

173 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 35.41(c), 284.288(a), and 284.403(a)

[Docket No. RM20-7-000]

Safe Harbor Policy for Data Providers to Price Index Developers

(December 17, 2020)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commission proposes to amend its regulations to codify the Safe Harbor Policy established in the Commission's *Policy Statement on Natural Gas and Electric Price Indices*. Under the Safe Harbor Policy, data providers that report transactions to natural gas and electric price index developers consistent with the procedures set forth in the *Policy Statement* are afforded a rebuttable presumption that their transaction data is accurate, timely, and submitted in good faith. The proposed change does not modify the existing policy and is intended to promote voluntary reporting of wholesale natural gas and electricity transactions to price index developers by alleviating market participant concerns that the Safe Harbor Policy is not binding on the Commission.

DATES: Comments are due **[INSERT DATE 90 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**

ADDRESSES: Comments, identified by Docket No. RM20-7-000, may be filed

electronically at <http://www.ferc.gov> in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426. Hand-delivered comments must be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The Comment Procedures Section of this document contains more detailed filing procedures.

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SUPPLEMENTARY INFORMATION:

173 FERC ¶ 61,238
UNITED STATES OF AMERICA
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Developers

Docket No. RM20-7-000

NOTICE OF PROPOSED RULEMAKING

(December 17, 2020)

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1. Under the Commission's regulations, a data provider (a market participant that reports transaction data to price index developers) must submit accurate and factual information to price index developers, and not knowingly submit false or misleading information or omit material information.¹ Pursuant to the Commission's Safe Harbor Policy, which is currently set forth in the Commission's *Policy Statement on Natural Gas and Electric Price Indices*,² if the data provider can demonstrate that it has adopted and followed the standards for reporting set forth in the Commission's *Policy Statement*, it will benefit from a rebuttable presumption that it has submitted its transactions accurately, timely, and in good faith. The Commission proposes to codify its Safe Harbor Policy in its regulations. The proposed change does not modify the existing policy and, together with the proposed *Revised Policy Statement* that the Commission is issuing concurrently, is intended to promote voluntary reporting of wholesale natural gas and electricity transactions to price index developers.³

2. To codify the Safe Harbor Policy, we specifically propose to amend 18 CFR 35.41(c), 284.288(a), and 284.403(a) of the Commission's regulations by adding

¹ This requirement is set forth in three regulations, 18 CFR 35.41(c), 284.288(a), and 284.403(a). Each sets forth the requirement in identical language.

² *Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121, at P 37 (*Initial Policy Statement*), clarified, 105 FERC ¶ 61,282 (2003) (*2003 Clarification Order*), further clarified, 112 FERC ¶ 61,040 (2005) (*2005 Clarification Order*) (collectively, *Policy Statement*).

³ See *Actions Regarding the Commission's Policy on Price Index Formation and Transparency, and Indices Referenced in Natural Gas and Electric Tariffs*, 173 FERC ¶ 61,237 (2020).

language to indicate: (1) that there will be a rebuttable presumption of accuracy, timeliness, and good faith for data providers who submit transactions to price index developers in a manner consistent with the *Policy Statement*; and (2) that inadvertent reporting errors by such data providers will not constitute violations of those regulations.

I. Background

3. Natural gas indices play a vital role in the energy industry, as they are used to price billions of dollars of natural gas and electricity transactions annually in both the physical and financial markets. A natural gas index is a weighted average price derived from a set of fixed-price⁴ natural gas transactions within distinct geographical boundaries that market participants voluntarily report to a price index developer.⁵

4. Natural gas indices serve as a proxy for the locational cost of natural gas in the daily and monthly markets, as many market participants reference index prices in their physical and financial transactions. Interstate natural gas pipelines, Independent System Operators (ISOs), and Regional Transmission Organizations (RTOs) reference natural gas indices in their FERC-jurisdictional tariffs for various terms and conditions of

⁴ The term “fixed-price” refers to a negotiated natural gas contract for next-day or next-month delivery, and physical basis transactions for next-month delivery. These transaction types are defined in the FERC Form No. 552: Annual Report of Natural Gas Transactions (FERC Form No. 552). The FERC Form No. 552 requires market participants that annually buy or sell more than 2.2 trillion British Thermal Units (Btu) of physical natural gas to provide aggregated data related to their fixed-price, physical basis, Nymex plus and index-based transactions made in the next-day and next-month (bidweek) markets.

