

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

Notice of Proposed Rulemaking (NOPR)

FERC Docket No. RM04-7-000

May 18, 2006

The Commission proposes to amend its regulations governing market-based rates for public utilities pursuant to the Federal Power Act (FPA). The Commission is proposing to codify and, in certain respects, revise its current standards for market-based rates for sales of electric energy, capacity, and ancillary services. The Commission is proposing to retain several of the core elements of its current standards for granting market-based rates. The Commission proposes certain revisions to these standards and seeks comment on other issues. The Commission also proposes to streamline certain aspects of its filing requirements to reduce the administrative burdens on applicants, customers and the Commission.

The Purpose of the Proposed Rule

- To revise and codify the standards for market-based rates for wholesale sales of electric energy, capacity, and ancillary services.
- To help customers by ensuring that they are protected from the exercise of market power.
- To provide greater certainty to sellers seeking market-based rate authority.
- To reform and streamline the administration of the market-based rate program so that parties have an understandable and efficient process to follow.

Brief Overview

- Major proposed reforms:
 - Adopt regulations that would attempt to track the Commission's current standards for granting market-based rates.
 - To consider transmission access and other barriers to entry as part of a vertical market power analysis rather than the current practice of considering these issues separately.
 - To codify affiliate abuse rules in the regulations and require sellers to abide by those regulations rather than considering affiliate abuse as a separate analytical feature of obtaining or retaining market-based rate authority.
 - Adopt a market-based rate tariff of general applicability.
 - Adopt a regional approach to submitting triennial reviews.
 - Adopt two categories of sellers: one group that must submit a triennial review and a second group that will only be required to file change in status reports.
- Core elements being retained:

- The current interim horizontal (generation) market power screens in principle with a few enhancements
- Recognition of native load requirements
- Allowing a seller to rebut a presumption of market power by performing a Delivered Price Test
- Customer protection such as the default cost-based rate mitigation
- Complying with a Commission-approved OATT mitigates vertical market power

The Applicability of the Proposed Rule

- The proposed rule applies to all public utility wholesale sellers transacting under market-based rates

Significant Proposed Reforms

Horizontal Analysis

In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power that provide a rebuttable presumption of whether market power exists for a utility applying to obtain or retain market-based rate authority. Sellers that do not pass the initial screens are, among other things, allowed to provide additional evidence for Commission consideration and may rebut the presumption of market power by submitting a DPT analysis. Such an approach allows the Commission to concentrate its efforts on sellers that may possess generation market power while screening out those sellers that do not pose such concerns. The Commission proposes the following:

- Modifying the treatment of newly-constructed generation to avoid a situation in which all generation becomes exempt from the Commission's market power analyses as new generation is constructed and older (pre-1996) generation is retired. This was not the intent of the original exemption provided in Order No. 888.
- To continue to provide flexibility by allowing sellers and intervenors to present evidence that the market is smaller or larger than the default geographic market and to provide guidance as to the factors the Commission will consider in evaluating whether, in a particular case, to adopt an expanded geographic market instead of relying on the default geographic market.
- Changing the native load proxy for the wholesale market share screen from the minimum peak day in the season to the average peak native load, averaged across all days in the season, and to clarify that native load can only include load attributable to native load customers as that term is defined in section 33.3(d)(4)(i) of the Commission's regulations.
- Allowing applicants the option of using seasonal capacity instead of nameplate capacity, and to retain the snapshot in time approach for the screens but to allow

“known and measurable” changes (sometimes referred to as foreseeable and reasonably certain at the time of filing) for the DPT.

Vertical Market Power

- Transmission Market Power: to continue the current policy under which an OATT is deemed to mitigate a seller’s transmission market power.
- In recognition of the fact that OATT violations may nonetheless occur, the proposed rule proposes that violation(s) of the OATT may be cause to revoke market-based rate authority in addition to any other applicable remedies, such as civil penalties.

