UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ELECTRICITY MARKET TRANSPARENCY PROVISIONS OF SECTION 220 OF THE FEDERAL POWER ACT	**DOCKET NO. RM10-12-000**

REQUEST FOR REHEARING AND CLARIFICATION OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The National Rural Electric Cooperative Association ("NRECA") hereby requests rehearing and clarification of the Commission's Final Rule concerning the *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, issued September 21, 2012 in the above captioned docket.[1] NRECA requests rehearing of the Commission's inclusion of member sales transactions in the 4 million MWh threshold since those sales take place entirely outside of the markets, do not result in any market presence, are not influenced by market prices and have no influence on market prices. If the Commission does not grant rehearing, NRECA seeks clarification that non-public utilities that have a *de minimis* market presence, in terms of sales to non-members, may seek waivers of the EQR requirements on a case-by-case basis and may be granted automatic waivers under certain circumstances. NRECA also asks that the Commission clarify that it will not require non-public utilities to begin collecting and reporting data until after the Commission implements the new EQR software requirements and that it will continue to grant extensions of time to file EQRs for good cause shown. Finally, NRECA supports Edison Electric Institute's ("EEI") request for rehearing of the eTag ID requirement

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[1] *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012).

because the burden of reporting outweighs the benefits to the Commission of receiving eTag information.

I. BACKGROUND

NRECA submitted comments on the April 21, 2011 Notice of Proposed Rulemaking ("NOPR") issued in this proceeding urging the Commission not to impose EQR filing requirements on non-public utilities. NRECA asserted that if the Commission imposes such requirements, it should (i) calculate whether a non-public utility is exempt from the filing requirement based on wholesale sales rather than retail sales; (ii) adopt the proposed threshold of at least 4 million MWh of wholesale sales; (iii) exclude sales by non-public utilities to their members from the calculation of the 4 million MWh threshold; (iv) increase the 1 million MWh annual wholesale sales threshold for Balancing Authorities to at least 4 million MWh; and (v) not require double-reporting of sales data by three-tier Generation and Transmission Rural Electric Cooperatives.

NRECA appreciates that the Commission's Final Rule adopted several of the measures proposed by NRECA. However, the Commission failed to adequately consider several important points. Consequently NRECA is requesting rehearing and clarification on four issues with the goal of ensuring that the Commission can obtain the type of market information it seeks without unduly burdening market participants, and in particular non-public utilities.

II. REQUEST FOR REHEARING

A. SPECIFICATION OF ERROR AND STATEMENT OF ISSUE PURSUANT TO 18 C.F.R. §385.713(C)(1) AND (2)

The Commission erred in failing to exclude intra-familial or member sales from the 4 million MWh threshold that is used to determine whether a non-public utility has a *de minimis* market presence for Electric Quarterly Reporting purposes, because those sales do not impact or

contribute to market presence. The Commission's decision was arbitrary and capricious and inconsistent with Section 220(d) of the Federal Power Act, which provides that "The Commission shall not require entities who have a *de minimis* market presence to comply with the reporting requirement of this section."[2] *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Order is arbitrary and capricious where agency fails to provide reasoned basis for its decision, and departs from precedent.)

B. THE COMMISSION SHOULD EXCLUDE ALL MEMBER SALES BY NON-PUBLIC UTILITIES FROM THE 4 MILLION MWH THRESHOLD.

The Commission should exclude all member sales from the 4 million MWh threshold that is used to determine whether a non-public utility has more than a *de minimis* market presence and must file EQRs. Section 220(d) of the Federal Power Act provides that "The Commission shall not require entities who have a *de minimis* market presence to comply with the reporting requirement of this section."[3] Member sales or intra-familial sales transactions by non-public utilities do not result in any "market presence." For instance, Generation and Transmission Rural Electric Cooperatives ("G&Ts") typically were created for the express purpose of selling power to their Distribution Cooperative owners, and they enter into cost-based power sales contracts with their owners for terms that frequently are for thirty or forty years and relate to matters other than power purchases, such as construction activities.[4] Sales pursuant to those contracts cannot in any sense be considered to constitute a market presence because they take place entirely outside the power sales markets and in many instances were negotiated before

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[2] 16 U.S.C.A. § 824t.

