

124 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 33

Docket No. RM04-7-005

Market-Based Rates For Wholesale Sales of Electric Energy, Capacity and Ancillary
Services by Public Utilities

Order Requesting Supplemental Comments

(Issued August 29, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order Requesting Supplemental Comments.

SUMMARY: The Federal Energy Regulatory Commission (Commission), in response to requests for rehearing of Order No. 697-A, intends to revise the definition of the term “affiliate” adopted in Order No. 697-A and codified in § 35.36(a)(9) of the Commission’s regulations, and seeks supplemental comments on this issue.

DATES: Comments are due [**Insert date 45 days after publication in the FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Market-Based Rates For Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities Docket No. RM04-7-005

ORDER REQUESTING SUPPLEMENTAL COMMENTS

(Issued August 29, 2008)

1. The Federal Energy Regulatory Commission (Commission) intends to revise the definition of the term “affiliate” adopted in Order No. 697-A and codified in § 35.36(a)(9) of the Commission’s regulations,¹ in response to issues raised in requests for rehearing of Order No. 697-A.² To ensure a complete record and full opportunity of all parties to comment on a revised definition of “affiliate” in this docket, the Commission is seeking supplemental comments on this issue.

¹ 18 CFR 35.36(a)(9).

² Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, FERC Stats. & Regs. ¶ 31,252, clarified, 121 FERC ¶ 61,260 (2007), order on reh’g, Order No. 697-A, 73 FR 25832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, clarified, 124 FERC ¶ 61,055 (2008).

I. Background

2. In Order No. 697-A, the Commission clarified that it would define the term “affiliate” for purposes of Order No. 697 and the affiliate restrictions adopted in § 35.39 of its regulations as that term is used in the regulations adopted in the Affiliate Transactions Final Rule.³ The Commission stated that it was taking this action in light of its goal to have a more consistent definition of affiliate for purposes of both exempt wholesale generators (EWGs) and non-EWGs to the extent possible, as well as to strengthen the Commission’s ability to ensure that customers are protected.

3. The Commission explained that in the Affiliate Transactions Final Rule, it considered the use of the term affiliate in the context of the Affiliate Transactions Notice of Proposed Rulemaking, the Commission’s Standards of Conduct for Transmission Providers, and other precedent.⁴ In particular, the Commission considered its order in the 1995 Morgan Stanley case, in which it adopted distinct definitions of affiliate for EWGs and non-EWGs. The Commission noted there that section 214 of the Federal Power Act (FPA) required use of the Public Utility Holding Company Act of 1935 (PUHCA 1935) definition of affiliate to determine whether an electric utility is an affiliate of an EWG for

³ Cross-Subsidization Restrictions on Affiliate Transactions, Order No. 707, 73 FR 11013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 (Feb. 21, 2008) (Affiliate Transactions Final Rule), order on rehearing, Order No. 707-A, 73 FR 43072 (July 24, 2008), FERC Stats. & Regs. ¶ 31,272 (2008).

⁴ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 182 (citing Morgan Stanley Capital Group, Inc., 72 FERC ¶ 61,082, at 61,436-37 (1995) (Morgan Stanley)).

purposes of evaluating EWG rates for wholesale sales of electric energy. The Commission thus stated in Morgan Stanley that the PUHCA 1935 definition of affiliate would apply to EWGs for matters arising under Part II of the FPA.⁵ For all other public utilities, the Commission adopted a definition that in essence treats all companies under the common control of another company, as well as that controlling company, as affiliates. The Commission also stated in Morgan Stanley that a ten percent or greater voting interest creates a rebuttable presumption of control.⁶ After reviewing the precedent established in Morgan Stanley, the Commission in the Affiliate Transactions Final Rule also reviewed FPA section 214 as revised by EAct 2005 as well as the affiliate definitions contained in both PUHCA 1935⁷ and the Public Utility Holding Company Act of 2005 (PUHCA 2005).⁸

⁵ Morgan Stanley, 72 FERC ¶ 61,082 at 61,436-37.

⁶ Id. The Commission did this by adopting the definition of an affiliate found in its Standards of Conduct for Interstate Pipelines.

