

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS.

Subchapter K. RELATIONSHIPS WITH AFFILIATES.

§25.271. Foreign Utility Company Ownership by Exempt Holding Companies.

- (a) **Certification to Securities and Exchange Commission.** Upon request by a holding company which is exempt under §3 of the Public Utility Holding Company Act of 1935, codified at 15 United States Code 79, the commission may certify to the Securities and Exchange Commission (SEC) that the commission has the authority and resources to protect ratepayers and that it intends to exercise its authority over holding companies owning both a jurisdictional electric utility and a foreign utility company (FUCO) under the safe harbor provisions of subsection (c) of this section or the case-by-case review provisions of subsection (d) of this section. The commission may also notify the SEC that a previously-issued certification regarding a requesting holding company will be ineffective prospectively.
- (b) **Policy goals.** The commission will seek to protect the public interest in having electricity service available to all citizens of the state at just, fair, and reasonable rates that are unaffected by investments by exempt holding companies in foreign utility companies (FUCOs), while avoiding strictures that would place exempt holding companies at a competitive disadvantage in international markets. The commission will consider these policy goals in each decision whether to issue a certification or to notify the SEC that a previously-issued certification is prospectively withdrawn.
- (c) **Safe harbor investments.** The following safe harbor provisions apply to investments in FUCOs by exempt holding companies that are affiliated with electric utilities subject to the regulatory jurisdiction of the commission:
- (1) The commission must certify to the SEC that the commission has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise its authority, provided that all holding companies of electric utilities that are subject to the regulatory jurisdiction of this commission must have filed with the commission corporate undertakings, signed under oath by an authorized executive officer of the holding company agreeing to adhere to the covenants and to make the filings specified in paragraph (2) of this subsection.
 - (2) The holding company must adhere to the following covenants:
 - (A) That any indebtedness incurred in relation to the acquisition by the holding company, or by any affiliate of the electric utility, of an ownership interest in a FUCO will be without recourse to the electric utility;
 - (B) That the electric utility, the holding company, or any affiliate of the electric utility will not enter into any agreements under the terms of which the electric utility is obligated to commit funds in order to maintain the financial viability of a FUCO or an affiliate of the electric utility investing in a FUCO;
 - (C) That the electric utility will not provide, directly or indirectly, any guarantees or other forms of credit support for any funds borrowed by the holding company or an affiliate of the electric utility in connection with the acquisition of any ownership interest in a FUCO;
 - (D) That the electric utility, the holding company, or any affiliate of the electric utility will not make any investment in a FUCO under circumstances in which the electric utility would be liable for the debts and/or liabilities of the FUCO incurred as a result of acts or omissions of the FUCO;
 - (E) That the electric utility will maintain and provide a copy to the commission of its accounting policies and procedures that assure that the electric utility is adequately and fairly compensated by the holding company or an affiliate of the electric utility for any use of the electric utility's assets or personnel in furtherance of a FUCO;
 - (F) That the holding company provides the commission reasonable access to books and records and financial statements, or copies thereof, of the FUCO or other affiliate doing business with the FUCO, in English and stated in United States dollars, as the commission may request to:

