

122 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 141 and 385

[Docket No. RM07-18-000; Order No.709]

Elimination of FERC Form No. 423

(Issued March 11, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to eliminate the collection of the FERC Form No. 423, Monthly Report of Cost and Quality of Fuels for Electric Plants. The Commission is eliminating collection of the FERC Form No. 423 following the December 2007 report, which was due February 15, 2008.

EFFECTIVE DATE: This rule will become effective [**insert date that is 30 days after the date of publication in the FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT:

Lawrence Greenfield (Legal Information)
Office of General Counsel, Energy Markets
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(202) 502-6415, lawrence.greenfield@ferc.gov

James M. Krug (Technical Information)
Division of Administration, Case Management and Strategic Planning
Office of Energy Market Regulation
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(202) 502-8419, james.krug@ferc.gov

Patricia Morris (Technical Information)
Division of Administration, Case Management and Strategic Planning
Office of Energy Market Regulation
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(202) 502-8730, patricia.morris@ferc.gov

SUPPLEMENTARY INFORMATION:

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.

Elimination of FERC Form No. 423

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ORDER NO. 709

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ORDER NO. 709

FINAL RULE

(Issued March 11, 2008)

1. The Federal Energy Regulatory Commission (Commission) is amending its regulations, 18 CFR 141.61, to eliminate the collection of the FERC Form No. 423, Monthly Report of Cost and Quality of Fuels for Electric Plants (Form 423). The Commission is eliminating collection of the Form 423 following the submission of the December 2007 report, which was due February 15, 2008.
2. As a separate matter, we note that Energy Information Administration (EIA) has expressed a need for the information previously collected on Form 423 and intends to collect such information starting January 1, 2008, as part of its newly authorized EIA-923.¹ As discussed below, however, to ensure the continuity of data collection, the Commission will, by separate notice, indicate that it will continue to collect such

¹ Energy Information Administration Electric Power Survey, OMB Control No. 1905-0129, Supporting Statement A (submitted to the Office of Management and Budget for review on October 4, 2007), available at: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200709-1905-003.

information if EIA is not prepared to begin its collection, but not beyond the December 2008 Form 423, due in February 2009.

I. Background

3. Form 423 gathers information on the cost and quality of fuels delivered to steam electric generating plants of 50 MW or greater. This information had been used over the years for a variety of purposes, including: (1) to conduct fuel reviews under Federal Power Act (FPA) sections 205(a) and (e);² (2) to address fuel costs and fuel purchase practices affecting public utility rates under FPA sections 205 and 206;³ and (3) to detect abnormally high fuel costs in public utility fuel purchases indicative of affiliate preference under FPA sections 205 and 206.⁴

4. Form 423 is submitted electronically on a monthly basis by approximately 190 utilities for their 569 steam electric generating plants.

5. On November 2, 2007, the Commission issued a Notice of Proposed Rulemaking (NOPR) amending its regulations to eliminate the collection of the Form 423.⁵ In the NOPR, the Commission stated that the Commission's infrequent use of the information collected in the Form 423 no longer justified the burden and cost of collecting it.

² 16 U.S.C. 824d(a), (e).

³ 16 U.S.C. 824d, 824e.

⁴ Id.

⁵ Elimination of FERC Form No. 423, 72 FR 65246 (Nov. 20, 2007), FERC Stats. & Regs. ¶ 32,624 (2007).

6. In response to the NOPR, comments were filed by: American Electric Power Service Corporation (AEP); the American Public Power Association and the National Rural Electric Cooperative Association (jointly APPA and NRECA); Arch Coal, Inc. (Arch Coal); City of Santa Clara, California, City of Redding, California and M-S-R Public Power Agency (jointly Cities/M-S-R); the Edison Electric Institute (EEI); FPL Group, Inc. (FPL Group); the National Association of Regulatory Utility Commissioners (NARUC); the National Mining Association (NMA); the Oklahoma Corporation Commission (OCC); the South Carolina Office of Regulatory Staff (ORS); and the Public Utilities Commission of Ohio (PUCO). The commenters responded to the Commission's invitation for comments both on its proposal to eliminate the Form 423, and on the proposed date to eliminate Form 423.

