is appropriate in the case of investments in energy-related companies. The Commission noted in adopting the safe harbor provisions of rule 53 that investments in EWGs and FUCOs were new activities, and that the potential risks, which could not accurately be predicted, could conceivably be significant. The Commission rejected a test based on consolidated capitalization, because it would not directly reflect the effect of losses in connection with an EWG or FUCO investment. The Commission concluded that the level of retained earnings, which is directly sensitive to losses, was a more appropriate standard against which to measure these investments.[110] In contrast, as discussed previously, investments under rule 58 are deemed to be appropriate within the ordinary course of business of registered systems and consistent with the

[96] Comments of Entergy.

[97] Comments of AGA and Columbia.

[98] Comments of Columbia and Entergy.

[99] Rules 90, 91 and 92 under the Act, 17 CFR 250.90, 250.91 and 250.92.

[100] Comments of AGA.

[101] Comments of Consolidated, GPU and Southern.

[102] Comments of AGA and GPU.

[103] The Commission notes that its jurisdiction over the issuance and sale of securities by a registered holding company and its subsidiaries to finance investments in nonutility companies pursuant to rule 58 will also serve to minimize risk and to enable the Commission to monitor the effects of nonutility activities on the registered system. The Commission has jurisdiction over such financing transactions under sections 6 and 7 of the Act, and must consider certain effects of proposed financings in determining whether the standards of the Act have been satisfied. See the Proposing Release, 60 FR at 33646.

[104] One registered holding company also observes in this regard that a standard based on consolidated retained earnings would create uncertainty in a registered holding company system's planning. Comments of CSW.

[105] Comments of Southern.

[106] Comments of GPU and Northeast.

[107] Comments of Allegheny and Southern.

[108] Comments of CSW.

[109] Section 32 of the Act provides that, in determining whether to approve a proposed issuance of securities related to EWG investments, the Commission may not make certain negative findings under the Act unless the proposed transaction would have a substantial adverse impact on the financial integrity of the registered holding company system. Section 32(h)(3) and (4). Section 32 also directs the Commission to adopt regulations that would set forth ''the actions which would be considered to have a substantial adverse impact on the financial integrity of the registered holding company system [and] ensure that the [financing in question] has no adverse impact on any utility subsidiary or its customers, or on the ability of State commissions to protect such subsidiary or customers * * *.'' Section 32(h)(6). Rule 53 was adopted to effectuate these provisions. If the rule's safe harbor are satisfied, the Commission is precluded from making the negative findings specified in section 32(h)(3) and (4).

[110] The Commission stated that ''(b)ecause EWGs and foreign utility companies are still novel entities, there is little experience on which to base predictions concerning their performance * * *. [R]etained earnings would best capture the effect upon a system's financial condition of reverses in EWG and foreign utility company investments.'' Holding Co. Act Release No. 25886 (Sept. 23, 1993), 58 FR 51488, 51493 (Oct. 1, 1993).

protected interests under the Act. The risks are more predictable and presumably more limited. In rejecting alternative bases for the investment limitation in rule 53, the Commission also noted that consolidated capitalization ''relates principally to the capital structure created to fund the holding company system's domestic utilities * * *,''[111] and thus is not a particularly appropriate standard against which to measure investments in EWGs and FUCOs. This is not the case for acquisitions of interests in energy-related companies, whose activities, as previously discussed, are closely related to the core utility business of a registered system. Because total system capitalization is intended to support the system's utility business, the Commission regards it as an appropriate measure of the amount of capital that may be invested in utility-related businesses. In addition, because consolidated capitalization is a more stable base of calculation than retained earnings, the amount of the investment cap would be less subject to fluctuations.

The test in rule 53 was formulated to effectuate the specific protections required by section 32.[112] In contrast, section 9(c)(3), under which rule 58 is adopted, deals with a different type of investment than that covered by section 32, *i.e.,* one appropriate in the ''ordinary course of business.'' Investors and consumers are protected not only through the investment cap for energy-related investments, but also through this limitation.

In view of these considerations, the Commission believes that a consolidated capitalization standard is appropriate for purposes of a limitation on exempt investments under rule 58. The final rule incorporates this standard.

c. Treatment of previous investments. The Commission received a significant number of comments concerning the proposed exclusion of prior investments in energy-related companies, made pursuant to Commission order, from the calculation of aggregate investment for purposes of the limitation of the rule. New Orleans and one registered holding company[113] assert that such prior investments should be included in the calculation.[114] The majority of commenters, however, consider the ''grandfathering'' of these investments to be appropriate. These commenters note that the investments have been found to satisfy the requirements of the Act.[115] Further, the commenters assert that inclusion of prior investments would penalize those registered holding companies that have successful energy-related programs in place,[116] and also prevent registered holding companies from competing on an equal footing with exempt holding companies and companies not subject to the Act.[117] Finally, the commenters contend that it would be burdensome to require a determination of whether or not various prior investments are energy-related for purposes of rule 58.[118]

Several commenters propose that the limitation should exclude not only investments made pursuant to Commission order prior to the rule, but also previously-authorized investments that have not yet been made as of the date of the rule.[119] One commenter suggests, in addition, that investments that the Commission may authorize by future order should be excluded for purposes of the limitation of rule 58.[120] This commenter also requests the Commission to clarify whether previous investments in energy-related companies pursuant to other exemptions should be excluded from calculation of the investment limit. At issue are investments by registered holding companies in their nonutility subsidiaries pursuant to rules 52 and 45, as recently amended.[121]

The Commission believes that all amounts that have actually been invested in energy-related companies pursuant to Commission order prior to the date of effectiveness of the rule should be excluded from the calculation of aggregate investment under rule 58. The Commission also believes it is appropriate to exclude from the calculation all investments made prior to that date pursuant to available exemptions.[122]

The Commission believes, however, that any investment made after the date of effectiveness of rule 58 should be included for purposes of calculation of the limitation, regardless of whether these investments are made pursuant to prior Commission order or available exemptions.[123] As for the question of whether investments approved by order after the date of effectiveness of rule 58 should be excluded from the calculation, the Commission believes that the issue is best addressed on a case-by-case basis. This approach will enable the Commission to consider the effect of the particular transaction on the registered system.

d. Definition of ''aggregate investment''. Rule 58, as proposed, defined ''aggregate investment'' to mean all amounts invested, or committed to be invested, in energy-related companies, for which there is recourse, directly or indirectly, to the registered holding company. The Commission

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[111] *Id.*

[112] In discussing the investment limitation, the Commission stated that rule 53 is ''intended to protect system financial integrity and so protect utilities and their ratepayers.'' A ''key factor'' in this regard is the ability of the holding company, which is a source of capital for its utility subsidiaries, to obtain financing at a reasonable cost. Retained earnings was chosen as the basis of the safe harbor investment limitation, among other things, because they are linked to the cost of capital, and thus provide a ''fundamental protection.'' 58 FR at 51492.