⁷ 15 U.S.C. 79a et seq. PUHCA 1935 defines an affiliate as:

(a) any person that directly or indirectly owns, controls or holds with the power to vote, 5 per centum or more of the outstanding voting securities of such specified company;

(b) any company 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with the power to vote, directly or indirectly, by such specified company;

(continued...)

4. In Order No. 697-A, the Commission explained that after taking into account these differing definitions, and recognizing the need to provide greater clarity and consistency in its rules, the Commission found in the Affiliate Transactions Final Rule that it was

(c) any individual who is an officer or director of such specified company, or of any company which is an affiliate thereof under clause (a) of this paragraph; and

(d) any person or class of persons that the [Securities and Exchange Commission] determines, after appropriate notice and opportunity for hearing, to stand in such relation to such specified company that there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligation, duties, and liabilities imposed in this title upon affiliates of a company.

⁸ EAct 2005 at 1261 *et seq.* Prior to its amendment by the Energy Policy Act of 2005, section 214 of the FPA, 16 U.S.C. 824m, read as follows:

No rate or charge received by an exempt wholesale generator for the sale of electric energy shall be lawful under section 824d of this title if, after notice and opportunity for hearing, the Commission finds that such rate or charge results from the receipt of any undue preference or advantage from an electric utility which is an associate company or an affiliate of the exempt wholesale generator. For purposes of this section, the terms "associate company" and "affiliate" shall have the same meaning as provided in section 2(a) of the Public Utility Holding Company Act of 1935.

EAct 2005 amended section 214 of the FPA by substituting the reference to the PUHCA 1935 definition of affiliate with a reference to the PUHCA 2005 definition. PUHCA 2005 defines an affiliate of a specified company as any company in which the specified company has a five percent or greater voting interest. Thus, as revised by EAct 2005, the only EWG affiliate sales that are subject to FPA section 214 are sales by an EWG to a company in which it owns a five percent or greater voting interest.

important to try to adopt a more consistent definition in its various rules and also one that is sufficiently broad to allow the Commission to protect customers adequately.⁹ The Commission further explained that on this basis, the definition of affiliate as adopted in the Affiliate Transactions Final Rule explicitly incorporated the PUHCA 1935 definition of an affiliate for EWGs, which uses a five percent voting interest threshold, rather than incorporate it by reference, as previously had been done. The definition in the Affiliate Transactions Final Rule also adopted a parallel definition of affiliate for non-EWGs, but with adjustments to reflect the ten percent voting interest threshold for non-EWGs that was utilized up to that time and to eliminate certain language not applicable or necessary in the context of the FPA. The Commission in Order No. 697-A then adopted in this rule the same definition of “affiliate” that it had adopted in the Affiliate Transactions Final Rule.

II. Requests for Rehearing

5. The Electric Power Supply Association (EPSA), the Mirant Entities (Mirant)¹⁰ and Reliant Energy, Inc. (Reliant) (together, petitioners) submitted requests for rehearing of the Commission’s determination in Order No. 697-A to codify in its market-based rate

⁹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 182.

¹⁰ The Mirant Entities are Mirant California, LLC, Mirant Delta, LLC, Mirant Potrero, LLC, Mirant Canal, LLC, Mirant Kendal, LLC, Mirant Bowline, LLC, Mirant Lovett, LLC, Mirant Chalk Point, LLC, Mirant Mid-Atlantic, LLC, Mirant Potomac River, LLC, and Mirant Energy Trading, LLC.

regulations a definition of affiliate that distinguishes between EWGs and non-EWGs.¹¹

They argue that the Commission erred in adopting a separate definition for EWGs.¹²

6. EPSA states that a five percent ownership threshold for EWGs imposes substantially greater burdens on EWGs and achieves no useful regulatory purpose. EPSA contends that the Commission has provided no reasoned explanation for using a definition derived from PUHCA 1935 that imposes greater burdens, including change in status reporting obligations, on EWGs than those imposed on other market-based rate sellers. EPSA maintains that if the Commission is going to promulgate a definition of affiliate for market-based rate purposes, it should apply to EWGs the definition adopted in Order No. 697-A for non-EWGs, which uses a ten percent ownership threshold.¹³

EPSA also argues that the Commission's promulgation of a separate definition of affiliate for EWGs was a violation of the notice requirements of the Administrative Procedure Act because the Commission did not signal any intent to do so either in the market-based rate

¹¹ Other issues have been raised on rehearing of Order No. 697-A and will be addressed in a subsequent order.