II. Discussion

7. The issuance of Order No. 888⁶ and the electric industry's increasing reliance on market-based rates have created a diminished need for the Form 423 information.

Greater use of market-based rates has resulted in less reliance on cost-based rates and less need to evaluate rates by reference to a utility's costs; market-based rates are not tied to

⁶ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

the cost of providing service but instead reflect market conditions. In short, there are fewer public utilities with cost-based rates⁷ and particularly with fuel adjustment clauses as part of their rates. This, in turn, has resulted in fewer rate cases and fewer complaints filed with the Commission, and less need for Form 423's fuel cost and quality data.

Accordingly, the Commission will no longer collect the Form 423; the reduced need for Form 423's data no longer justifies continued collection of Form 423. Moreover, should the Commission have a need for information concerning fuel costs and purchases in the future, it can obtain such information on a case-by-case basis through special reports, investigations, data requests or in formal proceedings.⁸

8. In contrast to the Commission's lack of need for the information, EIA, in its collection statement to the Office of Management and Budget (OMB), stated that "EIA has multiple uses for the data and requests approval to collect it." Presently, EIA collects similar information from non-utility generators and, as explained in EIA's collection statement to OMB, adding to it information from Commission-jurisdictional public utilities would, for the first time, capture all such data on one form for the entire industry. EIA further proposed to merge the combined Form 423 data collection with information from three other existing EIA data collections (EIA-906, EIA-920, and EIA-767), in an

⁷ A review of data from the Electric Quarterly Reports for calendar year 2006 indicates that market-based power sales constituted 90 percent of jurisdictional power sales (reported as energy sales and booked out transactions).

⁸ See, e.g., 16 U.S.C. 825e, 825f.

effort to improve data quality, consistency and reporting efficiency. The result, EIA stated, would be a new survey, the EIA-923.⁹ EIA received OMB approval to collect the EIA-923 on December 21, 2007.¹⁰

9. The Commission's decision to stop collecting the Form 423 data is not tied to EIA's decision to collect this data. However, to ensure continuity of the data collection, the Commission will coordinate with EIA. EIA anticipates beginning the collection of its EIA-923 starting with the January 2008 report, and so the Commission will end its collection of the Form 423 information with the December 2007 report, which was due February 15, 2008. However, if EIA is not prepared to collect the information, to prevent a gap in data collection, the Commission will continue to collect the data until EIA begins its collection, but not beyond the December 2008 report, due in February 2009.

10. Should EIA begin its collection of EIA-923 data effective January 2008, the Commission will issue a separate notice announcing that it has ceased collection of the Form 423 effective after the December 2007 report. Should EIA not begin its collection at that time, the Commission will issue a separate notice announcing that it will continue collection of the Form 423.

⁹ Energy Information Administration Electric Power Survey, OMB Control No. 1905-0129, Supporting Statement A (submitted to the Office of Management and Budget for review on October 4, 2007), available from: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200709-1905-003.

¹⁰ EIA received final approval from OMB to collect the information through EIA-923 in a Notice of Office of Management and Budget Action dated December 21, 2007.

A. Elimination of the Form 423

Comments

11. Three commenters, EEI, FPL Group, and the OCC, support the Commission's proposal to discontinue collecting the Form 423. All three claim that the Form 423 imposes a substantial burden on the regulated community.

12. Eight commenters opposed the Commission's proposal to eliminate the Form 423. State commissions and regulatory offices¹¹ argue that they need the Form 423 information in a timely manner to do their work. NARUC argues that the Form 423 information helps to facilitate state commission efforts to assure efficient use and pricing of fuels. PUCO states that it has an essential need for timely receipt of Form 423 data and that the timeliness of the Commission's data collection and posting allows it to efficiently conduct electric fuel cost reviews, address electric utility fuel costs and fuel purchase practices, detect abnormally high fuel costs, calculate electric rates based on fuel costs, and properly respond to any energy emergency. PUCO believes the Commission's discontinuation of collecting Form 423 information would hinder PUCO's ability to effectively perform its duties. PUCO asserts that getting the Form 423 data only from EIA, as proposed, will result in a six-month delay between the time the data is collected and when the data is published. Such a delay, PUCO believes, compromises its ability to conduct fuel cost reviews. The ORS states that the timeliness of the Form 423

¹¹ NARUC, PUCO, and ORS.

information is important to the annual review of fuel costs and purchasing practices in South Carolina.

