

Thus, EEI asserts, there is “no reason to create redundant requirements for registered holding company systems.” EEI makes the same policy and legal arguments against the reporting requirements proposed in the Interim Rule.

28. FirstEnergy, while not requesting rehearing, reiterates many of EEI’s comments. FirstEnergy also points out that the documentation the Interim Rule requires companies to maintain is different from the documentation that the SEC requires companies to maintain under PUHCA. Additionally, FirstEnergy echoes EEI’s argument that the SEC has the sole and exclusive jurisdiction over the regulation of cash management programs. Finally, in regard to the proposed notification and filing requirements, FirstEnergy argues that “in our view, there is no critical need for utilities to file this information with the Commission” and that “such information could then be made available to the Commission in connection with an audit or other Commission proceeding.”

Commission Response:

29. The Commission finds that to better ensure that rates for jurisdictional services are just and reasonable, it must examine the financial structure of the entities it regulates. As the Commission stated in the Interim Rule, regulated entities routinely place large quantities of funds (over \$25 billion, at last count) into cash management accounts. As recent market events have shown, financial troubles may afflict both PUHCA and non-PUHCA companies. A highly leveraged company, with the accompanying fixed interest expense and future obligation to repay the principal, may be in a weakened financial position if there is an unfavorable change in the business climate. This event may result in an inadequate flow of cash which may have an adverse impact on the FERC-regulated entity’s ability to remain solvent. As a result, it is vital to the Commission’s statutory mission that it has on hand the necessary information to understand how regulated entities are accounting for their assets.

30. Section 318 of the FPA governs conflicts between the Commission’s and the SEC’s regulations.²¹

²¹ In the *Arcadia* case, *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) (*Arcadia*), cited by both FirstEnergy and EEI, the Supreme Court declined to address the issue of whether Section 318 prohibits all Commission regulation of a subject matter regulated by the SEC or “only such regulation as actually imposes a conflicting requirement.” *Arcadia*, 498 U.S. at 77. Instead, the Court held that the Commission’s actions at issue did not relate to one of the four subject matters laid out in Section 318 and concluded, therefore, that

31. FirstEnergy and EEI mistakenly seem to believe that the Commission’s requirements are in conflict with the requirements of the SEC, and are therefore barred by FPA Section 318. The Final Rule does not dictate the content of or terms for participating in a cash management program. And nothing in the regulations the Commission is adopting is incompatible with existing SEC requirements.

32. While the SEC sometimes requires the filing of cash management agreements and notification of changes in a holding company’s capital equity, there is nothing that prevents a registered holding company from making one filing with the SEC and its subsidiary making another filing with FERC. Therefore, there is no conflict, and Section 318 does not bar the proposed regulations.

C. Applicability of the Rule to Utilities Regulated by State PUCs

33. The Interim Rule did not specifically address application of the rule to companies whose cash management programs are regulated by State Public Utility Commissions (PUCs).

Comments Received:

34. EEI and Duke Energy suggest that the Interim Rule should not apply to a public utility or licensee whose participation in cash management arrangements or whose securities and debts are regulated by the utility commission of the State in which the public utility or licensee is organized and operating. The commenters argue that those companies are subject to oversight similar to the oversight the Commission is imposing here. Second, EEI suggests that Section 204(f) of the FPA excludes such State-regulated public utility activities from further Commission regulation.²² If a State utility commission already regulates a utility’s participation in a cash management arrangement, or regulates

there was no conflict between the actions of the Commission and the actions of the SEC. The complete chronology of the *Arcadia* case is as follows: *Ohio Power Co.*, 39 FERC 61,098 (1987), *reh’g denied*, 43 FERC 61,046 (1988), *vacated sub nom. Ohio Power v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989), *reh’g denied*, 897 F.2d 540 (D.C. Cir. 1989), *order on cert. Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990), *order on remand sub nom. Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992), *cert. denied sub nom. Arcadia v. Ohio Power Co.*, 506 U.S. 981 (1992).

²² 16 U.S.C. 824c(f). Section 204 of the FPA reads as follows:

“The provisions of this Section [204 dealing with Commission regulation of public utility securities and liabilities] shall not apply to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.”

the utility’s securities and debt, EEI asserts that the Commission should defer to the state commission’s regulation of those activities and not also apply the documentation and reporting requirements of the Final Rule to the utility.

35. National Grid, PacifiCorp, Edison, and others urge the Commission to avoid imposing cash management program requirements that either conflict with or inappropriately duplicate requirements of state commissions that may have existing regulatory oversight. PacifiCorp, for instance, states that it already receives regulatory permission for its cash management operations from six states and is loath to modify those agreements since any modification would require it to seek regulatory approval from each of those states, as well as the SEC. Both PacifiCorp and National Grid companies seek clarification that the new cash management rules pertain only to proper documentation, reporting, and notification, and not modification of their cash management programs. Edison believes that the proposed reporting requirements are unduly burdensome, considering that Edison is already regulated by both the California Public Utilities Commission (CPUC) and the SEC with respect to affiliate transactions. According to Edison, CPUC’s rules and regulations already require it to comply with voluminous documentation and other requirements concerning its relationship with its affiliates.

Commission Response:

36. The Commission’s Final Rule does not conflict with any requirement of any State PUC. The Final Rule does not require entities to alter their cash management agreements, nor will the Commission alter them after they are filed. Further, as mentioned earlier, the FPA gives the Commission broad authority to collect the information it needs to administer the FPA, NGA and ICA. The documentation and reporting requirements all fall within this broad grant of power.

37. EEI and Duke Energy’s concern over Section 204(f)’s limitation on the Commission’s authority over the issuance of securities regulated by a state commission is misplaced. Section 204 does not apply because the Commission is not regulating the issuance of any security by means of this Final Rule. Therefore, in response to EEI’s concerns, none of the Final Rule’s requirements regulates a public utility’s ability to “issue any security, or assume any obligation or liability.”

38. In response to other complaints about duplication of effort, the