[113] Comments of Allegheny.

[114] New Orleans believes that the total of existing investments and future investments under rule 58 would be so great as to be detrimental to ratepayers. As of December 31, 1995, registered holding companies had invested approximately $1.25 billion in companies that would be energy-related companies within the meaning of rule 58(a). As of that date, such investments represented approximately 1.6% of consolidated capitalization of the registered systems having such investments. On an individual basis, no registered system had more than approximately 5.6% of its consolidated capitalization invested in energy-related companies as of December 31, 1995. The Commission believes that this level of investment does not raise any significant issues of risks to the interests protected by the Act. The Commission also notes that because registered holding companies often make these investments through nonutility subsidiaries, system operating companies and their ratepayers are insulated from exposure to any direct losses that may result from the investments.

[115] Comments of CSW, EUA, GPU and Northeast.

[116] Comments of EUA.

[117] Comments of AGA.

[118] Comments of EUA and GPU.

[119] Comments of AEP, Consolidated, EUA, Entergy and Southern.

[120] Comments of Entergy.

[121] See Holding Co. Act Release No. 26311 (June 20, 1995), 60 FR 33634 (June 28, 1995) (exempting from the requirement of prior Commission approval capital contributions and non-interest bearing open account advances by parent companies to nonutility subsidiaries, and the issuance by nonutility subsidiaries and acquisition by their parents of specified types of securities, the proceeds of which are for use in the subsidiary's existing business).

[122] Under this interpretation, amounts invested by a registered system company in an energy-related company during the period between adoption and effectiveness will be excluded for purposes of calculating aggregate investment; provided, that such investments are used solely to fund activities in which the company has previously been authorized to engage by order of the Commission and that such amounts are not disproportionate to the current operations of such business. Since these additional investments will fund activities that the Commission has previously considered and approved under sections 9(a)(1) and 10 of the Act, the Commission does not believe that their exclusion raises any significant concerns with respect to protection of the interests covered by the Act. Any investments in existing energy-related companies made prior to the effective date of the rule must be reported on Form U–9C–3.

[123] As discussed below, the Commission is adopting amendments to rules 52 and 45 that subject investments in energy-related companies to the same limitations under these rules as are applicable under rule 58. These limits apply to all energy-related companies, regardless of whether the initial investment in such company was made pursuant to order or pursuant to rule 58.

stated that the term was intended to have a meaning similar to that provided by rule 53.[124] The language of the definition, as proposed, did not specifically include amounts invested by subsidiary companies that are without guaranty by, or other recourse to, the parent holding company. Such investments, which are exempt under subsection (a)(1) from the requirement of Commission approval, are intended to be included in calculating the limitation under the rule. The rule as adopted reflects this intent.[125]

In terms of the types of investments encompassed, the scope of the definition of ''aggregate investment'' in rule 58 is intended to be similar to that of rule 53. The term thus would include amounts actually invested in an energy-related company, as well as amounts committed to be invested under the terms of subscription agreements, or stand-by or other similar capital funding agreements.

B. Investments by Gas Registered Holding Companies in Gas-Related Companies

Rule 58(a)(2) exempts from the requirement of prior Commission approval under sections 9(a)(1) and 10, pursuant to section 9(c)(3), the acquisition by a gas registered holding company or its subsidiary company of securities of a ''gas-related company,'' as defined. Such acquisitions are not subject to any limitation as to amount. A ''gas-related company'' is defined in the Proposing Release as a company that derives, or will derive, substantially all of its revenues from activities permitted under sections 2(a) and 2(b) of the GRAA and such other nonutility activities as the Commission may, from time to time, by order upon application under sections 9 and 10 and section 2(b) of the GRAA, authorize a gas registered holding company to engage in, and, in so doing, designate as gas-related for purposes of rule 58. The rule contemplates that gas-related companies, like energy-related companies, will derive substantially all of their revenues from the respective activities designated in the rule.

1. Definition of ''Gas-Related Company''

Some commenters question whether registered holding companies that have only electric utility operations or that have both electric and gas utility operations should be entitled to invest in gas-related companies on an unlimited basis under the rule.[126] The portion of rule 58 that permits such investments reflects and depends upon findings under the GRAA that certain activities satisfy the requirements of sections 10 and 11 of the Act. The GRAA is available only to companies in systems in which the holding company is registered solely by reason of ownership of voting securities of gas utility companies. As a result, other registered holding company systems are not entitled to the benefits of the GRAA or the related provisions of rule 58. The language of the rule has been clarified to make this explicit.

Several commenters raise an issue concerning the scope of the definition of gas-related company.[127] The definition, as proposed, can be read to include companies that derive substantially all of their revenues from only the activities specified in section 2(a) of GRAA and activities found by the Commission, by order, to satisfy the requirements of section 2(b) of GRAA. This interpretation would not, however, take into account that some activities specifically identified in section 2(b) as being related to the supply of natural gas (*i.e.*, exploration, development, production, marketing and manufacture of natural or manufactured gas) were found by the Commission to be permissible under the standards of the Act prior to the enactment of the GRAA, and are not the subject of a subsequent order under that legislation. Under rule 58 as proposed, a gas holding company system might be required to obtain an order under section 2(b) of GRAA in order for these gas-related activities to be covered by the rule's exemption.

Activities of the type specified in section 2(b) of GRAA were intended to be included in the activities in which gas-related companies may engage, regardless of whether a Commission order approving such activities was issued under GRAA[128] or under sections 9(a) and 10 prior to the enactment of GRAA,[129] or both.[130] In all of these cases, the Commission found that the standards of sections 10 and 11 were satisfied, either through traditional analysis or by means of the assumptions created by GRAA. The rule has been clarified to accomplish this result.

