

Energy Policy Act of 2005: Summary of Electricity Title

Mandatory Bulk Power System Reliability Standards. FERC must certify and oversee an Electric Reliability Organization (“ERO”) to establish and enforce mandatory reliability standards upon owners, operators and users of the bulk power system, which is broadly defined to include both transmission system network facilities and generation-based ancillary services needed to maintain reliability. The reliability standards will apply in every state, including the ERCOT area of Texas, but not in Hawaii and Alaska. A reliability standard is defined as one that provides for the reliable operation of the bulk power system. FERC cannot, however, use the reliability standards to compel the enlargement of bulk power system facilities or the construction of new transmission or generation capacity. The Act preserves the existing prerogatives of state utility commissions to take action to ensure the safety, adequacy, and reliability of electric service within the state, as long as the state’s action is not inconsistent with any FERC-approved reliability standard. On September 1, 2005, FERC issued a notice of proposed rulemaking proposing criteria for the establishment of an ERO.


Federal Transmission Siting Authority. The Act institutes a two-step federal backstop transmission siting regime that is intended to overcome obstacles in the state commission siting process. The first step consists of the designation by the Secretary of Energy of National Interest Electric Transmission Corridors (“NIETC”), which are defined as “any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.” In deciding whether to designate an NIETC, the Secretary may consider the economic vitality and economic growth of the corridor or the end use markets served by the corridor, diversification of supply, energy independence and national energy policy and national defense and homeland security.

The second step consists of the issuance by FERC of permits for construction or modification of transmission facilities in an NIETC if FERC determines that (i) the state in which the transmission facilities are to be located lacks authority to approve the siting of the facilities or consider their interstate benefits; (ii) the applicant does not qualify for a permit in the state because the applicant does not serve end-use customers in the state; (iii) the state has withheld approval of the facilities for more than a year; or (iv) the state has conditioned its approval in such a way that construction or modification of the facilities will not “significantly reduce” congestion or is not economically feasible; and (v) the proposed construction or modification is consistent with the public interest and meets other general standards, such as reducing transmission congestion. Consistent with an analogous provision of the Natural Gas Act, the issuance of a transmission line permit by FERC carries with it the right of eminent domain if the permit holder cannot otherwise acquire the necessary property.

Federal preemption can be overridden if three or more contiguous states form an interstate compact establishing a regional transmission siting agency that unanimously approves a transmission project in an NIETC.

The Act also provides that the Secretary of Energy, acting through the Western Area Power Administration (“WAPA”) or the Southwestern Power Administration (“SWPA”), may upgrade existing or construct new transmission facilities in an NIETC or to accommodate an actual or projected increase in demand for transmission capacity. The Secretary may engage in these activities with the participation of “other entities” so long as the funds contributed by such other entities do not exceed \$100 million during fiscal years 2006 through 2015. The undefined term “other entities” presumably means any entities other than WAPA or SWPA.

Repeal of PUHCA. The Act repeals the Public Utility Holding Company Act of 1935 (“PUHCA”) effective six months after the date of enactment. However, the Act also transfers some of the existing responsibilities of the SEC under PUHCA to FERC and state regulatory commissions.



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Both FERC and state regulatory authorities are provided access to holding company books and records. FERC may obtain access to holding company, associate company and affiliate company records if those records are relevant to costs incurred by a public utility or natural gas company that is an associate company of the holding company, and are necessary or appropriate for the protection of customers with respect to FERC-jurisdictional rates. FERC is not, however, provided access to the books and records of any person that is a holding company solely by reason of ownership of one or more QFs, EWGs or foreign utility companies or holding companies whose public utility operations are confined substantially to a single state. Access is also not allowed if class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company.

A state commission regulating a public utility in a holding company system may obtain holding company, associate company and affiliate company records if the records have been identified in reasonable detail in a proceeding before the state commission, are deemed by the state commission to be relevant to costs incurred by the public utility and are necessary for the effective discharge of the responsibilities of the state commission in the proceeding. Like FERC, state commissions are not authorized access to the books and records of any person that is a holding company solely by reason of ownership of one or more QFs.

If an associate company is organized specifically to provide non-power goods or administrative or management services to a public utility in the same holding company system, then the Commission, at the behest of the holding company system or a state commission having jurisdiction over the public utility, must review and authorize the allocation of the costs for such goods or services to the extent relevant to that associate company. The Commission must exempt from such reviews any company in a holding company system whose public utility operations are confined substantially to a single state, and any class of transactions that the Commission finds is not relevant to the jurisdictional rates of a public utility.