[3] 16 U.S.C.A. § 824t.

[4] *See e.g.* Comments of National Rural Electric Cooperative Association, Docket No. RM10-12-000, at pp. 10-11 (filed June 28, 2011) ("NRECA Comments").

power sales markets even existed. In addition, while the Commission justified requiring public utilities to file EQRs "to comply with the requirement under FPA Section 205(c) to show all rates, terms and conditions of jurisdictional services,"[5] the Commission does not have Section 205(c) jurisdiction over sales by non-public utilities. The Commission has correctly held that sales by non-public utilities to their members should not be reported in EQRs, because those sales do not constitute market sales. The Commission stated:

> These types of sales do not significantly impact wholesale price formation in electric markets because these sales generally take place between a non-public utility and a pre-determined customer without arm's length negotiations.[6]

That same logic compels the conclusion that sales by non-public utilities to their members should not be included in determining whether the utility exceeds the 4 million MWh threshold for reporting, since those sales do not constitute a market presence. Since such sales will not provide the type of information needed to assist the Commission in meeting its obligations under Section 205(c) or fulfilling the FPA Section 220 objectives of monitoring collusion or anticompetitive conduct, the Commission should revise the 4 million MWh threshold to exclude member sales by non-public utilities.

III. REQUEST FOR CLARIFICATION

A. THE COMMISSION SHOULD CLARIFY THAT IT WILL GRANT WAIVERS ON A CASE-BY-CASE BASIS FOR NON-PUBLIC UTILITIES WITH A *DE MINIMIS* MARKET PRESENCE AND MAY CONSIDER AUTOMATIC WAIVERS FOR NON-MEMBER SALES OF 1 MILLION MWH OR LESS

If the Commission does not grant NRECA's request for rehearing, it should clarify that it will grant waivers, on a case-by-case basis, of the EQR requirement to non-public utilities that

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[5] Final Rule at P 56, citing Order No. 2001, FERC Stats. and Regs. ¶ 31,127 at PP 11, 44.

[6] NRECA Comments at P 22.

exceed the 4 million MWh threshold but nonetheless have a *de minimis* market presence. For example, a non-public utility may make more than 4 million MWh of sales to its members and have only a few thousand MWh of sales to non-members. Without a waiver, the non-public utility would have to invest substantial time and money to comply with the EQR reporting requirements simply to report inconsequential market sales that do not impact the market. Granting such waivers would be consistent with the Commission's policy concerning waivers of the EQR requirement.[7]

The Commission should also grant automatic waivers under certain circumstances, thereby eliminating the need for a non-public utility to file a waiver request. Under the circumstances described above, the Commission may determine that non-public utilities with, for example, less than 1 million MWh of sales to non-members automatically qualify for an exemption and need not file a waiver request.

B. THE COMMISSION SHOULD CLARIFY THAT IT WILL NOT REQUIRE NON-PUBLIC UTILITIES TO BEGIN COLLECTING AND REPORTING EQR DATA UNTIL AFTER IT FINALIZES THE NEW SOFTWARE.

The Commission should clarify that if it has not completed its software revisions by May 31, 2013, it will not require non-public utilities to begin collecting and reporting data until the beginning of the first quarter after it has completed those revisions. The Commission acknowledges in the Final Rule that "new filers will need the opportunity to learn about the filing" system and therefore establishes the third quarter of 2013 as the first EQR reporting period.[8] The Commission has stated that it will convene a staff-led technical conference to assist

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[7] *See* NOPR, FERC Stats. & Regs. ¶ 32,676 at P 135, n.147 (citing *Bridger Valley Elect. Assoc., Inc.*, 101 FERC ¶ 61,146).

