

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellingshoff.

Accounting and Financial Reporting for Public Utilities Docket No. RM04-12-002
Including RTOs

ORDER DENYING REHEARING

(Issued October 19, 2006)

1. On December 16, 2005, the Commission issued Order No. 668,¹ amending the accounting and financial reporting requirements for public utilities. On April 20, 2006, the Commission issued Order No. 668-A, denying rehearing and issuing a clarification on the proper netting of certain energy transactions. On May 22, 2006, the Wisconsin Companies² filed a request for rehearing of the clarification issued in Order No. 668-A. In this order, we deny rehearing.

Background

2. In Order No. 668, the Commission adopted new accounting and reporting requirements for public utilities, including Independent System Operators and Regional Transmission Organizations (jointly, RTO). These new measures required that public utilities that participate in RTO energy markets, and may both bid generation into the market and buy generation to serve their load from the market, should record transactions on a net basis, because the purchase and sale transactions are to serve load in the same reporting period and are made in contemplation of each other, and thus should be netted.³ In Order No. 668-A, the Commission clarified that RTO energy market transactions in the day-ahead RTO energy market and real-time RTO energy market must be separately

¹ *Accounting and Financial Reporting for Public Utilities Including RTOs*, Order No. 668, FERC Stats. & Regs. ¶ 31,199 (2005), *reh'g denied*, Order No. 668-A, FERC Stats. & Regs. ¶ 31,215 (2006).

² The Wisconsin Companies are: Madison Gas and Electric Company, Wisconsin Electric Power Company, Wisconsin Power and Light Company, and Wisconsin Public Service Corporation.

³ Order No. 668, FERC Stats. & Regs. ¶ 31,199 at P 80-84.

netted to determine whether an entity is a net seller or net purchaser in each market in any given hour. This is because the two RTO-administered energy markets are cleared and settled separately.⁴

Request for Rehearing

3. On May 22, 2006, the Wisconsin Companies filed a request for rehearing of the clarification. Specifically, they assert that the Commission violated the Administrative Procedure Act (APA)⁵ by not adhering to the Act's notice and comment rulemaking procedures, and by not providing a reasoned explanation for what, in the Wisconsin Companies' view, is a reversal of Commission policy.⁶ The Wisconsin Companies also claim that the Commission violated its own rules by participating in *ex parte* communications concerning the clarification, and that the clarification is unduly discriminatory.

4. The Wisconsin Companies state that the clarification "upset" their understanding of Order No. 668.⁷ They characterize it as "clearly arbitrary and capricious," "in the absence of any rationale," and in violation of the APA because it is a new rule, issued "without reasoned explanation or the benefit of comment by affected entities."⁸ According to the Wisconsin Companies, netting should occur *across* RTO markets because, while there may be two separate markets, they lead to a single outcome – the service of an entity's native load.⁹

5. The Wisconsin Companies also state that the clarification potentially exposes them to disproportionate gross receipts tax liability, since it does not allow them to net sales and purchases across the different markets.¹⁰ According to the Wisconsin Companies, the clarification is unduly discriminatory because "some market participants, and not

⁴ Order No. 668-A, FERC Stats. & Regs. ¶ 31,215 at P 14-16.

⁵ 5 U.S.C. §§ 551-59 (2000).

⁶ See Wisconsin Companies' Request for Rehearing at 2.

⁷ *Id.* at 5.

⁸ *Id.* at 6, 8.

⁹ *Id.* at 7.

¹⁰ *Id.* at 8.

others, may now be exposed to disproportionate gross receipt[s] tax liability.”¹¹ The Wisconsin Companies also claim that the Commission violated its own rules by participating in *ex parte* communications concerning the clarification.¹²

6. On July 6, 2006, E.ON U.S. LLC (E.ON) filed a response to the request for rehearing.

Discussion

7. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure¹³ prohibits answers to requests for rehearing. Therefore, we reject E.ON’s pleading.

8. The Wisconsin Companies assert that the Commission violated the APA and its own regulations by failing to use notice and comment rulemaking procedures, not including a “reasoned explanation” for allegedly reversing prior policy, issuing an unduly discriminatory rule, and engaging in *ex parte* communications during the proceeding. We disagree, and for the reasons discussed below, deny rehearing.

