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April 9, 2001

Honorable Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Proposed Rules and Forms Relating to
Foreign Utility Companies

Dear Secretary Katz:

Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden, Arps") submits these comments in response to the Securities and Exchange Commission's ("Commission") reissued proposed rules 55 and 56, and an amendment to rule 87 (collectively, "Proposed Rules"), relating to foreign utility companies ("FUCOs") under the Public Utility Holding Company Act of 1935 ("PUHCA" or "Act"). Holding Co. Act Release No. 27342 (Feb. 7, 2001). Skadden, Arps represents numerous foreign and domestic companies that either are or hold interests in FUCOs. In the course of advising and representing its clients, Skadden, Arps has had the opportunity to reflect on numerous fundamental issues concerning the regulatory treatment of FUCOs and the policies that should inform that treatment. We believe the Proposed Rules, on balance, present a reasonable approach to FUCO investments that allows the Commission to fulfill its mission under the Act to protect U.S. investors and consumers in light of the growing internationalization of the utility industry. While we have a number of specific comments on the Proposed Rules, our primary concern is with certain policy issues involving FUCOs that recur in numerous contexts. The Commission specifically requested comment on such matters in Part VII of its proposing release, and a significant portion of our remarks respond to that request.

Our primary concern thus is the allowable scope of FUCO operations. In brief, by making section 11(b) of the Act inapplicable to FUCOs, section 33 removed not only system integration as a criterion for evaluating allowable FUCO operations, it also necessarily expanded the scope of other businesses, as that term is understood under section 11(b), that are compatible with FUCO status. A FUCO is, of course, a gas or an

electric utility, but it is a utility that has developed without the constraints imposed by the Act and thus frequently has engaged in diverse business activities that are consistent with local laws and business. To force FUCOs to conform to the Act's standards for jurisdictional utilities would severely inhibit the investments that section 33 is intended to promote. As explained below, appropriate FUCO diversification should be understood in local terms, with the Commission focusing on issues such as general financial risk and affiliate transactions potentially detrimental to U.S. consumers.

I. Section 33 and Investment Diversification

Section 33 of the Act makes a fundamental departure from previous policy on the regulation of public utility holding companies. Section 33(c)(3) states:

> Any interest in the business of 1 or more foreign utility companies, or 1 or more companies organized exclusively to own, directly or indirectly, the securities or other interest in a foreign utility company, shall for all purposes of this Act, be considered to be—
>
> > (A) consistent with the operation of a single integrated public utility system, within the meaning of section 11; and
> >
> > (B) reasonably incidental, or economically necessary or appropriate, to the operations of an integrated public utility system, within the meaning of section 11.

Prior to the passage of section 33, the Act represented a consistent expression of a single basic policy judgment, i.e., that investment diversification by utility holding companies must be limited by the requirements of utility operations conducted in the public interest. President Roosevelt stated the proposition as follows in a message to Congress:

> We do not seek to prevent the legitimate diversification of investment in operating utility companies by legitimate investment companies. But the holding company in the past has confused the function of control and management with that of investment and in consequence has more frequently than not failed in both functions. *Report of the National Power Policy Committee*, H.R. Exec. Doc. No. 137 at 2 (March 12, 1935) (Statement of President Roosevelt).

Holding company operations had to be limited to undertakings "absolutely necessary to the continued functioning of a geographically integrated operating utility system." The basic premise that supported this argument was the assumption that utility operations were "essentially local" in character and that control of those operations should be returned to the affected localities. Id. at 3.

Section 33 departs from this premise fundamentally. Its primary purpose is to "allow the United States to compete globally in the utility area," which is a

component of a broader policy underlying the Energy Policy Act of 1992 that seeks "to promote greater competition for the benefit of energy customers." 138 Cong. Rec. S17,625 (daily ed. Oct. 8, 1992) (statement of Sen. Riegel). Section 33 requires the Commission to continue its traditional task under the Act of protecting investors and consumers. But it implicitly also requires the Commission to do this from a purely financial perspective without regard to principles of system integration, which, with very limited exceptions, cannot apply to international investments. Section 33(c)(1) calls on the Commission to promulgate rules concerning FUCO investments that would protect consumers and provide for "the maintenance of the financial integrity of [a] registered holding company system." Under these circumstances, the Commission must rely solely on generic financial risk mitigation devices.

