

132 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

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

Docket Nos. RM04-7-007

Market-Based Rate Affiliate Restrictions

RM10-20-000

ORDER GRANTING IN PART REQUEST FOR EXTENSION OF TIME TO
COMPLY

(Issued July 2, 2010)

1. On April 15, 2010, the Commission issued an order which addressed the Compliance Working Group's request for clarification of the market-based rate affiliate restrictions.¹ In the April 15 Clarification Order, the Commission provided guidance regarding which employees may not be shared under the market-based rate affiliate restrictions codified in Order No. 697.² Concurrently, the Commission issued a Notice of Proposed Rulemaking (NOPR) in Docket No. RM10-20-000 in which it proposed to

¹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities*, 131 FERC ¶ 61,021 (2010) (April 15 Clarification Order).

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, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

revise the market-based rate affiliate restrictions in order to reflect the guidance provided in the April 15 Clarification Order.³

2. On April 21, 2010, the Edison Electric Institute (EEI) submitted a request for an extension of time to comply in which it requests an expedited determination that the guidance provided in the April 15 Clarification Order will not be subject to enforcement unless and until the Commission issues a final rule pursuant to the Market-Based Rate Affiliate Restrictions NOPR.⁴ EEI contends that its request should be granted because: (1) the guidance set forth in the Market-Based Rate Affiliate Restrictions NOPR and in the April 15 Clarification Order seeks to resolve “confusing ambiguities that companies could not reasonably be expected to have resolved in the same way as the [April 15 Clarification Order] on their own”; and (2) this guidance could require companies to make modifications to their operations that may or may not be required depending on Commission action in the rulemaking.⁵ According to EEI, the April 15 Clarification Order announced three categories of employees who cannot be shared under the affiliate restrictions, two of which – employees engaged in fuel procurement and employees engaged in resource planning – had not previously been specified under the affiliate restrictions.

3. As an initial matter, with respect to EEI’s assertion that the clarifications in the April 15 Clarification Order could require companies to make modifications to their operations, we emphasize that the April 15 Clarification Order was not intended to expand the existing market-based rate affiliate restrictions as codified in our existing regulations, but rather was intended to provide guidance to the industry as to how the Commission interprets and applies its existing market-based rate affiliate restriction regulations.

³ *Market-Based Rate Affiliate Restrictions*, 75 Fed. Reg. 20,796 (Apr. 21, 2010), Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,630 (2010) (Market-Based Rate Affiliate Restrictions NOPR).

⁴ EEI does not provide a date by which it requests that the Commission act on its request for extension of time. On May 17, 2010, EEI separately filed a motion to stay enforcement of the April 15 Clarification Order until conclusion of the rulemaking proceeding or to rescind the Order as premature in light of the NOPR. In the alternative, EEI requests rehearing of the April 15 Clarification Order. In light of our decision here to grant EEI’s motion for extension of time to comply, we dismiss as moot EEI’s motion for stay or rescission. EEI’s request for rehearing of the April 15 Clarification Order will be addressed in a separate order.

⁵ EEI Request for Extension of Time at 2.

4. We will deny EEI's request for extension of time to comply with the guidance provided in the April 15 Clarification Order to the extent that EEI is seeking an extension with respect to employees who engage in economic dispatch or who determine the timing of scheduled outages. Prior to the April 15 Clarification Order, the Commission explained in Order No. 697-A that "shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, *may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities.*"⁶

5. Nevertheless, we will grant EEI's request for an extension of time to comply with the guidance provided in the April 15 Clarification Order regarding employees that engage in fuel procurement or resource planning until such time as the Commission issues a final rule in the Market-Based Rate Affiliate Restrictions NOPR proceeding. However, affected entities must continue to comply with the currently effective market-based rate affiliate restrictions adopted in Order No. 697 and as clarified in Order No. 697-A,⁷ including the prohibition against the sharing of market information between a franchised public utility with captive customers and its market-regulated power sales affiliate.⁸ Further, this extension of time does not change the Commission's findings in prior orders clarifying the market-based rate affiliate restrictions.⁹ To the extent that affected entities believe they need additional guidance concerning compliance with the currently effective market-based rate affiliate restrictions, they may submit a request for a no-action letter regarding specific proposed transactions, practices or situations¹⁰ or may seek waiver of the market-based rate affiliate restrictions on a case-by-case basis.¹¹

⁶ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253 (emphasis added).

⁷ *Id.*

⁸ See 18 C.F.R. § 35.39(d)(1) (2010) ("A franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public.").

⁹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

¹⁰ See *Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC ¶ 61,157 (2008).

¹¹ See *Cleco Power LLC*, 130 FERC ¶ 61,102 (2010) (granting Cleco Power LLC and its affiliate Acadia Power Partners, LLC limited waiver of certain affiliate restrictions).

The Commission orders:

The Commission hereby grants an extension of time for affected entities to comply with certain clarifications provided in the April 15 Clarification Order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.