


ENERGY ALERT

FERC REQUIRES PUBLIC UTILITIES WITH MARKET-BASED RATE AUTHORITY TO FILE A NOTICE OF CHANGE OF STATUS WITHIN 30 DAYS OF AN APPLICABLE OCCURRENCE

 On February 10, 2005, the Federal Energy Regulatory Commission (FERC or Commission) issued a Final Rule requiring sellers with market-based rate authority to file a “notice of change in status” within 30 days of the occurrence of such a change, and establishing guidelines to define the types of events that trigger this reporting requirement.¹ The Commission promulgated the Final Rule so that it will have “more timely” and “up-to-date information regarding . . . ownership or control of generation or transmission facilities and affiliate relationships.”²

The “change in status” reporting requirement has always pertained to the “characteristics” the Commission relied upon in granting market-based rate authority to a specific seller, i.e., information that enabled the Commission to determine that the seller does not have generation market power, transmission market power or the ability to raise barriers to entry and will not engage in affiliate abuse – the “four-prong” market-based rate test. Prior to the issuance of the Final Rule, the Commission allowed entities authorized to sell power at wholesale at market-based rates to “choose between promptly reporting changes in status, filing a three-year update in lieu of reporting changes in status as they occurred, or reporting such changes in conjunction with the [triennial] updated market analysis.”³ The Final Rule requires sellers to report applicable changes in status “no later than 30 days after the legal or effective date of the change in status”⁴

Content/Effect. A typical notice of change in status must include a description of the change and a “narrative explaining whether (and, if so, how) [the] change in status reflects a departure from the characteristics relied upon by the Commission in originally granting the seller market-

¹ *Reporting Requirement for Changes in Status For Pub. Utils. With Mkt.-Based Rate Authority*, 110 FERC ¶ 61,097 (2005) (Final Rule).

² *Id.* at P 9.

³ *Id.* at P 8 (footnotes omitted).

⁴ *Id.* at P 106.

based rate authority.”⁵ However, the Commission explained that “[i]t is incumbent upon the applicant to decide whether the change in status is a material change and to provide adequate support and analysis.”⁶ Although the Commission is *not* requiring “entities affected by a change in status to automatically file an updated market analysis,” it stated that it “reserves the right to require additional information, including an updated market power analysis, if necessary to determine the effect of an entity’s change in status on its market-based rate authority.”⁷ Further, the Commission confirmed that any subsequent revocation or revision of market-based rate authority based on a filed notice of change in status will be pursuant to Section 206 of the Federal Power Act.⁸

Sellers with market-based rate authority must file any notice of change in status “in the same docket in which market-based rate authority was granted” and must serve it “on the service list for that docket.”⁹ The Commission will publish a notice of filing and establish a period for interested parties to submit comments regarding any filed notice of change in status.¹⁰ The Commission clarified that a filed notice of change in status is a compliance filing and thus the Commission “is not required to take action within 60 days.”¹¹

Implementation. The Commission explained that the new reporting requirement “will be considered part of the seller’s market-based rate tariff as of 30 days after the date of publication of [the] Final Rule” in the Federal Register.¹² However, sellers also have a filing requirement: “Market-based rate sellers [are] required to include the reporting requirement in their market-based rate tariffs either at the time that they file any amendment to their tariffs, when they report a change in status under [the] Final Rule, or when they file their three-year updated market power analysis, whichever occurs first.”¹³

Change in Status Defined. The Commission provided the following general standards to guide sellers in determining whether a change in status is reportable:

[A]pplicants are reminded that the baseline determination of whether a filing is required is whether the change in status in question would have been reportable in an initial application for market-based rate authority under the Commission’s four-part analysis To the extent that the change in status in question would have been reportable in an initial request for market-based rate authority, a change in status filing is required.¹⁴

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⁵ *Id.* at P 93.

⁶ *Id.* at P 94.

⁷ *Id.* at P 95.

⁸ *Id.* at P 115.

⁹ *Id.* at P 107.

¹⁰ *Id.*

¹¹ *Id.* at P 114.

¹² *Id.* at P 98.

¹³ *Id.*

¹⁴ *Id.* at P 5.

[A] notice of change in status is required in circumstances where the factors the Commission relied upon in evaluating the four-part test as it applies to an applicant change.¹⁵

The appendix that follows contains excerpts from the Final Rule that discuss these distinctions.

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¹⁵ *Id.* at P 26.