II. Risk Mitigation Issues Under the Proposed Rules

We agree with the Commission that case-by-case review of FUCO acquisitions as a means of controlling investment risk would seriously undercut the purposes of section 33. Such review would saddle the Commission with substantial new burdens, and in passing on individual cases the Commission could find itself reviewing business judgments to a degree that would be unprecedented under the Act and contrary to the intent of Congress when it amended the Act to permit investments in FUCOs by registered holding companies. Proposed rule 55 avoids these problems by leaving risk assessment where it has traditionally resided, with management, and providing for Commission review when specific evidence of enhanced risk appears. The rule does this by (i) establishing certain investment limitations, (ii) requiring investment review procedures, and (iii) creating specific indicia of financial difficulty that trigger a need for further Commission review of FUCO investments. We believe that the Commission should refine its investment review requirements to clarify that they are essentially procedural rather than substantive. As currently drafted, rule 55(b) specifies that a registered holding company may not invest in a FUCO unless (a) it has adopted a set of FUCO investment procedures and (2) the company's board of directors reviews the investment and adopts a resolution approving the investment based on specific findings relating to risk mitigation.

The Commission notes that it recognizes the difficulty of developing uniform standards to address investment risks and that risks must be analyzed in light of specific circumstances. It strongly suggests that it is seeking to have risks analyzed thoroughly and systematically by companies investing in FUCOs, but not in accordance with a specific set of principles. Moreover, numerous Commission orders authorizing companies to invest in excess of 50 percent of consolidated retained earnings in exempt wholesale generators and FUCOs follow this pattern by authorizing companies to establish internal review committees to analyze investment risk and make recommendations to senior management. See e.g., Exelon Corp., Holding Co. Act Release No. 27266 (Nov. 2, 2000). It is our experience that no energy company, regardless of its regulatory status and regardless of the location of an acquisition target, makes a significant acquisition without extensive due diligence, including a detailed assessment of risk factors. Indeed, most companies would have fiduciary obligations

under relevant corporate laws to perform such inquiries. Moreover, each company acquisition is unique with its own set of risks depending upon the type of businesses and nature of the companies involved. Due to the uniqueness of individual situations and the many types of risk factors implicated, risk factor assessments do not lend themselves to the development of uniform standards.

We believe that proposed rule 55(a) should be revised to clarify that the procedures in question are internal review procedures devised to assure that all relevant risk factors have been considered thoroughly. We also believe that any procedures adopted should be identified and conform with existing corporate practice as permitted under relevant corporation laws. This would mean, in particular, that a company's board of directors should be able to satisfy its obligations under the rule through delegation of certain of its review responsibilities to a special committee appointed by the board. Moreover, it is often not a practicable or efficient use of corporate resources to require board approval for each individual FUCO acquisition, and the specialization that delegation encourages promotes the development of expert judgment without a loss of accountability. It also should be noted that the Commission approved board delegation of investment review in the Exelon order cited above.

The laws of foreign jurisdictions will generally contain rules on corporate governance that provide procedures for investment review and approval that are analogous to the procedures authorized by U.S. state corporation laws. These statutes, however, may not provide precisely the same institutional arrangements as state corporation laws, and foreign registered holding companies should be in a position to use the appropriate local alternatives. Foreign business practices also may be such that the Commission's desired result would be achieved by means other than those commonly found in U.S. corporations. We have provided revised language for rule 55 dealing with this issue.

III. Proposed Amendment to Rule 87

Although the Commission expresses general satisfaction with its current procedures for regulating affiliate transactions involving FUCOs or exempt wholesale generators ("EWGs"), it has, nonetheless, proposed an amendment to rule 87 under the Act that would require Commission approval of all intrasystem agreements involving EWGs and FUCOs. The Commission has taken this step in deference to the state regulators and consumer groups that previously suggested that the Commission establish "clear pricing standards" for affiliate transactions that would protect ratepayers.