Several commenters also note that other activities associated with the natural gas supply chain, such as exploration and production of associated petroleum, were contemplated to be included in GRAA-permitted activities and should be included in the activities permitted to be engaged in by gas-related companies under rule 58.[131] The Commission agrees that the activities in which a gas-related company may engage under rule 58 should be consistent with those contemplated by GRAA.[132]

The definition, as proposed, contained a provision permitting addition of new activities by order upon application. As discussed above in the context of energy-related companies, this provision has not been included in the rule as adopted.

The definition of a gas-related company has also been revised, as was the definition of an energy-related company, to permit indirect investment through intermediate subsidiaries.

2. Limitation on Investments in Gas-Related Companies

The Commission requested comment on whether a limitation on investments

[124] See Holding Co. Act Release No. 25886 (Sept. 23, 1993), 58 FR 51488 (Oct. 1, 1993). Rule 53(a)(1)(i) (17 CFR 250.53(a)(1)(i)) provides that aggregate investment includes all amounts invested, or committed to be invested, in exempt wholesale generators and foreign utility companies, for which there is recourse, directly or indirectly, to the registered holding company. Among other things, the term includes, but is not limited to, preliminary development expenses that culminate in the acquisition of an exempt wholesale generator or a foreign utility company; and the fair market value of assets acquired by an exempt wholesale generator or a foreign utility company from a system company (other than an exempt wholesale generator or a foreign utility company).

[125] An indirect investment made through an intermediate subsidiary will only be counted once in the calculation of aggregate investment.

[126] Comments of CSW and Cinergy.

[127] Comments of AGA, Columbia and Consolidated.

[128] See, *e.g.*, *Consolidated Natural Gas Co.*, Holding Co. Act Release No. 26363 (Aug. 28, 1995) (sale of propane services); *Columbia Gas System*, Holding Co. Act Release No. 25802 (April 22, 1993) (marketing natural gas to nonaffiliates); *National Fuel Gas Co.*, Holding Co. Act Release No. 25437 (Dec. 20, 1991) (marketing, storage and transportation of natural gas and pricing consultation); *National Fuel Gas Co.*, Holding Co. Act Release No. 25265 (March 5, 1991) (exploration and development of gas supply reserves); *CNG Transmission Corp.*, Holding Co. Act Release No. 25239 (Jan. 9, 1991) (development, construction and operation of natural gas pipelines); and *Consolidated Natural Gas Co.*, Holding Co. Act Release No. 25224 (Dec. 21, 1990) (development of technologies to enhance the supply, transportation and utilization of natural gas).

[129] See, *e.g.*, *National Fuel Gas Co.*, Holding Co. Act Release No. 24381 (May 1, 1987) (drilling and well maintenance and related services); *Consolidated Natural Gas Co.*, Holding Co. Act Release No. 23023 (Aug. 5, 1983) (sale of natural gas byproducts); *National Fuel Gas Co.*, Holding Co. Act Release No. 21903 (Feb. 2, 1981) (construction of underground storage facilities); and *Columbia Gas System*, Holding Co. Act Release No. 13610 (Nov. 27, 1957) (extraction and sale of natural gas byproducts).

[130] See, *e.g.*, *National Fuel Gas Co.*, Holding Co. Act Release Nos. 26181 (Dec. 6, 1994) and 24381 (May 1, 1987) (pipeline construction and maintenance and related services).

[131] Comments of AGA and Columbia.

[132] See, *e.g.*, 136 Cong. Rec. S17586 (Oct. 27, 1990) (Statement of Sen. D'Amato) (production and sale of oil and other petroleum products may constitute ''production'' for purposes of GRAA, if oil and natural gas are present in the geologic formation underlying a particular well).

in gas-related companies is appropriate. Two commenters state that no such limitation is needed.[133] They note, among other things, that because many activities involved in the gas business are nonutility interests for purposes of the Act, investment in such activities is necessarily significant, and any limitation would limit the usefulness of the rule for gas registered systems.[134] In view of the Congressional intent, evidenced by the GRAA, that gas systems be permitted to engage in certain gas-related activities without restriction as to amount, the Commission has not revised the rule to add a limitation on those activities.[135]

C. Other Conditions to Use of the Rule

The Commission sought comment on whether use of rule 58 should be conditioned on meeting other types of requirements, and the form such conditions should take. Commenters were invited to address the need for additional conditions to use of the rule 58 exemption based on, for example, the financial condition of the registered holding company system, the extent of losses experienced by the system over recent periods and prior bankruptcies of system companies.

The registered holding companies and the American Gas Association uniformly state, for various reasons, that no further conditions to use of rule 58 are needed in order for investors and consumers to be protected from risks.[136] One holding company suggests that, if conditions are imposed, they should be based on current or future facts rather than past circumstances.[137] New Orleans, however, disagrees and suggests that use of the rule be conditioned on a demonstration of financial viability by the holding company. New Orleans also recommends that consumer safeguards in the form of audit authority and access to books and records for ratemaking authorities be added.[138]

For several reasons, the Commission believes that no additional conditions are required in order to protect investors and consumers from the risks of these diversified activities. First, as noted above, the rule addresses activities that the Commission has determined previously to be so closely related to utility operations as to be in the ordinary course of business of a registered holding company and that, in many instances, have been approved in prior orders of the Commission under sections 9(a)(1) and 10. In addition, reasonable limitations on exempt investments in energy-related companies are an important feature of the rule, designed to limit the financial exposure of the registered system. Finally, through the filing of Form U–9C–3 under rule 58(c), both the Commission and interested state regulators will have the opportunity to monitor the nature and scope of each registered holding company system's activities pursuant to rule 58. In view of these safeguards, the Commission is adopting the rule without further condition.

III. Proposed Amendments to Rule 52 and Rule 45

The Proposing Release requested comment on proposed amendments to rules 52 and 45 under the Act, to conform the rules to rule 58.[139] Rule 52(b), as currently in effect, exempts from the requirement of Commission approval under sections 6(a) and 7 of the Act the issue and sale by a nonutility subsidiary of a registered holding company of any common stock, preferred stock, bond, note or other form of indebtedness, subject to certain conditions. Rule 52(d) further exempts from the requirement of prior Commission approval under sections 9(a)(1) and 10 of the Act the acquisition by a registered holding company of any such security, provided that the transaction does not involve the formation of a new subsidiary.[140]

The exemptions under rule 52(b) and 52(d), both as previously in effect and as proposed to be amended, are broader than the exemption in proposed rule 58. Accordingly, the Commission proposed to amend rule 52 to add a limitation on the aggregate amount of securities that may be issued and sold by energy-related companies and acquired by associate companies, consistent with the limitation of rule 58.