APPENDIX

EXCERPTS FROM FERC FINAL RULE EXPLAINING REPORTABLE CHANGES IN STATUS FOR SELLERS WITH MARKET-BASED RATE AUTHORITY¹

Changes in “Control” of Generation and Transmission Facilities or Inputs to Electric Power Production Are a “Change in Status”

- “[I]f an applicant has control over certain capacity [contractually or otherwise] such that the applicant can affect the ability of the capacity to reach the relevant market, then that capacity should be attributed to the applicant” and is a reportable change in status.²
- “[T]he capacity associated with contracts that confer operational control of a given facility to an entity other than the owner must be assigned to the entity exercising control over that facility”³ Such assignment constitutes a change in status.
- “[C]ontracts or arrangements that convey ownership or control over generation, transmission or other inputs to electric power production, other than fuel supplies, [are] report[able] as a change in status.”⁴ However, the Commission cautioned that “the label placed on a specific contract does not determine whether it constitutes a reportable change in status. Instead, it is the manner in which the specific terms and conditions of the contract or arrangement convey ownership or control of the generation, transmission or other inputs to electric power production.”⁵
- “[A]greements that relate to operation (including scheduling and dispatch), maintenance, fuel supply, risk management, and marketing that transfer the control of jurisdictional assets are subject to the change in status reporting requirement. These types of arrangements have been referred to as energy management agreements, asset management agreements, tolling agreements, and scheduling and dispatching agreements.”⁶
- Long-term contracts entered into by a utility to satisfy “provider of last resort” obligations or pursuant to state-regulated competitive solicitations may be reportable if the market-based rate seller acquired control of additional capacity that affects the Commission’s four-prong market-based rate analysis.⁷

¹ *Reporting Requirement for Changes in Status For Pub. Utils. With Mkt.-Based Rate Authority*, 110 FERC ¶ 61,097 (2005) (Final Rule).1 *Id.* at P 47.

² *Id.* at P 47.

³ *Id.* at P 48.

⁴ *Id.* at P 82.

⁵ *Id.* at P 83.

⁶ *Id.* at P 83.

⁷ *Id.* at P 41.

- *100 MW Threshold*: “[S]mall increases in [control of] generation of less than 100 MW need not be immediately reported. However, market-based rate sellers must report as a change in status each cumulative increase in generation of 100 MW or more that has occurred since the most recent notice of a change in status filed by that seller”⁸

Events That Do Not Trigger the Reporting Requirement

- “[T]he reporting obligation . . . extend[s] only to changes in circumstances within the knowledge and control of the applicant [A]n applicant [is] not required to report a change in circumstances based on an action taken by a competitor (such as a decision to retire a generation unit or take transmission capacity out of service) or natural events”⁹
- “[I]ntra-corporate reorganizations that do not otherwise have an impact on [the Commission’s] four-part test and are not otherwise reportable need not be reported as a change in status.”¹⁰
- Section 35.27 of the Regulations of the FERC have provided that generation facilities constructed after July 9, 1996, are rebuttably presumed not to have generation market power.¹¹ The Commission clarified: “[T]o the extent that the generation owned or controlled by an applicant [in the relevant market] and its affiliates is post-1996, and the applicant or an affiliate acquires through purchase or acquisition additional post-1996 generation, no change in status filing is required.”¹²
- “[P]urely financial transactions involving future swaps and derivatives that do not provide for physical delivery are [not reportable]”¹³
- “[A] decrease in ownership or control due to dispositions of generation, transmission or inputs to production [are] not reportable”¹⁴
- Transmission outages are not per se reportable as a change in status unless the “transmission outage affects one or more of the factors of the four-part market-based rate test (e.g., if it reduces imports of capacity by competitors that, if reflected in the generation market power screens, would change the results of the screens from a ‘pass’ to a ‘fail’)”¹⁵

⁸ *Id.* at P 68.

⁹ *Id.* at P 27.

¹⁰ *Id.* at P 34.

¹¹ 18 C.F.R. § 35.27 (2004).

¹² Final Rule at P 38.

¹³ *Id.* at P 39.

¹⁴ *Id.* at P 40.

¹⁵ *Id.* at P 75.

Effect of Other Filings with the FERC

- “[A] market-based rate seller may incorporate by reference in its notice of change of status any filings regarding the change in status made pursuant to other reporting requirements,” such as “dispositions of jurisdictional facilities covered by [Federal Power Act (FPA), Section] 203 applications” and “long-term contracts or affiliate transactions that are filed pursuant to [Section] 205 [of the FPA.]”¹⁶
- “To the extent that an affiliate experiences a change in status, such change in status must be reported” by the affiliates to the extent it implicates a factor the Commission relied upon in granting market-based rate authority to the other affiliate. However, “various affiliates within a corporate family may submit a single notice [of change in status].”¹⁷

CONTACT INFORMATION

If you have questions concerning this Alert or would like further information on the Final Rule, please contact:

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¹⁶ *Id.* at PP 34, 35.

¹⁷ *Id.* at P 51.