We submit that Commission approval of intrasystem agreements involving transactions between nonutilities is not appropriate or necessary. Approval would be appropriate for transactions between a FUCO (or EWG) and a U.S. utility. The Commission should be concerned with intrasystem agreements only when the interests of U.S. captive customers are involved. The Federal Energy Regulatory Commission has taken a similar approach with regard to affiliate transactions. See Ameren Energy Generating Company, 93 FERC ¶ 61,204 (2000).

The Commission's rules as proposed would mean that transactions between an EWG and a FUCO, or between either of these and a non-utility energy-related company that is an associate of a registered holding company would require Commission approval. This casts far too broad a net, and should the Commission choose to amend rule 87, it should limit any exclusion from rule 87 to transactions in which one party is a public utility company subsidiary of a registered holding company.

IV. EWG Investment Limitation

The Commission should consider altering its safe-harbor investment limitation for EWGs to account for important development in the domestic electric utility industry. In many instances legislative or regulatory initiatives require a company to unbundle its electric generation operations from its transmission and distribution operations. In other cases, changing market conditions caused by increasing competition have led companies to exit either the generation or the transmission and distribution business and concentrate on the sector where management believes the greatest opportunities exist. If a registered holding company is required by law to divest generation assets, it should not be hampered by an investment limitation from transferring those assets to its own newly-formed EWGs. We believe that the Commission should exempt such situations entirely from any safe-harbor investment limitation for EWGs. In addition, we believe that the increase in divestiture of generation assets generally both presents registered holding companies with significant new opportunities and creates a need for new financing that the public interest requires be met. The Commission thus should consider raising the safe-harbor level for investments in domestic EWGs generally and should eliminate the investment limitation when a company is required to divest generating assets as a result of law or order.

V. Diversification of FUCO Investments

The Commission also requested comment on "the advisability of possible limitations upon the ability of a holding company to qualify its foreign businesses as a FUCO." We submit a careful reading of section 33 does not support the adoption of such limitations but rather supports a broad conception of allowable FUCO operations.

While section 32 requires exempt wholesale generators to be engaged "exclusively" in wholesale electric generation operations, section 33 contains no analogous exclusivity requirements. Section 33(a)(3) defines a FUCO as a company that owns or operates foreign electric utility or retail gas utility facilities. By its terms, section 33(a)(3) requires that a FUCO's utility operations be exclusively foreign, but it neither explicitly nor implicitly requires that its foreign operations be exclusively utility operations under the Act. We do not believe that implying an exclusivity requirement with respect to FUCOs is justified either as a matter of statutory interpretation or policy.[1]

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[1] Given the Commission's focus on broad policy issues in this proceeding, an excursus into technical matters of textual meaning and canons of interpretation is unwarranted

When Congress established in section 33(c)(3) that FUCOs owned by registered holding companies would satisfy the requirements of section 11(b)(1), it in effect did two things. First it said in section 33(c)(3)(A) that that ownership of a FUCO would be deemed to be consistent with the operation of a single integrated public utility system under section 11(b)(1). This is, however, not so much a policy choice as it is a necessary precondition for a policy choice. If a FUCO had to satisfy the Act's system integration requirements, there would be no FUCOs other than ones in contiguous foreign countries, and the Act already authorized such acquisitions prior to the promulgation of section 33(c)(3)(A). The central and essential policy choice came in section 33(c)(3)(B), where Congress said that FUCOs would satisfy the requirement of section 11(b)(1) that a registered holding company's "other businesses" be "reasonably incidental, or economically necessary or appropriate to the operation of an integrated public-utility system." In other words, the fundamental proposition underlying section 33(c) is that FUCO investments are consistent with the Act's diversification restrictions.

In addition to the statutory argument discussed above, there are policy reasons supporting the adoption of a broad conception of allowable FUCO operations. The investment review procedures proposed in this rulemaking mitigate any potential risks of diversification. In light of these procedures, limitations upon the ability of a holding company to qualify its foreign businesses is unnecessary. In addition, the financial risks FUCO diversification may present have already been accounted for in the price for which a company can be acquired. Any prudent acquiring company will analyze those risks carefully, and there is no reason to presume that imposing the Act's standards on an acquiring company will change the risk balance. On the contrary, it is more likely that forcing divestiture of operations that do not meet standards the Commission applies to domestic investments would reduce the value of a foreign company and make it a more risky investment by upsetting its business plan and removing relationships that in a foreign context have proven functionally appropriate.

