

109 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

(Docket No. RM04-14-000)

Reporting Requirement for Changes in Status
For Public Utilities With Market-Based Rate Authority

(Issued October 6, 2004)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission), acting pursuant to section 206 of the Federal Power Act (FPA),¹ is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates. In particular, the Commission proposes to amend its regulations to establish guidelines concerning the types of events that trigger this reporting obligation and to modify the market-based rate authority of current market-based rate sellers to ensure that all such events are timely reported to the Commission by eliminating the option to delay reporting of such events until submission of a market-based rate seller's updated market power analysis. We propose that this reporting requirement be incorporated into the market-based rate tariff of each entity that is currently authorized to make sales at market-based

¹ 16 U.S.C. § 824e (2000).

rates, as well as that of all future applicants. The Commission seeks public comment on its proposal.

DATES: Comments are due **[insert date 30 days after publication in the FEDERAL REGISTER]**.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street N.E., Washington, DC, 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Reporting Requirement for Changes in Status
For Public Utilities With Market-Based Rate
Authority

Docket No. RM04-14-000

NOTICE OF PROPOSED RULEMAKING

(Issued October 6, 2004)

Introduction

1. In order to facilitate our oversight of public utilities with market-based rate authority, to ensure that the rates being charged continue to be just and reasonable and to give guidance to market participants to facilitate compliance with the Commission's reporting requirements, this Notice of Proposed Rulemaking proposes to standardize and clarify market-based rate sellers' reporting requirement for changes in status. In previous orders authorizing wholesale power sales in interstate commerce at market-based rates, the Commission has required market-based rate sellers to inform the Commission of any change in status that would reflect a departure from the characteristics the Commission relied upon in authorizing sales at market-based rates. Some sellers were given the option of filing a new market analysis every three years in lieu of reporting changes in status on an ongoing basis. Others were given the option to report such changes every three years in conjunction with an updated market analysis. With respect to the events

that qualify as a change in status, the Commission has stated that they include, but are not limited to: (1) ownership of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production or affiliation with any entity that has a franchised service area.

2. We propose to impose uniform standards on all market-based rate sellers by eliminating the option to delay reporting changes in status until submission of the triennial review, or to file a triennial review in lieu of reporting changes in status as they occur. To that end, acting pursuant to section 206 of the FPA, we propose to amend our regulations and to modify the market-based rate authority of current market-based rate sellers to include the requirement to timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. We propose that this reporting requirement be incorporated into the market-based rate tariff of each entity that is currently authorized to make sales at market-based rates, as well as that of all future applicants. We propose that notice of such changes in status be filed no later than 30 days after the change in status occurs. As discussed below, we seek public comment on our proposal.

Background

3. The Commission has a statutory duty under the FPA to ensure that rates charged by public utilities authorized to make wholesale sales in interstate commerce at market-

based rates are just and reasonable.² The Commission uses a four-part test to determine whether to grant a public utility market-based rate authority. That test examines whether the applicant or its affiliates possess the potential to exercise market power by considering generation market power, transmission market power, barriers to entry, and the potential for affiliate abuse or reciprocal dealing. Sellers authorized to make sales at market-based rates are then required to file electric quarterly reports containing a summary of the contractual terms and conditions in every effective service agreement for market-based power sales and transaction information for their market-based rate sales during the most recent calendar quarter.³

4. The Commission has also required that market-based rate sellers report any changes in status that would reflect a departure from the characteristics the Commission relied upon in its existing grant of market-based rate authority. When the Commission first granted market-based rate authorizations, it required traditional utilities that satisfied the Commission's initial market power review to file an updated market power analysis every three years to allow the Commission to monitor competitive conditions and to determine whether the applicants still satisfied our market power concerns.⁴ Power

² 16 U.S.C. § 824d(a) (2000).

³ Revised Public Utility Filing Requirements, Order No. 2001, 67 FR 31043 (May 8, 2002), III FERC Stats. & Regs. ¶ 31,127 (Apr. 25, 2002). The required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001.