⁵ S&P Global Platts (Platts), Natural Gas Intelligence (NGI), Argus, and Natural Gas Week are examples of price index developers.

service. State commissions also use natural gas indices as benchmarks when reviewing the prudence of natural gas or electricity purchases. Finally, many natural gas financial derivative contracts used in hedging and speculation settle against the natural gas price indices.

5. Given that natural gas price index developers use physical fixed-price natural gas transactions to calculate the price of published natural gas indices, it is important that the market for these transactions be robust, liquid, and transparent. The Commission's investigation into the 2000-2001 Western Energy Crisis revealed problems in how published natural gas price indices were generated that "facilitate[d], rather than discourage[d], manipulation and collusion."⁶ Recognizing the need to restore confidence in natural gas price indices, the Commission began an exhaustive analysis of these and related issues in the form of multiple staff white papers, two technical conferences, and a follow up staff workshop.

6. At the conclusion of these efforts, the Commission issued its *Policy Statement* "to explain what the Commission expects of natural gas and electric price indices and under what conditions the Commission will give industry participants safe harbor protection for good faith reporting of transaction data to entities that develop price indices."⁷ In particular, "the Commission [created] a rebuttable presumption that companies and

⁶ *Initial Report on Company-Specific Separate Proceedings and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies*, Docket No. PA02-2-000, at 38 (Aug. 13, 2002).

⁷ *Initial Policy Statement*, 104 FERC ¶ 61,121 at P 5.

individuals that report trade data to price index developers in accordance with the standards adopted here are doing so in good faith, and will not be investigated or subjected to administrative penalties for inadvertent mistakes made in the course of reporting energy transaction information.”⁸ Thus, the Commission adopted the Safe Harbor Policy for the explicit purpose of “encourag[ing] more industry participants to contribute to the formation of price indices.”⁹ Consistent with the *Policy Statement*, the Commission has not investigated or imposed penalties on any companies for inadvertent reporting errors.

7. After the *Policy Statement* was issued, the natural gas volumes market participants reported to price index developers increased, which resulted in greater confidence in those indices. However, after 2010, the estimated traded volume of fixed-price natural gas transactions reported to price index developers began to decline significantly.¹⁰ FERC Form No. 552 data show that the estimated volume of fixed-price transactions voluntarily reported to price index developers declined by approximately 54% from 2010 until 2019.¹¹ At the same time that fixed-price reporting to price index developers

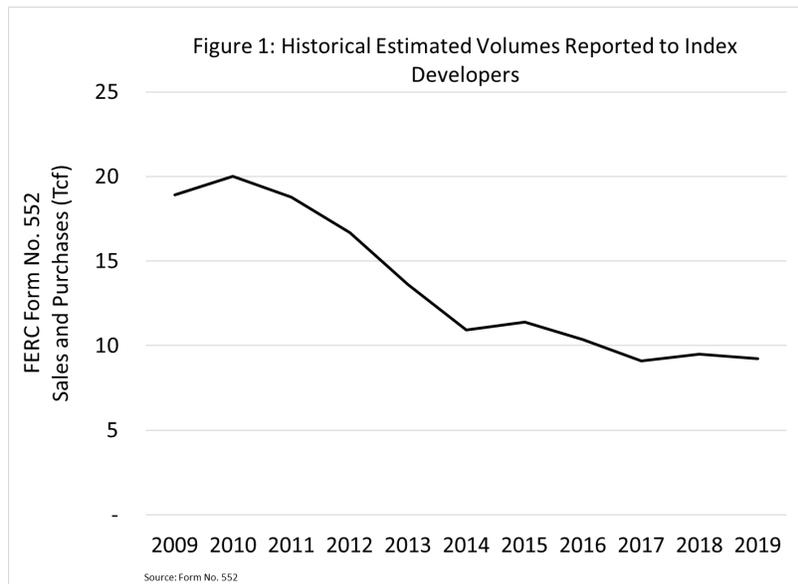
⁸ *Id.*

⁹ *Id.*

¹⁰ Two index developers now include fixed-price transactions from the InterContinental Exchange (ICE) to increase the liquidity of their indices. Staff analysis of the estimated volumes reported to index developers does not include that supplemental information from ICE.

¹¹ The Commission must estimate the volumes reported to price index developers on the FERC Form No. 552 because FERC Form No. 552 filers can provide aggregated

decreased, the traded volume of natural gas transactions that referenced natural gas indices, known as index gas, increased. For example, FERC Form No. 552 data showed that index gas increased from 69% of the traded volumes in the U.S. physical natural gas market in 2010 to 82% in 2019. Figure 1 shows the estimated physical natural gas volumes reported to index developers based on FERC Form No. 552 data.



