Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 250 and 259

[Release No. 35–27342; International Series Release No. 1246; File No. S7–05–01]

RIN 3235–AF78 and 3235–AF79

Foreign Utility Companies

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are reproposing and seeking further comment on rules 55 and 56 and an amendment to rule 87 under the Public Utility Holding Company Act of 1935. The reproposed rules and amendment address various issues related to the acquisition and ownership of foreign utility companies by registered holding companies. As a related matter, we are requesting comments on amendments to forms used to report information concerning foreign utility companies. In addition, we are requesting comment on possible limitations upon the ability of a holding company to qualify foreign operations as a foreign utility company. The rulemaking is intended to carry out Congress' mandate to adopt rules concerning acquisitions of foreign utility companies by registered holding companies.

DATES: Comments must be submitted on or before April 9, 2001.

ADDRESSES: Please send three copies of the comment letter to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–05–01; include this file number on the subject line if E-mail is used. Anyone can read and copy the comment letters at our Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters also will be posted on our Internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: David B. Smith, Jr., Associate Director, at 202/942–0855 or Catherine A. Fisher, Assistant Director, at 202/942–0545.

SUPPLEMENTARY INFORMATION: Today we are reproposing and requesting further public comment on proposed rules 55 and 56 (17 CFR 250.55 and 17 CFR 250.56) and an amendment to rule 87 (17 CFR 250.87) under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) (''Holding Company Act'' or ''Act'').[1] We are also requesting comment on amendments to Form U–57 (17 CFR 259.207), the form used to report a company's status as a foreign utility company, and Form U5S (17 CFR 259.5s), the annual reporting form for registered holding companies. Finally, we are seeking comment on potential limitations on the ability of a holding company to qualify its foreign operations as a foreign utility company.[2]

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I. Executive Summary and Introduction

In 1992, Congress adopted the Energy Policy Act of 1992 (Pub. L. 102–486, 106 Stat. 2776 (1992)). The legislation amended the Holding Company Act to create two new types of exempt entities—exempt wholesale generators (''EWGs'') and foreign utility companies (''FUCOs''). Congress directed us to adopt rules concerning registered holding companies' interests in these entities.

In 1993, we proposed various rules as directed by Congress. Later that same year, we adopted the proposed rules relating to EWGs, but not those relating to FUCOs. Today we are reproposing and requesting further public comment on the rules relating to FUCOs. We are also requesting comment on proposed amendments to Form U–57 (17 CFR 259.207), the form used to report a company's status as a FUCO, and Form U5S (17 CFR 259.5s), the annual report form for registered holding companies. In addition, we are requesting comment on limitations on the ability of a holding company to qualify its foreign operations as a FUCO.

As originally proposed, rule 55 would have required us to review an acquisition if, among other things, aggregate investment in FUCOs exceeded 50% of the registered holding company's consolidated retained earnings. The reproposed rule contains conditions that are designed to address the broader issues related to FUCO investments. Reproposed rule 55 requires:

- The registered holding company to implement review and risk-assessment methodologies that address the risks of FUCO investments;
- That no more than 2% of the registered system's domestic utility employees render services to EWGs and FUCOs;
- That registered holding companies keep accurate books and records with respect to their FUCO investments and

[1] *See* Holding Company Act Release No. 25757 (Mar. 8, 1993), 58 FR 13719 (Mar. 15, 1993) (''Proposing Release'').

[2] The Commission continues to support conditional repeal of the Public Utility Holding Company Act of 1935. *See PUHCA Repeal: Is the Time Now?: Oversight Hearings Before the Subcomm. on Finance and Hazardous Materials of the House Comm. on Commerce,* 106th Cong., 2nd Sess. (1999) (statement of Isaac C. Hunt, Jr., Commissioner, SEC).

make these books and records available to our staff; and

- That we and other interested regulatory agencies receive prompt reports of FUCO acquisitions.

In addition, proposed rule 55 requires our prior review and approval of FUCO acquisitions in any of the following circumstances:

- The registered holding company's investment in FUCOs and EWGs exceeds 50% of consolidated retained earnings (or such greater amount as may be authorized by Commission order);
- The registered holding company or certain of its subsidiaries has experienced recent financial weakness, as indicated by certain bankruptcy proceedings or declines in earnings (conditions identical to those set forth in rule 53(b));
- The holding company has reported that it has obtained rate increases for retail customers in order to recover losses or inadequate returns on FUCO investments; or
- Any public-utility subsidiary of the registered holding company has a rating from a nationally recognized statistical rating organization with respect to its debt securities that is less than investment grade.

We are also proposing to amend Item 9 of Form U5S, the form on which registered holding companies provide information on a cumulative yearly basis, to require the holding company to disclose whether it has sought recovery of losses or inadequate returns on FUCO investments through higher rates to system retail ratepayers.

We are also reproposing rule 56 to clarify the status of subsidiary companies of registered holding companies formed to hold interests in FUCOs. Under the proposed rule, a registered holding company, unless otherwise restricted (for example, by rule 55) could acquire a subsidiary company engaged exclusively in the direct or indirect ownership of FUCOs without the need to apply for, or receive, our approval.

In addition, we are reproposing an amendment to rule 87 to require an order before an EWG or FUCO may provide services to, or construction for, or sell goods to, an associate company (other than to an EWG, FUCO or exempt telecommunications company). The proposed amendment would also require registered holding companies to furnish state and federal regulators copies of applications under rule 87 and certificates under rule 24 (17 CFR 250.24).

We are also proposing an amendment to Form U–57, which a company uses to claim FUCO status. The amended form would also be used to report FUCO acquisitions, whether or not our prior approval was required to make the acquisitions. Registered holding companies would be required to submit copies of the report on Form U–57 simultaneously to us and to other interested federal, state or local regulators. As a consequence, we and other interested regulators can monitor, regulate and provide comments and recommendations concerning the FUCO activities of registered holding companies.

II. Background

A. The Internationalization of the Energy Business

The utility business is rapidly evolving into a global industry, with participants seeking multinational investment opportunities. Sweeping political and economic changes worldwide have created a large demand for American utility expertise and significant investment opportunities for United States companies. Registered public-utility holding companies have taken advantage of these opportunities. As of December 31, 1998, registered holding companies had invested $8.2 billion in FUCOs and $892 million in domestic and foreign EWGs. Based on publicly reported information, we believe that investments made by exempt holding companies, and public utilities not part of a registered or exempt holding company system, are significantly higher.[3] In addition, foreign companies have acquired, or announced their intention to acquire, U.S. utilities and register under the Act. These transactions, and the issues they raise under the Act, were the subject of a 1999 concept release (''Concept Release'').[4]

Congress amended the Holding Company Act in 1992 to facilitate these changes. As discussed in greater detail below, the Energy Policy Act of 1992 (''Energy Policy Act'') created new categories of exempt entities, EWGs and FUCOs. We were given rulemaking authority with respect to certain matters arising from these provisions. In view of the increasing internationalization of the power industry and developments since the enactment of the Energy Policy Act, we are reproposing rules related to FUCO investments and requesting comment on international issues.

B. The Statutory Background

The Holding Company Act was enacted in the wake of widespread fraud and mismanagement by large and far-flung public-utility holding companies. The Holding Company Act generally requires that a holding company limit its operations to a group of related operating utility properties within a confined geographic region.[5] To ensure that these standards are met, the Act generally requires our prior approval for public-utility company acquisitions.[6]

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[3] As of December 31, 1998, holding companies exempt under rule 2 of the Act had invested $12.3 billion in FUCOs and domestic and foreign EWGs. On August 18, 1999, AES Corp., which recently was granted an exemption from registration under section 3(a)(5) of the Act in connection with its acquisition of CILCORP Inc. (*see* Holding Co. Act Release No. 27036 (Aug. 20, 1999)), announced that it has agreed to purchase a 4,000 megawatt power station serving England and Wales for approximately $3.0 billion. In addition, domestic energy companies that are not part of either a registered or exempt holding company system have made major investments in FUCOs and EWGs in recent years. For example, in 1995 and 1996, PacifiCorp, a public utility company operating in the western United States, acquired an Australian electric distribution company and an interest in an Australian power plant and mine for a total of $1.7 billion. According to a U.S. Department of Energy report, U.S. energy companies have played ''a major role * * * as investors in the reformed and privatized electricity sectors'' in the United Kingdom, Australia and Argentina. *See* Electricity Reform Abroad and U.S. Investment Energy Information Administration, September 1997, at v.

[4] *See* Registered Public-Utility Holding Companies and Internationalization, Holding Co. Act Release No. 27110 (Dec. 14, 1999), 64 FR 71341 (Dec. 21, 1999). In the Concept Release, we noted that, among other things, the comments received would inform our consideration of applications and requests for interpretive guidance concerning foreign holding companies and our review, under section 11 of the Act, of registration statements filed by foreign holding companies. *See* Concept Release at 71344 and *infra* section III.C.

Recently, we issued an order (''NEES/National Grid Order'') approving the acquisition of New England Electric System (''NEES''), a registered holding company, by The National Grid Group plc (''National Grid''), a British utility holding company that would register under the Act, and approving certain related transactions. *See* National Grid Group plc, Holding Co. Act Release No. 27154 (March 15, 2000). On November 29, 1999, Scottish Power plc (''Scottish Power''), also a British utility holding company, acquired PacifiCorp, a U.S. utility, in a transaction that was not subject to our approval. Scottish Power has registered under the Act. By order dated December 6, 2000, we authorized PowerGen plc, another British utility, to acquire LG&E Energy Corp., a U.S holding company exempt from registration under section 3(a)(1) of the Act.*See* PowerGen plc, Holding Co. Act Release No. 27291.

[5] *See* section 11 of the Act (15 U.S.C. 79k). *See also Federal Trade Commission Report to the Senate, Utility Corporations*, S. Doc. No. 92, 74th Cong., 1st Sess. 24 (1935); *Report on the Relation of Holding Companies in Power and Gas Affecting Control*, H.R. Rep. No. 1827, 73rd Cong., 2d Sess. (1933–1935) (documenting the circumstances that gave rise to passage of the Act).

[6] Section 9(a)(1) (15 U.S.C. 79i(a)(1)) requires our prior approval for the direct or indirect acquisition of any securities or utility assets or any other interest in any business by a company in a registered system. In addition, section 9(a)(2) (15 U.S.C. 79i(a)(2)) generally requires our prior approval for an acquisition that would result in an extension of a holding-company system.

When the Act was passed over sixty years ago, Congress believed that these constraints were necessary to protect the public interest and the interests of investors and consumers.

Congress in 1935 did not foresee the changes that have taken place in recent years. Federal legislation enacted in the late 1970s and early 1990s opened the wholesale power-generation sector of the electric industry to competition. Half of the states are in the process of implementing measures to increase competition in retail markets. More and more utilities are moving toward disaggregation of vertically integrated operations in favor of focusing on one component of the utility business, such as transmission or distribution. In addition, sweeping political and economic changes worldwide have created a large demand for American utility expertise and significant investment opportunities for United States companies. Finally, the utility business is rapidly evolving into a global industry, with participants seeking multinational investment opportunities.

Congress recognized these changes in enacting Title VII of the Energy Policy Act. The Energy Policy Act was designed to address the constraints imposed by the Holding Company Act on investments by public-utility holding companies in certain types of power facilities. To this end, the Energy Policy Act added two new sections to the Holding Company Act: Section 32, relating to EWGs and section 33, relating to FUCOs.[7] An EWG, which may be either foreign or domestic, is exempt from all provisions of the Act, and may be acquired by a registered holding company without our prior approval.[8] A FUCO is ''exempt from all of the provisions of (the) Act, except as otherwise provided under (section 33(c)) * * *.'' and may be freely acquired by a registered holding company pending the adoption of rules under section 33(c)(1) concerning these acquisitions.[9] Sections 32 and 33 of the Act reduced the barriers provided by the Act to the participation of domestic companies in independent power production and foreign utility investment, activities to which the Act previously raised significant barriers.[10]

In amending the Act to accommodate EWG and FUCO investments, Congress pursued another goal—the protection of domestic ratepayers.[11] In this regard, the legislation gives state regulators significant responsibility for the protection of consumers of domestic utilities. The Commission, however, is given primary responsibility to shield the consumers of registered holding companies from any adverse effects of EWG and FUCO investments.

We have noted that there is an inherent tension between the drive toward a competitive energy market and the demand for effective consumer protection.[12] Congress gave us the responsibility to strike an appropriate balance between the statutory goals embodied in sections 32 and 33.