Rule 45(b) currently exempts from the requirement of Commission approval under section 12(b) of the Act and rule 45(a) thereunder certain investments in existing subsidiaries by means of cash capital contributions or open account advances. In particular, rule 45(b)(4) exempts without limitation any capital contribution or open account advance without interest to a subsidiary company. Because this provision is inconsistent with the investment limitation in rule 58, the Commission proposed to amend rule 45(b)(4) to conform the aggregate amount of capital contributions and open account advances that may be made to energy-related subsidiary companies to the limitations of rule 58.

Few commenters express any view on the proposed amendments to rules 52 and 45. Two registered holding companies support adoption of the amendments.[141] An exempt holding company opposes the amendments as unnecessary and as potentially limiting the Commission's flexibility under rule 58.[142]

Without the proposed conforming changes, registered holding companies could use rule 58 to make initial acquisitions of securities of energy-related companies, and arguably could use rules 45 and 52 to make additional unlimited acquisitions of securities of such companies, in each instance without Commission approval. To permit this result would render meaningless the limitations of rule 58 on investments in energy-related companies. In addition, a question would arise whether section 9(c)(3), under which rule 58 is promulgated, permits such acquisitions of securities without Commission oversight. The Commission believes that the proposed amendments are necessary in order to carry out the purposes of rule 58. Accordingly, the amendments are adopted in the form proposed.

IV. Other Proposals in Connection With Rule 58

Several commenters propose changes to other rules or Commission orders to

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[133] Comments of AGA and Consolidated.

[134] Comments of Consolidated.

[135] See the Proposing Release, 60 FR at 33647.

[136] Comments of Allegheny (the rule's investment limitation protects investors and ratepayers, and the Commission and the states can monitor activities through Form U–9C–3); AEP (the investment limitation and the fact that these activities are conducted separately from utility operations provide protections); AGA (each venture should be viewed on a prospective basis, not on the basis of past experience; adverse developments can be monitored through reports filed with the Commission, the FERC and state regulators); Columbia (a ''no bankruptcy'' condition is contrary to the policy of the bankruptcy laws, and bankruptcy is irrelevant where the company emerges with an investment grade rating); Consolidated (the Commission can invoke its jurisdiction if problems are perceived); Entergy (the Commission can monitor investments in the context of holding company financing approvals); GPU (the state regulators and the FERC can protect ratepayers from risk); and Southern (the rule addresses all conditions necessary for satisfaction of section 10; no other conditions are needed to protect against cross-subsidization, since rule 58 companies are still subject to the intrasystem transaction provisions of the Act and such transactions must be reported on Form U–9C–3).

[137] Comments of Columbia.

[138] Comments of New Orleans.

[139] See the discussion of the need for these amendments in the Proposing Release. 60 FR at 33648.

[140] The Commission has proposed to amend rule 52 further to expand the types of securities that qualify for the exemption. See Holding Co. Act Release No. 26312 (June 20, 1995), 60 FR 33640 (June 28, 1995).

[141] Comments of Allegheny and Southern.

[142] Comments of Wisconsin Energy.

conform them to the provisions of rule 58. These proposals are discussed below.

A. Rule 16

As currently in effect, rule 16 under the Act provides that any company and its affiliates will be exempt from all obligations, duties or liabilities imposed by the Act upon subsidiaries or affiliates of a registered holding company, if (1) the company is not a public-utility company, (2) the company engages primarily in certain specified activities related to the supply of natural or manufactured gas, (3) less than 50% of the voting stock of the company is owned by registered holding companies, and (4) the acquisition by a registered holding company of an interest in the company was approved by the Commission upon application.[143] Several commenters suggest that the coverage of the rule 16 exemption be extended to energy-related companies and gas-related companies, as defined in rule 58, and their affiliates.[144]

The Commission believes that a proposal to amend rule 16 to make it consistent with rule 58, and to enhance its usefulness (which is limited at present), should be considered. Such an amendment, however, is beyond the scope of this rulemaking.

B. Existing Limitations on Investments in Energy-Related Companies

In the past, the Commission in some instances incorporated conditions and limitations in certain orders approving energy-related activities, including a requirement that an energy-related company derive at least 50% of its revenues from associate companies or from specified geographic areas.[145] As discussed above, these geographic and other limitations are not included in rule 58 as adopted.[146] One commenter suggests that any 50% limitation in an order approving the acquisition of an interest in a business that would qualify as energy-related under rule 58 should cease to apply by virtue of the rule, without any need for an amended order.[147]

The Commission agrees that, where an order approving the acquisition or retention of a nonutility business by a registered holding company system includes a limitation of the type discussed above, and such limitation would not apply if the interest held by the registered holding company system were acquired under rule 58, the limitation in the order should no longer apply. These conditions are effectively superseded by rule 58, and no further filings and orders are needed to eliminate them.

C. Associate Transactions

Several commenters suggest that transactions between an energy-related company and some or all of its associate companies should be exempt from the requirements of the Act and rules thereunder,[148] including the rules under section 13(b) of the Act. Section 13(b) of the Act generally requires that intrasystem service, sales and construction contracts be performed in accordance with such terms and conditions as the Commission may prescribe, either by rule or order, ''as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies, at cost, fairly and equitably allocated among such companies.'' Entergy Corporation suggests that rule 87 under the Act[149] be amended to provide that transactions subject to section 13(b) do not require an order upon application. General Public Utilities Corporation suggests an amendment of rule 90[150] to exclude transactions between an energy-related company and its associates from the at-cost standards. Northeast Utilities suggests that all transactions between an energy-related company and its affiliates should be exempt from the Act.

Section 13(b) authorizes the Commission to exempt conditionally or unconditionally such transactions as it may determine, by rule or order, to be consistent with the protected interests, if such transactions ''(1) are with any associate company which does not derive, directly or indirectly, any material part of its income from sources within the United States and which is not a public-utility company operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business.'' It does not appear that the Commission has previously considered its authority to grant other exemptions from the requirements of section 13(b).

The commenters' requests are beyond the scope of the proposed rulemaking. In addition, the Commission believes that it would be inappropriate to address the issues raised in the limited context of the activities addressed in rule 58. Nonutility companies in registered holding company systems have, in any event, substantial freedom to engage in transactions with associate nonutility companies under rule 87(b)(1).[151] The Commission declines to accept the commenters' suggestions.