8. Commission staff held a technical conference on June 29, 2017, which addressed index liquidity and transparency issues and potential actions the Commission could consider taking in order to increase both the volume of transactions reported to natural gas price index developers and the transparency of the physical natural gas price

data for themselves and their affiliates, some of whom may or may not report to index developers. Staff estimates this volume by calculating the average of the minimum volume reported (i.e., the total volume from filers with affiliates that all indicate that they report to price index developers) and the maximum possible volume reported (i.e., the total volume from filers with at least one affiliate that indicates that it reports to price index developers).

formation process.¹² In post technical conference comments, a number of commenters suggested that placing the Safe Harbor Policy into the Commission's regulations would help to provide regulatory certainty which in turn would lead to an increase in the number of data providers that would report their transactions to price index developers.¹³

II. Discussion

9. The Commission proposes to revise three sections of its regulations, 18 CFR 35.41(c), 284.288(a), and 284.403(a). Although each of the three sections applies to different jurisdictional entities, they set forth almost identical requirements. Section 35.41(c) applies to persons with or seeking authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act. Section 284.288(a) applies to interstate pipelines that offer transportation service under subparts B or G of part 284. Section 284.403(a) applies to sales for resale by persons that are not interstate pipelines. Each section currently requires that data providers reporting transactions to price index developers provide accurate, factual information, and not knowingly submit false or misleading information or omit material information.

¹² Docket No. AD17-12-000. A staff-led technical conference addressing similar issues was held in 2003 in Docket No. AD03-7-000.

¹³ AGA, Comments, Docket No. AD17-12-000, at 7 (filed July 31, 2017); Tenaska Comments, Docket No. AD17-12-000, at 5 (filed July 31, 2017).

Reporting must be performed consistent with the procedures set forth in the *Policy Statement*.¹⁴ The regulations do not incorporate the Safe Harbor Policy.

10. Currently, the Safe Harbor Policy is set forth in the *Policy Statement*, which advises the public about how the Commission intends to exercise its discretionary authority. The *Policy Statement*, however, is non-binding.¹⁵ Although the Commission has never pursued enforcement action against a market participant for inadvertent errors in reporting transactions to price index developers, concerns nonetheless remain among market participants that this potential exists.¹⁶

11. To alleviate these concerns and encourage voluntary reporting in order to promote more robust, liquid, and transparent indices, we propose to add identical language to 18 CFR 35.41(c), 284.288(a), and 284.403(a) to incorporate the Safe Harbor Policy into the regulatory text. This proposed language states that “[f]or a Seller who reports in a manner consistent with procedures set forth in the Policy Statement, there will be a rebuttable presumption that information submitted to publishers of electricity or natural gas indices is accurate, timely, and submitted in good faith.” The proposed revisions also state that “[i]nadvertent reporting errors by a Seller who reports in a manner consistent

¹⁴ 18 CFR 35.41(c), (Market behavior rules); see also 18 CFR 284.288(a) (Code of conduct for unbundled sales service) (identical language); 18 CFR 284.403(a) (Code of conduct for persons holding blanket marketing certificates) (identical language).

¹⁵ See, e.g., *Panhandle Eastern Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999).

¹⁶ See *Supra* P 8.

with the procedures set forth in the *Policy Statement* shall not constitute violations of this provision.” This action will eliminate any concerns that the Commission might choose to depart from the Safe Harbor Policy as set forth in the *Policy Statement*.

12. By incorporating the Safe Harbor Policy into the Commission’s regulations, the Commission will provide certainty to the regulated industry that, provided that the data provider reports in a manner consistent with the *Policy Statement*, inadvertent errors in reporting will not constitute violations of the Commission’s regulations requiring accurate reporting and will not give rise to civil penalties. Under the proposed language, for data providers that report consistent with the *Policy Statement*, only intentional or reckless behavior may give rise to liability. Based on industry comments during and after the technical conference,¹⁷ we believe that incorporation of the Safe Harbor Policy into the Commission’s regulations will provide greater certainty to market participants and will lead to increased voluntary reporting to price index developers.

III. Environmental Analysis

13. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect

¹⁷ See, e.g., American Gas Association, Post-Technical Conference Comments, Docket No. AD17-12-000, at 7 (filed July 31, 2017) (“...there is a perception that a “fat finger” error could result in a party being the subject of an investigation.”); Edison Electric Institute, Post-Technical Conference Comments, Docket No. AD17-12-000, at 5 (filed July 31, 2017) (“Despite [the *Policy Statement*], as indicated during the technical conference, there is a perceived regulatory risk associated with transaction reporting and a concern that it will invite costly audits and enforcement actions even for inadvertent errors.”).

on the human environment.¹⁸ The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.¹⁹ The actions proposed here fall within the categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, and for information gathering, analysis, and dissemination.²⁰ Therefore, an environmental assessment is unnecessary and has not been prepared in this Notice of Proposed Rulemaking.

