

119 FERC ¶ 61,295
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

(Docket No. RM04-7-000; Order No. 697)

Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary
Services By Public Utilities

(Issued June 21, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to revise Subpart H to Part 35 of Title 18 of the Code of Federal Regulations governing market-based rates for public utilities pursuant to the Federal Power Act (FPA). The Commission is codifying and, in certain respects, revising its current standards for market-based rates for sales of electric energy, capacity, and ancillary services. The Commission is retaining several of the core elements of its current standards for granting market-based rates and revising them in certain respects. The Commission also adopts a number of reforms to streamline the administration of the market-based rate program.

EFFECTIVE DATE: This rule will become effective **[Insert Date 60 days after publication in the FEDERAL REGISTER]**.

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Régie de l'énergie
DOSSIER: R-3669-2008 Phase 2
DÉPOSÉE EN AUDIENCE
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affiliates making sales within the mitigated balancing authority area. Our decision here takes into account Duke's and PPL's arguments against rescission of blanket authorization for all affiliates in all markets. We conclude that it is not necessary to rescind such blanket authorizations in the case of affiliates that make sales outside of the mitigated balancing authority area because the seller retains its market-based rate authority in unmitigated markets. We clarify that the effective date for rescinding blanket authorization under Part 34 will be commensurate with the date on which a mitigated seller begins to sell power at cost-based rates. Further, sellers losing their market-based rate authority must file with the Commission to obtain specific authorization for securities to be issued, or liabilities to be assumed, prior to the date the seller first sells at cost-based rates.

2. Sellers Affiliated with a Foreign Utility

Commission Proposal

1001. Under existing policy, a seller affiliated with a foreign utility selling in the United States (and each of its affiliates) must not have, or must have mitigated, market power in generation and transmission and not control other barriers to entry. In addition, the Commission considers whether there is evidence of affiliate abuse or reciprocal dealing. However, for sellers affiliated with a foreign utility, the Commission has allowed a modified approach to the current four prongs.

1002. With regard to generation market power, should any of the seller's first-tier markets include a United States market, the seller performs the market power screens in that control area(s). With regard to transmission market power, the Commission

requires the seller affiliated with a foreign utility seeking market-based rate authority to demonstrate that its transmission-owning affiliate offers non-discriminatory access to its transmission system that can be used by its competitors to reach United States markets. The Commission does not consider transmission and generation facilities that are located exclusively outside of the United States and that are not directly interconnected to the United States. However, the Commission would consider transmission facilities that are exclusively outside the United States but nevertheless interconnected to an affiliate's transmission system that is directly interconnected to the United States. A seller affiliated with a foreign utility must inform the Commission of any potential barriers to entry that can be exercised by either it or its affiliates in the same manner as a seller located within the United States. Regarding affiliate abuse, the requirement that a power marketer with market-based rate authority file for approval under section 205 of the FPA before selling power to a utility affiliate does not apply to situations involving sales of power to a foreign utility outside of the Commission's jurisdiction.

1003. The Commission proposed in the NOPR to retain its current policy when reviewing the application for market-based rate authorization by a seller affiliated with a foreign utility, and sought comment regarding whether the current policy is adequate to grant market-based rate authorization to such sellers. No comments were submitted on the broad question of whether our current policy, in general, is

adequate. However, Powerex and NL Hydro¹¹⁴⁶ raise specific issues that are addressed below. As discussed below, we conclude that our current approach needs no modification. Accordingly, we will adopt the NOPR proposal to retain our current policy when reviewing an application for market-based rate authority by a seller affiliated with a foreign utility.

Comments

1004. Powerex notes that comparability for non-jurisdictional United States-based transmission providers ("unregulated transmitting utilities" under the FPA) is now defined by statute to mean service "at rates that are comparable to those that the unregulated transmitting utility charges itself" and "on terms and conditions that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential."¹¹⁴⁷ Powerex notes that, in the OATT Reform NOPR, the Commission proposed to apply the comparability requirement of FPA section 211A on a case-by-case basis, *i.e.*, by complaint.¹¹⁴⁸ Powerex states that, under principles of national treatment as set out in the North American Free Trade Agreement (NAFTA), the Commission should impose no more stringent a burden on similarly non-

¹¹⁴⁶ NL Hydro is a Crown Corporation owned by the Government of Newfoundland and Labrador.