Under the Energy Policy Act, we continue to have jurisdiction over financing transactions related to EWG and FUCO acquisitions. The legislation required us to adopt regulations concerning EWG financings within six months of the date of enactment of the legislation. Congress also directed us to adopt rules with respect to FUCO acquisitions to address the protection of customers of the domestic operating companies of registered holding companies and the financial integrity of registered systems.

C. The Original Rule Proposal

We initially proposed rules 55 and 56 in 1993 as part of a comprehensive set of regulations intended to implement sections 32 and 33 of the Holding Company Act, which were added by the Energy Policy Act.[13] The rules were, by conception and design, linked. Proposed rule 55, addressing FUCO acquisitions, incorporated the conditions of rule 53, addressing EWG financings. It is therefore important to discuss the operation of rule 53, which was adopted in 1993,[14] as background to the approach of rule 55.

Rule 53 sets forth two means by which a registered holding company may obtain approval of a proposed financing that will be used to invest in EWGs. The first is a partial ''safe harbor.'' Rule 53(a) creates a partial safe harbor by describing the circumstances in which a financing will be deemed not to have a substantial adverse impact on system financial integrity within the meaning of section 32(h)(3).[15] To rely upon the safe harbor, a registered holding company's aggregate investments in EWGs and FUCOs cannot exceed 50% of the system's

[7] Section 32 defines an EWG, in pertinent part, as any person determined by the Federal Energy Regulatory Commission to be engaged, directly or indirectly, in the business of owning or operating, or owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale. Section 32(a)(1) (15 U.S.C. 79z–5a(a)(1)). The term ''eligible facility'' generally includes any facility, wherever located, that is used for the generation of electric energy exclusively at wholesale. Section 32(a)(2) (15 U.S.C. 79z–5a(a)(2)). An EWG that owns a facility located in a foreign country may make retail sales if none of the energy produced by the facility is sold to consumers in the United States. Section 32(b) (15 U.S.C. 79z–5a(b)).

Section 33 defines a FUCO as a company that owns or operates facilities that are not located in any State and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light or power. The definition further requires that a company derive no part of its income, directly or indirectly, from such utility operations within the United States, and that neither the company nor any of its subsidiaries is a public-utility company operating in the United States. Section 33(a)(3)(A) (15 U.S.C. 79z–5b(a)(3)(A)).

[8] Sections 32(e) and 32(g) of the Act.

[9] Section 33(c)(1) directs us to adopt rules concerning registered holding companies' acquisition of interests in FUCOs.

[10] *See, e.g.,* statement of Sen. Wallop, Cong. Rec. S17615 (Oct. 8, 1992) (section 32 is intended to ''streamline and minimize'' federal regulation); statement of Sen. Riegle, Cong. Rec. S17629 (Oct. 8, 1992) (''the purpose of section 33 is to facilitate foreign investment, not burden it.''). The Concept Release discusses the possible implications of section 33 for foreign companies investing in the United States; the NEES/National Grid Order discusses certain issues under the Act with respect to the acquisition of domestic utilities by foreign holding companies, including the application of section 33 to these transactions. *See supra* note 3.

[11] The legislation seeks to ''carefully strik(e) a balance between the concerns of many who are affected by its provisions, namely consumers, ratepayers, municipals, industrials, utility companies and State and Federal regulators.'' Statement of Rep. Dingell, Cong. Rec. H11428 (Oct. 5, 1992).

[12] *See* Proposing Release, *supra* note 1. This tension is also reflected in the debates over the Energy Policy Act. *Compare* statement of Sen. Riegle, 138 Cong. Rec. S17629 (Oct. 8, 1992) (''There are immediate and fleeting market opportunities for U.S. companies * * * We do not want Government barriers to these historic opportunities * * * The purpose of section 33 is to facilitate foreign investment, not burden it.'') with statements of Rep. Markey, 138 Cong. Rec. H11446 (Oct. 5, 1992) (''I am very concerned that utilities will make unwise investments in foreign utility systems with great potential risk to their asset base, and in turn to their ratepayers—residential, commercial, and industrial * * *. This provision would invite utilities to shift valuable resources and management—paid for by captive retail ratepayers—from monopoly markets to competitive markets. Utility expansion into new markets raises the same problems as does utility diversification in general: Risk of failure, diversification of utility profits from measures which would strengthen the utility's financial condition, reduced utility maintenance, the draining of top management from the core utility, and cross-subsidization.'').

[13] *See* Proposing Release, *supra* note 1. In the Proposing Release, we proposed rules 53, 54, 55, 56 and 57.

[14] *See* Holding Co. Act Release No. 25886 (Sept. 23, 1993), 58 FR 51488 (Oct. 1, 1993) (''Adopting Release''). In the Adopting Release, we adopted rules 53, 54 and 57.

[15] The ability to rely upon the safe harbor precludes a determination by us under section 32(h)(3) of the Act (15 U.S.C. 79z–5a(h)(3)) that the issuance and sale of securities in proposed EWG financings ''(are) not reasonably adapted to the earning power of (the registered holding company) or to the security structure of (the registered holding company) and other companies in the same holding company system, or that the circumstances are such as to constitute the making of (a guarantee involved in the proposed EWG financings) an improper risk for the (registered holding company).''

consolidated retained earnings (''50% CRE Requirement'').[16] In addition, no more than 2% of the system's domestic utility employees can render services to EWGs and FUCOs, and the registered holding company must give us reasonable access to the books and records of these entities, and provide copies of filings under the rule to other interested regulators.

The financing safe harbor is not available if the conditions of rule 53(a) are not satisfied or if certain specified financial events have occurred, such as an event of bankruptcy or other evidence of financial or operating problems.[17] To obtain approval in this circumstance, a registered holding company must demonstrate that the proposed financing will not have substantial adverse impact upon system financial integrity and that the transaction will have no adverse impact on any utility subsidiary or its customers, or on the ability of state commissions to protect that subsidiary or customers.[18]

Proposed rule 55 described the conditions under which a registered holding company could acquire an interest in a FUCO without the need to apply for, or receive, prior approval. Proposed rule 55 incorporated the conditions of rule 53. If the conditions were met, a registered holding company could acquire a FUCO without our approval.

Proposed rule 55 proved controversial. We received comments from registered holding companies,[19] state and local regulators,[20] and other interested parties, including the National Association of Regulatory Utility Commissioners (''NARUC''), the United States Departments of Energy and State, and several members of Congress.[21] The opposing views of the commenters generally reflected the tension in the legislation between the drive toward a competitive energy market and the demand for effective consumer protection.[22] On the one hand, regulated companies emphasized the need for flexibility to respond to historic, and fleeting, opportunities available as the utility industry world-wide undergoes a fundamental reorganization. On the other hand, consumer advocates urged caution, voicing concerns about possible detriment to captive utility ratepayers. A number of commenters asserted that the statute requires us to review each FUCO acquisition.[23]

Opinion among state regulators was also divided. Some state regulators, such as the Pennsylvania Commission, found the rules as proposed to be adequate.[24] Others suggested that they be more restrictive.[25]

Many commenters suggested that we request further comment upon the rule 55. In light of the comments and upon our own review of the matter, we decided to give additional consideration to the issues raised by proposed rule 55.[26]

D. Subsequent Developments

Since the proposal of rule 55 in 1993, we have gained significant experience in addressing FUCO investments. Specifically, as of December 31, 1999, we had authorized six registered holding companies to finance FUCO and EWG acquisitions in an amount equal to 100% of their consolidated retained earnings (''100% Orders'').[27] In considering these applications, we have had an opportunity to consider the ways in which registered holding companies go about identifying and making FUCO investments. We also now have the benefit of reviewing the experience that registered holding companies have had with respect to their FUCO investments. Based on this experience, as well as the comments on proposed rule 55 and the

[16] Rule 53(a)(1)(i) (17 CFR 250.53(a)(1)(i)) defines ''aggregate investment'' as all amounts invested, or committed to be invested, in EWGs and FUCOs, 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 EWG or a FUCO, and the fair market value of assets acquired by an EWG or a FUCO from a system company (other than an EWG or a FUCO).

''Consolidated retained earnings'' are defined as the average of the consolidated retained earnings of the registered holding company system as reported for the four most recent quarterly periods on the holding company's Form 10–K (17 CFR 249.310) or 10–Q (17 CFR 249.308a) filed under the Securities Exchange Act of 1934.

[17] Under rule 53(b) (17 CFR 250.53(b)), the safe harbor is unavailable if:

(1) The registered holding company, or any subsidiary company having assets with book value exceeding an amount equal to 10% or more of consolidated retained earnings, has been the subject of a bankruptcy or similar proceeding, unless a plan of reorganization has been confirmed in the proceeding; or

(2) The average consolidated retained earnings for the four most recent quarterly periods have decreased by 10% from the average for the previous four quarterly periods and the aggregate investment in EWGs and foreign utility companies exceeds two percent of total capital invested in utility operations; provided, this restriction will cease to apply once consolidated retained earnings have returned to their pre-loss level; or

(3) In the previous fiscal year, the registered holding company reported operating losses attributable to its direct or indirect investments in EWGs and foreign utility companies, and the losses exceed an amount equal to 5% of consolidated retained earnings.

[18] *See* rule 53(c) (17 CFR 250.53(c)).

[19] American Electric Power Co., Inc. (''AEP''); Central and South West Corporation (''CSW''); Columbia Gas System, Inc. (''Columbia''); Consolidated Natural Gas co. (''CNG''); Eastern Utilities Associates (''EUA''); Entergy Corporation (''Entergy''); General Public Utilities Corporation (''GPU''); Northeast Utilities (''Northeast''); and The Southern Company (''Southern''). Citations to a particular comment letter will be in the form of [commenting party's abbreviated name] at [page number]. For example, a citation to page 3 of the comment letter of AEP would be ''AEP at 3.'' Comments we received on the Proposing Release may be found in File No. S7–9–93.

[20] Alabama Public Service Commission (''Alabama Commission''); Arkansas Public Service Commission (''Arkansas Commission''); Florida Public Service Commission (''Florida Commission''); Iowa Utilities Board; Council of the City of New Orleans and the Mississippi Public Service Commission (''City of New Orleans''); Pennsylvania Public Service Commission (''Pennsylvania Commission''); and Public Utility Commission of Texas (''Texas Commission'').

[21] We received comments from Chairman Donald W. Riegle, Jr. of the Senate Committee on Banking, Housing and Urban Affairs, Senator Dale Bumpers, and Chairman Edward J. Markey of the House Subcommittee on Telecommunications and Finance. In addition, we received comments from Baker & Botts, L.L.P.; catalyst Old River Hydroelectric Ltd. Partnership; Dewey Ballantine; Edison Electric Institute (''EEI''); The Electricity Consumers Resource Council, the American Iron and Steel Institute and the Chemical Manufacturers Association (collectively, the ''ECRC''); K&M Engineering & Consulting Corporation; and Morgan Stanley & Co., Inc.

[22] *See supra* note 11.

[23] *See* City of New Orleans at 9 (''Congress * * * intended that all foreign utility company acquisition be routinely subjected to SEC pre-approval'').

In his comments, Senator Bumpers also stated that ''Congress did not intend for a safe harbor approach to apply to holding company investments in foreign utility companies.'' In support of this assertion, Senator Bumpers explained that when he objected to the inclusion of section 33 in the final bill, proponents of the legislation assured him that ''state utility commissions would be able to provide their comments to the SEC on individual foreign investments proposed by registered holding companies.'' Sen. Bumpers at 1–2.

[24] ''Generally, the consumer protection afforded by the [SEC's] proposed rulemaking is adequate and not unduly burdensome. The Pennsylvania Commission has adequate rules to regulate its jurisdictional utilities and, in turn, protect its domestic ratepayers.'' Pennsylvania Commission at 1.

[25] The City of New Orleans and the Texas Commission proposed limiting investment in any one foreign country to 10% of consolidated retained earnings, as a measure to diversify risk. City of New Orleans at 24; Texas Commission at 3.

[26] *See* Adopting Release, *supra* note 14. Unlike section 32, section 33 did not establish a date by which the Commission must promulgate rules regarding FUCOs.

[27] *See* Southern Co., Holding co. Act Release Nos. 26501 (Apr. 1, 1996) (order) and 26646 (Jan. 15, 1997) (denying request for reconsideration), *aff'd*, Campaign for a Prosperous Georgia v. SEC, 149 F.3d 1282 (11th Cir. 1998); Central and South West Corp., Holding Co. Act Release No. 26653 (Jan. 24, 1997); GPU, Inc., Holding Co. Act Release Nos. 26773 (Nov. 5, 1997) (order) and 26779 (Nov. 17, 1997) (opinion); Cinergy Corp., Holding Co. Act Release no. 26848 (Mar. 23, 1998); American Electric Power Co., Inc., Holding Co. Act Release No. 26864 (Apr. 27, 1998); New Century Energies, Inc., Holding Co. Act Release No. 26982 (Feb. 26, 1999).

