

# **The Energy Policy Act of 2005**

## **PUHCA Repeal and PURPA Modification**

**By Phil Lookadoo**

**Thelen Reid & Priest LLP**

**701 8<sup>th</sup> Street, N.W.**

**Washington, DC 20001**

**Tel: 202-508-4350**

**E-mail: [plookadoo@thelenreid.com](mailto:plookadoo@thelenreid.com)**

**Phil Lookadoo** is a Partner with **Thelen Reid & Priest LLP**. Since 1980, he has represented clients in the energy industry. Mr. Lookadoo specializes in energy project development, energy transactions (both physical commodity and financial hedging) transactions, and energy regulatory requirements. He received his B.S. from West Virginia University, his M.S. in Physics from University of Virginia, and his J.D. from Emory University.

# Introduction

- On August 8, 2005, the Energy Policy Act of 2005 (“EPAct’05”) was enacted. It has been almost 13 years since the prior enactment of major energy legislation.

# **Section 1. Public Utility Holding Company Act Repeal**

The last remaining piece of New Deal business legislation, the Public Utility Holding Company Act of 1935 (“PUHCA of 1935”), will be repealed 6 months after enactment of the EPAct’05 (February 8, 2006).

A new PUHCA of 2005 is simultaneously enacted and administered by FERC.

- Section 32 of PUHCA of 1935, establishing Exempt Wholesale Generators (“EWGs”), is repealed.
- PUHCA of 2005 gives FERC (in place of SEC) access to books and records of holding companies, but expressly exempts holding companies owning QFs and EWGs from this requirement.

- **Section 2. Modifications to Public Utility Regulatory Policies Act of 1978 (PURPA)**

- The obligation of electric utilities to enter into new mandatory purchase and sale contracts with QFs will be terminated if FERC determines that an organized market is available for power sales and purchases.
- The statutory prohibition against public utility ownership of more than 50% of QFs is also eliminated.

- To prevent so-called PURPA Machines, new standards are to be established by FERC for “new” cogeneration QFs requiring the thermal and electric output to be used fundamentally for industrial, commercial or institutional purposes, and not fundamentally for sale to electric utilities.

- **Section 3. Generic FERC Rulemaking Proceedings**
- FERC rulemakings required by the EPA Act '05 include the following for which FERC has issued Notices of Proposed Rulemaking (“NOPR”):

– **Docket No. RM05-32** – Proposed regulations to implement the repeal of PUHCA of 1935 (SEC jurisdiction) and the enactment of PUHCA of 2005 (FERC jurisdiction); NOPR issued on September 16, 2005, to become effective 6 months after enactment of EPAct (Feb 8, 2006). FERC proposes elimination of its regulations regarding Exempt Wholesale Generators (“EWGs” under Section 32 of PUHCA of 1935).

## RM05-32 (cont)

- Grandfathers exemption from the “access to books and records” provisions of PUHCA of 2005 for entities that are holding companies solely as a result of owning QFs and existing EWGs. FERC indicates in this NOPR that its access under Section 301 of Federal Power Act to books and records of entities with market-based rate tariffs on file at FERC is broader than the books and records provisions of PUHCA of 2005, so there is no reason to continue authorizing new EWGs solely to exempt their holding companies from the books and records provisions of PUHCA of 2005.

- **Docket No. RM05-34** – Proposed regulations to implement FERC’s merger policy under Section 203 of the FPA after EAct’05; NOPR issued on October 3, 2005, to become effective when new Section 203 of the FPA becomes 6 months after enactment of EAct (Feb 8, 2006). FERC’s proposed regulations would require FERC approval under Section 203 prior to any purchase, lease or other acquisition of an existing generation facility with a value in excess of \$10 million that is used for interstate wholesale sales and which FERC has jurisdiction over for ratemaking purposes.

- **Docket No. RM05-36** – Proposed regulations to implement the modifications of PURPA, including elimination of electric utility ownership restrictions for QFs, elimination of mandatory obligations of electric utilities to purchase power from QFs, and new standards for cogeneration facilities that are QFs; NOPR issued on October 11, 2005, to become effective 6 months after enactment of EPAct (Feb 8, 2006).

## RM05-36 (cont)

- Most significantly for renewable energy generators, FERC proposes elimination of QF's current exemption from Sections 205 and 206 (rate regulation) of the FPA for all QFs not selling power pursuant to a "state regulatory authority avoided-cost regime."

## RM05-36 (cont)

- This will require all QFs, not exempt as provided above, to file a market-based rate tariff at FERC, pursuant to which such QFs will make wholesale sales of energy, and will presumably subject such QFs to quarterly reporting obligations, market monitoring, must-run and mitigation measures imposed on public utilities selling power under market-based rate tariffs.

## RM05-36 (cont)

- Note that Small Power Producer QFs with an output greater than 30 MW that are not geothermal power producers, such as wind-energy facilities above 30 MW, are already subject to Section 205 of FERC.
- FERC has also said in this NOPR that it is willing to consider granting an exemption from Sections 205 and 206 for small QFs, perhaps 5 MW and smaller.