Affiliate Abuse

The Commission has explained that its concern with the potential for affiliate abuse is that a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings. The Commission stated that potential abuses include such practices as affiliates selling products to a utility with a franchised service territory and captive customers (franchised public utility) at excessive prices, or a franchised public utility providing inputs to an affiliate at preferentially low prices. Both of these practices are examples of market power that is exercised to the disadvantage of captive customers. The Commission also has explained that there may be a potential for affiliate abuse through means such as the pricing of non-power goods and services or the sharing of market information. The Commission proposes:

- To discontinue referring to affiliate abuse as a separate “prong” of the analysis and instead to codify in the Commission’s regulations an explicit requirement that any seller with market-based rate authority must comply with the affiliate sales restrictions provisions.
- To address affiliate abuse by requiring that the conditions set forth in the proposed regulations be satisfied on an ongoing basis as a condition of obtaining and retaining market-based rate authority.
- That an affiliate power sale that has not been pre-approved by the Commission would constitute a tariff violation.
- To codify code of conduct restrictions in its regulations to help protect against cross-subsidization by captive customers of “non-regulated” power sales affiliates.

Streamline the Administration of the Market-Based Rate Program

In an effort to streamline and simplify the market-based rate program in general, while maintaining a high degree of oversight, the Commission proposes several changes and clarifications. Significant areas of modification involve the three-year updated market power analysis (triennial review or updated market power analysis) that all sellers with

market-based rate authority currently are required to file, and the development of a market-based rate tariff of general applicability.

With regard to updated market power analyses, the Commission's current general practice is to require such an analysis to be submitted within three years from the date of the Commission order granting the seller market-based rate authority or accepting the previous triennial review. The Commission proposes:

- To modify that general practice and put in place a structured, systematic review to assist the Commission in analyzing sellers in markets based on a coherent and consistent set of data.
- To modify the requirements for filing updated market power analyses in two ways. First, the Commission proposes to establish two categories of sellers with market-based rate authorization. The first category, Category 1 (roughly 550 sellers), would consist of power marketers and power producers that own or control 500 MW or less of generating capacity in aggregate and that are not affiliated with any public utility with a franchised service territory. In addition, Category 1 sellers must not own or control transmission facilities, other than limited equipment necessary to connect individual generating facilities to the transmission grid (or must have been granted waiver of the requirements of Order No. 888 because such facilities are limited and discrete and do not constitute an integrated grid) and must present no other vertical market power issues. Category 1 sellers would not be required to file a regularly scheduled triennial review. The Commission would monitor any market power concerns for these sellers through the change in status reporting requirement and ongoing enforcement monitoring.
- Category 2 (roughly 600 sellers), would include all sellers that do not qualify for Category 1. Category 2 sellers, in addition to the change in status reports, would be required to file regularly scheduled triennial reviews. To ensure greater consistency in the data used to evaluate Category 2 sellers, the Commission proposes to require each Category 2 seller to file updated market power analyses for its relevant geographic markets (default and any proposed alternative markets) on a schedule that will allow examination of the individual seller at the same time that the Commission examines other sellers in these relevant markets and contiguous markets within a region from which power could be imported. The Commission would continue to make findings on an individual seller basis, but would have before it a complete picture of the uncommitted capacity and simultaneous import capability into the relevant geographic markets under review.

Market-Based Rate Tariff of General Applicability

- The NOPR proposes to adopt a market-based rate tariff of general applicability (MBR tariff), applicable to all sellers authorized to sell at market-based rates. Rather than each entity having its own MBR tariff, which can result in dozens of

tariffs for each corporate family with potentially conflicting provisions, each corporate family would have only one tariff, with all affiliates with market-based rate authority separately identified in the tariff

- Reduce the administrative burden and confusion that occurs when there are multiple, and potentially conflicting, tariffs in a single corporate family.
- Maintain the flexibility of sellers and customers in negotiating the terms of individual transactions.