D. Rule 48

One commenter suggests that rule 48 under the Act be amended to permit energy-related companies to engage in customer financing in connection with their energy-related businesses.[152] As noted previously, customer financing in connection with certain energy-related activities has been approved by order in the past. The Commission considered whether customer financing should be included in rule 58, either as a separate energy-related activity or as an aspect of other energy-related activities.[153] However, it appears that an amendment to rule 48 would be the appropriate measure to address this question.[154]

V. Quarterly Reports on Form U–9C–3

The Commission proposed that registered systems provide periodic information with respect to all energy-related and gas-related company subsidiaries on Form U–9C–3, in lieu of the separate rule 24 certificates required under the terms of any outstanding Commission orders.[155] This procedure

[143] 17 CFR 250.16.

[144] Comments of Columbia and Consolidated.

[145] For instance, the Commission has conditioned approval of acquisitions of energy services and demand-side management businesses on a requirement that at least 50% of revenues be derived from a specified geographic area, within the system's retail service territory and contiguous areas. See, *e.g., Entergy Corp.,* Holding Co. Act Release No. 25718 (Dec. 28, 1992); and *Northeast Utilities,* Holding Co. Act Release No. 25114 (July 3, 1990). In addition, the registered system was required in some instances to divest its equity interest in the nonutility business within a specified period. See, *e.g., Entergy Corp.,* Holding Co. Act Release No. 25718.

[146] The rule does not incorporate geographic limitations based on the retail service territory of the registered holding company system. However, based on existing precedent and the markets with which the Commission is currently familiar, activities permitted by the rule are limited to the United States. The rule has been modified to make this limitation clear.

[147] Comments of CSW.

[148] Comments of Entergy, GPU and Northeast.

[149] Rule 87 specifies the cases in which subsidiaries of registered holding companies may perform services or construction for or sell goods to associate companies, subject to compliance with the ''at cost'' rules and certain other conditions.

[150] Rule 90 sets forth the general rule that any transaction involving service, construction or sale of goods between a subsidiary of a registered holding company and an associate company must be performed at cost, as defined, and provides exceptions.

[151] 17 CFR 250.87(b)(1).

[152] Comments of GPU. Rule 48 currently exempts financing in connection with purchases by utility customers of standard electric and gas appliances. 17 CFR 250.48.

[153] See comments of Northeast.

[154] Amendment of rule 48 is beyond the scope of this rulemaking.

[155] See the Proposing Release, 60 FR at 33648. Cinergy suggests that, to the extent that information

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was intended to lessen the reporting burden for holding companies, and to make available a single, comprehensive report covering all energy-related and gas-related business activities of a registered holding company for the interested state commissions, with which the report must also be filed.

The Commission requested comment on the form and content of Form U–9C–3. In particular, the Commission sought comment on whether a report should be filed quarterly or on a semiannual or other basis. The Commission also requested comment on whether any special reporting requirements may be needed with respect to the revenues derived from any activities of such companies other than the activities specified in the rule, to ensure that energy-related and gas-related companies derive substantially all of their revenue from such activities, as required by the rule.

Several commenters assert that the form should not be adopted, because Form U5S provides sufficient information to enable regulators to protect consumers [156] and could be modified to require reporting of rule 58 investments in a manner similar to treatment of exempt wholesale generators and foreign utility companies.[157] One commenter suggests that no reporting requirements are needed with respect to investments in gas-related companies, since there are no limits on these investments.[158] Most commenters suggest that changes be made to the form if it is adopted.

With respect to the timing of reporting, one commenter, New Orleans,[159] specifically approves of quarterly filings, on the ground that regulators need quarterly reports in order to monitor activities and institute corrective action. Most industry commenters, however, object to quarterly filings, because the information in the proposed form duplicates other periodic reports, such as that on Form U5S;[160] because annual filings achieve the purpose of assuring compliance with the conditions of the rule;[161] because competitors are not burdened with preparation of the form;[162] because the benefits of quarterly reporting do not justify its costs;[163] and because rule 58 companies should not be required to file more frequently than holding companies and service companies.[164] Many of these commenters believe that annual filings are appropriate,[165] although one favors semiannual reporting,[166] and another proposes that the bulk of the information be filed annually, with quarterly filings used to report any changes during the quarter.[167] One commenter suggests that the form be clarified to indicate that filings are to be made quarterly rather than ''continuously.'' [168] The Commission has concluded that the filing of complete and current financial statements and other information (particularly information on transactions between rule 58 companies and their affiliates) in each quarterly report will facilitate appropriate monitoring of acquisitions pursuant to the rule. The form, as adopted, thus requires quarterly reporting.

Many commenters express concern with the type of reporting required by the proposed form, particularly the required financial statements. The commenters believe that this requirement is burdensome, and unnecessary, because registered systems file consolidating financial statements in their annual reports on Form U5S; [169] because separate financial information would be required even for a company in which only a minor investment is made; [170] because state regulators are interested in nonutility operations as a whole rather than separate components; [171] and because separate financial statements would be required for each subsidiary in cases where investments are structured through several tiers of subsidiaries.[172] The Commission believes that the filing of financial information for each investment under rule 58 is appropriate to enable the Commission and the interested state commissions to monitor activity under the rule. The Commission is, however, modifying certain of the requirements in the form as proposed to deal with certain issues raised by commenters on the proposal.

The purpose of requiring financial statements is to provide information on each significant investment, not to compel holding companies to prepare financial statements for shell companies. As a result, the form, as adopted, permits consolidation of the financial statements of downstream subsidiaries with those of the first-tier energy-related or gas-related company,[173] so long as the first-tier subsidiary owns interests only in companies engaged in one permitted activity.

The Commission also recognizes that the filing of financial statements for companies in which the registered system holds only a small interest may be overly burdensome without offering a significant measure of protection for utility shareholders and consumers. Accordingly, the form, as adopted, requires the filing of financial statements only for companies in which the registered system has at least a 50% equity or other ownership interest. The form provides that, for all other rule 58 companies, the registered holding company will make available to the Commission such financial statements as are available to it.