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- (i) review transactions between the electric utility and such FUCO or affiliate pursuant to the Public Utility Regulatory Act §14.154; and
 - (ii) review transactions between any affiliate and the FUCO if such affiliate also has transactions directly or indirectly with the electric utility;
 - (G) That the holding company will file with the commission quarterly a report listing the total amount of the aggregate investments by the holding company and its subsidiaries and the percentage of the holding company's consolidated net worth, from the company's most recent SEC form 10-Q, represented by such investments;
 - (i) "Aggregate investment" means all amounts invested, or committed to be invested, in exempt wholesale generators located outside the United States (foreign EWGs) and FUCOs, for which there is recourse, directly or indirectly, to the holding company. Among other things, the term must include preliminary development expenses that culminate in the acquisition of a foreign EWG or a FUCO.
 - (ii) Such report must be filed no later than ten days following the filing of the 10-Q for the quarter.
 - (H) That in the event the holding company anticipates making any investment in a FUCO that would result in the aggregate investment as defined in subparagraph (G) of this paragraph of such holding company exceeding 30% of the consolidated net worth of such holding company, the holding company must so advise the commission before a final commitment to ownership of such FUCO is made;
 - (I) That the electric utility will provide, by March 31 of each year, a copy of the electric utility's three-year cash flow forecast;
 - (J) That the holding company will provide to the commission all SEC forms for reporting information related to foreign EWG and FUCO investments, no later than ten days after such forms are provided to the SEC;
 - (K) That the holding company will promptly notify the commission whenever any of the following occurs:
 - (i) It is unable to provide the certifications, undertakings, or documents provided for in this paragraph;
 - (ii) The aggregate investment exceeds 30% of consolidated net worth;
 - (iii) The holding company's operating losses attributable to its direct or indirect investments in foreign EWGs and FUCOs exceeded 5.0% of consolidated retained earnings during the previous four quarters; and
 - (L) That the holding company will comply with the informational filing requirements of subsection (d) of this section in connection with a contemplated investment in a FUCO, unless the commission finds good cause not to require the holding company to provide such additional information.
- (d) **Other investments.** For any occasion for which a holding company has undertaken to notify the commission of an event specified in subsection (c)(2)(H) or (K) of this section, the following provisions apply:
 - (1) The holding company must provide the following information, to the extent such information is reasonably available at the time of submission of the filing, at least 30 days before the date when it anticipates making a final commitment to ownership of a FUCO not already covered by a certification letter:
 - (A) A description of the proposed investment, including a description of the FUCO assets being acquired, their geographical location, the form of the investment (partnership, joint venture, direct purchase, etc.), the holding company's percentage share of the investment, a description of how the investment will fit into the corporate subsidiary structure, and any other information reasonably necessary in the opinion of the holding company to provide a complete overview of the nature of the proposed investment;

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- (B) Any financial requirements and/or commitments by the holding company or the electric utility that will be made or assumed as a result of this investment; this information should include, but is not limited to, an estimate of the amount of equity capital to be invested;
 - (C) Any debt obligations resulting from this investment which will provide recourse to the holding company or the electric utility;
 - (D) The holding company's general corporate objectives regarding diversification and foreign utility investments, and the specific objectives of the proposed FUCO investment;
 - (E) A statement that the electric utility has effective written policies and accounting procedures which insure that any use by the FUCO of assets or personnel of an affiliate of the electric utility, or other transactions between the FUCO and an affiliate of the electric utility will not negatively affect Texas ratepayers; and a statement that the electric utility will demonstrate in each subsequent rate proceeding before the commission, and each subsequent audit, that no FUCO investment increased the cost of capital or revenue requirement of the electric utility;
 - (F) A calculation, based on the holding company's most recent SEC Form 10-Q, of aggregate consolidated holding company investments as defined in subsection (c)(2)(G) of this section as a percentage of consolidated holding company net worth, stated both before and after all asset transfers from any affiliate of the electric utility to FUCOs at fair market value;
 - (G) A statement that the holding company will provide to the commission all SEC forms for reporting information related to foreign EWG and FUCO investments, no later than ten days after such forms are provided to the SEC; and
 - (H) Responses to questions, if any, contained on a commission prescribed form.
- (2) The notification prescribed in this subsection may be submitted less than 30 days before the date when the holding company anticipates making a final commitment to ownership of a FUCO not already covered by a certification letter upon a showing of good cause. Good cause for purposes of the preceding sentence must be deemed to include, without limitation, a representation that the holding company lacked the information required to make a submission at an earlier date or a representation that making the submission at an earlier date would have unreasonably jeopardized the ability of the holding company to go forward with the contemplated investment.
- (3) In its review of the information provided pursuant to this section, the commission will consider, among other things, the number and magnitude of prior FUCO investments by the holding company, including the diversity among the countries in which such investments are located and other differences between such investments, and the magnitude of the proposed investment and its effect on the diversity of the portfolio.
- (e) **Post-investment reporting.** The electric utility must comply with the following post-investment reporting obligations:
- (1) With respect to any investment in a FUCO for which an informational filing was made pursuant to subsection (d)(1) of this section, the electric utility or holding company must notify the commission no later than ten days after the holding company makes a final commitment to ownership of a FUCO that such a commitment has been made. Such notice must include any material corrections, additions, and supplementation of previously-provided information; and
 - (2) For any FUCO investment covered by a certification, the electric utility or holding company must notify the commission no later than 30 days after any material change in the circumstances or nature of an investment in a FUCO. Such notice must include all appropriate corrections, additions, and supplementation of previously-provided information. A material change would include, but is not limited to, any change that would have an adverse impact of greater than 1.0% of consolidated net worth most recently reported; full or partial divestiture of the investment; a catastrophic event that destroys a significant amount of FUCO property