Concept Release, we are reproposing the rule.[28]

III. Proposed Rule 55

A. Preliminary Matter: Commission Review of Specific Acquisitions and the Role of State Commissions

One of the most controversial issues was whether rule 55 should require us to review each FUCO acquisition. On the one hand, several commenters asserted that our rules should require that FUCO investments be approved on a case-by-case basis, either by us or by state regulators.[29] On the other hand, many commenters stated that a case-by-case review would be impractical and inconsistent with the statutory purpose to facilitate investments in FUCOs. These commenters expressed concern that requiring case-by-case approval ''would be so complex and time-consuming that it would render the affected companies unable to react to market conditions in a timely fashion,'' and, as a result, ''these companies would be unable to take advantage of the investment opportunities that Congress, when it adopted the subject of new legislation, meant them to be able to pursue.''[30]

Having carefully considered the comments, and based on our experience, we continue to believe that a requirement that we approve each individual FUCO acquisition would undercut the purpose of section 33. We believe, however, that rule 55 should incorporate conditions that balance the registered holding companies' need for flexibility and their domestic consumers' need for protection against potential detriment from FUCO investments.

In our 100% Orders, we have focused on the preservation of capital for domestic utility operations, the effect of FUCO investments upon the daily operations of the domestic utility subsidiaries, and the possible effect of these investments upon domestic ratepayers. We have stated that ''[a]lthough foreign utility operations raise unique issues for the administration of the Act, we believe that the relevant considerations are generally those identified in section 32(h)(6), relating to the preservation of capital for domestic utility operations, the effect of foreign utility company investments upon the daily operations of the domestic utility subsidiaries, and the possible effect upon domestic ratepayers.'' [31] We have looked at numerous factors, including the holding company's current financial health, the percentage of total capital these securities transactions would amount to, the company's debt/equity ratio, the insulation of its operating subsidiaries from the debt of the holding company, the extent to which the operating companies are dependent on infusions of holding company capital to conduct their operations, and the fact that the state utility commissions with jurisdiction over the operating companies did not object to the financing. Our 100% Orders require the registered holding company to remain in compliance with the requirements of rule 53(a), other than the 50% CRE Requirement, at all times during the period of authorization of the order. The 100% Orders cease, by their terms, to be effective if one of the disqualifying circumstances described in rule 53(b) occurs during the period. The registered holding company also specifically undertakes that it will not seek recovery through higher rates to its utility subsidiaries' customers to compensate it for any possible losses that it may sustain on investments in EWGs and FUCOs or for any inadequate returns on these investments. We believe that it is appropriate to include similar requirements in proposed rule 55.[32] The reproposed rule does not, and cannot, provide absolute certainty against any potential detriment from FUCO acquisitions.

In this regard, we have given particular consideration to the urging of NARUC and other commenters that the rule be amended to include a role for state and local regulators. Our practice in granting the 100% Orders has demonstrated that state commissions have played a significant consultative role in matters relating to FUCO investments. In each of the 100% Orders, the relevant state commissions have provided us with letters stating that the order would not impair the ability of the state commission to regulate the holding company's domestic utilities or protect the utilities' customers. These views have been helpful to our decisions in these matters. We contemplate that state regulators will play a similar role in those instances where rule 55 requires our approval of FUCO acquisitions. We request comment whether this approach strikes the appropriate balance in addressing the competing concerns reflected in section 33.[33]

B. Conditions of Rule 55

1. Procedures and Board Review

We have frequently noted that investments in FUCOs pose risks that do not arise in the domestic utility industry. Foreign investment and commercial activities entail country-specific risks related to political and economic conditions. It is important to a holding company system's financial integrity that these risks be analyzed and addressed in a systematic way.

In commenting on proposed rule 55, the Department of Energy stated that assessment of risk is ''the proper function of utility management, not regulatory agencies. * * * The SEC can provide adequate protection to domestic consumers and investors by establishing the regulations proposed in this rulemaking and by aggressively overseeing transactions and contractual arrangements between registered holding companies and their foreign utility subsidiaries.''[34]

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[28] We are also addressing issues raised by significant FUCO ownership by foreign and domestic registered holding companies. *See* section VII, *infra*.

[29] *See supra* note 23. In addition, the ECRC, for example, voiced concern that ''safe harbors will not adequately protect U.S. electricity consumers against the hazards of [registered holding company] investment in foreign utilities and EWGs.'' NARUC suggested that companies seeking to come within a safe harbor should be required to file an application and serve each affected state and local utility commission; any affected state could then file a notice of adverse impact that would make the safe harbor unavailable. The Department of Energy suggested a procedure under which state commissions could file comments with us.

[30] AEP at 6–7; CNG at 2–3; Entergy at 22; GPU at 13; Northeast at 11–12; and the Department of Energy at 13–14.

[31] Southern Co., Holding Co. Act Release No. 26501, citing the Proposing Release, *supra* note 1.

[32] We have noted in our 100% Orders that ''(a)s a practical matter, * * * it may not be feasible to insulate the operating companies completely from a potential increase in cost of capital that could result from a major loss in connection with these investments.'' *See, e.g.*, Southern Co., *supra* note 27.

[33] Section 33(c)(1), by its terms, does not contemplate the participation of state ratemaking authorities. Although the legislative history is silent on the point, it seems that Congress may have envisaged, at most, an advisory role for state regulators with respect to FUCO acquisitions and financings for purposes of acquiring interests in FUCOs by registered holding companies. Section 33(c)(1) (15 U.S.C. 79z–5b(c)(1)), for example, expressly requires us to ''reasonably and fully consider'' the recommendation of an interested state commission regarding the registered holding company's relationship to a FUCO.

[34] Department of Energy at 13–14. Many of the registered companies agreed. *See* AEP at 6–7 (''although risk does vary from project to project and from country to country, such risks will be reflected in the company's analysis of the pricing and other negotiated terms of the transaction''); CNG at 3 (''It can be reasonably assumed that the (registered holding companies) would * * * see to adequate safety in the construction and operations of EWGs and foreign utility companies in which they invest.''); GPU at 13; Northeast at 11–12.

Southern described the factors it assesses prior to investing in a foreign project. These factors include political and financial stability, the compatibility of business practices and customs, legal systems, the availability of political insurance and currency risk

Continued

This observation is borne out by our experience with the 100% Orders. In requesting 100% Orders, applicants have emphasized the role in FUCO investments of procedures designed to analyze risks. These types of procedures cannot assure that all FUCO investments will be profitable. They are designed to assure that risks are fully analyzed by corporate personnel and their advisers and that appropriate risk-mitigation measures are implemented.

The proposed rule therefore incorporates a condition designed to assure that the risks of FUCO investments are thoroughly analyzed and addressed. The board of directors of the registered holding company would be required to adopt procedures designed to analyze the risks of investing in foreign jurisdictions. These risks include developing, constructing and operating utility facilities abroad and the related political, legal and financial, and foreign currency risks.

While the proposed rule identifies certain risks that should be addressed, the list is not intended to be exhaustive. Nor does the rule mandate specific procedures. A number of commenters emphasized the difficulty of developing uniform standards to address such diverse and complex issues as sovereign risk, currency fluctuation, repatriation of earnings, political stability, potential tort liability and adequacy of local safety standards and regulatory oversight. Holding companies would be expected to develop procedures based on the particular circumstances of the holding company and the anticipated investments.

The proposed rule also requires that specific FUCO acquisitions be approved by the holding company's board of directors. The board's approval would be based upon, among other things, findings that the FUCO investment procedures have been complied with; that measures have been, or will be, taken to mitigate the risks that the FUCO acquisition presents to the holding company and its associate companies; and that the FUCO acquisition and any related financing have been structured such that ratepayers of the holding company's associate companies are adequately insulated from any adverse effects of the FUCO investment.[35]

Copies of the procedures, the board resolutions, and any documents that serve as a basis for the board findings would be required to be preserved in the holding company's books and records. This will enable our inspection staff to determine whether appropriate procedures have been effectively implemented.

We request comment on the proposed approach. Should the rule require boards of directors to make additional findings concerning specific issues? Should the rule require certain legal and other expert opinions to serve as the basis of the findings? Should the rule specify additional procedures?

2. Personnel Devoted to FUCOs and EWGs

Proposed rule 55 also provides that no more than 2% of the system's domestic utility employees can render services to EWGs and FUCOs.[36] Rule 53 contains the same requirement. We believe that this provision offers a further safeguard for the utility operations of the registered system.[37] Diversion of expertise from the system's core business is a basic concern of the Act.[38] This same concern reappears in the legislative history of the Energy Policy Act.[39]

3. Commission Review of Certain Investments

It may be appropriate for us to review FUCO acquisitions if the holding company's investments in FUCOs exceed certain levels or if the holding company has experienced recent financial weakness. In these circumstances, the proposed rule requires the holding company to demonstrate that the acquisition will not have a substantial adverse impact upon system financial integrity or upon any system utility, its customers, or the State commission's ability to protect the utility or its customers. We believe that the approach of rule 53(c), which defines the circumstances where rule 53's safe harbor is not available, are also appropriate to define the circumstances under which our review of a transaction is appropriate.

The proposed rule would require our review when:

- The registered holding company's investment in FUCOs and EWGs exceeds 50% of consolidated retained earnings (or such greater amount as may be authorized by Commission order);[40]
- The registered holding company or certain of its subsidiaries (''Significant Subsidiaries'') has been the subject of a bankruptcy or similar proceeding, unless a plan of reorganization has been confirmed in the proceeding;[41]
- The average consolidated retained earnings for the four most recent quarterly periods have decreased by 10% from the average for the previous four quarterly periods and the aggregate investment in EWGs and FUCOs exceeds two percent of total capital invested in utility operations; or
- In its previous fiscal year, the registered holding company reported operating losses attributable to its direct or indirect investments in EWGs and FUCOs, and these losses exceed an amount equal to 5% of consolidated retained earnings.

We are also proposing two additional circumstances that would trigger the transaction review requirement:

- The holding company has sought recovery of losses or inadequate returns on FUCO investments through higher rates to retail ratepayers.

In the 100% Orders, holding companies have always undertaken that they would not seek to recover losses from ratepayers. In order to provide greater assurance that losses, if any, are not passed on to ratepayers, we are proposing to amend Item 9 of Form U5S, the form for annual reports that registered holding companies are required to file under section 5(c) of the Act, to require disclosure of whether any rate increases to retail customers have been obtained in order to recover these losses.[42]

If, during the preceding three years, the holding company has responded to this item in the affirmative, the proposed rule would require our approval of additional acquisitions.

- The securities of any Significant Subsidiary that is a public-utility company were rated less than

protection, as well as an evaluation of risk balanced against projected returns. Southern at 15–16.

[35] In the applications relating to the 100% Orders, registered holding companies have suggested that they take a number of measures to meet these objectives. For example, applicants have represented that they seek local partners (including government agencies) or obtain ''political risk'' insurance to reduce the risks of expropriation, reduce construction risks through performance guarantees, and seek financing that is non-recourse to the holding company. The registered holding companies have also represented that they take a number of measures to address foreign currency risks.

[36] Proposed rule 55(a)(3).

[37] ''The SEC has appropriate discretion in considering the issues and promulgating the regulations to take the steps reasonably necessary to protect operating companies and their customers.'' Statement of Sen. Wallop, 138 Cong. Rec. S17615 (Oct. 8, 1992).

[38] *See* section 1(b)(2) (15 U.S.C. 79a(b)(2)).

[39] *See, e.g.,* Statement of Rep. Markey, 138 Cong. Rec. H11446 (Oct. 5, 1992).

[40] If, for example, a holding company has received a 100% Order, the percentage would be 100%.

[41] At the time of the filing of the bankruptcy petition, the subsidiary must have had assets with a book value exceeding an amount equal to 10% or more of the holding company's consolidated retained earnings. *See* rule 55(b)(1)(i).

[42] 15 U.S.C. 79e(c). Item 9 of Form U5S requires the reporting of information concerning EWGs and FUCOs.

investment grade by a nationally recognized statistical rating organization.

This provision is designed to afford an additional protection for domestic ratepayers. The rating of the debt securities of a public-utility subsidiary has a direct effect on its cost of funds and its rates. A rating of less than investment grade suggests that we should review FUCO acquisitions to assure that they will not have an adverse impact on the financial integrity of the holding company system, which could, in turn, lead to further rate increases. This approach will also afford state regulators an opportunity to present their views concerning the effects of FUCOs on rates.