¹¹⁴⁷ 16 U.S.C. 824j-1(b).

¹¹⁴⁸ OATT NOPR at P 111.

jurisdictional Canadian and Mexican transmission-owning utilities. For that reason, Powerex urges the Commission to clarify that it will presume that Canadian and Mexican transmitting utilities are providing comparable and not unduly discriminatory or preferential transmission service unless this presumption is otherwise rebutted by third party or Commission-instituted complaint.¹¹⁴⁹

1005. NL Hydro urges the Commission to reject Powerex's suggestion that the Commission no longer should require market-based rate sellers to affirmatively demonstrate that non-discriminatory access is offered on transmission facilities that they or their affiliates own, control, or operate outside of the United States. NL Hydro argues that the comparability standard of FPA section 211A does not govern the Commission's market-based rate analysis of transmission market power.¹¹⁵⁰ It states that the Commission has not suggested, in either this proceeding or the OATT rulemaking, that the comparability standard in FPA section 211A should create a presumption that any market-based rate seller (domestic or affiliated with a foreign utility) should be presumed to have passed the transmission market power test.¹¹⁵¹

1006. NL Hydro supports the Commission's proposal to retain its existing requirements with respect to the mitigation of transmission market power when

¹¹⁴⁹ Powerex at 32.

¹¹⁵⁰ NL Hydro reply comments at 3.

¹¹⁵¹ Id. at 5.

reviewing the market-based rate applications of sellers affiliated with a foreign utility. According to NL Hydro, these requirements establish a reasonable balance among important regulatory objectives by: (1) requiring non-discriminatory access to foreign transmission facilities for access to United States markets as a condition of market-based rate authority; (2) complying with the national treatment requirements of NAFTA; and (3) applying principles of comity to the jurisdiction of foreign regulatory authorities with direct regulatory jurisdiction over foreign transmission entities.¹¹⁵² Accordingly, NL Hydro believes that the Commission should codify in its regulations the requirement that a market-based rate seller, or its affiliate, that owns, controls, or operates transmission facilities outside of the United States must demonstrate that non-discriminatory access is offered on those facilities so that competitors of the seller may reach United States markets.

Commission Determination

1007. We will continue to require a seller seeking market-based rate authority that is a foreign utility or is affiliated with a foreign utility to affirmatively demonstrate that any owned or affiliated transmission is offered on a non-discriminatory basis that can be used by competitors of the seller or its affiliate to reach United States markets. Accordingly, we reject Powerex's suggestion that the Commission should presume that foreign transmitting utilities are providing comparable and not unduly

¹¹⁵² NL Hydro at 13.

discriminatory or preferential transmission service unless this presumption is rebutted. The Commission did not propose to implement section 211A of the FPA in Order No. 890 and section 211A is not relevant to the Commission's analysis for purposes of granting or denying market-based rate authority.¹¹⁵³

1008. We will codify in § 35.37(d) of the Commission's regulations the requirement that a market-based rate seller affiliated with a foreign utility, or its affiliate, that owns, controls, or operates transmission facilities outside of the United States and is interconnected with the United States must demonstrate that comparable, non-discriminatory access is offered on those facilities so that competitors of the seller may reach United States markets.

3. Change in Status

Commission Proposal

1009. In early 2005, the Commission clarified and standardized market-based rate sellers' reporting requirements for any change in status that departed from the characteristics the Commission relied on in initially authorizing sales at market-based rates. In Order No. 652,¹¹⁵⁴ the Commission required, as a condition of obtaining and retaining market-base rate authority, that sellers file notices of such changes no later than 30 days after the change in status occurs. In the NOPR, the Commission sought comment on a number of issues that the Commission identified in Order No. 652 as

¹¹⁵³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 192.

¹¹⁵⁴ Order No. 652 at P 47.