The Commission thus should not begin with a presumption that the concept of functional relationships applicable to domestic utilities under the Act can apply to FUCO investments. Congress effectively invalidated this presumption when it passed section 33(c)(3). As a result, the Act requires the Commission to focus on financial risk that foreign investments may create for U.S. consumers. Foreign

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here. Nevertheless, certain basic principles are worth noting. The Supreme Court has found that "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Russelo v. United States, 464 U.S. 16, 23 (1983), citing United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972). The disparate inclusion of the exclusivity requirement in section 32 of the Act and its exclusion in section 33 thus creates a presumption that the difference is purposeful, and we believe that the broader policy matters discussed in the text of our comments sustains this presumption.

investments should not be evaluated from the perspective of their effects on foreign consumers but only in terms of their financial viability.

Moreover, utility operations in foreign countries, of course, have developed within their own historical circumstances and under their own regulatory regimes. To apply the U.S. concept of diversification would frustrate the purpose of the creation of the FUCO exemption under the Energy Policy Act of 1992 to promote greater competition for the benefit of energy customers.

Finally, the Commission's concern with diversification should be limited to any potential impact on U.S. consumers. We believe that structural separation of the U.S. utility from FUCO operations protects U.S. consumers and further supports the proposition that diversification limits are unnecessary. Structural separation of U.S. utility from FUCO operations through use of intermediate holding company structures provides a means of preventing cross subsidization of U.S. and foreign operations to the detriment of U.S. consumers. It allows financial arrangements to be segregated which facilitates effective monitoring of potential risks and implementing of prohibitions on transactions deemed to present unacceptable risks. Moreover, structural separation allows U.S. regulatory authorities, in particular state utility commissions, to prevent cross subsidization of foreign operations by U.S. consumers. Financial difficulties experienced by foreign operations potentially could affect the cost of capital for the top holding company, but state commissions are in a position to prevent those costs from being borne by U.S. consumers.

Should the Commission, nevertheless determine, that some limits on the investment diversification by FUCOs are necessary, the Commission should apply a more liberal version of the functional relationship test. For example, the Commission should allow FUCO ownership of other types of utility companies, such as water companies, as well as other broadly defined energy-related investments.

The Act's focus on electric and gas utility operations can obscure the presence of water, telecommunications, and certain transportation functions as traditional utility operations. The Act's framers, however, took a broader view, and early Commission practice affirmed that fact to a remarkable degree. This is particularly true with respect to water utility operations. The legislative history of section 11(b)(1) shows that a good deal of the Commission's authority with respect to "other businesses" under this section was intended to benefit the retention of water properties. As originally proposed, this section required limiting operations of a registered holding company to a single integrated public utility system and:

> Such business as is reasonably incidental, or economically necessary or appropriate, to the operations of such system; the Commission may permit as reasonably incidental or economically necessary or appropriate to the operations of such system the retention of an interest in any business (other than the business of a public utility company as such) in which such registered holding

> company or such subsidiary company thereof is engaged or has an interest if the Commission finds (1) that such business is affected with the public interest and its rates or charges are regulated by law, and that the retention of such interest in such business is not detrimental to the proper functioning of a single geographically and economically integrated public utility system, or (2) [certain state or state university agricultural and horticultural properties used for experimental or developmental purposes].

Senator Minton stated during the course of debate on the floor of the Senate that he had proposed this language with American Water Works Corporation in mind.[2] That company owned extensive water utility properties as well as electric and gas facilities that subsequently became jurisdictional under the Act, and Senator Minton intended his amendment to allow retention of those properties.