¹² EPSA Rehearing Request at 5 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 182-83); Mirant Rehearing Request at 6-7; Reliant Rehearing Request at 2-3.

¹³ EPSA Rehearing Request at 19.

notice of proposed rulemaking or in Order No. 697 and did not afford interested parties an opportunity to comment on the regulatory text.¹⁴

7. Reliant similarly argues that placing disparate burdens on companies simply because they do or do not hold EWG status is arbitrary and capricious and not in the public interest. According to Reliant, the Commission has provided no reasonable basis to maintain two different definitions for determining affiliates of EWGs and non-EWGs. Reliant asserts that the only reason that the Commission previously had adopted a narrower affiliate definition under the market-based rate program for EWG utilities was its prior belief that FPA section 214 did not provide sufficient discretion to the Commission to use a different definition.¹⁵ However, Reliant states that the Commission effectively recognized in Order No. 697-A that it is not required by statute to use the FPA section 214 definition of affiliate for purposes beyond the narrow scope of section 214 and that, for purposes outside of section 214, it has discretion to adopt an affiliate definition for EWGs that is different from that contained in section 214.¹⁶ Reliant argues that the Commission must not be arbitrary and capricious in the exercise of that discretion.

¹⁴ Id. at 5-6, 13-15 (citing 5 U.S.C. 553(b)(3)).

¹⁵ Reliant Rehearing Request at 13.

¹⁶ Id. at 9.

8. Reliant states that it supports the Commission's goal of using consistent affiliate definitions for all FPA public utilities, but it asserts that the use of different standards for EWGs and non-EWGs for FPA purposes (other than the narrow situations that might arise under section 214 of the FPA) does not achieve that consistency.¹⁷ Reliant submits that the Commission has consistently recognized in administering its market-based rate program that the relevant inquiry with respect to affiliate relations pertains to control, *i.e.*, whether a market-based rate seller is controlled by another entity or whether a market-based rate seller and other sellers are under common control of the same entity. It notes that the Commission has consistently concluded that the starting point for assessing control is based on a standard that begins with the ownership of ten percent or more of a company's voting securities.¹⁸ According to Reliant, a lower five percent standard for EWGs casts too broad a net, with the result being that EWG public utilities and their owners may be required to impute affiliation at thresholds significantly below the ten percent standard applicable to non-EWG utilities. Reliant submits that the Commission has not explained how this disparate treatment of EWGs is necessary or appropriate for assessing market power or other purposes under its market-based rate program.

¹⁷ Id. at 11.

¹⁸ Id. at 15.

9. Reliant therefore argues that the Commission should grant rehearing and eliminate the PUHCA 1935 definition for EWG affiliates and use the same definition of affiliate for EWGs that it has adopted in Order No. 697-A for non-EWG utilities, which Reliant describes as based on a control standard.¹⁹

10. Mirant raises similar arguments. It maintains that the Commission provided no basis for adopting a five percent voting interest affiliate test for EWGs when the test for non-EWGs is ten percent. Mirant argues that the five percent voting interest standard that has its origin in FPA section 214 applies only to evaluation of EWG rates and has no relevance to an analysis of control over generation or the events that should trigger a change in status filing. Mirant contends that this rulemaking concerns both the measure of a seller's ability to exercise market power and the facts that warrant reporting of "changes in status" in a seller's market-based rate docket.²⁰ It states that the requirement that market-based rate sellers report changes in status is based not on the Commission's concern for the rates and charges of the EWG, but on the Commission's need to be informed of the potential exercise of market power through the ownership or control of generation or transmission. Mirant therefore requests that the Commission analyze the

¹⁹ Id. at 17.