13. Arch Coal is concerned that the elimination of the Form 423 will result in a significant loss of market data used by coal producers, transportation companies and other entities that service the electric industry. Arch Coal believes only power generators currently required to file EIA-906 and EIA-920 will be required to file the new EIA-923, resulting in a reduction of the sample size by 24 percent, and significantly degrading both the quality and value of the data. Arch Coal argues that data collected on EIA-923 will not be available at the plant level for 18 months for non-jurisdictional generators, and only for those plants that currently file EIA-906 and EIA-920. It believes this means there will be an additional time lag of more than one year, making it extremely difficult to use this data for business decisions. Arch Coal urges greater transparency in the electric power generation sector, which it believes promotes market competitiveness. Reducing data reliability and timeliness hinders market efficiency.

14. NMA feels the Commission may be dropping collection of vital information at a time when the need for this data is escalating. NMA further contends that, should EIA subsequently discontinue its EIA-923 due to budget constraints, the Commission will need to reestablish collection of the Form 423 data. NMA adds that the data EIA will collect in EIA-923 will be sample data, rather than the more inclusive plant data the Commission currently collects. NMA believes this methodology will result in a material reduction in the number of reporting plants. Further, there are no guarantees that EIA

will make plant-level information available to the public as in the past. NMA argues that without public access to this information, complaints against generators cannot be filed.

15. AEP suggests that, should responsibility for the data collection be transferred, EIA should use the same or similar filing procedures for its EIA-923 as those employed by the Commission for its Form 423 data. AEP is concerned that the technological advances made by the Commission with respect to the collection of the data may not be maintained by EIA.

16. APPA and NRECA state that the Commission has an obligation to ensure that cost-based rates are just and reasonable, and that the Commission's reliance on other means to gather data under specific circumstances or on a case-by-case basis is not sufficient to protect customers. APPA and NRECA also assert the Commission itself needs the information for its ongoing market oversight. Customers also need access to the data on an ongoing basis in order to have sufficient information to protect their own interests through filing a complaint with the Commission. Furthermore, APPA and NRECA are concerned that the Commission has not gone far enough in its commitment to maintain the availability of the data. They note that EIA has made changes to its data collection programs in the past after EIA has cited budget constraints and that these changes were detrimental to the quality and availability of industry data. Further, APPA and NRECA claim the Commission must take an active role in ensuring that EIA receives sufficient funding to continue its collection of the data that is currently in Form 423. If EIA decides to stop collecting the Form 423 data in its EIA-923, APPA and NRECA

assert the Commission must step in and resume its collection of the information.

Cities/M-S-R state that the Commission should continue to collect Form 423 data.

Commission Response

17. As explained above, the Commission's infrequent use of the Form 423 data no longer justifies the burden and cost of the Commission collecting the data. While others may have their own particular proprietary reasons for this data,¹² the Commission's collection of information is driven by the Commission's needs and the Commission no longer needs Form 423's fuel cost and quality data.¹³ The arguments put forth by the eight commenters opposing the Commission's proposal thus do not provide sufficient reasons for the Commission to continue collecting the data; the Commission does not need this data on an ongoing basis.

18. Despite our elimination of the Form 423, the public will still have access to this data. EIA has taken the initiative to continue collection and has received OMB authorization to do so. The generator data to be collected by EIA on Schedules 1 and 2 of its new EIA-923 is the same as the generator data collected in the Form 423 (with the exception of one item--the coal district number--which was eliminated). Furthermore, EIA will be making EIA-923 data available on its website for both Commission-

¹² E.g., state commission review of retail rates, state commission review of fuel purchasing practices, and coal industry analysis of coal markets.