Section 11 subsequently became the focus of intense Congressional debate over the so-called death sentence for extended complex holding company systems. In the course of negotiations between the House and Senate, the principle underlying the Minton amendment became a vehicle for achieving compromise through a process of generalization.[3] It ultimately emerged as the final sentence of section 11(b), which provides that:

> The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

The Commission has acted consistently with this Congressional intent in administering the Act. For example, in ruling on American Water Works's system simplification plan under section 11(e), the Commission ruled that the company could retain its substantial water properties, which at the time represented approximately 30 percent of the holding company system's total operations. The Commission noted that:

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[2] Congressional Record, Senate, June 7, 1935, p. 8849. The provision concerning agricultural and horticultural properties had been tailored by Senator [Hiram] Johnson to address potential loss of support to agricultural research facilities of the University of California that had received support in some form from an entity that would be classed as a utility under the statute as proposed.

[3] See the comments of Representative Rayburn at Congressional Record, August 22, 1935 at 14164.

> The directly-owned water companies have been a substantial and stable source of revenue to applicant, and many of the problems of management of water companies are closely related to those that arise in connection with the management of gas and electric utilities. American Water Works and Electric Co., Inc., Holding Co. Act. Release No. 35-949 (Dec. 30, 1937)

The company ultimately chose to divest its water properties, but for reasons unrelated to the regulatory status of water properties.[4]

An examination of utility operations internationally shows a similar close connection between gas, electric, and water utilities. Water service has been viewed commonly as a natural monopoly, *see*, Mary M. Shirley, *Reforming Urban Water Systems: A Tale of Four Cities, in Regulatory Policy in Latin America*, 148 (2000), and numerous instances exist internationally where water utilities have been associated historically with other utility operations. No policy that underlies the Act is promoted by requiring divestiture of such properties, and if a FUCO has historically operated water properties successfully, it is evidence that continued operation, as well as future acquisition of similar businesses, does not represent an inappropriate risk for U.S. investors and consumers.

Because FUCO's have evolved without being subject to the Act's constraints on diversification, it is only natural that they frequently include operations that at first glance appear to fall outside what the Act would allow under traditional diversification restrictions. However, the Commission should view the functional relationships between these operations and a company's utility operations in light of the business and regulatory context in which they arose and the business plans that led to diversification. Once again, the critical issue for the Commission is not how the diversification affects foreign utility customers, but simply what its implications may be for the financial integrity of the company to be acquired by a U.S. holding company. The Commission should defer to the judgments of foreign regulators with respect to the impact diversification has on foreign utility customers.

Thus if diversified operations viewed in their local context, rather than through the lens of the Act, complement a FUCO's electric or gas utility business, they can provide financial strength and thus reduce the risks of foreign investments relevant to U.S. consumers. For example, the operation of water utility properties frequently involves collateral activities that can provide financial benefits to the company as a whole. Examples include waste treatment, environmental cleanup, and certain chemical operations.

Utility operations also may involve companies in energy exploration and production that is broader in scope than the Commission would view as retainable by a

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[4] See American Water Works and Electric Co., Inc., Holding Co. Act Release No. 7091 (Dec. 23, 1946).

domestic registered holding company. Other activities that can be a normal outgrowth of utility operations include general construction, civil engineering, and similar infrastructure activities. No fixed principles can define the scope of activities that can complement FUCO operations financially, but to the degree that non-utility businesses can be shown to supply financial benefits to the company as a whole, they should be retainable without threatening the interests the Commission is charged with protecting. It should be emphasized that a new FUCO's existing non-utility businesses were necessarily developed or acquired without risk to U.S. consumers, and the risks associated with a FUCO's acquisition by a domestic holding company would be addressed adequately through the procedures proposed here.

VI. FUCO Investments Involving Entities Owned or Controlled by Foreign Governments

The Commission also has asked for comment on U.S. utility acquisitions by FUCOs owned or controlled by foreign sovereign states. Such acquisitions raise issues under the Act that probably cannot be resolved on the basis of a formal rule. For example, the Act's requirements with respect to access to books and records raise unique issues when the ultimate owner of a FUCO is a foreign government. Nevertheless, it should be possible on a case-by-case basis to reach an accommodation in such instances where sufficient access for the Commission's purposes could be assured. We thus urge the Commission in such circumstances to seek through individual negotiations to establish working relationships with FUCO's owned by foreign sovereigns that will allow mutually beneficial transactions and without compromising the basic policies the Commission is charged with implementing. For example, it should be possible in many instances to negotiate a limited right to access to books and records so as to allow disclosure related to the investment in the holding company and the U.S. public utility that will permit the Commission to protect the interests of U.S. consumers without impinging on the prerogatives of a foreign sovereign.

