



Selling Electricity to Data Centers or Any End User: Will FERC Regulate You?

What You Need to Know

Key takeaway #1

FERC approval to sell power may be necessary under the Federal Power Act (FPA); if so, you will become a FERC FPA-public utility.

Key takeaway #2

Public Utility Holding Company Act (PUHCA) public-utility company status may be triggered.

Key takeaway #3

Find out what FERC FPA or PUHCA regulation may apply to you and your corporate family.

Client Alert | 4 min read | 06.23.25

You want to own electric generation or energy storage facilities that are used to sell power to data centers or other end user parties (e.g., other types of industrial or commercial customers, institutional entities, traditional utilities, or RTO/ISO markets). Will Federal Energy Regulatory Commission (FERC) regulation apply to you?

- **FERC Generally.** A company that plans to own, operate, or control electric generation or energy storage facilities (including associated interconnection facilities) that are used to make power sales will need to consider what FERC regulations, if any, will apply under the Federal Power Act (FPA) and the Public Utility Holding Company Act of 2005 (PUHCA).
- **FPA “Public Utility” Generally.** An FPA “public utility” includes an entity that sells energy, capacity, and/or ancillary services at wholesale in interstate commerce, and/or owns or operates FERC-jurisdictional facilities (e.g., interconnection transmission facilities, wholesale power sale tariffs, or contracts). Retail electricity sales are not subject to FERC’s FPA rate regulation.
- Before making FERC jurisdictional wholesale power sales (e.g., selling power or generating test power from its facilities), a company must obtain prior FERC approval under Section 205 of the FPA by having a FERC-accepted tariff or rate schedule for such power sales unless an exception applies (e.g., companies

that own certain types of small renewable generation or cogeneration projects that are eligible for qualifying facility (QF) status under the Public Utility Regulatory Policies Act (PURPA), companies making wholesale power sales solely with the Electric Reliability Council of Texas (ERCOT) are not subject to FERC FPA rate regulation).

- A company may qualify for market-based rate authority under FPA Section 205 if it and its affiliates meet FERC criteria for such treatment (i.e., demonstrating lack of market power in the markets in which it will sell power) and related lightened regulation with respect to some rate and financial matters
- An FPA “public utility” is subject to ongoing FERC FPA rate, financial, and corporate regulation for various activities (e.g., power sales, debt or equity issuances, sales or acquisitions of certain assets, certain upstream ownership changes).
- **PUHCA Generally.** PUHCA is primarily a books and records access statute pursuant to which FERC imposes books and records access, retention, record-keeping, accounting, and reporting requirements, in certain circumstances, on PUHCA “holding companies” and their applicable related companies unless an exemption or waiver applies.
 - A PUHCA “holding company” is an entity that directly or indirectly owns, controls, or holds with power to vote 10% or more of the voting securities of a PUHCA “public-utility company.”
 - A PUHCA “public-utility company” includes an “electric utility company,” which is an entity that directly owns or controls facilities used for the generation, transmission, or distribution of electric energy for sale (retail or wholesale).
 - PUHCA “electric utility companies” include, for example, QF companies, exempt wholesale generators (EWGs), foreign utility companies (FUCOs), and non-traditional utilities that sell power at retail or wholesale.
 - Whether a PUHCA “holding company,” “electric utility company,” or its relevant related companies qualify for waivers or exemptions from PUHCA regulation is a case specific analysis which depends on the types of PUHCA utilities in its corporate family.

Applying these utility rules to your plans can be complex. Depending on your facts, you could be both an FPA “public utility” and a PUHCA “electric utility company” or just a PUHCA “electric utility company.” Here are but a few examples of how the statutes (under FERC’s current precedent) would apply to a company that owns or controls generation or battery storage facilities (a GenCo) and its power sale arrangements involve providing power to a data center or other type of end use customer (an End User):

- A GenCo will not be an FPA public utility but will be a PUHCA electric utility company if it sells all of its output solely at retail to an End User.
- A GenCo will be an FPA public utility and a PUHCA electric utility company if makes retail sales to an End User and also sells excess power at wholesale into a FERC-regulated RTO or ISO market.

- A GenCo that sells power at wholesale to a third-party (e.g. a power marketer) who then resells it to an End User will be a PUHCA electric utility company and an FPA public utility (unless the GenCo is located within ERCOT, Alaska, Hawaii, or a U.S. territory so that its wholesale power sale is not subject to FPA-rate regulation).

(There is a pending FERC proceeding (FERC Docket EL25-49-000, *et al.*,) on potential changes to PJM's transmission tariff regarding interconnection of co-located generation and large loads (like data centers) which also sought comments on FERC's current interpretation of its jurisdiction over co-location arrangements. The outcome in that proceeding on FERC's co-location jurisdiction could affect the analysis of a generator's FPA or PUHCA utility status when its plans involve an end user load co-location arrangement.)

Crowell can (i) guide you on navigating the FERC rules that may apply to your planned generation and power sale activities; (ii) assist with structuring ownership or investments in electric assets or electric industry activities to comply with, mitigate, or avoid FERC regulation; and (iii) help with obtaining approvals applicable to your operations to comply with FERC's rules.

Contacts

Laura Szabo

Counsel

She/Her/Hers

New York D | +1.212.895.4271

lszabo@crowell.com

Deborah A. Carpentier

Senior Counsel

She/Her/Hers

Washington, D.C. D | +1.202.624.2857

dcarpentier@crowell.com

Tyler A. O'Connor

Partner

Washington, D.C. D | +1 202.624.2704

toconnor@crowell.com