

134 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM10-20-000]

Market-Based Rate Affiliate Restrictions

(Issued January 20, 2011)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Withdrawal of Notice of Proposed Rulemaking and Termination of Rulemaking Proceeding.

SUMMARY: The Federal Energy Regulatory Commission (Commission) withdraws a notice of proposed rulemaking, which proposed to amend its regulations governing market-based rates for public utilities pursuant to section 205 of the Federal Power Act (FPA) to include in the regulatory text the clarification that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement or resource planning may not be shared under the market-based rate affiliate restrictions codified in Order No. 697.

EFFECTIVE DATE: This withdrawal will become effective [Insert_date that is 30 days after publication in the **FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

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Docket No. RM10-20-000

WITHDRAWAL OF NOTICE OF PROPOSED RULEMAKING AND
TERMINATION OF RULEMAKING PROCEEDING

(Issued January 20, 2011)

1. On April 15, 2010, the Commission issued a Notice of Proposed Rulemaking (NOPR) in this proceeding.¹ For the reasons set forth below, we are exercising our discretion to withdraw the NOPR and terminate this rulemaking proceeding.

I. Background

2. In Order No. 697,² the Commission adopted affiliate restrictions that govern the relationship between franchised public utilities with captive customers and their “market-regulated” power sales affiliates, i.e., affiliates whose power sales are regulated in whole or in part on a market-based rate basis. These market-based rate affiliate restrictions govern the separation of functions, the sharing of market information, sales of non-power

¹ *Market-Based Rate Affiliate Restrictions*, 75 FR 20796 (Apr. 22, 2010), Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,567 (2010).

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, *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).

goods or services, and power brokering. The Commission requires that, as a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless explicitly permitted by Commission rule or order. Failure to satisfy the conditions set forth in the affiliate restrictions constitutes a violation of a seller's market-based rate tariff.³

3. On March 9, 2009, the Compliance Working Group⁴ submitted a request for clarification in the Commission's market-based rate rulemaking proceeding regarding which employees can be shared for purposes of compliance with the Commission's market-based rate affiliate restrictions. On October 28, 2009, the Compliance Working Group submitted an amended request for clarification. In response to the Compliance Working Group's request, the Commission provided clarification regarding which

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549-550.

⁴ The Compliance Working Group stated that it consists of 27 energy companies, which include integrated electric businesses, merchant generators, marketing and trading businesses, and natural gas distributors, and explains that the group was formed in mid-2008 "to develop a model [Commission] compliance program guide." Compliance Working Group Request for Clarification, Docket No. RM04-7-007, at 2 (filed Mar. 9, 2009); Compliance Working Group Amended Request for Clarification, Docket No. RM04-7-007, at 3 (filed Oct. 28, 2009). The members of the Compliance Working Group taking part in its request for clarification are: Allegheny Energy, Inc., American Electric Power Company, Inc., Cleco Corporation, Consumers Energy Company, Dominion Resources, Inc., Duke Energy Corporation, Edison International, El Paso Electric Company, Energy East Corp., Entergy Corporation, Exelon Corporation, FirstEnergy Corp., FPL Group, Inc., Pacific Gas and Electric Co., Progress Energy, Inc., Public Service Enterprise Group Incorporated, and Westar Energy, Inc.

employees may not be shared under the affiliate restrictions.⁵ Concurrently with the April 15 Clarification Order, the Commission issued the NOPR, in which it proposed to revise the text of the separation of functions and information sharing provisions of the affiliate restrictions contained in § 35.39 of the Commission's regulations in order to reflect the clarification provided in response to the Compliance Working Group's request.