Respectfully submitted,

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Appendix A

Proposed Revised FUCO Rules

PART 250--GENERAL RULES AND REGULATIONS, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

1. The authority citation for part 250 is revised to read as follows:

Authority: 15 U.S.C. 79c, 79f(b), 79i(c)(3), 79t, 79z-5a and 79z-5b unless otherwise noted.

2. Sections 250.55 and 250.56 are added to read as follows:

§ 250.55 Acquisitions of foreign utility companies.

(a) FUCO investments. A registered holding company may not, directly or indirectly, acquire the securities of, or any interest in, a foreign utility company ("FUCO Investment") unless the following conditions are satisfied:

(1) The board of directors, or in the case of a foreign corporation a body having the responsibilities and powers commonly exercised by a board of directors, of the registered holding company has adopted procedures ("FUCO Investment Procedures") designed to analyze the risks of investing in foreign jurisdictions, including, for example, operational risks, construction risks, commercial risks, management risks, political risks, legal risks, financing risks and foreign currency risks.

(2) The board of directors, or a body in a foreign corporation having the responsibilities and powers of a board of directors, has reviewed, and adopted, or such directors or officers to whom such responsibility has been delegated pursuant to applicable state or foreign law has reviewed and adopted, a resolution approving, the FUCO Investment based upon, among other things, findings that:

(i) The FUCO Investment Procedures have been complied with;

(ii) Measures have been, or will be, taken to mitigate the risks that the FUCO Investment presents to the holding-company system; and

(iii) The FUCO Investment and any related financing have been structured so that ratepayers of the system's public-utility companies are adequately insulated from any adverse effects of the FUCO Investment.

(3) No more than two percent of the employees of the system's domestic public- utility companies render services, at any one time, directly or indirectly, to exempt wholesale generators or foreign utility companies in which the registered holding company, directly or indirectly, holds an interest; provided, that the Commission has previously approved the rendering of such services.

(4) If paragraph (b) of this section is applicable, the registered holding company has obtained an order from the Commission approving the FUCO Investment.

(b) Commission approval of certain investments.

(1) A registered holding company may not make FUCO Investments except pursuant to an order granted by the Commission if any of the following events has occurred: (i) The registered holding company, or any subsidiary company having assets with book value exceeding an amount equal to 10% or more of consolidated retained earnings ("Significant Subsidiary"), has been the subject of a bankruptcy or similar proceeding, unless a plan of reorganization has been confirmed in such proceeding;

(ii) The registered holding company system's average consolidated retained earnings for the four most recent quarterly periods, as reported on the holding company's Form 10-K or 10-Q (§ 249.308a or § 249.310 of this chapter) filed under the Securities Exchange Act of 1934 (15 U.S.C. 78a-78) as amended, have decreased by 10% from the average for the previous four quarterly periods and the aggregate investment in exempt wholesale generators and foreign utility companies exceeds two percent of the registered holding company system's total capital invested in utility operations. This restriction will cease to apply once consolidated retained earnings have returned to their pre- loss level;

(iii) In its previous fiscal year, the registered holding company reported operating losses attributable to its direct or indirect investments in exempt wholesale generators and foreign utility companies, and such losses exceed an amount equal to 5% of consolidated retained earnings;

(iv) If, during the three fiscal years preceding the acquisition, the holding company has reported, in response to Item 9 of Form U5S (§ 259.5s of this chapter) increases for retail customers have been obtained in order to recover losses or inadequate returns on FUCO Investments;

(v) Any Significant Subsidiary of the holding company that is a public-utility company has a rating from a nationally recognized statistical rating organization with respect to its debt securities that is less than investment grade; or

(vi) The registered holding company's investment in FUCOs and EWGs exceeds 50% of consolidated retained earnings or such greater amount as may be authorized by the Commission by order under § 250.53(c). *9262

(2) An applicant that is required to obtain Commission approval of FUCO Investments must affirmatively demonstrate that the investments:

(i) Will not have a substantial adverse impact upon the financial integrity of the registered holding company system; and

(ii) Will not have an adverse impact on any utility subsidiary of the registered holdingcompany, or its customers, or on the ability of State commissions to protect the subsidiary or its customers.