As is the case with our 100% Orders, our approval of each acquisition may not be necessary. In many circumstances, the requested authorization may reflect the ''budget method'' of our 100% Orders—that is, authorization to invest a specified amount in FUCOs. Individual review may be appropriate, for example, when a Significant Subsidiary of the holding company has experienced significant financial difficulty.

We request comment on the proposed Commission review requirement. Should any other events trigger the requirement that we review FUCO acquisitions? Should other measures be used, such as the relation of FUCO investments to consolidated capitalization, consolidated assets, or net utility plant? Should the conditions be more restrictive? Should FUCO investments be required to be insured against political and exchange risks? [43]

4. Books and Records and Reporting Requirements

Proposed rule 55 requires a company that is relying on the rule to maintain books and records with respect to the FUCO investment.[44] The proposed rule also requires that certain information be provided to retail rate regulators. Specifically, a registered holding company that makes a FUCO investment must, within ten days of the investment, file a statement on Form U–57 with us and provide a copy to every regulator having jurisdiction over the rates of any system utility. The registered holding company must also provide to the regulators other filings by the holding company related to its FUCOs. These filings are related to the financing of the FUCO acquisition and certain contractual relationships between the FUCO and the holding company, its affiliates or associate companies.

The access to information made possible by the books and records provisions and the reporting requirements under rule 55(d) should help retail ratemakers to shield consumers from the costs that may be associated with investment in FUCOs.[45] Under proposed rule 87, discussed below, our prior approval would be necessary for intrasystem service, sale and construction arrangements involving FUCOs,[46] and financing transactions and other relationships incidental to the acquisition remain subject to the Act.[47] These measures should help to ensure ''the protection of the customers of a public utility company which is an associate company of a FUCO and the maintenance of the financial integrity of the registered holding company system.'' [48]

We request comment whether these provisions (or the related provisions in rule 53) should be modified in any respect. For example, should the rule permit the FUCO to keep its books and records in conformity with local accounting conventions (rather than U.S. generally accepted accounting principles, as required by certain provisions of rule 53) if the local accounting system permits us to determine whether transactions between the FUCO and the other companies in the holding company system comply with the Act's standards?

C. Comments Received in Response to the Concept Release

We received comments from a wide range of commenters in response to the Concept Release.[49] While none of the commenters discussed rule 55 specifically, several commented on the operation of rule 53 and the importance of providing safeguards to limit the possibility that FUCO investments would have an adverse effect on domestic utilities, particularly the FUCO investments of *foreign* registered holding companies. One commenter suggested that the Commission should establish standards for the type of businesses in which a FUCO could engage. Several industry commenters suggested that the safe harbor approach should be modified to focus on the financial condition of the holding company, including its credit ratings, rather than the relationship of the FUCO investments to consolidated retained earnings.[50]

We believe that the suggested approach is not warranted at this time. The current approach does not establish an irrebuttable presumption concerning the appropriate ratio of FUCO investments to retained earnings; rather, it establishes a point at which the Commission can review the level of investment and, with input from state regulators, determine whether it is likely to have an adverse effect on the holding company and its public utility subsidiaries. Rule 55 would apply equally to foreign and domestic registered holding companies.

Several commenters addressed the question of whether the existing FUCO investments of foreign registered holding companies should be automatically ''grandfathered'' for purposes of rule 53.[51] Most of these commenters suggested that grandfathering should not be automatic; rather, they urged the Commission to subject these investments to the type of review required by rule 53(c). This is the approach that we took in the NEES/

[43] Department of State at 1–2.

[44] The books and records required to be kept are those required by rule 53. A registered holding company must maintain books and records to identify investments in, and earnings from, any FUCO in which it directly or indirectly holds an interest. Rule 53 also addresses the books and records that must be kept with respect to partially owned FUCOs.

[45] *See* Section 18 of the Act [15 U.S.C. 79r] (authorizing the Commission ''upon its own motion *or at the request of a state commission*'' to inquire into the business of any registered holding company or subsidiary) (emphasis added).

[46] *See* Intrasystem Service, Sales and Construction Contracts Involving Exempt Wholesale Generators and Foreign Utility Companies, Holding Co. Act Release No. 25887 (Sept. 23, 1993), 58 FR 51508 (Oct. 1, 1993), RIN 3235–AF87, File No. S7–28–93 (''Rule 87 Proposing Release''). We proposed, and today are reproposing, a clarifying amendment to rule 87. The rule currently allows subsidiary companies of a registered holding company to enter into certain intrasystem agreements without the need to apply for or receive our prior approval. The proposed amendment would make clear that our approval, by order upon application, is required for intrasystem service, sales and construction agreements involving an EWG or FUCO, and another subsidiary company in the registered system, other than an EWG or FUCO.

[47] *See* section 33(c)(2) of the Act (15 U.S.C. 79z–5b(c)(2)).

[48] Section 33(c)(1) of the Act (15 U.S.C. 79z–5b(c)(1)).

[49] We received letters from 30 commenters, including state officials and regulators, the U.S. Department of State, foreign and domestic holding companies, consumer, trade and business associations and individuals. These letters may be found in File No. S7–30–99.

[50] NEES and National Grid place particular emphasis on this approach. *See* Joint Response of The National Grid Group plc and New England Electric System to the Concept Release on Registered Public Utility Holding Companies and Internationalization in File No. S7–30–99.

[51] ''Grandfathering'' excludes FUCO investments a holding company has made prior to the time it registers under the Act from the 50% CRE Requirement of rule 53. Only investments made after registration would be subject to the percentage limitation. *See supra* note 16 and accompanying text.

National Grid Order and which is reflected in reproposed rule 55.

IV. Proposed Rule 56

We are also reproposing rule 56. Proposed rule 56 clarifies the status of subsidiary companies of registered holding companies formed to hold interests in FUCOs. Under the rule, a company engaged directly or indirectly, and exclusively, in the business of owning or operating, or both owning or operating, all or part of one or more FUCOs would be deemed a FUCO for purposes of the Act, and a registered holding company could acquire such a company on the same terms and conditions that it could acquire the underlying FUCO.

Proposed rule 56 should not result in additional risk to consumers. To the contrary, intermediate companies permitted by the proposed rule may isolate risks that might be associated with the new ventures and secure, where possible, additional tax benefits. The statute provides a similar exemption for intermediate companies formed to hold interests in EWGs.[52]

V. Proposed Amendment to Rule 87

Rule 87 addresses the circumstances in which a subsidiary company of a registered holding company may perform services or construction for, or sell goods to, an associate company without the need to apply for or receive our prior approval. Among other things, the rule allows a subsidiary utility company to render incidental services to an associate company, and any subsidiary company to ''perform services or construction for, or sell goods to'' an associate nonutility company.

In 1993, we proposed an amendment to rule 87 that was designed to make it clear that Commission approval is required for intrasystem agreements involving EWGs and FUCOs.[53] The proposed amendment would also have required registered holding companies to furnish state and federal regulators copies of applications under rule 87 and certificates under rule 24.[54] We noted in the Rule 87 Proposing Release that the amendment would allow us to monitor services to EWGs and FUCOs to prevent the diversion of management and goods to these companies by other system companies, and would ensure that system companies are fairly reimbursed for the use of their employees' time or for the provision of goods.[55]

Comments on the proposed rule were mixed.[56] Holding companies that commented on the proposed rule generally suggested that it would impose unnecessary administrative burdens.[57] They also asserted that rule 53, which allows no more than 2% of a holding company system's domestic utility personnel to render services to affiliated FUCOs and EWGs, and section 13(b) of the Act, requiring services to be provided at cost, protected the interests of the holding company's domestic utilities.[58] Two holding companies suggested that the scope of the rule amendment be narrowed to address only transactions with domestic public utilities.[59]

State regulators and consumer groups supported the proposal but believed that it was too narrow. They suggested that the Commission establish ''clear pricing standards'' for affiliate transactions that would protect ratepayers. Generally, they suggested that if the value of the services provided to a FUCO or EWG exceeded their cost, the utility should be required to charge the market value; if the utility was the purchaser of the services, the price should be the lower of market value or cost.

Since the proposal of the amendments to rule 87, registered holding companies have generally sought our approval of intrasystem agreements involving EWGs and FUCOs.[61] In addition, our staff has found, in its examinations of holding company systems, that transactions between service companies and FUCOs have adhered to the Act's standards.

While this experience suggests that the amendment may be unnecessary, we are nevertheless reproposing it in view of the comments of state regulators and consumer groups. These commenters suggested that they would benefit from receiving applications related to these transactions, as well as the filings under rule 24.

We are not proposing to incorporate substantive standards for transactions between FUCOs or EWGs and system utilities into the rule. We continue to believe that variations from the ''at cost'' standards of section 13(b) are best addressed on a case-by-case basis. We note that we have recently granted an exemption from the ''at cost'' standard for certain types of transactions with FUCOs.[62] We will continue to be flexible in addressing such requests particularly where they are supported by state regulators and are designed to assure that captive ratepayers do not subsidize FUCO investments.

VI. Proposed Amendment to Form U–57

In the Proposing Release, we requested comment on a new form (Form U–57), which we adopted in the Adopting Release. Form U–57 is currently used by companies claiming FUCO status. We now propose amending Form U–57 so that it may be used by both companies claiming FUCO status as well as registered holding companies reporting the acquisition of a FUCO under rule 55. The FUCO and the holding company could file a single form, thus avoiding duplicative filings.

Form U–57, as proposed to be amended, contains four items.

- Item 1 requires a description of each FUCO acquired, its location and business address, and the facilities used for the generation, transmission and distribution of electric energy for sale or for the distribution at retail of natural or manufactured gas. It further requires identification of each system company that holds an interest in the FUCO and,

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[52] *See* section 32(a)(1) of the Act (15 U.S.C. 79z–5a(a)(1)), which defines EWG to include an intermediate subsidiary that is engaged exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities.

[53] *See* Rule 87 Proposing Release, *supra* note 46.

[54] Filings under rule 24 are normally made within ten days of the consummation of a transaction, but may be made quarterly, semiannually or annually, as specified by the relevant order. We noted that the filing of certificates would inform the regulators of services rendered to EWGs and FUCOs and would facilitate audits of system companies. *Id.*

[55] *Id.* We also noted an earlier proposed amendment to rule 83 (17 CFR 250.83). *See* Holding Co. Act Release No. 25668 (Nov. 3, 1992), 57 FR 54025 (Nov. 16, 1992). The proposed amendment to rule 83 would have allowed subsidiaries of registered holding companies to provide services for certain foreign associate companies without the need for prior approval under section 13(b), so long as the consideration to be paid by the foreign associate company is not less than the cost of the service, sales or construction to the subsidiary company rendering such services. The requirement that services be provided at not less than cost was intended to prevent the subsidization of foreign activities by domestic system companies. We asked commenters to consider the proposed amendment to rule 83 in their comments on rule 87. *See* Rule 87 Proposing Release, *supra* note 46, at note 3.

[56] Comments on the proposed amendment to rule 87 may be found in File No. S7–28–93.

[57] Allegheny Power System; AEP; Columbia; CNG; and GPU.

[58] *Id.*

[59] Northeast; Southern.

[60] Joint comments by the City of New Orleans, the Arkansas Commission and the Mississippi Commission; joint comments by NARUC, Consumer Federation of America and Environmental Action; and the Ohio Office of the Consumer's Counsel.

[61] *See, e.g.,* Southern Co., Holding Company Act Release No. 26212 (Dec. 30, 1994); Entergy Corp., Holding Company Act Release No. 26322 (Jun. 30, 1995); National Fuel Gas Co., Holding Company Act Release No. 26847 (Mar. 20, 1998); Central and South West Corp., Holding Company Act Release No. 26887 (Jun. 19, 1998); American Electric Power Co., Inc., Holding Company Act Release No. 26962 (Dec. 30, 1998); Cinergy Corp., Holding Company Act Release No. 26984 (Mar. 1, 1999); Cinergy Corp., Holding Company Act Release No. 27016 (May 4, 1999); Entergy Corp., Holding Company Act Release No. 27039 (Jun. 22, 1999).

[62] *See* Energy Corp., Holding Company Act Release Nos. 27040 and 27039 (Jun. 22, 1999).

to the extent known, each person that holds five percent or more of any class of voting securities of the FUCO.

