

131 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM10-20-000]

Market-Based Rate Affiliate Restrictions

(April 15, 2010)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) proposes to amend its regulations to revise its regulations governing market-based rates for public utilities pursuant to section 205 of the Federal Power Act (FPA). The Commission proposes to clarify that employees that determine the timing of scheduled outages, or that engage in economic dispatch, fuel procurement, or resource planning may not be shared under the market-based rate affiliate restrictions codified in Order No. 697.

DATES: Comments are due [Insert_date that is 60 days after publication in the **FEDERAL REGISTER**].

ADDRESSES: You may submit comments, identified by docket number by any of the following methods:

- Agency Web Site: <http://www.ferc.gov>. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.

- Mail/Hand Delivery: Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.

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SUPPLEMENTARY INFORMATION:

131 FERC ¶ 61.033
UNITED STATES OF AMERICA
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Docket No. RM10-20-000

NOTICE OF PROPOSED RULEMAKING

(April 15, 2010)

I. Introduction

1. In this order, the Federal Energy Regulatory Commission (Commission) is proposing to revise § 35.39 of its regulations promulgated in Order No. 697¹ in order to reflect the clarification provided in an order to be issued concurrently with this order in response to the Compliance Working Group's² concerns regarding compliance with the

¹ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (Order No. 697), clarified, 121 FERC ¶ 61,260 (2007), order on reh'g, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, clarified, 124 FERC ¶ 61,055, order on reh'g, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), order on reh'g, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), order on reh'g, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

² The Compliance Working Group states that it consists of 27 energy companies, which include integrated electric businesses, merchant generators, marketing and trading businesses, and natural gas distributors, and explains that the group was formed in mid-2008 "to develop a model [Commission] compliance program guide." Compliance Working Group Request for Clarification, Docket No. RM04-7-007, at 2 (filed Mar. 9, 2009); Compliance Working Group Amended Request for Clarification, Docket No. RM04-7-007, at 3 (filed Oct. 28, 2009). The members of the Compliance Working Group taking part in its request for clarification are: Allegheny Energy, Inc., American Electric Power Company, Inc., Cleco Corporation, Consumers Energy Company,

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market-based rate affiliate restrictions codified in Order No. 697.³ Specifically, the Commission is proposing to revise the separation of functions and information sharing provisions of those affiliate restrictions to explicitly state that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not be shared under the Commission's market-based rate affiliate restrictions adopted in Order No. 697.

II. Background

2. In Order No. 697, the Commission adopted affiliate restrictions that govern the relationship between franchised public utilities with captive customers and their "market-regulated" affiliates, i.e., affiliates whose power sales are regulated in whole or in part on a market-based rate basis. These market-based rate affiliate restrictions govern the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering. The Commission requires that, as a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless explicitly permitted by Commission rule or order. Failure to satisfy the conditions

Dominion Resources, Inc., Duke Energy Corporation, Edison International, El Paso Electric Company, Energy East Corp., Entergy Corporation, Exelon Corporation, FirstEnergy Corp., FPL Group, Inc., Pacific Gas and Electric Co., Progress Energy, Inc., Public Service Enterprise Group Incorporated, and Westar Energy, Inc.

³ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities, 131 FERC ¶ 61,021 (2010) (April 15 Clarification Order).

set forth in these affiliate restrictions constitutes a violation of the market-based rate tariff.⁴

3. On March 9, 2009, the Compliance Working Group submitted a request for clarification in the Commission's market-based rate rulemaking proceeding regarding which employees can be shared for purposes of compliance with the Commission's market-based rate affiliate restrictions. On October 28, 2009, the Compliance Working Group submitted an amended request for clarification. In response to the Compliance Working Group's request, the Commission is providing clarification regarding which employees may not be shared under these affiliate restrictions.⁵ In this Notice of Proposed Rulemaking (NOPR), we propose to revise the text of the separation of functions and information sharing provisions of the affiliate restrictions contained in § 35.39 of the Commission's regulations in order to reflect the clarification provided in response to the Compliance Working Group's request.

III. Discussion

4. Under the separation of functions requirement in the market-based rate affiliate restrictions, employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised

⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549-550.

⁵ April 15 Clarification Order, 131 FERC ¶ 61,021.

utilities with captive customers.⁶ Order No. 697 exempts certain categories of employees from this separation of functions requirement. Employees in these categories are permitted to be shared, and Order No. 697 gives examples of permissibly “shared employees” that are drawn from Order No. 2004, which established the Standards of Conduct rules that were in effect at the time that Order No. 697 was issued.⁷ In particular, the market-based rate affiliate restrictions provide that “Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing,

⁶ 18 CFR 35.39(c)(2)(i).

⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 561-566 (citing Standards of Conduct for Transmission Providers, Order No. 2004, FERC Stats. & Regs. ¶ 31,155, at P 96, 99-101, 145-146 (2003), order on reh’g, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, at P 134, order on reh’g, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, order on reh’g, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), order on reh’g, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006); see id. P 562 (citing 18 CFR 358.4(a)(5) (Order 2004-era Standards of Conduct)).

organizing or executing generation or market functions.”⁸ Moreover, under the information sharing restriction, “[a] franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public.” However, “[p]ermissibly shared support employees, field and maintenance employees and senior officers and board of directors under § 35.39(c)(2)(ii) may have access to information covered by the prohibition of § 35.39(d)(1), subject to the no-conduit provision in § 35.39(g).”⁹

5. In its request for clarification, the Compliance Working Group asked the Commission to clarify which employees are permissibly “shared employees” for purposes of the Commission’s market-based rate affiliate restrictions. Specifically, it suggests that the Commission should interpret these affiliate restrictions to permit sharing of employees who are neither “transmission function employees” nor “marketing function employees” under the Standards of Conduct.¹⁰ The Compliance Working Group

⁸ 18 CFR 35.39(c)(2)(ii); see also Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 562.

⁹ 18 CFR 35.39(d).

¹⁰ Standards of Conduct for Transmission Providers, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008) (Standards of Conduct Final Rule), order on reh’g, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, order on reh’g, Order No. 717-B, 129 FERC ¶ 61,123 (2009). As discussed below, “transmission function employees” and

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stated that the issue arose because shared employees under the market-based rate affiliate restrictions are defined by reference to shared employees under the Order No. 2004-era Standards of Conduct, but as of the effective date of the Standards of Conduct Final Rule, November 26, 2008, the Standards of Conduct no longer use the concept of shared employees. The Compliance Working Group therefore claimed that this inconsistency poses a compliance conundrum that needs to be addressed in order to enable companies and their employees to understand, and comply with, the market-based rate affiliate restrictions.

6. As explained in the April 15 Clarification Order, we are denying the Compliance Working Group's request that the Commission interpret the market-based rate affiliate restrictions to permit the sharing of employees who are neither transmission function employees nor marketing function employees under the Standards of Conduct. However, in order to address the Compliance Working Group's concerns regarding compliance with the market-based rate affiliate restrictions, the April 15 Clarification Order provides guidance regarding which employees may not be shared under the affiliate restrictions.¹¹

“marketing function employees” are defined terms under the Standards of Conduct. See 18 CFR 358.3(d); 358.3(i).

¹¹ April 15 Clarification Order, 131 FERC ¶ 61,021 at P 39-42.

7. Specifically, in the April 15 Clarification Order the Commission denies the Compliance Working Group's request that it interpret the market-based rate affiliate restrictions to permit the sharing of employees who are neither transmission function employees nor marketing function employees under the Standards of Conduct because the Standards of Conduct definition of "marketing function employee" does not include certain employees who may not be shared under the market-based rate affiliate restrictions (for instance, employees that make economic dispatch decisions or that determine the timing of scheduled outages). Thus, the Commission explains that granting the Compliance Working Group's requested interpretation would permit market-based rate sellers to share employees that may not currently be shared under the affiliate restrictions.

8. The April 15 Clarification Order explains that "marketing function employee" is not a defined term in the market-based rate regulations adopted in Order No. 697, and explains that the restrictions on which employees may be shared under the market-based rate affiliate restrictions are not limited to those employees who are engaged in sales. It states that as clarified in Order No. 697-A, under the market-based rate affiliate restrictions, "shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and

may not determine the timing of scheduled outages for facilities.”¹² In this regard, the April 15 Clarification Order explains that responsibility for economic dispatch or the timing of scheduled outages, for example, is not a “marketing function” under the Standards of Conduct and, therefore, engaging in these activities would not cause an employee to be a marketing function employee subject to the Independent Functioning Rule under the Standards of Conduct (and therefore, those employees could be shared). Thus, consistent with the Commission’s determinations in Order No. 697-A, the April 15 Clarification Order clarifies that, for purposes of compliance with the market-based rate affiliate restrictions, a franchised public utility with captive customers and its market-regulated power sales affiliates may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.¹³

9. In addition, as explained in the April 15 Clarification Order, franchised public utilities with captive customers should be prohibited from sharing employees that engage in resource planning or fuel procurement with their market-regulated power sales affiliates. If the franchised public utility and its market-regulated power sales affiliate are permitted to share employees that make strategic decisions about future generation

¹² April 15 Clarification Order 131 FERC ¶ 61,021 at P 37 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253).

¹³ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

supply, such as deciding when and/or where to build or acquire generating capacity, such strategic decision making by a shared employee could result in generation being built or acquired for the benefit of the market-regulated power sales affiliate, and at the expense of the captive customers of the franchised public utility. In this regard, the Commission notes that the corporate entity has an inherent incentive to decrease its market-regulated power sales affiliate's costs in order to maximize profits for shareholders.