¹³ We are not aware of any reason why a state commission that needs such data from utilities it regulates, or associated companies, cannot obtain such data from them. 16 U.S.C. 824(g); 42 U.S.C. 16453.

jurisdictional and non-jurisdictional companies under a planned EIA data-collection-and-release cycle that will be shorter than the Form 423 data collection-and-release cycle utilized by the Commission.¹⁴ The Commission thus finds no basis for commenter concerns that only sample data will be collected, or about the loss of data or a smaller number of respondents who must file.

19. The Commission's ability to carry out its market and rate oversight functions will not be hindered by the elimination of the Form 423. Current users of the Form 423 data will be readily able to download the same data by accessing the new EIA-923 data from EIA's website. In addition, there are other sources of data which can be utilized, such as Form Nos. 1 and 3-Q, which will give them access to information they may need to protect their interests should they wish to file a complaint with the Commission. As a result, elimination of Form 423 should not hinder the Commission's ability to carry out its market and rate oversight functions. AEP's suggestion that EIA consider Commission methodologies in its EIA-923 software should be addressed to EIA.

20. Commenter concerns about future EIA funding levels and their impact on EIA data collections are speculative and, in any event, are beyond the scope of this rulemaking.

¹⁴ Currently, the Form 423 is due 45 days after the end of the month. The data is then posted to the Commission's website 45 days after the due date. The EIA-923 will be due the last day of the month following the reporting month and the data will be posted to EIA's website approximately 45 days after the due date, when EIA publishes its Electric Power Monthly for that month.

B. Date of Elimination of the Form 423**Comments**

21. EEI, NARUC, OCC, and Cities/M-S-R argue that the Commission should continue to collect the information contained in Form 423 until EIA is prepared to take over these duties, so there is no gap in information collection. NARUC and Cities/M-S-R both add that, if necessary, this data collection should continue beyond the Commission deadline of December 2008.

Commission Response

22. As noted above, the Commission intends to coordinate its elimination of Form 423 with EIA's collection of EIA-923. The Commission will continue collection of Form 423 should EIA not be able to begin its collection program as proposed, but not beyond December 2008; the Commission is currently authorized by OMB to collect Form 423 data only through December 2008. Moreover, EIA has received OMB authorization to begin collecting EIA-923.¹⁵ Therefore, the Commission disagrees with EEI, NARUC, OCC, and Cities/M-S-R that there is a need to extend its collection of, and to obtain additional OMB authorization to collect, Form 423 beyond December 2008.

¹⁵ Notice of Office of Management and Budget Action (December 21, 2007) (OMB Control No. 1905-0129).

C. Other Issues

Comment

23. Commenters raise various issues largely related to the type and timing of information to be collected by EIA.

24. PUCO claims Form 423 data should be updated to include renewable and intermittent resources.¹⁶ The OCC, while it supports the Commission in its suggestion not to require additional reporting, proposes that “state commissions [be] notified of additional reviews or requests about individual public utilities’ information that are in the respective state commission’s jurisdiction.”

25. FPL Group does not support EIA’s proposal to institute a mandatory collection of this information in its EIA-923. FPL Group argues that, absent a greater showing of need for this information by the EIA, providing such information should be voluntary.

26. EEI encourages the Commission to recognize that the fuel cost, quantity, and other information reported in the Form 423 is commercially sensitive, and asks that EIA treat this same information as confidential and not release it in a disaggregated form that discloses company and plant level information or even state or regional information because that can compromise negotiations and prices in particular markets.

¹⁶ If the Commission determines that it has additional data needs related to renewable and intermittent resources, those data needs will be addressed in a separate proceeding.

27. NARUC urges the Commission to join it in requesting that EIA preserve the existing reporting schedule to ensure the usefulness of the information collected.

NARUC is concerned that EIA proposes to collect the same data using a six month rather than a two month lag period. NARUC contends a six month delay would significantly reduce the usefulness of the information and would undermine the ability of state commissions to effectively use this information in conducting fuel cost reviews.