- Item 2 requires a statement of the purchase price paid for the FUCO; the type and amount of capital invested, directly or indirectly, in the FUCO; any debt or other financial obligation for which there is recourse to a system company (other than an EWG or FUCO); and any direct or indirect guarantee of a security of the FUCO.
- Item 3 requires the identification of each domestic associate public-utility company and, if applicable, its holding company.
- Item 4 requires the identification of the location of the books and records required by rule 53 and provides that a registered holding company, by filing the form, undertakes that it will provide us or our representatives with access to these books and records in the United States, at a location that we may reasonably request.

The amended form should provide us and state and local regulators with timely notice of all FUCO acquisitions made in reliance on rule 55 and much of the same information, on a transactional basis, that registered holding companies are required to provide us on a cumulative yearly basis in Item 9 of Form U5S. Access to information concerning these investments as they are made will enhance our ability, as well as the ability of the state commissions, to monitor, regulate, and in the case of state regulators, provide us comments and recommendations concerning the foreign utility activities of registered holding companies.

VII. General Request for Comment and Request for Additional Comment

The Commission requests comment on the new rules, rule amendment, and form amendments proposed in this release, suggestions for additional provisions or changes to existing rules or forms, and comments on other matters that might have an effect on the proposals contained in this release. We also request information regarding the potential effect of the proposals on the U.S. economy on an annual basis. Commenters are requested to provide empirical data to support their views.

We are also seeking additional comment on the advisability of possible limitations upon the ability of a holding company to qualify its foreign operations as a FUCO. In the NEES/National Grid Order, we determined that it was appropriate for a U.K. public-utility holding company to qualify its foreign businesses as a FUCO. This status allowed the U.K. holding company to acquire a U.S. registered holding company without regard to the integration provisions of the Act. We determined that treating the foreign businesses as a FUCO would not undermine the policies of the Act or be detrimental to the protected interests. We also noted in the NEES/National Grid Order that, in addition to its foreign utility operations, National Grid holds various nonutility businesses of a type that we or Congress has found to satisfy the standards of section 11(b)(1) of the Act.

Since the date of the NEES/National Grid Order, various foreign holding companies have sought the advice of our staff concerning the qualification of their existing businesses as a FUCO for purposes of making a U.S. utility acquisition. Some of these holding companies have been agencies of foreign sovereign states; others have been foreign conglomerates. We are seeking public comment about whether the foreign business activities of these holding companies and their ownership and corporate structure could pose risks to the protected interests under the Act. Should certain circumstances or business activities or the scope and size of those activities preclude a claim of FUCO status? What standards should we adopt to reflect the considerations involved when an acquiror is controlled by a foreign sovereign, is highly diversified and/or engages in diversified activities that are significantly larger than the utility operations? We note that these standards may be as appropriate for a domestic holding company as for a foreign one.

VIII. Regulatory Flexibility Act Certification

The proposed rules and amendments will not affect any small entities as defined in rule 110. Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), our Chairman has certified that the proposed rules and amendments will not, if adopted, have a significant economic impact on a substantial number of small entities. A copy of this certification is attached as Appendix A. We encourage written comments on the certification. Commenters are asked to describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

IX. Cost-Benefit Analysis

Benefits

Proposed Rule 55; Proposed Amendments to Forms U–57 and U5S. As discussed in section II.B. above, Congress directed us to adopt rules with respect to FUCO acquisitions to address the protection of customers of the domestic operating companies of registered holding companies and the financial integrity of registered systems. We are reproposing rules 55 and 56 under this directive.

Rule 55 will benefit investors and ratepayers of registered holding companies by ensuring that FUCO investments are undertaken with requisite prudence, while relieving companies of the burden of seeking a Commission order to make FUCO investments when proper safeguards are in place. The benefits afforded by the rule are not possible to quantify. The reporting of all FUCO investments is required by the rule; however, registered holding companies meeting rule 55(a)'s requirements with respect to their acquisitions of FUCOs will be granted a complete safe harbor from Commission review, thus obviating the need to file a Form U–1 (17 CFR 259.101) in connection with the acquisition and the costs associated with the filing.

Further, we believe that rule 55, as well as rule 56, discussed below, will benefit registered holding companies by placing them on more equal footing with other entities (*e.g.,* utilities and utility holding companies not subject to the Holding Company Act) that make investments in foreign energy projects. By giving them the ability to make these investments without our prior review or approval under certain circumstances, and by facilitating their use of intermediate subsidiaries to make these investments, the proposed rules will provide registered holding companies with greater flexibility and fewer administrative burdens.

The proposed amendment to Form U5S requires that registered holding companies report, in response to Item 9 of the form,[63] when rate increases for retail customers have been obtained in order to recover losses or inadequate returns on FUCO investments. Likewise, the proposed amendment to Form U–57, which designates the form as the means of reporting all FUCO investments under proposed rule 55(d), requires disclosure to regulators and the public regarding the nature of specific overseas investments. In conjunction with the reporting and dissemination requirements of proposed rule 55(d), the proposed form amendments will assist state and federal regulators in protecting ratepayers by notifying regulators soon after a holding company makes a FUCO investment and by alerting them to any adverse impact of FUCO investments on

[63] Item 9 of Form U5S requires the reporting of information concerning EWGs and FUCOs.

domestic rates. This will allow state regulators to consider whether any remedial action is necessary to address this impact.

The recordkeeping and reporting requirements of the rule will give the Commission and other interested regulators the ability to better monitor, regulate and provide comments and recommendations concerning the FUCO activities of registered holding companies. This will further the goals of the Energy Policy Act by helping regulators to protect domestic ratepayers from the risks associated with these activities.[64]

Proposed Rule 56. Proposed rule 56, which clarifies the status of certain system companies that hold interests in EWGs and FUCOs, benefits those registered holding companies that structure their ownership of FUCOs through an intermediate entity. Without this rule, an acquisition which would be exempt from Commission approval under rule 55, for example, could nevertheless require an application and Commission approval as to the creation and acquisition of the intermediate company, and that company's acquisition of the FUCO interest. This rule eliminates the need for such a filing, and thus creates savings similar to those provided by rule 55(a). As discussed in section IV above, proposed rule 56 may isolate certain risks associated with foreign ventures, but should not result in additional risk to consumers.

Proposed Amendment to Rule 87. The proposed amendment to rule 87 will allow the Commission to monitor services to EWGs and FUCOs to help us prevent the diversion of management and goods to these companies by other system companies. The ability of the Commission to prevent transactions which could have a detrimental effect on the system's operating utilities will benefit domestic ratepayers in ways that are not possible to quantify.[65] The filing of certificates pursuant to rule 24 will inform the Commission of services rendered to EWGs and FUCOs and facilitate audits of system companies.[66] State and federal regulators will obtain such information through the requirement that registered holding companies furnish them copies of applications under rule 87 and certificates pursuant to rule 24. Finally, prior Commission approval will ensure that system companies are fairly reimbursed for the use of their employees' time or for the provision of goods.

Costs

Proposed Rule 55; Proposed Amendments to Forms U–57 and U5S. Rule 55, and the related amendments to Forms U–57 and U5S, will impose certain costs on registered holding companies. We believe that the procedures to be followed in rule 55(a) and rule 55(b) are similar to those used by any prudent corporation, utilizing existing personnel and in consultation with outside professionals, in determining whether to make any significant investment in a foreign venture.[67] Based on our experience in reviewing and granting the 100% Orders, we believe that each of the six holding companies with a 100% Order has already implemented FUCO investment procedures consistent with the proposed rule, or can comply with the rule's risk-assessment and review requirements with only minimal additional expenditures. The other five registered holding companies with FUCO investments as of December 31, 1998, may also utilize similar procedures.[68] Therefore, we believe that rule 55(a) and (b) should not result in significant additional costs for a holding company to make a FUCO investment; rather, these provisions would incorporate common business practice in a Commission rule. Nevertheless, we are providing cost estimates based on the assumption that registered holding companies would be required to implement various procedures as a result of the proposed rule.

Proposed rule 55 prescribes the conditions under which a registered holding company can invest in a FUCO. If the company complies with all applicable provisions of the rule, it may make the investment without the need to apply for or receive our approval. Paragraphs (a), (c) and (d) of the rule apply to all FUCO investments. Paragraph (b) applies to all FUCO investments not covered by an effective Commission order.[69] Assuming paragraph (b) is applicable, use of the rule's safe harbor provision will cause registered holding companies to incur costs related to the following:

- Adopting risk-assessment methodologies that address the risks of FUCO investments (rule 55(a)(1));
- Receiving formal approval of each FUCO investment by the company's board of directors based on certain findings (rule 55(a)(2));
- Monitoring services to FUCOs by utility personnel and service company personnel (rule 55(a)(3));
- Verifying that certain adverse events have not occurred (rule 55(b)(1));
- Maintaining books and records concerning FUCO investments as required by rule 53 and in the manner required by rule 53 (rule 55(c));
- Preparing and promptly filing reports of FUCO investments with the Commission and other interested regulatory authorities (rule 55(d)).

We estimate that a registered holding company will incur an annual cost of approximately $200,000 in connection with establishing and updating risk-assessment methodologies consistent with rule 55(a)(1). In addition, we estimate that a registered holding company will incur an average cost of approximately $50,000 each year in connection with implementing these methodologies under rule 55(a)(2).[70] We base these estimates on our experience in monitoring FUCO investments and our familiarity with internal procedures currently used by registered holding companies in making these investments, particularly under 100% Orders and through staff audits of holding companies with FUCO investments.[71]

[64] *See supra* note 11 and accompanying text.

[65] For example, although rule 53(a)(3) requires Commission approval before a registered holding company system's domestic utility personnel can render services to EWGs and FUCOs in which the registered holding company holds an interest, we are concerned that this requirement could be evaded by means of rule 87. *See* Rule 87 Proposing Release, *supra* note 45, at note 5 and accompanying text.

[66] *See supra* note 55.

[67] We note that the actual cost of complying with the rule, particularly rule 55(a)(1), could be significantly higher for companies that utilize the assistance of third parties in determining whether to make a FUCO investment. We also recognize that registered holding companies consider making FUCO investments, and incur costs assessing the potential risks and returns on these ventures, that they ultimately determine not to pursue. Therefore, we believe there are significant costs associated with potential foreign ventures that do not result in actual investments.

[68] As of December 31, 1998, 11 of the 18 active registered holding companies had FUCO investments and seven had no FUCO investments. Of the 11 with FUCO investments, six had been issued 100% Orders.

[69] For example, if a registered holding company has received a 100% Order and that order is still effective, then the requirements of paragraph (b) would not apply. Rather, the company would comply with the conditions of the 100% Order and the other provisions of rule 55 in order to make the FUCO investment without further Commission authorization.

[70] This amount assumes that a registered holding company will consider ten separate FUCO investments per year. In 1998, nine registered holding companies made investments in a net total of 89 new FUCO subsidiaries (or an average of approximately ten new FUCOs each), as reported in Item 9 of Form U5S and certificates filed under rule 24. The range of new FUCO subsidiaries was broad, with one registered holding company increasing its number of FUCOs by 30, while another decreased its FUCO subsidiaries by two. The actual cost to comply with rule 55(a)(1) and (2) will vary depending on the level of FUCO activity undertaken by a holding company in a particular year.

[71] *See supra* note 34 and accompanying text. Information from a small sample of registered

Assuming each of the 11 registered holding companies with FUCO investments as of December 31, 1998, establishes, implements and updates procedures under rule 55(a)(1) and (2), we estimate that the aggregate cost would be $2.75 million each year.

We estimate that review for compliance with the criteria contained in rule 55(a)(3) and rule 55(b)(1) will cost each registered holding company an additional $200,000 per year.[72] The aggregate annual cost for the 11 registered holding companies with FUCO investments as of December 31, 1998, would be $2.2 million.

We estimate that implementing formal board review of FUCO investments will involve a one-time cost of $5,000 for each registered holding company.[73] We believe that board review can be obtained during regularly scheduled board meetings and that, once review of FUCO investments becomes part of a board's regular agenda, the cost of compliance will be nominal.

Registered holding companies that have EWG and/or FUCO investments already maintain books and records regarding these investments under rule 53(a)(2).[74] Accordingly, we believe that there will be no additional cost for maintaining books and records under proposed rule 55(c).