4. In the April 15 Clarification Order, the Commission denied the Compliance Working Group's request that the Commission interpret the market-based rate affiliate restrictions to permit the sharing of employees who are neither transmission function employees nor marketing function employees under the Standards of Conduct. However, in order to address the Compliance Working Group's concerns regarding compliance with the market-based rate affiliate restrictions, the April 15 Clarification Order provided guidance regarding which employees may not be shared under the affiliate restrictions.⁶ Specifically, the Commission rejected the Compliance Working Group's interpretation of the market-based rate affiliate restrictions because the Compliance Working Group's interpretation would permit the sharing of employees who are prohibited from being shared under the market-based rate affiliate restrictions (for instance, employees that make economic dispatch decisions or that determine the timing of scheduled outages).

⁵ *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).

⁶ April 15 Clarification Order, 131 FERC ¶ 61,021 at P 39-42.

Thus, the Commission explained that granting the Compliance Working Group's requested interpretation would permit market-based rate sellers to share employees that may not currently be shared under the affiliate restrictions.

5. The April 15 Clarification Order explained that “marketing function employee” is not a defined term in the market-based rate regulations adopted in Order No. 697, and explained that the restrictions on which employees may be shared under the market-based rate affiliate restrictions are not limited to those employees who are engaged in sales.⁷ It stated that, as clarified in Order No. 697-A, under the market-based rate affiliate restrictions, “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.”⁸ In this regard, the April 15 Clarification Order explained that responsibility for economic dispatch or the

⁷ Under the Standards of Conduct regulations, “marketing function employee” is defined as “an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions.” 18 CFR 358.3(d) (2010). “Marketing functions” means “in the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort. . . .” 18 CFR 358.3(c) (2010). As the Commission stated in the April 15 Clarification Order, the Standards of Conduct definition of “marketing function employee” may be read to be limited to those employees engaged in sales.

⁸ April 15 Clarification Order, 131 FERC ¶ 61,021 at P 37 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253).

timing of scheduled outages, for example, is not a “marketing function” under the Standards of Conduct and, therefore, employees engaging in economic dispatch or that determine the timing of scheduled outages would not be marketing function employees under the Standards of Conduct. Therefore, those employees could be shared under the Standards of Conduct, despite the fact that sharing of such employees is prohibited under the affiliate restrictions. Thus, consistent with the Commission’s determinations in Order No. 697-A, the April 15 Clarification Order clarified that, for purposes of compliance with the market-based rate affiliate restrictions, a franchised public utility with captive customers and its market-regulated power sales affiliates may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.⁹

6. The April 15 Clarification Order also explained that franchised public utilities with captive customers should be prohibited from sharing employees that engage in resource planning or fuel procurement with their market-regulated power sales affiliates. The Commission explained that if the franchised public utility and its market-regulated power sales affiliate are permitted to share employees that make strategic decisions about future generation supply, such as deciding when and/or where to build or acquire generating capacity, such strategic decision making by a shared employee could result in generation being built or acquired for the benefit of the market-regulated power sales affiliate, and at the expense of the captive customers of the franchised public utility. The

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

April 15 Clarification Order also explained that a shared employee that procures fuel for both the franchised public utility and the market-regulated power sales affiliate may have the incentive to allocate purchases of lower priced fuel supplies to the market regulated power sales affiliate while allocating purchases of higher priced fuel supplies to the franchised public utility. Therefore, given that the definition of marketing function employee under the Standards of Conduct does not specifically address employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning,¹⁰ the April 15 Clarification Order clarified that employees engaging in these activities are prohibited from being shared under the market-based rate affiliate restrictions, absent an explicit waiver from the Commission.

7. In order to reflect these clarifications, the Commission proposed in the NOPR to revise § 35.39 of its regulations in order to clarify that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not be shared under the market-based rate affiliate restrictions. Accordingly, the Commission proposed to revise the separation of functions provision contained in § 35.39(c)(2)(ii) of the regulations to include the provision that franchised

¹⁰ The prohibition on sharing employees that engage in resource planning applies only to the sharing of employees between a franchised public utility and its market-regulated power sales affiliate, and is not intended to alter resource planning activities by transmission providers that are permitted under the Standards of Conduct. *See Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280, at P 144 (2008) (Standards of Conduct Final Rule), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009).

public utilities with captive customers are prohibited from sharing employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning with their market-regulated power sales affiliates.