IV. Regulatory Flexibility Act Certification

14. The Regulatory Flexibility Act of 1980 (RFA)²¹ generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA does not mandate any particular outcome in a rulemaking. It only requires consideration of alternatives that are less burdensome to small entities and an agency explanation of why alternatives were rejected.

15. The Small Business Administration (SBA) size standards for natural gas and electric utilities are based on the number of employees, including affiliates. Under the SBA's standards, some data providers will fall under the following categories and

¹⁸ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

¹⁹ 18 CFR 380.4.

²⁰ *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5).

²¹ 5 U.S.C. 601-612.

associated size thresholds: Natural Gas Distribution and Electric Power Distribution, both at 1000 employees.²²

16. Because data providers who choose to report their transactions are already required to submit data consistent with the *Policy Statement* in order to receive the protections of the Safe Harbor Policy, the Commission estimates that there will be no additional compliance burden as a result of this proposed rule.

17. Based on the above, the Commission certifies that implementation of the proposed rule will not have a significant impact on a substantial number of small entities.

Accordingly, no initial regulatory flexibility analysis is required.

V. Comment Procedures

18. 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 90 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments must refer to Docket No. RM20-7-000, and must include the commenter's name, the organization they represent, if applicable, and their address.

19. 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 most standard word processing formats. Documents created electronically using word

²² 13 CFR 121.201 (2020), sector 22 (Utilities), NAICS codes 221210 (Natural Gas Distribution) and 221122 (Electric Power Distribution).

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.

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

21. 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.

VI. Document Availability

22. 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>). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020.

23. 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.

24. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email 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. Commissioner Clements is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission is proposing to amend Parts 35 and 288, 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.

§ 35.41 Market behavior rules.

2. Revise § 35.41(c) to read as follows:

§ 35.41 Market behavior rules.

(c) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement*, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. For a Seller who reports in a manner consistent with procedures set forth in the *Policy Statement*, there will be a rebuttable presumption that information submitted to publishers of electricity or natural gas indices is accurate, timely, and submitted in good faith. Inadvertent reporting errors by a Seller who reports in a manner consistent with the procedures set forth in the *Policy Statement* shall not constitute violations of this provision. Seller must identify as part of its Electric Quarterly Report filing requirement in § 35.10b of this chapter the publishers of electricity and natural gas indices to which it reports its transactions. In addition, Seller must adhere to any other standards and requirements for price reporting as the Commission may order.

PART 284 – CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

3. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717-717z, 3301-3432; 42 U.S.C. 7101-7352; 43 U.S.C. 1331-1356.

§ 284.288(a) Code of conduct for unbundled sales service.

4. Revise § 284.288(a) to read as follows:

§ 284.288(a) Code of conduct for unbundled sales service.

(a) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement*, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. For a Seller who reports in a manner consistent with procedures set forth in the *Policy Statement*, there will be a rebuttable presumption that information submitted to publishers of electricity or natural gas indices is accurate, timely, and submitted in good faith. Inadvertent reporting errors by a Seller who reports in a manner consistent with the procedures set forth in the *Policy Statement* shall not constitute violations of this provision. Seller must notify the Commission as part of its FERC Form No. 552 annual reporting requirement in § 260.401 of this chapter whether it reports its transactions to publishers of electricity and natural gas indices. In addition, Seller must adhere to any other standards and requirements for price reporting as the Commission may order.

§ 284.403 Code of conduct for persons holding blanket marketing certificates.

5. Revise § 284.403(a) to read as follows:

§ 284.403 Code of conduct for persons holding blanket marketing certificates.

(a) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement*, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. For a Seller who reports in a manner consistent with procedures set forth in the *Policy Statement*, there will be a rebuttable presumption that information submitted to publishers of electricity or natural gas indices is accurate, timely, and submitted in good faith. Inadvertent reporting errors by a Seller who reports in a manner consistent with the procedures set forth in the *Policy Statement* shall not constitute violations of this provision. Seller must notify the Commission as part of its FERC Form No. 552 annual reporting requirement in § 260.401 of this chapter whether it reports its transactions to publishers of electricity and natural gas indices. In addition, Seller must adhere to any other standards and requirements for price reporting as the Commission may order.

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