⁴ See, e.g., Entergy Services, Inc., 58 FERC ¶ 61,234 (1992); Louisville Gas & Electric, 62 FERC ¶ 61,016 (1993).

marketers, on the other hand, were required to promptly notify the Commission of changes in status.⁵ Subsequently, the Commission has allowed market-based-rate sellers to choose between promptly reporting changes in status, filing a three-year update in lieu of reporting changes in status as they occurred,⁶ or reporting such changes in conjunction with the updated market analysis.⁷ The Commission reserved the right to require such an analysis at any time. The Commission proposes to continue to reserve this right.

5. To carry out its statutory duty under the FPA to ensure that market-based rates are just and reasonable, the Commission must rely on market-based rate sellers to provide accurate, up-to-date information regarding any relevant changes in status, such as ownership or control of jurisdictional facilities and affiliate relationships. In contrast to when the Commission first began to authorize market-based rate sales, wholesale markets now have many more sellers of different types (e.g., independent power producers, power marketers, affiliated generators). As markets have expanded and developed, both the number and types of sellers have increased and the complexity of wholesale markets has increased. Furthermore, market structure is rapidly evolving due to restructuring, corporate realignments and new types of contractual and subcontracting arrangements, in

⁵ See, e.g., *Citizens Power & Light Corporation*, 48 FERC ¶ 61,210 (1989); *Enron Power Marketing*, 65 FERC ¶ 61,305 (1993); *InterCoast Power Marketing Co.*, 68 FERC ¶ 61,248 (1994).

⁶ See, e.g., *Morgan Stanley Capital Group, Inc.*, 69 FERC ¶ 61,175 (1994).

⁷ See, e.g., *AEP Power Marketing, Inc.*, 76 FERC ¶ 61,307 at 62,516 (1996); *Montaup Electric Co.*, 85 FERC ¶ 61,313 at 62,232 (1998); *Sithe/Independence Power Partners*, 101 FERC ¶ 61,210 at 61,907 (2002).

which utilities increasingly grant other firms control and/or influence over managing various aspects of their business such as power marketing. In light of these structural changes, the Commission has concluded that more timely reporting of changes in status is necessary.

6. We believe that, in today's electric industry, granting market-based rate sellers the option to delay reporting changes in status by up to three years does not provide the Commission with sufficient information to provide effective oversight of electricity markets.

7. Therefore, the Commission proposes to eliminate the option to delay reporting changes in status until the next triennial review, or to file a triennial review in lieu of promptly reporting changes in status, and to standardize the change in status reporting requirement. Accordingly, the proposed regulations would require that, as a condition of obtaining and retaining market-based rate authority, all sellers will be required to timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.

8. With respect to the types of events that should trigger the reporting obligation, the Commission proposes that, as an initial matter, the following events would qualify as changes in status: (1) ownership or control of generation or transmission facilities or inputs to electric power production; or (2) affiliation with any entity not disclosed in the

filing that owns or controls generation or transmission facilities or inputs to electric power production or affiliation with any entity that has a franchised service area.⁸

9. Although the market-based rate change in status provision has not specifically referenced “control” of assets, we have historically considered control of an asset to be a factor on which we rely in granting market-based rate authority. In order to eliminate any market uncertainty, we propose that the regulations specifically reference “control” as well as ownership as a factor relied upon by the Commission. In the Commission’s early orders granting market-based rate authority, we acknowledged that sellers may exercise market power through contractual arrangements granting them control of generation or transmission facilities just as effectively as they could through ownership.⁹ Similarly, the Commission’s guidelines for the assessment of mergers and its generation market power analysis for market-based rate authority provide that, for the purposes of the market power analysis, the capacity associated with contracts that confer operational control of a given facility to an entity other than the owner must be assigned to the entity exercising

⁸ The Commission’s regulations define “affiliated companies” as “companies or persons that directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, the [subject] company.” 18 CFR 101 (2004). *See also* 18 CFR § 161.2 (2004); Morgan Stanley Capital Group, *et al.*, 72 FERC ¶ 61,082 (1995).