8. The Commission also proposed to revise the information sharing provision contained in § 35.39(d)(2) of the regulations to include the provision that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not have access to information covered by the prohibition of § 35.39(d)(1).

II. Comments

9. The Edison Electric Institute (EEI), Ameren Services Company (Ameren), Dominion Resources Services, Inc. (Dominion), Duke Energy Corporation (Duke), Entergy Services, Inc. (Entergy), and the Nuclear Energy Institute (NEI)¹¹ filed comments opposing the codification of the clarifications provided in the April 15 Clarification Order. The Transmission Access Policy Study Group (TAPS) submitted comments in support of the NOPR's proposed codification of the clarifications provided.

10. EEI contends that the April 15 Clarification Order bypassed the notice-and-comment proceeding established in the NOPR, depriving the public of an effective opportunity to provide input on the Commission's proposed changes. According to EEI,

¹¹ NEI represents the commercial nuclear energy industry in regulatory communications, public policy and other matters. NEI states that its members generate electricity for sale in both regulated and deregulated markets. NEI Comments at 2-3.

the NOPR is evidence that the April 15 Clarification Order does more than merely clarify existing restrictions. NEI also states that the April 15 Clarification Order is effectively amending the Commission's affiliate restrictions regulations without notice and comment. NEI contends that the NOPR is not a logical outgrowth of the Compliance Working Group's request for clarification or the notice associated with the request and that, as a result, the notice and comment on the Compliance Working Group's request for clarification does not satisfy the Administrative Procedure Act.¹²

11. EEI opposes adoption of the proposed changes to the market-based rate affiliate restrictions because it believes that the Commission's current regulations provide a solid and a sufficient framework to protect captive customers.¹³ EEI contends that the April 15 Clarification Order could impose new obligations on a number of utilities and require reorganization and operational changes by affected entities.¹⁴ EEI argues that the Commission should not adopt any such changes absent evidence that captive retail customers are at risk of subsidizing the activities of market-regulated power sales affiliate operations. EEI requests that the Commission find that franchised public utilities with captive customers and their market-regulated power sales affiliates may share employees who: (1) perform economic dispatch and outage scheduling functions, but are abiding by

¹² NEI Comments at 10 (citing *Shell Oil Co. v. E.P.A.*, 950 F.2d 741, 747 (D.C. Cir. 1991)).

¹³ EEI Comments at 5.

¹⁴ *Id.* at 16-17.

guidance provided by the Commission or its staff permitting the sharing of these employees; (2) provide inputs and other support to the resource planning process but do not exercise decisional authority with respect to such matters;¹⁵ or (3) provide shared fuel procurement services within the corporate family when the Commission or a state commission has approved such sharing of employees, or sharing is consistent with no-action letters or other such guidance. EEI also states that the Commission should find that franchised public utilities with captive customers and their market regulated power sales affiliates may continue to rely on waivers, no-action letters, audit reports, informal guidance, or other documents that the Commission or its staff has issued, even if those documents precede or depart from the April 15 Clarification Order or the Final Rule issued pursuant to the NOPR.

12. With respect to fuel procurement employees, EEI requests that, at a minimum, the Commission clarify that: (1) those franchised public utilities with captive customers and their market-regulated power sales affiliates that currently rely on a shared fuel procurement unit may continue to do so; and (2) companies may seek waivers in the future to establish new shared fuel procurement units. EEI asserts that joint fuel procurement would be governed by the requirements of the regulations adopted in Order

¹⁵ While it is unclear what EEI means by its use of the term “inputs,” EEI appears to use the term “inputs” to describe support services.