A number of commenters express concern that the form will result in disclosure of confidential financial and other commercially sensitive information that may damage the holding company's competitive position.[174] The Commission agrees that confidentiality of certain business information is an important concern. As noted in the Proposing Release, however, the form does not require reporting of sensitive information such as identity of customers. Further, applicants may claim confidential treatment pursuant to rule 104 under the Act for some items of information. Thus, commercially sensitive information should have adequate protection.

Other changes in the final form include the following. The filing instructions have been revised to reflect electronic filing under the Commission's EDGAR system.[175] Also, the report for the last period in the reporting company's fiscal year will be

on securities issuances is reported on Form U–9C–3, reports under rule 52 on Form U–6B–2 reporting the same information should not be required. Such a change may be appropriate, but is beyond the scope of this rulemaking.

[156] Comments of AGA.

[157] Comments of Columbia. See Item 9 of Form U5S, 17 CFR 259.5s.

[158] Comments of Columbia.

[159] Comments of New Orleans.

[160] Comments of AGA and Columbia.

[161] Comments of Entergy.

[162] Comments of Allegheny.

[163] Comments of Southern.

[164] Id.

[165] Comments of Allegheny, AGA, Columbia, Consolidated, Entergy and Southern.

[166] Comments of Cinergy.

[167] Comments of AEP.

[168] Comments of CSW. The rule has been revised to clarify that the filing requirement is not continuous.

[169] Comments of Columbia. Cinergy commented that financial statements should be filed with the form only upon the initial acquisition of securities of an energy-related or gas-related company; thereafter, the consolidating financial statements in Form U5S would provide sufficient updating information.

[170] Comments of Allegheny and Southern.

[171] Comments of Southern.

[172] Comments of Allegheny and Southern.

[173] As discussed previously, indirect investment in energy-related and gas-related companies through intermediate subsidiaries is permitted under the rule as adopted.

[174] Comments of Allegheny, Columbia and Southern.

[175] Comments of Consolidated and Northeast.

due 90 days, rather than 60 days, after the end of the period.[176] Finally, the form has been clarified to require disclosure with respect to all energy-related and gas-related companies in which investments were made during the reporting period.[177] Other specific comments were not adopted, including a suggestion that all items except 5(b) (relating to associate transactions) are unnecessary.[178] In addition, the form has been revised to provide a format for reporting of the required information and to clarify generally the filing instructions.

Commenters believe that no other new reporting requirements are needed to assure that rule 58 companies derive substantially all of their revenues from permitted activities.[179] The Commission has concluded that Form U–9C–3, together with other existing reporting requirements, provides sufficient information for this purpose, and that no additional new requirements are needed.

VI. Conclusion

The Commission believes that registered holding company systems should be relieved of the regulatory burden of having to file multiple applications for authority to engage, through acquisitions of securities, in nonutility activities that are closely related to utility operations and that are of the same character or type as those the Commission has allowed in previous cases. Rule 58 is intended to permit investments in energy-related companies and gas-related companies, as defined, without geographic limits based on the registered system's service territory or other restrictions similar to those incorporated in some previous orders. The Commission believes that the limitation of the rule on the aggregate amount that a registered holding company system may invest, directly or indirectly, in energy-related companies should help to assure that the public interest and the interest of investors and consumers will not be adversely affected by acquisitions made pursuant to the rule. In addition, the reporting requirements should enable the Commission and interested state and local regulators to monitor financial and other effects of such transactions.

[176] Comments of Northeast.

[177] Comments of Cinergy.

[178] Comments of Allegheny. While the reporting of associate transactions is a primary purpose of the form, it is also intended to solicit information through which the staff of the Commission and interested state commissions can monitor compliance with the limitations of the rule, including limitations on the type of activities in which the company in question is engaged.

[179] Comments of AGA (information in Form U5S is adequate for this purpose); CSW (existing proposed reporting requirements could be reduced and still provide this assurance); Consolidated (if further assurance is needed, a statement of compliance could be included in the Form U5S) and Entergy and Northeast (Form U–9C–3 provides sufficient information to put regulators on notice of other activities).

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Chairman of the Commission has certified as follows:

I, Arthur Levitt, Chairman of the Securities and Exchange Commission, hereby certify pursuant to 5 U.S.C. 605(b) that proposed rule 58 and proposed amendments to rules 45 and 52 under the Public Utility Holding Company Act of 1935, as amended (15 U.S.C. 79 *et seq.*), together concerning the acquisition by a registered holding company and its subsidiaries of securities of certain nonutility companies, without a filing requirement, will not have a significant impact on a substantial number of small businesses. The reason for this certification is that it does not appear that any small businesses would be affected by the proposed rule and rule amendments.

Arthur Levitt, Chairman

Dated: June 19, 1995.

The Commission did not receive any comments with respect to the Chairman's certification.

Costs and Benefits

Rule 58 will substantially decrease regulatory costs for the twelve (12) electric and three (3) gas registered holding companies. In calendar year 1995, 35 applications would not have been filed had the proposed rule 58 and related rule amendments been in place. Estimated savings per application would have been approximately $28,000, including related legal, accounting, and management costs. Thus, for 35 applications filed in calendar year 1995, the aggregate savings would have been approximately $980,000 per year. Moreover, the reduction in Commission staff hours would have been approximately 3,800 hours (approximately 2 staff years). The only cost to the registered holding companies in complying with the rule will be the cost of completing and filing Form U–9C–3 on a quarterly basis. It is estimated that approximately 16 hours will be required to complete each form at an estimated cost of $100 per hour. Assuming 56 form submissions per year, the cost of compliance reporting would approximate $89,600 per year.

Paperwork Reduction Act

The proposed rule and rule amendments are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been submitted to the Office of Management and Budget for approval for use through September 30, 1998.

Statutory Authority

The Commission is adopting rule 58 and amending rules 45 and 52 pursuant to sections 6, 9, 12 and 20 of the Act.

List of Subjects in 17 CFR Parts 250 and 259

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

Text of Rules

For the reasons set out in the preamble, 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.

* * * * *

(b) *Exceptions.* * * *

(4) Capital contributions or open account advances, without interest, by a company to its subsidiary company; *Provided*, That capital contributions or open account advances to any energy-related company subsidiary, as defined in § 250.58, shall not be exempt hereunder unless, after giving effect thereto, the aggregate investment by a registered holding company or any subsidiary thereof in such company and all other such energy-related company subsidiaries does not exceed the limitation in § 250.58(a)(1).

* * * * *

3. Section 250.52 is amended by revising paragraph (b) to read as follows:

§ 250.52 Exemption of issue and sale of certain securities.