9. The Wisconsin Companies’ argue that the Commission violated the APA by not utilizing notice and comment rulemaking procedures prior to issuing the clarification, because the clarification is actually a new rule. We reject this argument. We were merely interpreting in Order No. 668-A the regulations we had just adopted in Order No. 668. That is, we said in Order No. 668 that we would allow transactions to be recorded on a net basis, and in Order No. 668-A we explained how that is to be done, *i.e.*, that the netting should not be across markets but within each market. There was nothing impermissible about our doing so. Indeed, the Wisconsin Companies effectively acknowledged the need for such a clarification, noting that Order No. 668 “permit[ed] the netting of sales and purchases,” “which the Wisconsin Companies *interpreted* to include both RTO Day-Ahead and Real-Time Energy Markets.”¹⁴ Moreover, under the APA, the Commission may issue interpretive rules without notice and comment rulemaking procedures¹⁵ to “clarify an existing statute or regulation.”¹⁶ Interpretive rules are “issued

¹¹ *Id.* at 8.

¹² *Id.* at 8.

¹³ 18 C.F.R. § 385.713(d)(1) (2006).

¹⁴ Wisconsin Companies’ Request for Rehearing at 5 (emphasis added).

¹⁵ 5 U.S.C. § 553(b)(A) (2006).

¹⁶ *N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 267 F.3d 128, 131 (2d Cir. 2001).

by an agency to advise the public of the agency's construction of . . . the rules which it administers,"¹⁷ and they "merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule."¹⁸ Here, even if the clarification was to be viewed as a new rule, it would be an interpretive rule. Order No. 668 requires the recording of RTO energy market transactions on a net basis. Order No. 668-A's clarification merely explains how the netting is to be done. A clarification "does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted."¹⁹

10. The Wisconsin Companies portray the clarification as a change in the Commission's previous position, unaccompanied by a reasoned explanation. This characterization is incorrect. The clarification did not alter the requirements of Order No. 668. It further explains those requirements. The Commission provided a reasoned explanation for its netting policy in Order No. 668; the clarification merely provides entities further guidance on applying Order No. 668's netting requirements.²⁰

11. The Wisconsin Companies also argue that the clarification is unduly discriminatory because some market participants, and not others, may now be exposed to disproportionate gross receipts tax liability. Contrary to the Wisconsin Companies' assertion, the clarification is not unduly discriminatory. We simply wish to have accounting that allows us to consider what is taking place in each market. The Commission is not a taxing authority, and does not impose tax liabilities. Moreover, the fact that, for our purposes, we want the markets to be netted separately also does not mean that gross receipts are higher and that tax liabilities are higher. For purposes of determining gross receipts, and gross receipts tax liability, it may be appropriate to

¹⁷ *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 88 (1995).

¹⁸ *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004).

¹⁹ *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

²⁰ The Wisconsin Companies acknowledge that there are two separate markets. See Wisconsin Companies' Request for Rehearing at 7. While ultimately, as we acknowledged in Order No. 668, FERC Stats. & Regs. ¶ 31,199 at P 80, the transactions in the two markets – day-ahead and real-time – are intended to serve load in real-time, the fact is that we want them to be netted separately. They are two separate markets, operated and settled separately. Also, separately netting the two markets increases transparency and aids the monitoring of activities in those markets.

further net across the two markets. That is a matter, however, between the Wisconsin Companies and the relevant taxing authorities. The clarification at issue here is directed at transparency in accounting.

12. Finally, the Wisconsin Companies assert that the Commission has violated its own rules by issuing the clarification in response to *ex parte* communications. The Wisconsin Companies miss that the prohibition on *ex parte* communications applies to “contested on-the-record proceedings,”²¹ and notice-and-comment rulemakings are expressly excluded.²² This proceeding is a notice-and-comment rulemaking proceeding. Therefore, the prohibition on *ex parte* communications does not apply to the clarification here.

The Commission orders:

The Wisconsin Companies’ request for rehearing is hereby denied.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.

²¹ 18 C.F.R. § 385.2201(a) (2006).

²² 18 C.F.R. § 385.2201(c)(1)(ii) (2006).