Nos. 667 and 707, and by applicable state orders and regulations, and argues that the Commission has not previously proscribed the use of joint fuel procurement units.¹⁶

13. Dominion, Ameren, Duke, Entergy, and NEI make arguments similar to those of EEI. Dominion, Duke, Entergy, and NEI argue that sharing of nuclear fuel procurement employees should be permitted. NEI argues that a categorical prohibition on the sharing of employees that engage in fuel procurement is unnecessary given that there is no record of abuse and that such a prohibition would negatively affect the ability of utilities to procure nuclear fuel. NEI argues that the Commission has allowed the sharing of fuel procurement employees in the past, and suggests that the Commission's concerns regarding the sharing of fuel procurement employees could be better addressed through procedural approaches, such as requiring separate contracts for each entity and auditable records to justify specific procurement actions.¹⁷ According to Entergy, market-based rate affiliate personnel with information on regulated utility nuclear fuel prices could not use that information in electricity trading or dispatch decisions in any manner to the

¹⁶ EEI Comments at 13-14 (citing *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g*, Order No. 667-A, FERC Stats. & Regs. ¶ 31,213 (2006), *order on reh'g*, Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g*, Order No. 667-C, 118 FERC ¶ 61,133 (2007); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 (2008), *order on reh'g*, Order No. 707-A, 124 FERC ¶ 61,047 (2008)).

¹⁷ NEI Comments at 4-7 (citing *Entergy Corp.*, No-Action Letter, Docket No. NL07-4-000 (Feb. 8, 2007)).

detriment of ratepayers, even if the no-conduit rule were ineffective in ensuring that marketing personnel do not have access to that information.¹⁸

14. Dominion claims that state regulation of fuel procurement protects captive ratepayers, and states that it currently uses shared fuel procurement personnel in accordance with state commission-approved affiliate agreements. Dominion proposes that the Commission create safe harbors, which Dominion describes as pre-defined categories for fast-track waiver requests that permit the sharing of resource planning and/or fuel procurement employees. Dominion argues that creating safe harbors would minimize utilities having to make a fact-specific showing that part or all of the affiliate restrictions should not apply and minimize problems with showings becoming outdated.¹⁹

15. Entergy argues that, particularly in the nuclear context, the prohibition on the sharing of outage schedulers should be read narrowly, so that employees that support the outage scheduling process may continue to be shared. Entergy seeks confirmation that its interpretation of the words “determine the timing of” as being limited to a small group of personnel, such as site outage managers and senior vice presidents, who are the outage

¹⁸ Entergy Comments at 15, 17.

¹⁹ Dominion Comments at 8, 19-22.

decision-makers, is correct²⁰ and requests that the Commission clarify that after-the-fact sharing of certain information does not constitute the sharing of market information.²¹

16. Ameren argues that the use of shared employees allows the utilities to avoid having to hire duplicate sets of employees, and asserts that the Commission has found the sharing of resource planning and fuel procurement personnel appropriate in other circumstances.²² Ameren also argues that the proposed prohibitions against the sharing of resource planning or fuel procurement employees would contradict the findings in *National Fuel Gas Supply Corp. v. FERC*,²³ where the court found that the record did not support the Commission's attempt to *extend* the Standards of Conduct to relationships between pipelines and an additional class of their affiliates. Similarly, Duke argues that the Commission has not previously prohibited sharing of employees who engage in fuel

²⁰ Entergy Comments at 20-21.

²¹ Specifically, Entergy argues that the sharing of information concerning the causes of forced outages, system weakness or equipment failures, other potential concerns, and best practices should be permitted. *Id.* at 21-22.

²² Ameren Comments at 14-15 (citing Standards of Conduct Final Rule, FERC Stats. & Regs. ¶ 31,280 at P 146; *Entergy Services, Inc.*, No-Action Letter, Docket No. NL07-4-000 (Feb. 8, 2007); *Cinergy Services, Inc.*, No-Action Letter, Docket No. NL06-1-000 (Jan. 31, 2006)).