* * * * *

(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 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; *Provided*, That any security issued to an associate company by any energy-related company subsidiary, as defined in § 250.58, shall not be exempt hereunder unless, after giving effect thereto, the aggregate investment by a registered holding company or any subsidiary thereof in such subsidiary and all other such energy-related company subsidiaries does not exceed the limitation in § 250.58(a)(1).

* * * * *

4. Section 250.58 is added to read as follows:

§ 250.58 Exemption of investments in certain nonutility companies.

(a) *Exemption from Section 9(a).* Section 9(a) of the Act (15 U.S.C. 79i(a)) shall not apply to:

(1) The acquisition by a registered holding company, or a subsidiary company thereof, of the securities of an energy-related company; *Provided*, That, after giving effect to any such acquisition, the aggregate investment by such registered holding company and subsidiaries in all such companies does not exceed the greater of:

(i) $50 million; or

(ii) 15% of the consolidated capitalization of such registered holding company, as reported in the registered holding company's most recent Annual Report on Form 10–K or Quarterly Report on Form 10–Q (§ 249.308a or § 249.310 of this chapter) filed under the Securities Exchange Act of 1934, as amended (15 U.S.C. 78 *et seq.*); or

(2) The acquisition by a holding company that is registered solely by reason of ownership of voting securities of gas utility companies, or a subsidiary company thereof, of the securities of a gas-related company.

(b) *Definitions*. For purpose of this section:

(1) The term *energy-related company* shall mean any company that, directly or indirectly through one or more affiliates, derives or will derive substantially all of its revenues (exclusive of revenues from temporary investments) from one or more of the following activities within the United States:

(i) The rendering of energy management services and demand-side management services;

(ii) The development and commercialization of electrotechnologies related to energy conservation, storage and conversion, energy efficiency, waste treatment, greenhouse gas reduction, and similar innovations;

(iii) The ownership, operation, sale, installation and servicing of refueling, recharging and conversion equipment and facilities relating to electric and compressed natural gas powered vehicles;

(iv) The sale of electric and gas appliances; equipment to promote new technologies, or new applications for existing technologies, that use gas or electricity; and equipment that enables the use of gas or electricity as an alternate fuel; and the installation and servicing thereof;

(v) The brokering and marketing of energy commodities, including but not limited to electricity, natural or manufactured gas and other combustible fuels;

(vi) The production, conversion, sale and distribution of thermal energy products, such as process steam, heat, hot water, chilled water, air conditioning, compressed air and similar products; alternative fuels; and renewable energy resources; and the servicing of thermal energy facilities;

(vii) The sale of technical, operational, management, and other similar kinds of services and expertise, developed in the course of utility operations in such areas as power plant and transmission system engineering, development, design and rehabilitation; construction; maintenance and operation; fuel procurement, delivery and management; and environmental licensing, testing and remediation;

(viii) The development, ownership or operation of "qualifying facilities," as defined under the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA"), and any integrated thermal, steam host, or other necessary facility constructed, developed or acquired primarily to enable the qualifying facility to satisfy the useful thermal output requirements under PURPA;

(ix) The ownership, operation and servicing of fuel procurement, transportation, handling and storage facilities, scrubbers, and resource recovery and waste water treatment facilities; and

(x) The development and commercialization of technologies or processes that utilize coal waste by-products as an integral component of such technology or process; *Provided*, That any company engaged in the activities specified in paragraphs (b)(1)(ii), (b)(1)(iii) with respect to electric powered vehicles, (b)(1)(vi), (b)(1)(ix) or (b)(1)(x) of this section, shall be an "energy-related company" for purposes of this section only if the securities of such company are acquired, directly or indirectly, by a registered holding company whose public-utility company subsidiaries are primarily electric utility companies; and *Provided further*, That any company engaged in the activities specified in paragraph (b)(1)(iii) of this section with respect to compressed natural gas powered vehicles, shall be an "energy-related company" for purposes of this section only if the securities of such company are acquired, directly or indirectly, by a registered holding company whose public-utility company subsidiaries are primarily gas utility companies.

(2) The term *gas-related company* shall mean any company that, directly or indirectly through one or more affiliates, derives or will derive substantially all of its revenues (exclusive of revenues from temporary investments) from one or more of the following activities within the United States:

(i) Activities permitted under section 2(a) of the Gas-Related Activities Act of 1990, 104 Stat. 2810; and

(ii) Activities specified in section 2(b) of the Gas-Related Activities Act and approved by order of the Commission under sections 9 and 10 of the Act (15 U.S.C. 79i–j).

(3) The term *aggregate investment* shall mean all amounts invested or committed to be invested in energy-related companies, for which there is recourse, directly or indirectly, to the registered holding company or any subsidiary company thereof.

(c) *Report on related business activities.* For each quarter of the fiscal year of the registered holding company in which any acquisition that is exempt under this section is made, and for each such quarter thereafter in which the acquired interest is held, the registered holding company shall file with this Commission and with each state commission having jurisdiction over the retail rates of the public-utility subsidiary companies of such registered holding company a Quarterly Report on Form U–9C–3 (§ 259.208 of this chapter). Such filing shall be made within 60 days following the end of the first three quarters of the fiscal year, and within 90 days after the end of the fourth quarter.

PART 259—FORMS PRESCRIBED UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

5. The authority citation for part 259 continues to read as follows:

Authority: 15 U.S.C. 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q and 79t.

6. Section 259.208 and Form U–9C–3 are added to read as follows:

§ 259.208 Form U–9C–3, for notification of acquisition of securities exempt from section 9(a) pursuant to rule 58 (§ 250.58 of this chapter).

This form shall be filed pursuant to § 250.58(c) as the certificate of notification of an acquisition of securities exempted from the application of section 9(a) of the Act (15 U.S.C. 79a *et seq.*) pursuant to § 250.58.

[Editorial Note: The text of Form U–9C–3 appears in the appendix to this document and will not appear in the Code of Federal Regulations.]

