

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Reporting Requirement Changes in Status for  
Public Utilities With Market-Based Rate  
Authority

Docket No. RM04-14-000

**Initial Comments of the  
Electricity Consumers Resource Council  
( ELCON )**

The Electricity Consumers Resource Council (ELCON) appreciates the opportunity to submit comments in response to the Commission's October 6, 2004 Notice of Proposed Rulemaking (NOPR) on reporting requirement changes in status for public utilities with market-based rate authority. As the national consumer group representing the interests of large industrial end users, we strongly support any attempt to reconcile the Commission's policy on market-based rates (MBR) with growing concerns that entities with MBR authority can exercise market power.<sup>1</sup>

**Introduction**

The NOPR proposes to amend the Commission's regulations and to modify the MBR authority of current MBR sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at

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<sup>1</sup> The types of market power that are at risk here are: (1) generation market power, (2) transmission market power, (3) barriers to entry, and (4) the potential for affiliate abuse or reciprocal dealing.

market-based rates. The NOPR proposes to establish guidelines concerning the types of events that trigger this reporting obligation and to modify the MBR authority of current MBR sellers to ensure that all such events are timely reported to the Commission by eliminating the option to delay reporting such events until submission of a MBR seller's updated (triennial) market power analysis. The Commission proposes that notice of such changes in status be filed no later than 30 days after the change in status occurs. NOPR at ¶ 2.

The events that potentially trigger a change in status include, but are not limited to: (1) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the MBR seller's original or most recent market analysis that owns or controls generation or transmission facilities or inputs to electric power production or affiliation with any entity that has a franchise service area. NOPR at ¶ 8. The most significant change from current practice is the clarification that "control" of assets or inputs to production, or any change in an affiliate's "control" of assets or inputs to production also qualifies as a change in status. NOPR at ¶ 9.

The NOPR proposes to incorporate these new requirements into the MBR tariff of each entity that is currently authorized to make sales at market-based rates.

### **Comments of the Electricity Consumers Resource Council**

ELCON unequivocally supports the clear intent of the Commission's proposals in this NOPR. We believe that some form of 30-day reporting requirement (as modified below) and the clarification that a change in status is triggered not only by a material change in ownership but also "control" of assets or inputs to production, or change in an affiliate's control of such assets or inputs are timely enhancements to the Commission's section 206 oversight of wholesale

markets. We believe that applicants for market-based rate authority that are vertically-integrated utilities, or unregulated independent or affiliate power producers with large portfolios of merchant capacity in regional or sub-regional markets, must be the target of the proposed rule because they wield the greatest potential for exercising market power.

Market-based rate authority is not an entitlement, and as long as workably competitive wholesale markets are a Commission policy objective, applicants for MBR authority must meet the most stringent test to ensure that rates are just and reasonable. For over a half-century, the Commission and the courts have had the opportunity to fine-tune the requirements of just-and-reasonable cost-of-service based rates. MBRs and the manner in which such rates are authorized are still largely experimental and therefore deserving of greater, not lesser regulatory scrutiny. The NOPR is an excellent step in this direction.

**The Thirty-Day Reporting Requirement Should Be Modified  
To Reduce the Potential Burden on Entities That Cannot Exercise Market Power**

Many large industrial end users own and operate a growing amount of behind-the-meter customer generation (*e.g.*, PURPA qualifying cogeneration) that is primarily dedicated to serve behind-the-meter load and a steam host. Such generation does not have the capability to influence market prices as might a similarly sized merchant/affiliate unit or fleet of such units. These companies have multiple business units and it may take more than 30 days for one business unit to be aware of another's transaction that could nominally trigger the proposed reporting requirement. ELCON proposes two modifications to the proposed rule.

First, the Final Rule should keep the 30-day initial notice period that would only alert the Commission that a potential change in status may have occurred. The respondent would have an additional sixty (60) days thereafter to file additional documentation as necessary.

Second, we recommend that the Final Rule include a materiality threshold for large, end-use corporations that may have relatively small changes in generation at its production sites, *i.e.*, relative to the generator rate bases of investor-owned utilities or the fleet sizes of independent/affiliate merchant generators. A general materiality threshold of 300 MW increase in generation (or alternatively, an increase in generation equal to 1 or 2 percent of installed capacity in a region market) would eliminate the need to report relatively small increases in generation. To the extent that the increase in generation was less than this threshold, the 30-day reporting requirement should be waived. A materiality threshold of this type would serve the purpose of reducing the need for unnecessary reporting and truly burdensome monitoring that confers no benefit to the market.

Respectfully submitted,

**The Electricity Consumers Resource Council**

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Dated: November 15, 2004