²³ 468 F.3d 831 (D.C. Cir. 2006).

procurement, and has not provided evidence that would support imposing new restrictions.²⁴

17. EEI contends that the proposed “blanket proscriptions” would run afoul of individual orders, notices, waivers, and no-action letters issued to companies that allow the sharing of employees that schedule outages or that engage in economic dispatch, resource planning or fuel procurement. Entergy argues that the Commission has previously recognized that co-owned units and plants should be excepted from certain prohibitions in the affiliate restrictions, as long as such sharing is kept to the minimum practicable level. Entergy seeks clarification as to whether the guidance provided by no-action letters and cases granting waivers to entities that co-own generation remains valid, and argues that if the Commission prefers that entities that have relied on this guidance but never submitted a waiver request, submit a waiver, it should so clarify.²⁵

18. Entergy argues that in the situation where a franchised public utility with captive customers and its market-regulated power sales affiliate co-own generation, there is a significant likelihood that market information about the level of dispatch of the total plant may become known to market-based rate affiliate personnel, despite co-owners taking steps to ensure that disclosures are kept to a minimum. Entergy argues that the Commission should clarify that the unintended, incidental sharing of market information

²⁴ Duke Comments at 3-4 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 564-565; Order No. 697-B, 125 FERC ¶ 61,326 at P 59).

²⁵ Entergy Comments at 22-23.

regarding economic dispatch as well as after-the-fact operational information does not violate the affiliate restrictions in the situation of co-owned generation, as long as economic dispatch decisions are made separately, and not by shared employees, and as long as the no-conduit rule is strictly followed.²⁶ Entergy also argues that the Commission should continue to permit sharing (for co-owned units) or coordination (for co-owned plants) of outage scheduling, to the extent necessary given the joint ownership arrangement, as well as the information sharing that inevitably results.²⁷ Entergy argues that the Commission should clarify that it recognizes the need for fuel procurement sharing in the situation of co-owned generation.²⁸

19. With respect to employees that engage in resource planning, EEI states that it has understood that “traditional” resource planning employees who make direct resource planning decisions could not be shared under the affiliate restrictions. However, it states that the Commission’s proposed proscription is written so broadly that it could inadvertently prevent the sharing of support staff, which is explicitly permitted by the Commission’s regulations.²⁹ EEI also states that it assumes that by the term “employee,” the Commission does not mean to include senior executives responsible for overseeing

²⁶ *Id.* at 23-24.

²⁷ *Id.* at 25 (citing *Allegheny Energy, Inc.*, 119 FERC ¶ 61,025 (2007)).

²⁸ *Id.* at 26-28.

²⁹ EEI Comments at 7-8.

corporate activities from a family-wide perspective and who have fiduciary responsibilities, including responsibilities regarding the acquisition of significant assets and corporate finance.³⁰

20. TAPS argues that the Commission should revise its regulations as proposed in the NOPR and should emphasize that its proposed clarifications concerning the sharing of employees are not an exhaustive listing of prohibited shared employees. TAPS states that the Commission correctly identified situations where the sharing of employees between affiliated market-based rate power sellers and franchised public utilities with captive customers could harm the captive customers of the franchised public utility.

21. EEI argues that the Commission should provide affected companies with 60 days of transition time to comply with the changes adopted in the Final Rule or to file a request for waiver.³¹ Ameren argues that if the Commission adopts the changes proposed in the NOPR, the Commission should only apply the prohibition against the sharing of fuel procurement and resource planning employees prospectively, beginning no earlier than 180 days after the Final Rule becomes effective, and that the Commission should grandfather existing sharing agreements.³² Dominion requests that the Commission provide “a significant amount of time” to undertake the structural reorganizations that

³⁰ *Id.* at 8, n.10.

³¹ *Id.* at 17.