Dated: February 14, 1997.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Appendix

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

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM U–9C–3

QUARTERLY REPORT PURSUANT TO RULE 58

(Name of registered holding company)

(Address of principal executive offices)

GENERAL INSTRUCTIONS

A. Use of Form

1. A reporting company, as defined herein, shall file a report on this form within 60 days after the end of each of the first three quarters, and within 90 days after the end of the fourth quarter, of the fiscal year of the registered holding company. The period beginning on the date of effectiveness of rule 58 and ending at the end of the quarter following the quarter in which the rule becomes effective shall constitute the initial period for which any report shall be filed, if applicable.
2. The requirement to provide specific information by means of this form supersedes and replaces any requirement by order of the Commission to provide identical information by means of periodic certificates under rule 24; but does not so supersede and replace any requirement by order to provide information by means of an annual report on Form U–13–60.
3. Information with respect to reporting companies that is required by Form U–13–60 shall be provided exclusively on that form.
4. Notwithstanding the specific requirements of this form, the Commission may informally request such further information as, in its opinion, may be necessary or appropriate.

B. Statements of Monetary Amounts and Deficits

1. Amounts included in this form and in related financial statements may be expressed in whole dollars, thousands of dollars or hundred thousands of dollars.
2. Deficits and other similar entries shall be indicated by either brackets or parentheses. An explanation should be provided by footnote.

C. Formal Requirements

This form, including exhibits, shall be filed with the Commission electronically pursuant to Regulation S–T (17 CFR 232.10 *et seq.*). A conformed copy of each such report shall be filed with each state commission having jurisdiction over the retail rates of a public-utility company that is an associate company of a reporting company. Each report shall provide the name and telephone number of the person to whom inquiries concerning the report should be directed.

D. Definitions

As used in this form, the word ''reporting company'' means an energy-related company or gas-related company, as defined in rule 58(b). All other words and terms have the same meaning as in the Public Utility Holding Company Act of 1935, as amended, and the rules and regulations thereunder.

ITEMS

ITEM 1—ORGANIZATION CHART

Name of reporting company	Energy or gas-related company	Date of organization	State of organization	Percentage of voting securities held	Nature of business

Instructions

1. Complete Item 1 only for the first three calendar quarters of the fiscal year of the registered holding company.
2. Under the caption ''Name of Reporting Company,'' list each energy-related and gas-related company and each system company that directly or indirectly holds securities thereof. Add the designation ''(new)'' for each reporting company of which securities were acquired during the period, and the designation ''(*)'' for each inactive company.
3. Under the caption ''Percentage of Voting Securities Held,'' state the aggregate percentage of the outstanding voting securities of the reporting company held directly or indirectly by the registered holding company at the end of the quarter.
4. Provide a narrative description of each reporting company's activities during the reporting period.

ITEM 2—ISSUANCES AND RENEWALS OF SECURITIES AND CAPITAL CONTRIBUTIONS

Company issuing security	Type of security issued	Principal amount of security	Issue or renewal	Cost of capital	Person to whom security was issued	Collateral given with security	Consideration received for each security

Instruction

With respect to a transaction with an associate company, report only the type and principal amount of securities involved.

Company contributing capital	Company receiving capital	Amount of capital contribution

ITEM 3—ASSOCIATE TRANSACTIONS

Part I—Transactions Performed by Reporting Companies on Behalf of Associate Companies

Reporting company rendering services	Associate company receiving services	Types of services rendered	Direct costs charged	Indirect costs charged	Cost of capital	Total amount billed

Part II—Transactions Performed by Associate Companies on Behalf of Reporting Companies

Reporting company rendering services	Associate company receiving services	Types of services rendered	Direct costs charged	Indirect costs charged	Cost of capital	Total amount billed

Instructions

1. This item is used to report the performance during the quarter of contracts among reporting companies and their associate companies, including other reporting companies, for service, sales and construction. A copy of any such contract not filed previously should be provided as an exhibit pursuant to Item 6. B.
2. Parts I and II concern transactions performed by reporting companies on behalf of associate companies, and transactions performed by associate companies on behalf of reporting companies, respectively.

ITEM 4—SUMMARY OF AGGREGATE INVESTMENT

Investments in energy-related companies:			
Total consolidated capitalization as of ____________	$xxx,xxx		Line 1.
Total capitalization multiplied by 15% (line 1 multiplied by 0.15)	xxx,xxx		Line 2.
Greater of $50 million or line 2		$xxx,xxx	Line 3.
Total current aggregate investment: (categorized by major line of energy-related business)			
Energy-related business category 1	xxx,xxx		
Energy-related business category 2	xxx,xxx		
Etc.	xxx,xxx		
Total current aggregate investment		xxx,xxx	Line 4.
Difference between the greater of $50 million or 15% of capitalization and the total aggregate investment of the registered holding company system (line 3 less line 4).		$xxx,xxx	Line 5.
Investments in gas-related companies:			
Total current aggregate investment: (categorized by major line of gas-related business)			
Gas-related business category	xxx,xxx		
Gas-related business category 2	xxx,xxx		
Etc.	xxx,xxx		
Total current aggregate investment		xxx,xxx	

ITEM 5—OTHER INVESTMENTS

Major line of energy-related business	Other investment in last U–9C–3 report	Other investment in this U–9C–3 report	Reason for difference in other investment

Instruction

This item concerns investments in energy-related and gas-related companies that are excluded from the calculation of aggregate investment under rule 58.

ITEM 6—FINANCIAL STATEMENTS AND EXHIBITS

List all financial statements and exhibits filed as a part of this report.

Instructions

A. Financial Statements

1. Financial statements are required for reporting companies in which the registered holding company system has at least a 50% equity or other ownership interest. For all other rule 58 companies, the registered holding company shall make available to the Commission such financial statements as are available to it.
2. For each reporting company, provide a balance sheet as of the end of the quarter and income statements for the three-month and year-to-date periods ending as of the end of the quarter, together with any notes thereto. Financial statements shall be provided only for the first three calendar quarters of the fiscal year of the registered holding company.

3. If a reporting company and each of its subsidiaries engage exclusively in a single category of energy-related or gas-related activity, consolidated financial statements may be filed.

4. Separate financial statements need not be filed for inactive companies or for companies engaged solely in the ownership of interests in energy-related or gas-related companies.

B. Exhibits

1. Copies of contracts required to be provided by Item 3 shall be filed as exhibits.

2. A certificate stating that a copy of the report for the previous quarter has been filed with interested state commissions shall be filed as an exhibit. The certificate shall provide the names and addresses of the state commissions.

SIGNATURE

[Registered Holding Company]

By: ______________________________

(Name)

____

(Title)

____

(Date)

[FR Doc. 97–4167 Filed 2–19–97; 8:45 am]

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