[8] Final Rule at P 85.

non-public utilities in collecting and filing EQR data. NRECA and its members greatly appreciate the Commission's outreach in this area. However, the Commission is currently in the process of revamping the EQR filing system to accommodate the "technological changes that will render the current filing process outmoded, ineffective, and unsustainable."[9] It would not be worth the Commission's time to teach the old filing system or new filers' time and effort to learn the old filing system if the new software will take effect shortly thereafter. Rather, the more appropriate course of action is to wait until the new software platform has been finalized and allow adequate time for new filers to learn how to use new the software before requiring the first set of EQR data to be collected and filed. Therefore, if the Commission has not completed work on the new software by May 31, 2013, it should defer the date as of which new filers must begin collecting and reporting EQR data until the beginning of the first quarter after the implementation of new software. This strikes a reasonable balance between the Commission's desire to obtain relevant information on jurisdictional transactions and the time and effort new filers will need to expend to learn the EQR filing system. NRECA also respectfully requests that the Commission make any EQR technical conferences available via webcast for the benefit of those new filers that may not be able to attend the conference in person.

C. THE COMMISSION SHOULD CONFIRM THAT IT WILL CONTINUE TO GRANT EXTENSIONS OF TIME FOR MARKET PARTICIPANTS WHO HAVE DIFFICULTY PREPARING THEIR EQRS WITHIN 30 DAYS AFTER THE END OF A QUARTER.

NRECA also requests the Commission to confirm that it will continue to grant extensions of time to file EQRs to market participants who show good cause for the extension. The Commission has granted extensions of time for the filing of EQRs on many occasions in the past.

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[9] *Revisions to Elec. Quarterly Report Filing Process*, Notice of Proposed Rulemaking, 139 FERC ¶ 61,234, P 1 (2012)

NRECA anticipates that some new filers, and particularly smaller non-public utilities and those with low levels of non-member sales, may have difficulty completing their initial reports, and that the Commission's adoption of new filing and software requirements may make it even more difficult to comply with filing deadlines. Consequently, NRECA asks the Commission to confirm that it will grant extensions of time to market participants who demonstrate that despite good faith efforts they cannot meet the filing deadlines.

IV. EEI'S REQUEST FOR REHEARING OF THE eTAG ID REQUIREMENT

NRECA supports EEI's request for rehearing of the eTag ID requirement. As EEI explains at pp. 8-16 of its rehearing request, the reporting of eTag ID information is overly burdensome on the reporting entity and will provide the Commission with information of limited value. NRECA shares these concerns. The identification of eTag information is a laborious task that may require the hiring of additional full-time personnel solely to extract, review, and report the data. Moreover, the eTag information that the Commission receives may be easily misinterpreted because of the complexities of power scheduling, which are explicitly detailed in the EEI rehearing request. Because the burden of reporting outweighs the benefits to the Commission of receiving eTag information, the Commission should grant EEI's rehearing request and eliminate the eTag reporting requirement.

V. CONCLUSION

For the foregoing reasons, NRECA urges the Commission to grant rehearing and hold that sales by non-public utilities to their members are not included in determining the 4 million MWh threshold for applicability of the EQR filing requirements. This is consistent with the concept accepted by the Commission that information on member or intra-familial sales do not contribute to market presence. If the Commission does not grant rehearing, NRECA requests

that the Commission clarify that it will grant waiver of the EQR filing requirements on a case-by-case to non-public utilities who exceed the 4 million MWh threshold but that nonetheless have a *de minimis* market presence in terms of sales to non-members and will consider granting automatic waivers under certain conditions. NRECA also requests that the Commission clarify that it will delay the imposition of the reporting requirement for non-public utilities until the first quarter after the implementation of the new EQR filing software; and that it will continue to grant extensions of time to file EQRs for good cause shown. NRECA respectfully requests that the Commission grant rehearing of the eTag information reporting requirement for the reasons set forth herein and for the reasons identified by EEI in its rehearing request.

Respectfully submitted,

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