³² Ameren Comments at 23-25.

will be required if the proposed changes are adopted. Dominion requests that the Commission require companies to be in compliance within one year of the later of: (1) the date of issuance of the Final Rule; (2) the date of Commission action on any waiver request filed within 30 days of the issuance of the Final Rule; or (3) the date of state commission action on any approval required in connection with a proposed restructuring to comply with the Final Rule.³³

III. Discussion

22. Upon further consideration, we will withdraw the NOPR because the current regulations are sufficient insofar as they already require that employees of a market-regulated power sales affiliate operate separately from the employees of any affiliated franchised public utility with captive customers, to the maximum extent practical. While the NOPR was intended to provide additional clarity to the industry by identifying in the regulatory text certain employees who cannot be shared, we find that codifying these clarifications in the regulatory text is unnecessary because the separation of functions requirement in the existing regulations already requires that, “[t]o the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility.”³⁴ The existing regulations also provide that “[a] franchised public utility with captive customers may not

³³ Dominion Comments at 23-24.

³⁴ 18 CFR 35.39(c)(2)(i) (2010).

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.”³⁵ Because we find that codifying these clarifications provided in the April 15 Clarification Order in the regulatory text is unnecessary, we conclude that it is no longer necessary to adopt the amendments to the regulations proposed in the NOPR. Sellers will be required to comply with the guidance provided in the April 15 Clarification Order within 90 days of the date of issuance of the order addressing EEI’s request for rehearing of the April 15 Clarification Order in Docket No. RM04-7-009, which is being issued concurrently with this order.³⁶

23. We find that commenters’ arguments objecting to the amendments to the regulatory text proposed in the NOPR and their arguments that adequate notice and opportunity for comment were not provided on the amendments to the regulatory text are rendered moot by our withdrawal of this NOPR. We address below commenters’ remaining arguments.

24. A number of commenters request that we clarify that franchised public utilities with captive customers may share employees with their market-regulated power sales affiliates where they are abiding by guidance provided by the Commission or by a state

³⁵ 18 CFR 35.39(d)(1) (2010).

³⁶ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 134 FERC ¶ 61,046, at P 27 (2011).

commission or in certain circumstances, such as in the case of co-owned generation facilities. We decline to grant such clarification on a generic basis.

25. While the Commission has granted waiver of its market-based rate affiliate restrictions to permit the sharing of certain employees in certain circumstances, such as employees that schedule outages at co-owned generation facilities, these waivers were based on case-specific circumstances and representations made by the specific applicants in those cases. For example, in *Cleco Power LLC*, the waiver of certain affiliate restrictions was limited to three employees, was limited to the “specific facts and circumstances” presented by the applicants, and was conditioned on the requirement that the applicants maintain sufficient records to allow the Commission to audit their compliance with the conditions of the waiver.³⁷ We believe that the Commission, for

³⁷ 130 FERC ¶ 61,102, at P 22-25 (2010) (granting limited waiver to permit sharing of employees that determine the timing of scheduled outages based on the conjoined nature of the facilities and the applicants’ representations that the waiver was necessary to allow for the practical and efficient operation of the conjoined facilities); *see also Allegheny Energy Inc.*, 119 FERC ¶ 61,025 at P 20, 22 (granting waiver of the market-based rate code of conduct information sharing provision (the market-based rate code of conduct was the predecessor to the affiliate restrictions codified in Order No. 697) based on the applicants’ representations that the waiver was necessary to allow for the practical and efficient operation of the conjoined facilities); *American Electric Power Service Corp.*, 119 FERC ¶ 61,064, at P 20 (2007) (granting waiver of the market-based rate code of conduct (the market-based rate code of conduct was the predecessor to the affiliate restrictions codified in Order No. 697) to allow sharing of a senior executive officer based on the applicants’ representations that the senior executive officer was not involved in the daily functions of directing, organizing and executing business decisions).

Further, the Commission has granted waiver of the affiliate restrictions where a seller demonstrates and the Commission agrees that the seller has no captive customers.

(continued...)

purposes of the affiliate restrictions, should retain its authority to review on a case-by-case basis circumstances where affiliates seek to share employees or market information. Accordingly, we clarify that prior orders granting waiver are case specific and apply only to the entities that were specifically granted waiver in those cases. Therefore, entities that have relied on this previous guidance but who have not submitted a waiver request themselves should submit such a request. Entities that have previously obtained waiver of certain of the affiliate restrictions may continue to rely on those waivers as long as the facts and circumstances relied upon by the Commission in granting the waiver remain true and accurate, and as long as any conditions set forth in the order granting waiver continue to be satisfied.

