

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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March 29, 2010

SENT VIA ELECTRONIC FILING

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. RM09-16-000 - Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act

Dear Secretary Bose:

For filing, please find the Notice of Intervention and Comments of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Control and Affiliation for)
Purposes of Market-Based Rate)
Requirements under Section 205) Docket No. RM09-16-000
of the Federal Power Act and)
the Requirements of Section 203)
of the Federal Power Act)

NOTICE OF INTERVENTION AND COMMENTS OF
THE NEW YORK STATE PUBLIC SERVICE COMMISSION

NOTICE OF INTERVENTION

On January 21, 2010, the Federal Energy Regulatory Commission (FERC or Commission) issued a Notice of Proposed Rulemaking (NOPR) proposing to amend the Commission's regulations. These amendments would grant blanket authorization for a holding company to acquire 10% or more, but less than 20%, of a public utility if the acquiring company files an Affirmation and agrees to conditions ensuring that it lacks control over the utility. The New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Comments in the above-captioned proceeding pursuant to the NOPR published in the Federal Register on January 28, 2010, and Rule 214 of the Commission's Rules of Practice and Procedure.

Copies of all correspondence and pleadings should be addressed to:

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BACKGROUND

The Commission's NOPR proposes to amend the Commission's regulations to allow a holding company to acquire 10% or more, but less than 20%, of a public utility's or holding company's outstanding voting securities, provided the investor files an Affirmation. The Affirmation would certify that such securities were not acquired, and are not being held, for the purpose, or with the effect, of changing or influencing the control of the public utility or holding company. The acquiring company would also be required to comply with certain conditions designed to limit its ability to exercise control.

The NOPR also proposes to amend the definition of an "affiliate" of a specified company to include any person that controls, is controlled by, or is under common control with such

specified company.¹ A public utility, in respect of which an Affirmation has been filed, would be exempt from certain reporting requirements of an affiliate for purposes of the Commission's market-based rate program.

DISCUSSION

The Commission Should Ensure That A Public Utility That Purchases Security Interests In Another Public Utility Cannot Inappropriately Profit By Exercising Market Power

The NYPSC recognizes the Commission's legitimate interests in streamlining its reporting requirements, but we are concerned that further exemptions from these requirements, as proposed in the NOPR, could create a lack of effective oversight and allow public utilities to inappropriately profit from the exercise of market power. By purchasing a security interest in another utility, even below 20%, the acquiring utility may obtain the ability to profit from the exercise of market power. Notwithstanding the inability of the purchasing utility to control the other companies' assets, the purchase could create an incentive for the utility to physically or economically

¹ The Commission's current regulations create a rebuttable presumption that a person that owns less than 10% of the outstanding voting securities of a public utility lacks control of that public utility. See, 18 CFR 35.36(a)(9)(v)(2009).

withhold supply that it does control in order to drive up prices for the other supply that it would receive profits from.

This potential to profitably exercise market power can be illustrated through two examples involving a 2,000 MW generator, assuming the price of electricity is \$50 per unit, and that a reduction in supply of 200 units will raise the price to \$54. In the first example, "XYZ Energy" sells all 2,000 units at the price of \$50, and makes \$100,000. If the generator then tries to profitably exercise market power by withholding 200 units, and in so doing raises the price from \$50 to \$54, it will sell 1,800 units at the \$54 price and receive total revenues of \$97,200. In this example, because the generators' revenues went down and it lost money via the withholding strategy, it suggests the generator would lack the ability to profitably exercise market power.

In the second example, XYZ Energy buys 20% of the stock in two 3,000-unit generating companies. This gives the generator, in effect, ownership of 1,200 more units (6,000 units x 20% = 1,200 units), although it does not control either of the 3,000 unit generators. In this situation, the generator is merely a passive owner that makes money from its ownership interests in other generators.

If XYZ Energy acts competitively, it would receive revenues from its own 2,000 unit generator and from the 1,200

units in which it has a 20% stake. At \$50, the generator would make \$100,000 from its own generator, plus \$60,000 from the generators in which it owns a 20% share ($\$50 \times 1,200$ units), for a total of \$160,000. However, if the generator withholds 200 units from its own unit in an effort to profitably exercise market power, and the price goes up to \$54, its revenues would be \$97,200 from its own generator ($\$54 \times 1,800$), plus \$64,800 from the two generators it has a 20% share of ($\$54 \times 1,200$), for a total of \$162,000. In this situation, the generator's acquisition of an ownership stake in other generators makes the withholding of 200 MW profitable. This suggests the generator would have market power, which it obtained by purchasing 20% of the shares of the other generators.

Given these possible scenarios, despite a utility not having control over the other facilities in which it acquires an ownership interest, we seek clarification from the Commission regarding how potential market power concerns will be identified and addressed. The NOPR appears to make it highly unlikely that such market power issues will be identified if no reporting requirements exist.

CONCLUSION

For the reasons noted above, the NYPSC respectfully requests that the Commission clarify how it will ensure that

public utilities cannot inappropriately profit by exercising market power, given the proposed amendments in the NOPR. The NOPR should not be adopted unless the Commission can ensure any such market power issues can adequately be identified and addressed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter McGowan". The signature is fluid and cursive, with the first name "Peter" being more prominent than the last name "McGowan".

Peter McGowan
General Counsel
Public Service Commission
of the State of New York

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Dated: March 29, 2010
Albany, New York