⁹ *See, e.g.*, Citizens Power & Light Corp., 48 FERC ¶ 61,210 (1989). In this order, we stated that: “[u]sually, the source of market power is dominant or exclusive *ownership* of the facilities. However, market power also may be gained without ownership. Contracts can confer the same rights of control. Entities with contractual control over transmission facilities can withhold supply and extract monopoly prices just as effectively as those who control facilities through ownership.”

control over that facility, rather than to the entity that is the legal owner of the facility.¹⁰

In addition, with respect to notifications of changes in status, the Commission has found that an entity controls the facilities of another when it controls the decision-making authority over sales of electric energy, including discretion as to how, when and to whom it could sell power generated by these facilities.¹¹

10. The Commission's general practice has been to require notifications of changes in status when the market-based rate applicant obtained ownership of new inputs to electric power production, other than fuel supplies. However, since the Commission is interested in being informed of significant acquisition of ownership or control of any inputs to electric power production, we propose to require a reporting obligation to this effect. The Commission seeks comments on this proposal.

11. We recognize that the language in the proposed regulations may be susceptible to different interpretations among market-based rate sellers concerning the scope of their reporting requirement. Accordingly, we seek public comment as to whether and how this

¹⁰ See *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 at P 95 (2004), *order on reh'g*, 108 FERC ¶ 61,026 at P 65 (2004); Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also* Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 at note 39 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

¹¹ *El Paso Electric Power Co., et al.*, 108 FERC ¶ 61,071 at P 14 (2004), *reh'g pending*.

language should be modified to ensure that the types of changes in status that could impact the continued basis of a grant of market-based rate authority are identified and timely reported to the Commission.

12. For example, should there be a threshold level of increases in generation (such as generation addition through acquisition, , self-build, long-term power purchases, repowering) that would trigger the reporting requirement? If so, what amount of increase in generation should trigger the reporting requirement?

13. Should the applicant have a reporting requirement if portions of the applicant's transmission system are taken out of service for a significant period of time (thus potentially affecting the scope of the relevant geographic market)? If so, what criteria should trigger this reporting requirement?

14. Beyond ownership or control of generation or transmission facilities or inputs to electric power production and affiliation with any entity not disclosed in the filing that owns or controls generation or transmission facilities or inputs to electric power production or affiliation with any entity that has a franchised service area, we seek comment as to whether there are other arrangements, contractual or otherwise, that should be promptly reported to the Commission. For example:

- What types of arrangements, contractual or otherwise, do market-based rate sellers enter into that could cause a need for the Commission to revisit the continuing basis of the grant of market-based rate authority for such sellers?
- What threshold of materiality, if any, of such arrangements should be met before such arrangements need be reported to the Commission?

- Should marketing alliances, brokering arrangements, tolling agreements or other sales-oriented arrangements be reported?

15. With respect to the form and content of such reports, we propose that the market-based rate seller be required to submit a transmittal letter including a description of the change in status and a narrative explaining whether (and, if so, how) this change in status reflects a departure from the characteristics relied upon by the Commission in originally granting the seller market-based rate authority, in particular whether the change in status affects the results of any of the prongs of the four-part test that the Commission uses to determine whether a public utility qualifies for market-based rate authority (i.e. generation market power, transmission market power, barriers to entry, affiliate abuse/reciprocal dealing). If the market-based rate seller believes that a change in status does not affect the continuing basis of the Commission's grant of market-based rate authority, it should clearly state the reasons on which it bases this conclusion.

16. In addition to including this reporting requirement in the Commission's regulations, we propose that this reporting requirement be incorporated into the market-based rate tariff of each entity that is currently authorized to make sales at market-based rates, as well as that of all future applicants. Market-based rate sellers would be required to submit a conforming provision to their market-based rate tariffs at the time that they file any amendment to their tariffs or (if earlier) when they apply for continued authorization to sell at market-based rates (e.g., in their three-year updated market power analysis). However, the Commission proposes that the obligation to report be effective at the time that the Final Rule becomes effective.