Rule 55(d) would require only registered holding companies to file Form U–57 for the purpose of reporting all FUCO investments and amends the form for this new purpose. Also under rule 55(d), registered holding companies will be required to provide state and local regulators with copies of all documents filed with the Commission that pertain to the registered holding company's FUCO investments (*i.e.*, Forms U–57, Forms U–1, certificates under rule 24 and Item 9 of Form U5S). However, as those FUCOs in which registered holding companies currently invest are the same as those for which the holding company has claimed FUCO status (on current Form U–57), the amendment will not itself increase the number of Form U–57s filed annually.[75] However, the form's (and rule 55(d)'s) new dissemination requirements could impose additional costs. We estimate that the annual cost for registered holding companies to comply with rule 55(d)'s filing requirement will be approximately $5,100 annually.[76] This amount includes the cost of copying and disseminating the Form U–57, including exhibits, to other interested regulators.

We estimate that the additional reporting burden imposed by the amendment to Form U5S will be minimal.

When rule 55(b) applies to a FUCO investment, a holding company must obtain our approval to make the investment. We estimate that the cost of a routine uncontested application for a FUCO investment or group of investments contained in the same application to be approximately $50,000.[77] Accordingly, holding companies eligible for the rule's ''safe harbor'' provision would forego the costs associated with preparing applications.

Proposed Rule 56. Because rule 56 has the effect only of clarifying the status of certain subsidiaries of registered holding companies, no compliance cost is associated with the rule.

Proposed Amendment to Rule 87. To the extent that a registered holding company's EWGs and FUCOs engage in transactions with other companies in the holding company system, the proposed amendment to rule 87 will cause registered holding companies to incur costs related to preparing and filing a Form U–1 seeking Commission authorization for the proposed transactions. We estimate that the cost of preparing and filing the Form U–1 for this authorization to be $10,150.[78]

Request for Comment

We are sensitive to the costs and benefits imposed by our rules. Therefore, we request comment on the potential costs and benefits associated with the proposed rules and amendments, and on any suggested alternatives to the proposals. We request quantitative data concerning these costs and benefits, particularly relating to costs imposed by rule 55(a) and (b).

We request information regarding the potential impact of the proposals on an annual basis. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[79] a rule is ''major'' if it has resulted, or is likely to result in:

- An Annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commenters should provide empirical data on any of these three areas. We note that, as of December 31, 1998, registered holding companies had $8.2 billion invested in FUCOs.[80] Accordingly, if, for example, rule 55 was likely to result in a one percent increase or decrease annually in FUCO investments, the rule could be deemed a ''major'' rule.

X. Paperwork Reduction Act

Certain provisions of proposed rule 55 and the proposed amendments to Form U–57 and Form U5S contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'')[81], and the Commission has submitted them to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for these collections of information are: (1) ''Rule 55, Exemption for Certain Acquisitions of One or More Foreign Utility Companies''; (2) ''Rule 57(a), Rule 55(d) and Form U–57, Notification of Foreign Utility Company Status and Notification of Acquisition of an Interest in a Foreign Utility Company''; and (3) ''Rule 1(c)

holding companies was obtained through staff audits. We note that the actual cost of complying with the rule, particularly rule 55(a)(1), could be significantly higher for companies that utilize the assistance of third parties in determining whether to make a FUCO investment.

[72] Like estimates associated with rule 55(a)(1) and (a)(2), these estimates are based on our experience in monitoring FUCO investments and our familiarity with internal procedures currently used by registered holding companies in making these investments. We have assumed that registered holding companies will make investments in a total of approximately 90 FUCO subsidiaries annually, based on FUCO investments reported by registered holding companies during fiscal 1998. See supra note 70.

[73] This amount assumes that a registered holding company will spend an average of 50 hours at an average hourly wage rate of $100 per hour.

[74] The availability of rule 54's safe harbor provision is conditioned, among other things, on a registered holding company maintaining books and records under rule 53(a)(2). Rule 53(a)(2)'s books and records maintenance provisions cover investments in both EWGs and FUCOs. *See* 17 CFR 250.54 and 250.53(a)(2).

[75] Furthermore, as noted in the amended instructions to Form U–57, the same form may be used to fulfill the requirements of both rule 55 and 57. We expect that registered holding companies will file one report both to claim FUCO status for their FUCO subsidiaries and to report the amount of investments made in these subsidiaries.

[76] This amount represents 34 annual Form U–57 filings multiplied by three additional hours to distribute the information under rule 55(d) at an hourly cost of $50 for in-house clerical staff. *See* also section X.C. *infra.*

[77] This amount is composed of (1) $31,250 for in-house professional and support staff to prepare and file the Form U–1 with the Commission (250 hours x $125 per hour), and (2) an additional $18,750 for outside professional fees (75 hours x $250 per hour). We estimate that only one Form U–1 filing will be made annually under amended rule 55(b). *See* section X.E. *infra.*

[78] As discussed in section X.E. *infra,* this amount is comprised of (1) $10,000 of in-house professional costs (80 hours x $125 per hour) and (2) $150 of in-house clerical costs (three hours x $50 per hour). We estimate that only one Form U–1 filing will be made annually under amended rule 87.

[79] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[80] This total represents the aggregate amount of capital invested by registered holding companies in FUCOs, as reported to the Commission on annual report Form U5S.

[81] 44 U.S.C. 3501 *et seq.*

and Form U5S thereunder, Annual Report.'' Rule 55, Form U–57 and Form U5S, which the Commission is proposing to amend, contain currently approved collections of information under OMB control numbers 3235–0430, 3235–0428 and 3235–0164, respectively. The currently approved collections of information for Form U–1 and rule 24, under OMB control numbers 3235–0125 and 3235–0126, respectively, also will be modified as a result of the proposed rule 55 and amendment to rule 87. The titles for these collections of information are: (1) ''Form U–1 (17 CFR 259.101), Application or Declaration under the Public Utility Holding Company Act of 1935''; and (2) ''Rule 24, 17 CFR 250.24, Reports of Consummation of Transactions.'' An agency may not sponsor, conduct, or require responses to a collection of information unless it displays a currently valid OMB control number.

A. Rule 55

Current proposed rule 55 provides for a ''safe harbor'' for FUCO investments when the requirements of rule 53(a) and (b) are satisfied. The current annual reporting burden under rule 55 reflects rule 53(a)(2)'s recordkeeping and retention requirement.[82] Current rule 55 does not create a reporting burden for respondents. The current approved annual burden under rule 55 is 110 burden hours per year (10 hours per response x 11 responses = 110 burden hours). The number of annual responses reflects one response for 11 registered holding companies per year. The cost of the burden, estimated to be $100 per hour[83], is $1,000 per response. The aggregate burden for all respondents is $11,000.

Proposed new rule 55 requires registered holding companies to perform certain tasks and satisfy certain conditions in connection with making any investment in a FUCO. The information collection associated with the rule is necessary to assist the Commission in monitoring FUCO investments to ensure that they are made prudently and only when proper safeguards are in place. The information will also give the Commission and other interested regulators the ability to better monitor, regulate and provide comments and recommendations concerning the FUCO activities of registered holding companies.

We estimate that the annual burden associated with establishing and updating rule 55(a)(1) methodologies would be approximately 1,600 hours for each registered holding company. Assuming that 11 registered holding companies adopt these methodologies,[84] the total annual burden would be approximately 17,600 hours (one response per year × 11 respondents × 1,600 hours = 17,600 hours). The cost of the reporting burden, estimated to be $125 per hour, [85] would be $200,000 per respondent. The aggregate burden for all respondents would be $2.2 million.[86]

We also note that, in addition to burden hours, the rule may impose additional costs, particularly in those cases where holding companies retain third parties to assist in assessing FUCO investments.[87] As discussed in section IX above, however, we believe that the burden hours imposed by the rule on the 11 holding companies with FUCO investments as of December 31, 1998, particularly those six with 100% Orders, would be substantially less.

We estimate that the annual burden associated with implementing methodologies in rule 55(a)(2) would be 400 hours for each registered holding company. Accordingly, the aggregate annual burden for 11 registered holding companies would be 4,400 hours (400 hours per response × 11 responses = 4,400 burden hours). The cost of the reporting burden, estimated to be $125 per hour,[88] would be $50,000 per respondent. The aggregate burden for all respondents would be $550,000.

We also estimate that the annual burden hours associated with the review for compliance with rules 55(a)(3) and 55(b)(1) would be approximately 1,600 additional burden hours for each registered holding company. Accordingly, the aggregate annual burden for 11 registered holding companies[89] would be 17,600 hours (1,600 hours per response × 11 responses = 17,600 hours). Each of these 11 registered holding companies will make one response per year. The cost of the reporting burden, estimated to be $125 per hour,[90] would be $200,000 per respondent. The aggregate burden for all respondents would be $2.2 million.

We estimate that rule 55(c)'s recordkeeping requirements would impose an annual burden of approximately 10 hours for each registered holding company.[91] Accordingly, the aggregate annual burden for 11 registered holding companies would be 330 hours. However, as discussed above, each registered holding company with an EWG or FUCO investment is required to maintain books and records regarding these investments under rule 53(a)(2).[92] Accordingly, we believe that the proposed rule itself does not impose any additional burden for maintaining books and records. Burden estimates for rule 55(d)'s filing requirements are discussed in section X.C. below.

Compliance with rule 55 would be mandatory for any registered holding company making a FUCO investment. Responses to the disclosure requirements of the rule will not be kept confidential unless granted confidential treatment. Rule 55(c) includes mandatory retention periods for books and records.[93]

B. Rule 87

The proposed amendment to rule 87 will require Commission approval under section 13(b) of the Act before any subsidiary of a registered holding company may perform services or construction for, or sell goods to, an EWG or a FUCO. The information collection associated with the amended rule would further the Commission's monitoring of intercompany

[82] Rule 53(a)(2) requires each registered holding company with an EWG or FUCO investment to maintain books and records regarding these investments in the manner prescribed by the rule.

[83] We estimate that current rule 55's recordkeeping and retention responsibilities are performed by in-house accounting, financial and bookkeeping staff, at an average rate of $100 per hour.

[84] As of December 31, 1998, 11 of the 18 active registered holding companies had FUCO investments.

[85] We estimate that rule 55(a)(1)'s responsibilities will be primarily performed by, and equally divided among (i) in-house attorneys, accountants and senior management, at an average rate of $150 per hour, and (ii) other in-house personnel (including financial, accounting and legal support staff), at an average rate of $100 per hour.

[86] We also note that, in addition to burden hours, the rule may impose additional costs, particularly in those cases where registered holding companies retain third parties to assist in assessing FUCO investments.

[87] *See supra* note 72 and accompanying text.

[88] We estimate that rule 55(a)(2)'s responsibilities will be primarily performed by (i) in-house attorneys, accountants and senior management, at an average rate of $150 per hour, and (ii) other in-house personnel (including financial, accounting and legal support staff), at an average rate of $100 per hour.

[89] We assume that the review for compliance with rules 55(a)(3) and 55(b)(1) will be performed annually by each registered holding company with a FUCO investment. *See supra* note 85.

[90] We estimate that rule 55(a)(3) and 55(b)(1)'s responsibilities will be primarily performed by, and divided equally among (i) in-house attorneys, accountants and senior management, at an average rate of $150 per hour, and (ii) other in-house personnel (including financial, accounting and legal support staff), at an average rate of $100 per hour.

[91] As rule 55(c)'s recordkeeping requirement is identical to that of rule 53, the hour burden estimate for rule 55(c) is the same as that currently approved for rule 53—110 burden hours per year (10 hours per response x 11 respondents = 110 burden hours).

[92] *See supra* note 74 and accompanying text.

[93] Retention periods found in 17 CFR part 257 are incorporated into the rule.

transactions in order to prevent the diversion of management and goods to EWGs and FUCOs by other system companies, and would ensure that system companies are fairly reimbursed for the use of their employees' time or for the provision of goods.

Rule 87 does not currently have a reporting burden because it does not involve a collection of information under the PRA. The proposed amendment to rule 87 is discussed under ''—Form U–1'' below. Compliance with the proposed amendment to rule 87 would be mandatory for any registered holding company with certain arrangements between its EWGs or FUCOs and its other associate companies. Responses to the disclosure requirements of the rule will not be kept confidential unless granted confidential treatment.

C. Form U–57

The preparation and filing of Form U–57 with the Commission and certain state regulators under rule 55 would be required for each FUCO investment made by any registered holding company, whether under the new rule's safe harbor or by Commission order. Because proposed rule 55 would permit FUCO investment without our prior review or approval, the form will be used to notify the Commission of FUCO investments made in reliance on the rule and assist the staff in monitoring these investments in order to protect customers of the associate operating utilities.