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or results in loss of life that could result in a significant liability claim; a change in the laws or government policy having a material impact on the FUCO; or an event which would place a significant restriction on the repatriation of earnings of the FUCO.

- (3) Unless included in SEC reports, each exempt utility holding company which directly or indirectly holds an interest in FUCOs or foreign EWGs must provide the following information: A consolidating statement of income of the exempt holding company and its subsidiary companies for the last calendar year, together with a consolidating balance sheet of the exempt holding company and its subsidiary companies as of the close of such calendar year.
 - (A) The information must be provided in English, monetary amounts in U.S. dollars, and according to generally accepted accounting principles.
 - (B) Such information must be received by the commission annually no later than March 15.

- (f) **Commission standards for granting or maintaining certification.**
 - (1) In general, the commission will issue and continue certification when the aggregate investment in FUCOs and foreign EWGs is less than 30% of the holding company's consolidated net worth, and the company has satisfactorily provided the information and assurances set out in the preceding subsections.
 - (2) With respect to any investment in a FUCO for which an informational filing was made pursuant to subsection (d)(1) of this section, the commission must determine on a case-by-case basis whether to issue a certification to the SEC or maintain a previously issued certification. The commission must endeavor to make such a determination prior to the date when the holding company anticipates having to make a final commitment to ownership of the FUCO. If the commission determines that it does not intend to continue certification, it may inform the SEC that maintaining a previously-issued certification would be inappropriate.
 - (3) The commission must notify the holding company requesting the certification or retention of certification of its decision within 45 days of receiving the request. If no action is taken by the commission within 45 days of receiving the request, the certification is deemed granted or affirmed.
 - (4) Any information submitted by a holding company pursuant to this section may be submitted by the holding company under seal. Each page tendered under seal must have the words "Confidential Information" typed or stamped on its face. The holding company must clearly identify each portion of the application alleged to be Confidential Information; identify the exemption to the Public Information Act, Texas Government Code Annotated, Chapter 552 (Vernon Supp. 1998), applicable to the alleged Confidential Information; and provide a detailed explanation of why the alleged Confidential Information is exempt from public disclosure under the Public Information Act. If the commission receives a Public Information Act request for disclosure of Confidential Information, then the Executive Director must promptly so notify the holding company. The Executive Director must timely request an Attorney General's opinion as to whether the information falls within any of the exemptions identified in Subchapter C of the Public Information Act. The Executive Director must promptly provide to the holding company a copy of an Attorney General opinion regarding the claim of confidentiality. If an Attorney General opinion recommends disclosure of Confidential Information, either in whole or in part, then the Executive Director must not release such information for ten calendar days, in order to allow the holding company time to pursue any legal remedies that it may have. The holding company may require the execution of an appropriate confidentiality agreement prior to providing access to such confidential information to commission staff or any other interested party. The form of any such confidentiality agreement must be approved by commission staff legal counsel prior to filing and included with the informational filing.