Amendments to PURPA Regarding QFs. The Act makes several important changes to the Public Utility Regulatory Policies Act of 1978 ("PURPA") with respect to the prerequisites for becoming a qualifying cogeneration facility, the obligation of utilities to purchase from Qualifying Facilities ("QF") (both cogeneration facilities and small power production facilities) and restrictions on the ownership of QFs. First, FERC is required to revise the criteria in 18 C.F.R. § 292.205 – its regulations governing operating and efficiency standards – for new cogeneration QFs to ensure that the thermal energy output of the facility "is used in a productive and beneficial manner," that the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility and to ensure that there is continuing progress in the development of efficient electric energy generating technology. For existing cogeneration QFs, the existing operating and efficiency standards will continue to apply.

Second, according to the Act, no electric utility may be required to enter into a new contract or obligation to purchase electric energy from a QF if FERC finds that the QF has nondiscriminatory access to a competitive capacity and energy market. Likewise, upon the expiration of an existing contract between a utility and a QF, the utility's obligation to purchase from the QF expires if the QF has nondiscriminatory access to a competitive market. The Act specifies three types of market that qualify as competitive. The first type of market is one with independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy, and wholesale markets for long-term sales of capacity and electric energy. The second type is one with transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to a nondiscriminatory, open access transmission tariff, and with competitive wholesale markets that provide a meaningful opportunity to sell long-term and short-term capacity and long-term, short-term and real-time electric energy to buyers other than the utility to which the qualifying facility is interconnected. The third type is wholesale markets for the sale of capacity and electric energy that are comparable to the other two types of markets. Once the purchase obligation is terminated, it can be

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reinstated upon an application by the affected QF showing that the competitive market conditions upon which the Commission relied are no longer met.

Finally, the Act eliminates the requirement that a QF must be at least 50%-owned by a person not primarily engaged in the generation or sale of electric power (*i.e.*, electric utilities and electric utility holding companies). The Act does not affect QFs' exemptions from certain state regulation and portions of the Federal Power Act ("FPA").

Mergers and Issuances of Securities. FERC's authority under FPA section 203 over mergers and issuances of securities is changed by the Act. First, the threshold value of jurisdictional assets being sold that triggers FERC's merger authority is changed from \$50,000 to \$10,000,000. Similarly, FERC's authority to regulate the purchase, acquisition or taking of the securities of another public utility is triggered when the value of the securities exceeds \$10,000,000 rather than, as before, \$50,000. In addition, for the first time FERC is provided authority over the disposition of a generation-only facility (lacking step-up transformers and other transmission facilities), but only if it is used for interstate wholesale sales and is subject to the Commission's ratemaking jurisdiction.

Transmission Rates. FERC must establish "incentive-based (including performance-based) rate treatments" for transmission, including "a return on equity that attracts new investment in transmission facilities." The "incentive-based rate" provision is vague as to the scope of its applicability, and FERC will be left with responsibility to issue a rule, within a year of enactment, to administer it. FERC is also required to "provide incentives to each transmitting utility or electric utility that joins [a regional transmission organization ("RTO")]. As with incentive-based rates, the precise nature of the "incentives" is left to FERC.

Penalties. The Act amends FPA section 316, the criminal penalties provision, by increasing the maximum penalties FERC may impose and broadening the scope of activities subject to penalties. Section 316(a) has been amended to increase the maximum fine for willfully and knowingly violating a provision of the Act from \$5,000 to \$1,000,000, and the maximum term of imprisonment for such violations from two to five years. Section 316(b) has been amended to increase the maximum fine for willfully and knowingly violating a rule or order of FERC from \$5,000 to \$25,000 per day. Section 316(c), which excluded violations of sections 211, 212, 213 and 214 from penalties under section 316, is stricken and replaced with a reference to Part II which contains the FPA's substantive non-hydro power provisions.

Similarly, the Act amends Section 316A to increase the maximum civil penalty for violations of any provision of FPA Part II from \$10,000 to \$1,000,000, whereas previously only violations of sections 211, 212, 213 and 214 were subject to civil penalties.

Native Load Service Obligations. The Act provides transmission preferences to utilities to meet service obligations to their native load. A load-serving entity (which is defined as "a distribution utility or an electric utility that has a service obligation" to provide electric service to end-users or to a distribution utility) that owns generation facilities, markets the output of federal generation facilities, or holds contractual rights to purchase electric energy, and that holds firm transmission rights through either ownership of transmission facilities or contractual entitlements, "is entitled to use the firm transmission rights, or equivalent tradable or financial transmission rights" to deliver electric energy to meet its service obligations. The native load provisions do not affect RTO methodologies for allocating or auctioning transmission rights if an RTO satisfies certain grandfathering tests enumerated by the Act.