28. AEP states the proposed submission deadline for EIA-923 should be lengthened. AEP is concerned about the shorter submission time that is proposed by the EIA, noting that the Commission allowed forty-five days after the close of the previous month to submit the data requested in Form 423 whereas under EIA-923 the time is shortened to thirty days after the last day of the prior month. AEP argues it is a large, multi-state utility operating in eleven states, and shortening the time for submission of data by fifteen days will not allow AEP enough time to gather all of the information from various resources and submit the data in a timely fashion. AEP claims this situation will be exacerbated if the efficiencies in the filing methods employed by the Commission are not adopted by the EIA. AEP also states a testing period should be established in order to ensure both utility and EIA preparedness.

Commission Response

29. The Commission is eliminating the collection of the Form 423 data. The concerns raised by PUCO, OCC, FPL Group, EEI, NARUC, and AEP are concerns that instead should be brought to the attention of EIA. Thus, issues about EIA's mandatory collection

of fuel cost and quality data, whether to include renewable and intermittent resource data, the confidentiality of data, the timing of the submission of data, and the need for a testing period are issues that should be brought to the attention of EIA. The OCC's request that state commissions be notified of "additional reviews or requests" is beyond the scope of this rulemaking.

III. Information Collection Statement

30. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and record keeping (information collections) imposed by an agency. Here, the Commission is proposing to cease collecting certain information. Nevertheless, OMB has been notified of the Commission's proposed actions in this case. The Commission will submit a copy of the Final Rule to inform OMB of its actions to discontinue the collection of this information and the resulting alleviation of burden imposed on the public.

IV. Environmental Analysis

31. Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment.¹⁷ No environmental consideration is necessary for the promulgation of a rule that involves information gathering, analysis,

¹⁷ Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

and dissemination.¹⁸ This Final Rule eliminates a data collection. Consequently, neither an environmental impact statement nor an environmental assessment is required.

V. Regulatory Flexibility Act

32. The Regulatory Flexibility Act of 1980 (RFA)¹⁹ 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. Most utilities to which this Final Rule applies would not fall within the RFA's definition of small entity.²⁰ Moreover, elimination of the Form 423 will reduce the burden on all entities, including small entities. Consequently, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities.

VI. Document Availability

33. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to obtain this document via

¹⁸ 18 CFR 380.4(a)(5).

¹⁹ 5 U.S.C. 601-12.

²⁰ 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 (NAICS) 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.

the Internet through the Commission's Home Page (<http://www.ferc.gov>) and from its 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.

34. From the Commission's Home Page on the Internet, the full text of this document is available in the Commission's document management system, eLibrary, in PDF and Microsoft Word format for viewing, printing, and downloading. To access this document in eLibrary, type the docket number (excluding the last three digits of the docket number), in the Docket Number field.

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

VII. Effective Date and Congressional Notification

36. These changes in the regulations are effective **[insert date that is 30 days after date of publication in the FEDERAL REGISTER]**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.²¹

²¹ 5 U.S.C. 804(2).

List of Subjects

18 CFR Part 141

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, Reporting and recordkeeping requirements

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission amends parts 141 and 385,

Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 141 – STATEMENTS AND REPORTS (SCHEDULES)

1. The authority citation for part 141 continues to read as follows:

Authority: 15 U.S.C. 79; 16 U.S.C. 791a-828c, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

§ 141.61 [Removed and Reserved]

2. Section 141.61 is removed and reserved:

PART 385 – RULES OF PRACTICE AND PROCEDURE

3. The authority citation for part 385 continues to read as follows:

Authority: 5 U.S.C. 551-557; 15 U.S.C. 717-717z, 3301-3432; 16 U.S.C. 791a-825v, 2601-2645; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101-7352, 16441, 16451-16463; 49 U.S.C. 60502; 49 App. U.S.C. 1-85 (1988).

§ 385.2011 Procedures for filing on electronic media (Rule 2011).

4. Section 385.2011, paragraph (a)(8) is removed and reserved.