(c) Books and records. A registered holding company that makes a FUCO Investment must maintain, and cause its subsidiaries to maintain, the books and records required by § 250.53 in the manner prescribed by § 250.53. The registered holding company will provide the Commission or its representatives with access to these books and records in the United States, at such place as the Commission may reasonably request. The books and records must be maintained for the periods set forth in Part 257 of this title, as appropriate.

(d) Form U-57 and other filings. A registered holding company that makes a FUCO Investment must, within ten business days of making the FUCO Investment, file a statement on Form U-57 (§ 259.207 of this chapter) with the Commission. The company must also simultaneously submit complete copies of the following, including exhibits, to every federal, state or local regulator having jurisdiction over the rates of any system public-utility company:

(1) The Form U-57 filed by the registered holding company in connection with the FUCO Investment;

(2) Any Forms U-1 (§ 259.101 of this chapter) and certificates under § 250.24 filed by the registered holding company in connection with the issuance of securities for purposes of financing the FUCO Investment, the entering into of service, sales or construction contracts, or the creation or maintenance of any other relationship with the foreign utility company and the registered holding company, its affiliates or associate companies; and

(3) A copy of Item 9 of Form U5S (§ 259.5s of this chapter) and Exhibits G and H to that Form.

§ 250.56 Status of subsidiary companies of registered holding companies formed to hold interests in foreign utility companies.

A subsidiary of a registered holding company which is engaged exclusively in the direct or indirect ownership of the securities, or an interest in the

business of, one or more foreign utility companies, shall be deemed to be a foreign utility company.

3. Section 250.87 is amended by adding paragraphs (d) and (e) to read as follows:

§ 250.87 Subsidiaries authorized to perform services or construction or to sell goods.

* * * * *

(d) This section shall not be applicable to the performance of services or construction for, or the sale of goods to, an associate company of a registered holding company if such associate company is an exempt wholesale generator or a foreign utility company. This section shall further not be applicable to the receipt by an associate company of a registered holding company of services or construction from, or the purchase of goods from, an associate company that is an exempt wholesale generator or a foreign utility company.

(e) Any application, or amendment thereto, filed directly or indirectly by a registered holding company seeking authority to render services or construction or to sell goods to an exempt wholesale generator or foreign utility company, or to receive services, construction or goods from an exempt wholesale generator or foreign utility company, must be simultaneously submitted to every State commission and to every federal or local governing body having jurisdiction over the retail rates of any affected public-utility company in the registered holding company system.

PART 259--FORMS PRESCRIBED UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

Subpart A--Forms for Registration and Annual Supplements

4. The authority citation for part 259 is revised to read as follows:

Authority: 15 U.S.C. 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q and 79t.

5. Item 9 of Form U5S (referenced in § 259.5s) is amended by adding paragraph (e) to read as follows:

Note: The text of Form U5S does not and the amendment will not appear in the Code of Federal Regulations.

Form U5S

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Annual Report

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Item 9. Wholesale Generators and Foreign Utility Companies

(e) State whether or not the holding company has sought recovery of losses or inadequate returns on any investment in a foreign utility company through higher rates to retail ratepayers.

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6. Section 259.207 and Form U-57 (referenced in § 259.57) are revised to read as follows:

§ 259.207. Form U-57, for notification of foreign utility company status pursuant to rule 57(a) (§ 250.57 of this chapter) and statement by registered holding company in connection with the acquisition of an interest in a foreign utility company pursuant to rule 55 (§ 250.55 of this chapter).

This form shall be filed pursuant to section 33(a)(3)(B) of the Act by a company claiming foreign utility company status. This form shall also be filed by a registered holding company acquiring any securities or other interest in the business of a foreign utility company. See § § 250.55 and 250.57 of this chapter.

---------- COMPARISON OF FOOTERS ----------

-FOOTER 1-
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A