26. Similarly, we clarify that an entity may rely on the guidance provided by Commission staff in a no-action letter if the letter was issued in response to that entity's request, and if the specific facts and representations relied on by Commission staff in responding to the no-action letter request remain true and accurate.³⁸

See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 552, 589. Likewise, sellers have the option of seeking waiver of the separation of functions requirement to allow the sharing of employees that engage in fuel procurement or resource planning.

³⁸ *See Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC ¶ 61,157, at P 10-12 (2008) (explaining that no-action letters “can offer useful guidance to the industry,” however, are non-binding on the Commission, and must relate to a specific, actual transaction, practice or situation in which the applicant is or may be involved, and that the applicant must explain the specific details of the transaction, practice or situation).

27. While we reject the notion that the Commission should rely on determinations made by state commissions with respect to the sharing of employees, we clarify that to the extent that an affected entity believes that a state commission's determination supports waiver of our market-based rate affiliate restrictions, the Commission will consider this argument on a case-by-case basis if this argument is presented in a request for a no-action letter regarding specific proposed transactions, practices or situations, or in a case-specific request for waiver of the affiliate restrictions.

28. Similarly, in response to commenters' arguments that sharing of nuclear fuel procurement and other fuel procurement employees should be permitted, an entity can seek waiver of the affiliate restrictions to permit the sharing of certain employees based on case-specific circumstances.

29. We deny Entergy's request that the Commission confirm which of Entergy's personnel determine the timing of scheduled outages, and its request as to whether after-the-fact sharing of certain information constitutes the sharing of market information, and whether unintended sharing of market information regarding economic dispatch and operational information violates the affiliate restrictions when such sharing occurs in the context of co-owned generation.³⁹ As we explain above, prior orders granting waiver of

³⁹ The Commission has adopted an exception to the independent functioning requirement and the information sharing restrictions for emergency circumstances affecting system reliability, provided that the subsequent reporting provisions are followed. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 568; 18 CFR 35.39(c)(2)(iii) (2010). The Commission has also explained that, while shared field and

(continued...)

the affiliate restrictions are case specific, and apply only to the entities that were specifically granted waiver in those cases. Further, Entergy does not provide sufficient detail regarding the activities of its personnel that determine the timing of scheduled outages, or sufficient detail regarding the facts and circumstances of the information sharing that it believes is permitted for the Commission to confirm whether Entergy's sharing of employees and market information is permitted.⁴⁰ To the extent that Entergy seeks clarification concerning whether it is complying with the market-based rate affiliate restrictions, or seeks waiver of certain affiliate restrictions, it may submit a request for a no-action letter regarding specific proposed transactions, practices or situations, or a case-specific request for waiver of the affiliate restrictions.

maintenance employees may not make economic dispatch decisions or determine when scheduled maintenance outages will occur, they may do so during emergency forced outages. *See* Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 568. In addition, the Commission has explained that it permits the sharing of information to enable nuclear power plants to comply with the requirements of the Nuclear Regulatory Commission (NRC) as described in the NRC's February 1, 2006 Generic Letter 2006-002, Grid Reliability and the Impact on Plant Risk and the Operability of Offsite Power. Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at n.339 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 581).

⁴⁰ With respect to Entergy's request that the Commission confirm that Entergy's interpretation of employees that determine the timing of scheduled outages is limited to a small group of personnel, such as site outage managers and senior vice presidents, who are the outage decision-makers, we note that the Commission has previously clarified "that companies may share employees and supervisors who have the authority to curtail or stop the operation of generation facilities solely for operational reasons" and 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." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

30. For the reasons discussed above, the Commission withdraws the NOPR and terminates this rulemaking proceeding.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.