17. With respect to the procedures for reporting notifications of changes in status, the proposed rule requires that such notifications be filed no later than 30 days after the occurrence of the triggering event. We seek comment as to whether this proposed time period is appropriate.

Information Collection Statement

18. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.¹² Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

19. Estimated Annual Burden

To satisfy the reporting requirement, the Commission expects respondents to submit a transmittal letter including a description of the change in status and a narrative explaining whether (and, if so, how) this change in status reflects a departure from the characteristics relied upon by the Commission in originally granting the seller market-based rate authority. The Commission estimates that, on average, it will take respondents six hours per response and that approximately 25 percent of current market-based rate sellers would experience a change in status in any given year.

¹² 5 CFR § 1320.11 (2004).

Data Collection	Number of Respondents	Number of Hours	Number of Responses	Total Annual Hours
FERC-516	1,238	6	.20	1,486

Title: Electric Rate Schedules and Filings, Reporting Requirement for Changes in Status For Public Utilities With Market-Based Rate Authority (FERC-516)

Action: Proposed Collection

OMB Control No. 1902-0096

Respondents: Businesses or other for profit.

Frequency of Responses: On occasion.

Necessity of Information: The proposed regulations will revise market-based rate sellers' reporting obligation and are intended to ensure that rates and terms of service offered by market-based rate sellers remain just and reasonable.

Internal review: The Commission has reviewed the proposed amendment to its regulations to establish a reporting obligation for changes in status and has determined that these regulations are necessary to ensure just and reasonable rates. These regulations, moreover, conform to the Commission's plan for efficient information collection, communication, and management within the electric utility industry. The Commission has assured itself, by means of internal review, that there is specific,

objective support for the burden estimates associated with the information/data retention requirements.

20. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, Attention: Michael Miller, Office of the Executive Director, phone: (202) 502-8415, fax: (202) 273-0873, e-mail: michael.miller@ferc.gov. Comments on the proposed requirements of the subject rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395-4650.

Environmental Analysis

21. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.¹³ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.¹⁴ This proposed

¹³ Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (Dec. 10, 1987).

¹⁴ 18 CFR § 380.4(a)(2)(ii) (2004).

rule, if finalized, is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be necessary.

Regulatory Flexibility Act Certification

22. The Regulatory Flexibility Act of 1980 (RFA)¹⁵ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.¹⁶ The Commission is not required to make such analyses if a rule would not have such an effect.

23. The Commission does not believe that the proposed amendment to our regulations would have such an impact on small entities. Based on past experience, most of the sellers having changes in status that would likely trigger a filing under the proposed regulations would be entities that do not meet the RFA's definition of a small entity. Therefore, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Comment Procedures

24. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative

¹⁵ 5 U.S.C. § 601-612 (2000).

¹⁶ The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (Section 22, Utilities, North American Industry Classification System, NAICS) (2004).

proposals that commenters may wish to discuss. Comments are due **[insert date 30 days after publication in the FEDERAL REGISTER]**. Comments must refer to Docket No. RM04-14-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

25. Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street N.E., Washington, D.C. 20426.

26. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

Document Availability

27. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

28. From FERC's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

29. User assistance is available for eLibrary and the FERC's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

List of subjects in 18 C.F.R. Part 35

Electric power, Reporting and recordkeeping requirements.

By direction of the Commission.

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 35, Chapter I, Title 18 of the Code of Federal Regulations, as set forth below:

PART 35 - - FILING OF RATE SCHEDULES AND TARIFFS

1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

2. In § 35.27, paragraph (c) is added to read as follows:

§ 35.27 Power sales at market-based rates.

* * * * *

(c) Reporting requirement. Any public utility with the authority to engage in sales for resale of electric energy in interstate commerce at market-based rates shall be subject to the following:

(1) As a condition of obtaining and retaining market-based rate authority, a public utility with market-based rate authority must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to each of the following:

(i) Ownership or control of generation or transmission facilities or inputs to electric power production, or

(ii) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production or affiliation with any entity that has a franchised service area.

(2) Any change in status subject to paragraph (c)(1) of this section must be filed no later than 30 days after the change in status occurs.