

Comments Received

42. Registered holding company commenters uniformly argue that registered holding companies, regulated by the SEC under the Public Utility Holding Company Act of 1935 (PUHCA), should be exempted from the proposed rule.¹⁴ They argue that their cash management activities are already regulated by the SEC, that efforts by FERC to regulate the same would be burdensome and duplicative, that the PUHCA itself protects against cash management abuse, and that Section 318 of the Federal Power Act (FPA) deprives FERC of the authority to regulate their cash management practices.¹⁵ Ameren suggests that the Commission deem registered holding companies in compliance with the proposed rule so long as the companies comply with all applicable PUHCA rules and SEC orders. Furthermore, several commenters, including Cinergy, point out that the regulation of cash management programs falls squarely within the technical expertise of the SEC.

43. Similarly, USG Pipelines,¹⁶ Cinergy and others argue that the rule should not apply to small regulated entities and urge the Commission expressly to exempt these entities. The NRECA asks that the rule not be applied to cash management programs maintained by FERC-regulated electric cooperatives.

44. Energy marketers and traders argue that ratepayers would not be adversely affected by mismanagement of their cash management programs, and, therefore, they should be exempted from the proposed rule.¹⁷ PSEG suggests expanding the exemption from the Uniform System of Accounts to include generators and suggests that energy marketers, traders and generators be allowed to apply for waivers by demonstrating that they are not subject to the Commission's cost-based rate regulation, similar to the Commission's

waiver of its part 35 cost of service filing requirements.

Commission Response

45. The Commission agrees with comments submitted by registered holding companies and their affiliates asserting that the SEC regulates their cash management activities. The Commission is not, in this interim rule, prescribing any limitations on the entry into and participation in cash management programs. The Commission is, however, prescribing documentation requirements that will apply to FERC-regulated entities that are subject to the SEC's oversight. In carrying out its oversight, the SEC has not promulgated regulations governing the documentation to be maintained for cash management activities. The SEC's case-by-case documentation requirements do not provide assurance that documentation adequate for this Commission's regulatory oversight will be maintained. Therefore, we shall require that FERC-regulated entities that are also subject to the PUHCA follow the documentation requirements that we are adopting in our Uniform Systems of Accounts. Section 318 of the FPA does not prohibit the imposition of these requirements because there is no conflict between the documentation requirements the Commission is adopting here and those used by the SEC.

46. The eligibility concerns of NRECA and others representing "small regulated entities" are moot since the Commission is not adopting the proposed prerequisites for participation in cash management programs. Small regulated entities and NRECA members are subject to our Uniform Systems of Accounts and thus will be subject to the documentation requirements that we are adopting in this interim rule.

47. Energy marketers, traders, generators and other FERC-regulated entities that have been granted waivers of our accounting and the FERC Annual Report Forms 1, 1-F, 2, 2-A or 6 reporting requirements will not be subject to the documentation requirements included in this interim rule.

E. Legal Authority to Prescribe Prerequisites

48. Several commenters¹⁸ argue that FERC lacks the authority under the

Natural Gas Act (NGA),¹⁹ the FPA, as well as the Interstate Commerce Act (ICA)²⁰ to impose any prerequisites for the use of cash management accounts. Other commenters argue that the regulation of cash management participation is beyond the jurisdiction of the Commission. Others state that the proper way to protect customers and redress cash management issues is through rate cases.²¹ Duke Energy in particular argues that the Commission's authority under its ratemaking powers and its related investigatory powers offers ample protection to ratepayers without the need for the more restrictive measures proposed in the NOPR.

49. These commenters' arguments about our authority to prescribe prerequisites to cash management programs are made moot by the Commission's decision in this interim rule to forego such prerequisites. The interim rule revises the Uniform Systems of Accounts for public utilities and licensees, natural gas companies, and oil pipeline companies pursuant to the authority granted the Commission under the FPA, the NGA, and the ICA to prescribe uniform accounting requirements for entities subject to the Commission's jurisdiction.²²

F. Requests for Policy Statement

50. EEI, INGAA, AOPL and other commenters²³ suggest that the Commission issue a policy statement concerning cash management programs rather than a rule.

51. Because a policy statement does not have the force of law, a policy statement in lieu of a rule would not provide the assurance or transparency of a rule on documentation requirements and, therefore, would not adequately protect ratepayers. The Commission

¹⁹ 15 U.S.C. 717.

²⁰ 49 App. U.S.C. 1-85 (1988).

²¹ E.g., Kinder Morgan, NiSource. These commenters argue that the Commission can prevent harm to consumers by disallowing the passthrough of costs related to improper cash management practices to customers, when the regulated entity files a rate case to recover such costs. However, the Commission observes that rate cases are infrequent for many FERC-regulated entities, and the harm done by improper cash management practices may occur long before a rate case is filed.

²² Section 301(a) of the Federal Power Act (FPA), 16 U.S.C. 825(a), section 8 of the Natural Gas Act (NGA), 15 U.S.C. 717g and section 20 of the Interstate Commerce Act (ICA), 49 App. U.S.C. 20 (1988), authorize the Commission to prescribe rules and regulations concerning accounts, records and memoranda as necessary or appropriate for the purpose of administering the FPA, NGA, and the ICA. The Commission may prescribe a system of accounts for FERC-regulated companies and, after notice and opportunity for hearing, may determine the accounts in which particular outlays and receipts will be entered, charged or credited.

²³ See e.g. Gulf South, Duke Energy, and Kinder Morgan.

¹⁴ Registered holding company commenters included: American Electric Power Company, Inc. (AEP), Allegheny, Ameren, Cinergy, FirstEnergy, KeySpan, National Fuel, National Grid, NiSource, Northeast Utilities (NU), SCANA, and WGL Holdings, Inc. (WGL Holdings).

¹⁵ 16 U.S.C. 792.

¹⁶ USG Pipeline Co., B-R Pipeline Co. and United States Gypsum Co. (collectively USG Pipelines).

¹⁷ Ontario Energy Trading International, Electric Power Supply Association, Edison Mission Energy, and Edison Mission Marketing and Trading, Inc. The concern is that entities with market-based rate authority may lose their exemption from the requirements of the Uniform System of Accounts, at which time they would become subject to the Commission's cash management requirements.

¹⁸ Among the commenters are Duke Energy, INGAA (comments supported by El Paso, National Fuel, and Williston Basin Interstate Pipeline Co.), EEI (comments supported by AEP), AOPL (comments supported by Chevron), and the Kinder Morgan Pipelines (Kinder Morgan).