The current approved burden estimate for Form U–57 is 144 hours.[94] The cost of this reporting burden, estimated to be $100 per hour,[95] is $300 per filing and the total annual cost is $14,400 for all respondents. However, the form is currently used by registered holding companies, and other entities, only to claim FUCO status for qualifying subsidiaries. Rule 55(d) would require the filing of Form U–57 by registered holding companies for the purpose of reporting all FUCO investments and amends the form for this additional purpose. In order to reflect recent trends, we propose to change the current number of annual filings from 48 to 101.[96] We also estimate that, when used to report rule 55 transactions, the amended Form U–57 will require approximately three hours to complete.[97] We believe that rule 55(d)'s requirement for registered holding companies to provide state and local regulators with copies of all documents filed with the Commission that pertain to the registered system's investment in FUCOs (*i.e.*, Forms U–57, Forms U–1, certificates under rule 24 and Item 9 of Form U5S) will add three burden hours for each of the 34 forms filed by registered holding companies. Therefore, we estimate a total increase of 261 annual burden hours for all respondents (three hours x 53 additional forms, plus three hours (under rule 55(d)) x 34 forms (those filed by registered holding companies)). The total annual hour burden for Form U–57 would increase from 144 hours to 405 hours as a result of the proposed amendment and the adjustment to reflect recent trends.

We estimate that, as is currently estimated, the cost of preparing a Form U–57 filing under rule 55 will be $100 per hour.[98] In addition, we estimate that the cost for registered holding companies to disseminate the 34 of these forms they will file each year will cost an additional $50 per hour.[99] The total annual cost for all respondents, therefore, would increase by $21,000, from $14,400 to $35,400 (101 total filings × 3 hours × $100 per hour = $30,300, plus 34 filings (those filed by registered holding companies) × 3 additional hours (under rule 55(d)) × $50 per hour = $5,100; $30,300 plus $5,100 = $35,400).

Compliance with amended Form U–57 would be mandatory for any registered holding company making a FUCO investment. Responses to the disclosure requirements of the form will not be kept confidential unless granted confidential treatment.

D. Form U5S

The amendment to Item 9 of Form U5S will require the holding company to disclose whether it has sought recovery of losses or inadequate returns on FUCO investments through higher rates to system retail ratepayers. This information will assist the Commission staff in protecting ratepayers from adverse consequences of FUCO investments by registered holding companies. Rule 55(d) will require that this information also be provided to other interested governmental regulators.

The current approved annual reporting burden for Form U5S is 257 hours (13.5 hours per response × 19 responses = 256.5 burden hours). Nineteen Forms U5S are filed annually, one by each of the 19 registered holding companies. The cost of the reporting burden, estimated to be $100 per hour,[100] is $1,350 per response. The aggregate cost for all responses is $25,650 per year.

We estimate that the proposed amendment would increase the hour burden per filing by one-half hour for those registered holding companies with FUCO investments. For the 11 registered holding companies with FUCO investments as of December 31, 1998, this would result in a total annual burden increase of 5.5 hours, or 262 hours for all registered holding companies. The aggregate cost for all respondents will increase by $550, from $25,650 to $26,200 per year.

Compliance with amended Form U5S would be mandatory for any registered holding company making a FUCO investment. Responses to the disclosure requirements of the form will not be kept confidential unless granted confidential treatment.

E. Form U–1

When rule 55(a)'s safe harbor is not available, rules 55(a)(4) and 55(b)(1) require that the registered holding company seek a Commission order to make a FUCO investment. This will require the holding company to prepare and file an application on Form U–1. The current approved annual reporting burden for Form U–1 is 224 hours per form. The Commission presently estimates that 121 forms are filed by 15 respondents annually, for a current approved aggregate burden of 27,104

[94] We currently estimate that 48 Forms U–57 are filed annually and that the current hour burden for each filing is three hours (48 responses x three burden hours per response = 144 hours).

[95] We estimate that the information provided in Form U–57 is prepared primarily by in-house financial, accounting and legal support staff, at an average rate of $100 per hour.

[96] In 1998, 78 Form U–57s were filed with the Commission by 34 different filers. In 1999, 92 Form U–57s were filed with the Commission by a total of 27 different filers. In each of these years, approximately one-third of all filings was made by registered holding companies. We estimate that the number of Form U–57s filed will continue to increase slightly and therefore estimate a new total of 101 responses per year, or an increase of 53 responses. We also estimate that approximately one-third, or 34, of the forms filed annually will be filed by registered holding companies.

[97] This burden hour estimate is based on the current approved burden of three hours per form. We believe that, when used to report rule 55 transactions, the Form U–57 also will require three hours to complete. This estimate assumes that up to three related transactions are being reported on one form. To the extent a registered holding company reports more than three transactions simultaneously on one Form U–57, the hour burden may increase.

[98] We estimate that the information provided in Form U–57 is prepared primarily by in-house financial, accounting and legal support staff, at an average rate of $100 per hour.

[99] We estimate that the dissemination requirement of rule 55(d) will be performed by in-house clerical staff, at an average cost of $50 per hour.

[100] We estimate that the information provided in Form U5S is prepared primarily by in-house financial, accounting and legal support staff, at an average rate of $100 per hour.

hours. The cost of the reporting burden, estimated to be $200 per hour, is $44,800 per response. The total cost is $5,420,800 for all respondents. Due to recent changes in filing trends, we propose to change the current estimates only with respect to the estimated number of annual respondents.

We propose to increase the annual number of respondents by 18 (from 15 to 33). For the three-year period ended December 31, 1999, an average of 15 registered holding companies filed Form U–1s each year. Over that same period, an average of 18 other companies filed Form U–1s annually. Therefore, the increase reflects the annual average Form U–1 filers other than registered holding companies. As the two additional annual Form U–1 filings resulting from the proposed rules and amendments will be filed by registered holding companies (because these rules apply only to them), and most registered holding companies already file at least one Form U–1 annually, we do not expect that the new rules and amendments will increase the annual number of Form U–1 respondents.

We estimate that approximately 250 burden hours will be required to prepare the Form U–1, under rules 55(a)(4) and 55(b)(1), describing the FUCO investment sought to be approved, respond to questions or comments, and file post-effective amendments as may be necessary or appropriate.[101] We estimate that an average of one new Form U–1 will be filed annually under the amended rule, resulting in a total of 250 burden hours per year. The cost of the reporting burden, estimated to be $125 per hour,[102] would be $31,250 per response. The aggregate hour burden for Form U–1 would then increase to 27,354 hours and the aggregate cost would then increase to $5,452,050 per year for all respondents. In addition, rule 55 will also result in an increase in the number of statements filed under rule 24. These statements must be filed with the Commission upon consummation of a transaction approved by the Commission. See ''Rule 24'' below.

The proposed amendment to rule 87 will require Commission approval under section 13(b) of the Act before any subsidiary of a registered holding company may perform services or construction for, or sell goods to, an EWG or a FUCO. We estimate that each of the 12 active registered holding companies with FUCO and/or EWG investments as of December 31, 1998, that engages in these activities, has previously sought and obtained our approval to do so under section 13 or other provisions of the Act. Accordingly, we do not believe that the amendment itself will result in the filing of any additional applications by current registered holding companies. However, an existing or newly formed registered holding company may, in the future, seek our approval under the amended rule. Therefore, we estimate that rule 87, as amended, will result in one additional Form U–1 filing per year. We estimate the annual burden hours associated with the preparing and filing of the form would be approximately 80 hours, [103] at an estimated cost of $125 per hour.[104] We estimate that furnishing state and federal regulators copies of applications under rule 87 and certificates under rule 24 will require an additional three annual burden hours of clerical time, at an estimated cost of $50 per hour. Accordingly, the aggregate annual burden for all registered holding companies would be 83 hours (83 hours per response × 1 respondent = 83 hours). The total annual cost would be $10,150 for all respondents. As a result, the aggregate hour burden for Form U–1 would increase to 27,437 hours and the aggregate cost would be $5,462,200 per year for all respondents. In addition, the amendment to rule 87 will also result in an increase in the number of statements filed under rule 24. See ''Rule 24'' below.

F. Rule 24

In addition to requiring one additional Form U–1 to be filed annually, rule 55(b) will increase the number of statements required under rule 24 which must be filed with the Commission upon consummation of a transaction approved by the Commission. The amendment to rule 87 will also increase the number of statements required under rule 24. The current approved annual burden under rule 24 is 636 burden hours per year (2 hours per response × 318 responses = 636 burden hours). It is currently estimated that these certificates are filed by 134 respondents per year. The cost of the reporting burden, estimated to be $125 per hour,[105] is $250 per response. The total cost is $79,500 for all respondents.

We estimate that the additional Form U–1 filed each year under rule 55(b) will require one additional certificate, or one additional response by one additional respondent, under rule 24, and that completion of the certificate will require two burden hours. Accordingly, the total burden hours will increase by two hours and the total hourly annual burden will increase to 638 hours (2 hours per response × 319 responses = 638 burden hours). The cost of the reporting burden, estimated to be $125 per hour, is $250 per response, or a total of $250 for all responses under rule 55(b). The total cost would increase to $79,750 for all respondents.

In addition, we estimate that the additional Form U–1 filed per year under rule 87 will require four additional certificates, or four additional response by one additional respondent, under rule 24, and that completion of each certificate will require two burden hours. The current approved annual reporting burden for rule 24, as adjusted to reflect the increase resulting from proposed rule 55(b), is 638 hours (2 hours per response × 319 responses = 638 burden hours). Including the amendment to rule 87, the total burden hours will increase by eight hours and the total hourly annual burden will increase to 646 hours (2 hours per response × 323 responses = 646 burden hours). The cost of the reporting burden, estimated to be $125 per hour, is $250 per response, or a total of $1,000 for all four responses under rule 87. The total cost, adjusted for both rule 55(b) and the amendment to rule 87, is $80,750 for all respondents.

[101] As noted above, we currently estimate that each registered holding company spends approximately 224 hours to prepare, file and process a Form U–1. Because of the complex nature of the authority to be sought, we believe the burden estimate for a Form U–1 filed under amended rule 87 would be slightly greater.

[102] We estimate that preparation of a Form U–1 under rule 55(b) is primarily performed by, and divided equally among (i) in-house attorneys, accountants and senior management, at an average hourly rate of $150 per hour, and (ii) other in-house personnel (including financial, accounting and legal support staff), at an average rate of $100 per hour. In addition, the staff estimates that outside attorneys and accountants will spend an additional 75 hours to assist the registered holding company in preparing and filing the form, at an average hourly rate of $250. *See supra* note 77 and accompanying text.

[103] We note that this is significantly less than the 250 hours estimated for a Form U–1 filed under rule 55(b). The lower burden estimate reflects the limited scope of the filing under amended rule 87.

[104] We estimate that preparation of a Form U–1 is primarily performed by, and divided equally among (i) in-house attorneys, accountants and senior management, at an average rate of $150 per hour, and (ii) other in-house personnel (including financial, accounting and legal support staff), at an average rate of $100 per hour. We do not estimate that outside professionals will be retained to prepare and file this form.

[105] We estimate that preparing and filing rule 24 certificates will be primarily performed by, and equally divided among (i) in-house attorneys, accountants and senior management, at an average rate of $150 per hour, and (ii) other in-house personnel (including financial, accounting and legal support staff), at an average rate of $100 per hour.

G. Request for Comment

The Commission requests comment on the reasonableness of these estimates. Commenters who disagree are requested to provide their own estimates with supporting rationales.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collections of information;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements should direct them to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503; and (ii) Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–05–01. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–05–01 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services.

XI. Statutory Authority

The Commission is proposing rules 55 and 56 pursuant to sections 14, 15, 20 and 33 of the Act, as amended, and is proposing the amendment to rule 87 pursuant to sections 13, 14, 15, 20, 32 and 33 of the Act, as amended.

XII. Text of Proposed Rules and Amendments

List of Subjects in 17 CFR Parts 250 and 259

Electric utilities, Holding companies, Reporting and record keeping requirements.

For the reasons set out in the preamble, title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

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

Authority: 15 U.S.C. 79c, 79f(b), 79i(c)(3), 79t, 79z–5a and 79z–5b unless otherwise noted.

2. Sections 250.55 and 250.56 are added to read as follows:

§ 250.55 Acquisitions of foreign utility companies.

(a) *FUCO investments.* A registered holding company may not, directly or indirectly, acquire the securities of, or any interest in, a foreign utility company (''FUCO Investment'') unless the following conditions are satisfied:

(1) The board of directors of the registered holding company has adopted procedures (''FUCO Investment Procedures'') designed to analyze the risks of investing in foreign jurisdictions, including, for example, operational risks, construction risks, commercial risks, management risks, political risks, legal risks, financing risks and foreign currency risks.