10. Similarly, a shared employee that procures fuel for both the franchised public utility and the market-regulated power sales affiliate may have the incentive to allocate purchases of lower priced fuel supplies to the market regulated power sales affiliate while allocating purchases of higher priced fuel supplies to the franchised public utility. By contrast, if the two entities are required to independently procure fuel, they would compete for the market's best priced fuel.

11. Therefore, given that the definition of marketing function employee under the Standards of Conduct does not specifically address employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning, the April 15 Clarification Order clarifies that employees engaging in these

activities¹⁴ are prohibited from being shared under the market-based rate affiliate restrictions, absent an explicit waiver from the Commission.

12. In order to reflect this clarification, we propose to revise § 35.39 of our regulations in order to clarify that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not be shared under the market-based rate affiliate restrictions. Accordingly, we propose to revise the separation of functions provision contained in § 35.39(c)(2)(ii) of the regulations to include the provision that franchised public utilities with captive customers are prohibited from sharing employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning with their market-regulated power sales affiliates.

13. We also propose to revise the information sharing provision contained in § 35.39(d)(2) of the regulations to include the provision that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not have access to information covered by the prohibition of § 35.39(d)(1).

¹⁴ The prohibition on sharing employees that engage in resource planning applies only to the sharing of employees between a franchised public utility and its market-regulated power sales affiliate, and is not intended to alter resource planning activities by transmission providers that are permitted under the Standards of Conduct Final Rule.

IV. Information Collection Statement

14. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection and data retention requirements imposed by an agency.¹⁵ Order No. 697's revisions to the information collection requirements for market-based rate sellers were approved under FERC-919 "Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities" OMB Control Nos. 1902-0234. While this order proposes to revise the regulations for the market-based rate program in order to provide clarification, it does not add to the existing information collection requirements. Accordingly, a copy of this order will be sent to OMB for informational purposes only.

V. Environmental Analysis

15. 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.¹⁶ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human

¹⁵ 5 CFR 1320.11.

¹⁶ Regulations Implementing the National Environmental Policy Act of 1969, Order No. 486, FERC Stats. & Regs., Regulations Preambles July 1996 – December 2000 ¶ 30,783 (1987).

environment.¹⁷ The actions proposed here fall within the categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, or do not substantially change the effect of legislation or regulations being amended.¹⁸ In addition, the proposed rule is categorically excluded as an electric rate filing submitted by a public utility under sections 205 and 206 of the FPA.¹⁹ As explained above, this proposed rule revises the regulations for the market-based rate program in order to provide clarification. Accordingly, no environmental assessment is necessary and none has been prepared in this NOPR.

VI. Regulatory Flexibility Act Analysis

16. The Regulatory Flexibility Act of 1980 (RFA)²⁰ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. Most filing companies

¹⁷ 18 CFR 380.4.

¹⁸ See 18 CFR 380.4(a)(2)(ii).

¹⁹ 18 CFR 380.4(a)(15).

²⁰ 5 U.S.C. 601-12.

regulated by the Commission do not fall within the RFA's definition of small entity.²¹

Moreover, as noted above, this proposed rule revises the regulations for the market-based rate program in order to provide clarification of an existing requirement that affected entities, including small entities, are currently required to comply with. Because the proposed revisions clarify an existing requirement, and do not add to the existing information collection or filing requirements, the Commission concludes that the proposed rule will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required.

VII. Comment Procedures

17. 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 proposals that commenters may wish to discuss. Comments are due [Insert Date that is 60 days after publication in the **FEDERAL REGISTER**]. Comments must refer to Docket No. RM10-20-000, and must include the commenters' name, the organization they represent, if applicable, and their address in their comments.

18. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts

²¹ 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 632. Section 3 of the Small Business Act defines a "small-business concern" as a business which is independently owned and operated and which is not dominant in its field of operation.

most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

19. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission; 888 First Street, NE, Washington, DC 20426.

20. 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.

VIII. Document Availability

21. 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 the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

22. From the Commission's Home Page on the Internet, this information is available on 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.

23. User assistance is available for eLibrary and the Commission's web site during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or e-mail at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

List of subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By direction of the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend part 35, Chapter I, Title 18, Code of Federal Regulations, as follows:

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 § 35.39, paragraphs (c)(2)(ii) and (d)(2) are revised to read as follows:

§ 35.39 **Affiliate restrictions.**

* * * * *

(c) **Separation of functions.**

* * * * *

(ii) Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions. Franchised public utilities with captive customers are prohibited from sharing employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning with their market-regulated power sales affiliates.

* * * * *

(d) Information sharing.

* * * * *

(2) Permissibly shared support employees, field and maintenance employees and senior officers and board of directors under §§ 35.39(c)(2)(ii) may have access to information covered by the prohibition of § 35.39(d)(1), subject to the no-conduit provision in § 35.39(g). Employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not have access to information covered by the prohibition of § 35.39(d)(1).

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