²⁰ Mirant Rehearing Request at 9.

issue in light of the purposes behind change in status filings and find that there is no basis for distinguishing between EWGs and non-EWGs in this context.²¹

III. Discussion

11. We have carefully considered the legal and policy arguments petitioners have raised on rehearing in opposition to a separate definition of affiliate for EWGs. Mirant and Reliant argue that, although section 214 of the FPA requires the Commission to apply a five percent standard to certain transactions involving EWGs, the Commission is not required to use a five percent standard in a definition of affiliate developed for the general task of assessing market concentration and market power.²² Petitioners argue instead that the Commission should apply the same standard in its market-based rate regulations to EWGs and non-EWGs for purposes of determining affiliation. Having again analyzed FPA section 214, and irrespective of any Commission precedent to the contrary, we agree that a reasonable interpretation of FPA section 214 is that it does **not** require the Commission to use a five percent threshold affiliate test for EWGs for all purposes under Part II of the FPA, and in particular for purposes of analyzing market concentration and market power.²³ We also find the arguments in support of a single

²¹ Id.

²² Id. at 8-9; Reliant Rehearing Request at 9, 11.

²³ Section 214 uses a five percent affiliate threshold with respect to determining whether the jurisdictional rates of an EWG are the result of a preference or advantage of

definition of affiliate, applicable to both EWGs and non-EWGs, to be persuasive. Upon reconsideration, therefore, we believe that using the same definition for EWGs as for non-EWGs is appropriate and that the definition the Commission adopted in Order No. 697-A for non-EWG utilities would not affect the substance of the Commission's analysis of market power issues. This definition is based on the structure of the PUHCA 1935 definition, but modified in several ways, including use of a ten percent threshold instead of five percent.

12. Accordingly, the Commission intends to revise the definition of affiliate in § 35.36(a)(9) of its regulations to delete the separate definition for EWGs and to revise the non-EWG part of the definition to delete the phrase "other than an exempt wholesale generator." Specifically, the revised definition of affiliate in § 35.36(a)(9) would provide that an affiliate of a specified company means: (a) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company; (b) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company; (c) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in

an affiliate of the EWG. While an analysis of market power relates to an EWG's rates, it does not involve the specific issue of whether an EWG has received an undue preference or advantage with respect to a particular wholesale sale.

such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and (d) Any person that is under common control with the specified company. For purposes of paragraph (a)(9)(i), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

13. We believe this revision will result in fair and consistent treatment of jurisdictional sellers. Before taking final action in response to the rehearing comments, however, we seek supplemental comments on the proposed revised definition of affiliate in § 35.36(a)(9) as discussed above.

IV. Information Collection Statement

14. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and record keeping (information collections) imposed by an agency.²⁴ Order No. 697's revisions to the information collection requirements for market-based rate sellers were approved under OMB Control Nos. 1902-0234. Order No. 697-A clarified aspects of the existing information collection requirements for the market-based rate program, but did not add to those requirements. While this order

²⁴ 5 CFR 1320.12.

requests comments on the Commission's proposal to revise the definition of affiliate in § 35.36(a)(9) of the Commission's regulations, it does not add to the existing information collection requirements for the market-based rate program. Accordingly, a copy of this order will be sent to OMB for informational purposes only.

V. Regulatory Flexibility Act

15. The Regulatory Flexibility Act of 1980²⁵ generally requires either a description and analysis of a rule that will have a significant economic impact on a substantial number of small entities or a certification that the rule will not have a significant economic impact on a substantial number of small entities.²⁶ In this order, the Commission seeks comment on a revised definition of affiliate in § 35.36(a)(9) of its regulations, which would apply to EWGs the definition based on a ten percent voting interest adopted in Order No. 697-A for non-EWGs, rather than using the definition adopted in Order No. 697-A for EWGs, which is based on a five percent voting interest. Public utilities seeking and currently possessing market-based rate authority are currently

²⁵ 5 U.S.C. 601-612.

²⁶ 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 that is independently owned and operated and that is not dominant in its field of operation. 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 year did not exceed four million MWh. 13 CFR 121.201.

required to comply with the Commission's regulations with regard to the definition of affiliate at § 36.36(a)(9) and the revised definition would decrease the number of entities considered to be affiliates of EWG public utilities. The Commission therefore concludes that a revised definition of affiliate in § 35.36(a)(9) should not have a significant economic impact on a substantial number of small entities.

VI. Document Availability

16. 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 DC 20426.

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List of subjects in 18 CFR Part 35

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.