(2) The board of directors has reviewed, and adopted a resolution approving, the FUCO Investment based upon, among other things, findings that:

(i) The FUCO Investment Procedures have been complied with;

(ii) Measures have been, or will be, taken to mitigate the risks that the FUCO Investment presents to the holding-company system; and

(iii) The FUCO Investment and any related financing have been structured so that ratepayers of the system's public-utility companies are adequately insulated from any adverse effects of the FUCO Investment.

(3) No more than two percent of the employees of the system's domestic public-utility companies render services, at any one time, directly or indirectly, to exempt wholesale generators or foreign utility companies in which the registered holding company, directly or indirectly, holds an interest; provided, that the Commission has previously approved the rendering of such services.

(4) If paragraph (b) of this section is applicable, the registered holding company has obtained an order from the Commission approving the FUCO Investment.

(b) *Commission approval of certain investments.*

(1) A registered holding company may not make FUCO Investments except pursuant to an order granted by the Commission if any of the following events has occurred: (i) The registered holding company, or any subsidiary company having assets with book value exceeding an amount equal to 10% or more of consolidated retained earnings (''Significant Subsidiary''), has been the subject of a bankruptcy or similar proceeding, unless a plan of reorganization has been confirmed in such proceeding;

(ii) The registered holding company system's average consolidated retained earnings for the four most recent quarterly periods, as reported on the holding company's Form 10–K or 10–Q (§ 249.308a or § 249.310 of this chapter) filed under the Securities Exchange Act of 1934 (15 U.S.C. 78a–78) as amended, have decreased by 10% from the average for the previous four quarterly periods and the aggregate investment in exempt wholesale generators and foreign utility companies exceeds two percent of the registered holding company system's total capital invested in utility operations. This restriction will cease to apply once consolidated retained earnings have returned to their pre-loss level;

(iii) In its previous fiscal year, the registered holding company reported operating losses attributable to its direct or indirect investments in exempt wholesale generators and foreign utility companies, and such losses exceed an amount equal to 5% of consolidated retained earnings;

(iv) If, during the three fiscal years preceding the acquisition, the holding company has reported, in response to Item 9 of Form U5S (§ 259.5s of this chapter) increases for retail customers have been obtained in order to recover losses or inadequate returns on FUCO Investments;

(v) Any Significant Subsidiary of the holding company that is a public-utility company has a rating from a nationally recognized statistical rating organization with respect to its debt securities that is less than investment grade; or

(vi) The registered holding company's investment in FUCOs and EWGs exceeds 50% of consolidated retained earnings or such greater amount as may be authorized by the Commission by order under § 250.53(c).

(2) An applicant that is required to obtain Commission approval of FUCO Investments must affirmatively demonstrate that the investments:

(i) Will not have a substantial adverse impact upon the financial integrity of the registered holding company system; and

(ii) Will not have an adverse impact on any utility subsidiary of the registered holding company, or its customers, or on the ability of State commissions to protect the subsidiary or its customers.

(c) *Books and records.* A registered holding company that makes a FUCO Investment must maintain, and cause its subsidiaries to maintain, the books and records required by § 250.53 in the manner prescribed by § 250.53. The registered holding company will provide the Commission or its representatives with access to these books and records in the United States, at such place as the Commission may reasonably request. The books and records must be maintained for the periods set forth in Part 257 of this title, as appropriate.

(d) *Form U–57 and other filings.* A registered holding company that makes a FUCO Investment must, within ten business days of making the FUCO Investment, file a statement on Form U–57 (§ 259.207 of this chapter) with the Commission. The company must also simultaneously submit complete copies of the following, including exhibits, to every federal, state or local regulator having jurisdiction over the rates of any system public-utility company:

(1) The Form U–57 filed by the registered holding company in connection with the FUCO Investment;

(2) Any Forms U–1 (§ 259.101 of this chapter) and certificates under § 250.24 filed by the registered holding company in connection with the issuance of securities for purposes of financing the FUCO Investment, the entering into of service, sales or construction contracts, or the creation or maintenance of any other relationship with the foreign utility company and the registered holding company, its affiliates or associate companies; and

(3) A copy of Item 9 of Form U5S (§ 259.5s of this chapter) and Exhibits G and H to that Form.

§ 250.56 Status of subsidiary companies of registered holding companies formed to hold interests in foreign utility companies.

A subsidiary of a registered holding company which is engaged exclusively in the direct or indirect ownership of the securities, or an interest in the business of, one or more foreign utility companies, shall be deemed to be a foreign utility company.

3. Section 250.87 is amended by adding paragraphs (d) and (e) to read as follows:

§ 250.87 Subsidiaries authorized to perform services or construction or to sell goods.

* * * * *

(d) This section shall not be applicable to the performance of services or construction for, or the sale of goods to, an associate company of a registered holding company if such associate company is an exempt wholesale generator or a foreign utility company. This section shall further not be applicable to the receipt by an associate company of a registered holding company of services or construction from, or the purchase of goods from, an associate company that is an exempt wholesale generator or a foreign utility company.

(e) Any application, or amendment thereto, filed directly or indirectly by a registered holding company seeking authority to render services or construction or to sell goods to an exempt wholesale generator or foreign utility company, or to receive services, construction or goods from an exempt wholesale generator or foreign utility company, must be simultaneously submitted to every State commission and to every federal or local governing body having jurisdiction over the retail rates of any affected public-utility company in the registered holding company system.

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

Subpart A—Forms for Registration and Annual Supplements

4. The authority citation for part 259 is revised to read as follows:

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

5. Item 9 of Form U5S (referenced in § 259.5s) is amended by adding paragraph (e) to read as follows:

Note: The text of Form U5S does not and the amendment will not appear in the Code of Federal Regulations.

Form U5S

* * * * *

Annual Report

* * * * *

Item 9. Wholesale Generators and Foreign Utility Companies

(e) State whether or not the holding company has sought recovery of losses or inadequate returns on any investment in a foreign utility company through higher rates to retail ratepayers.

* * * * *

6. Section 259.207 and Form U–57 (referenced in § 259.57) are revised to read as follows:

§ 259.207. Form U–57, for notification of foreign utility company status pursuant to rule 57(a) (§ 250.57 of this chapter) and statement by registered holding company in connection with the acquisition of an interest in a foreign utility company pursuant to rule 55 (§ 250.55 of this chapter).

This form shall be filed pursuant to section 33(a)(3)(B) of the Act by a company claiming foreign utility company status. This form shall also be filed by a registered holding company acquiring any securities or other interest in the business of a foreign utility company. *See* §§ 250.55 and 250.57 of this chapter.

Note: The text of Form U–57 does not and the amendment will not appear in the Code of Federal Regulations.

OMB Approval

OMB Number: 3235–0428.

Expires: October 31, 2001.

Estimated average burden hours per response: 3.00.

Securities and Exchange Commission, Washington, DC. 20549: FORM U–57—Notification of Foreign Utility Company Status and Notification of Acquisition of an Interest in a Foreign Utility Company

Filed Under Section 33(c) or Rule 55 of the Public Utility Holding Company Act of 1935.

_____

(Name of registered holding company)

_____

(Name of foreign utility company)

General Instructions

1. Use of Form

This form should be filed by, or on behalf of, a company that is or proposes to become a foreign utility company. This form should also be filed by a registered holding company that acquires an interest in a foreign utility company. *See* rule 55. A single filing on this form should be made by both the company claiming FUCO status and the registered holding company that makes an investment in the FUCO.

2. Formal Requirements

File two copies of this form with the Commission. Manually sign and file one copy at the place designated by the

Commission for filings under the laws it administers. Provide the second copy to the Division or Office responsible for administering the Act. Registered holding companies submitting this form under rule 55 shall simultaneously submit copies of this form to each federal, state or local regulator having jurisdiction over the rates of any public-utility company affiliated with the holding company.

3. Definitions and Other Matters

All terms used have the same meaning as in the Public Utility Holding Company Act of 1935 and rules and regulations. All monetary amounts reported on this form must be stated in United States dollars.

4. Withdrawal of Filing

Amend this form within 45 days of a determination that the company identified as the foreign utility company is not a foreign utility company (*i.e.*, due to a change in its business, a change in applicable law or otherwise).

Item 1

For each interest in a foreign utility company (''company'') acquired, identify the company, its location and its business address. Describe the facilities used for the generation, transmission and distribution of electric energy for sale or for the distribution at retail of natural or manufactured gas. Identify each system company that holds an interest in the company and describe the interest held. To the extent known, identify each person that holds five percent or more of any class of voting securities of the foreign utility company and describe the amount and nature of the interest.

Item 2

State the purchase price paid for the foreign utility company. State the type and amount of capital invested in the company by the registered holding company, directly or indirectly. Identify any debt or other financial obligation for which there is recourse to a system company (other than an exempt wholesale generator or foreign utility company). Identify separately any direct or indirect guarantee of a security of the foreign utility company by the registered holding company.

Item 3—Associate Companies

Name each domestic associate public-utility company and, if applicable, its holding company.

Item 4—Books and Records

Identify the location of the books and records required by rule 53. By filing this form, the registered holding company undertakes that it will provide the Commission or its representatives with access to these books and records in the United States, at such place as the Commission may reasonably request.

Exhibit A

If applicable, the state certification(s) required under section 33(a)(2) of the Act. Certification(s) previously filed with the Commission which are still in effect and which encompass the foreign utility company for which this notification is being filed may be incorporated by reference. If the certification(s) is not available at the time of filing the Form U–57, so state, and undertake to file such certification as an amendment when available.

Signature

The undersigned registered holding company has duly caused this statement to be signed on its behalf by the undersigned thereunto duly authorized.

By _____

(Signature and printed name and title of signing officer)

Date _____

By the Commission.

Dated: February 1, 2001.

Margaret H. McFarland,

Deputy Secretary.

Appendix A

Note: *Appendix A to the preamble will not appear in the Code of Federal Regulations.*

Regulatory Flexibility Act Certification

I, Arthur Levitt, Chairman of the Securities and Exchange Commission (''Commission''), hereby certify pursuant to 5 U.S.C. 605(b), that proposed rules 55 and 56 and amendments to rule 87, Form U–57 and Form U5S under the Public Utility Holding Company Act of 1935, as amended (''Holding Company Act''), would not, if adopted, have a significant economic impact on a substantial number of small entities.

Proposed rule 55 would define the circumstances under which a holding company registered under section 5 of the Holding Company Act can acquire an interest in a foreign utility company (''FUCO'') without the need to apply for or receive Commission approval. Proposed rule 56 would clarify the status of intermediate subsidiaries of registered holding companies that engage exclusively in the business of owning or operating, or both owning and operating, FUCOs, or a combination of eligible wholesale facilities (''EWGs'') and FUCOs. Under proposed rule 56, a registered holding company, unless otherwise restricted, could acquire the securities of, or an interest in, such a company without the need to apply for or receive Commission approval. The proposed amendment to rule 87 requires, with certain exceptions, a registered holding company to obtain a Commission order before an EWG or FUCO could provide services to, or construction for, or sell goods to, an associate company. The proposed amendment to rule 87 also would require registered holding companies to furnish state and federal regulators copies of applications under rule 87 and certificates under rule 24 of the Holding Company Act. The proposed amendments to Form U–57 and Form U5S govern reporting requirements relating to transactions subject to the proposed rules and rule amendments.

The proposed rules and amendments apply only to holding companies registered under section 5 of the Holding Company Act. Presently, there are 30 registered holding companies, none of which qualifies as a ''small business'' or ''small organization'' for purposes of the Regulatory Flexibility Act.

Accordingly, the proposed rules and amendments would not have a significant economic impact on a substantial number of small entities.

Dated: January 31, 2001.

Arthur Levitt,

Chairman.

[FR Doc. 01–3155 Filed 2–6–01; 8:45 am]

BILLING CODE 8010–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–105–1–7404; FRL–6935–2]

Approval and Promulgation of Air Quality State Implementation Plans; Texas; Approval of Clean Fuel Fleet Substitution Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve the State of Texas' Clean Fuel Fleet (CFF) substitute plan, incorporating them into the State Implementation Plan (SIP) under the Federal Clean Air Act (CAA). The State's CFF Substitute Plan is addressed in the SIP revision submitted on August 27 1998, and supplemented with additional technical information in a letter to the EPA dated November 17, 2000, by the State of Texas for the purpose of establishing a substitute CFF program.

In the Final Rules Section of this **Federal Register**, EPA is approving this SIP submittal as a direct final rule without prior proposal because we view it as noncontroversial and anticipate no adverse comments. See the direct final rule for detailed rationale for the approval. If EPA receives no adverse comments in response to this action, no further activity is contemplated. If EPA does receive adverse comments, we will