Price Transparency. The Act requires the Commission "to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce." Primarily, the Commission is to issue rules that provide for the timely dissemination of information about the availability and prices of wholesale sales and transmission service to the Commission, state commissions, buyers and sellers of wholesale electric energy, users of transmission service, and the public. The Commission is required to rely on existing price publishers and providers of trade processing services to the

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maximum extent possible, but the Commission may establish an electronic information system if it determines that the existing price publications are inadequate.

Market Manipulation. The Act makes it unlawful for any entity to employ “any manipulative or deceptive device or contrivance” in connection with “the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission.”

Jurisdiction over Cooperatives and Power Marketing Agencies. The Act expands FERC jurisdiction over power marketing agencies and both expands and contracts Commission jurisdiction over cooperatives.

First, the Act provides the Commission authority to require any unregulated transmitting utility (certain electric cooperatives, federal power marketing agencies, certain municipally-owned utilities) to provide transmission services at rates comparable to the rate the utility charges itself and on terms and conditions comparable to those under which the utility provides transmission services to itself. An “unregulated transmitting utility” is an entity described in FPA section 201(f), which has been amended by the Act to include not just, as before, the United States, states, and political subdivisions thereof, but also electric cooperatives that receive financing under the REA or that sell less than 4,000,000 MWh of electricity per year. The Commission’s authority to compel such transmission services is limited in several important ways. The Commission must exempt from the requirement any electric cooperative that sells less than 4,000,000 MWh, although the Commission may, in response to a complaint, revoke the exemption. The requirement does “not apply to facilities used in local distribution.” And the Commission is not authorized to require an unregulated transmitting utility to transfer its transmission facilities to an RTO. The Act also provides that a federal power marketing agency or the Tennessee Valley Authority may transfer control and use over some or all of its transmission facilities to an RTO.

Second, the Act provides the Commission with refund authority over entities described in section 201(f) to the extent such entities make a short-term (31 days or less, excluding monthly contracts subject to automatic renewal) sale of electric energy through an organized market in which the rates for sale are established by Commission-approved tariff and the sale violates the terms of the tariff or Commission rules in effect at the time of the sale. This refund authority does not extend, however, to any such entity that, along with its affiliates, sells less than 8,000,000 MWh per year or that is an electric cooperative. In addition, there are special provisions that apply to sales by the Bonneville Power Administration and the TVA.

Third, the Act amends FPA Section 306 by, among other things, adding “transmitting utility” to the type of entity about which a complaint may be filed. Prior to the Act, complaints could only be filed against a licensee or public utility. The Act defines transmitting utility as “an entity (including an entity described in section 201(f)) that owns, operates, or controls facilities used for the transmission of electric energy – (A) in interstate commerce; (B) for the sale of electric energy at wholesale.”

Advanced Transmission Technologies. The Act provides that the Commission “shall encourage, as appropriate, the deployment of advanced transmission technologies,” including eighteen specific technologies, such as high temperature lines and underground cables, and “any other technologies the Commission considers appropriate.” The precise methods of encouragement are left to the Commission.

The Secretary of Energy is authorized funding under the Act “to establish an Advanced Power System Technology Incentive Program to support the deployment of certain advanced power system technologies and to improve and protect certain critical governmental, industrial, and commercial processes.” Under this program, the Secretary can make two categories of payment. The Secretary may make payments of 1.8 cents per kWh to the owner or operator of a qualifying advanced power system technology facility (“a facility using an advanced fuel cell, turbine, or hybrid power system or

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power storage system to generate or store electric energy”), and may make payments of an additional 0.7 cents per kWh to the owner or operator of a qualifying security and assured power facility (an “advanced power system technology facility determined ... to be in critical need of secure, reliable, rapidly available, high quality power for critical governmental, industrial, or commercial applications”). Any such qualifying facility is eligible for incentive payments up to 10 million kWh per year, and \$10 million per year for fiscal years 2006 through 2012 are authorized to be appropriated for such payments.

Metering Provisions. State regulatory authorities must consider whether the electric utilities they regulate should be required to provide certain metering services. First, they must consider whether to require each electric utility to make available upon request net metering service to any electric consumer that the electric utility serves. Net metering is defined “during the applicable billing period.” In addition, they must consider whether to require each electric utility to offer each of its customer classes and individual customers a time-based rate schedule under which the utility’s rate varies during different time periods and reflects the variance, if any, in the utility’s costs of generating and purchasing electricity at wholesale. Each electric utility must provide a customer requesting a time-based rate with a time-based meter. In a State with retail access, customers of third-party marketers are also entitled to receive the same time-based metering and communications device and service as a retail electric consumer of the electric utility.

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