

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Control and Affiliation for Purposes of the
Commission's Market-Based Rate Requirements
under Section 205 of the Federal Power Act and the
Requirements of Section 203 of the Federal Power Act

Docket No. PL09-3-000

NOTICE OF AGENDA FOR WORKSHOP

(November 21, 2008)

As announced in the notice of workshop issued November 12, 2008, Commission staff will convene a workshop with interested persons regarding issues raised in Docket No. PL09-3-000, concerning the petition filed by the Electric Power Supply Association (EPSA). The workshop will be held on December 3, 2008, from 9:00 a.m. to 12:00 p.m. EST. The workshop will take place in hearing room 7 at the Federal Energy Regulatory Commission, located at 888 First Street NE, Washington, D.C.

This notice provides more information on the topics to be explored in the workshop. The goal of the workshop is to consider issues involving control and affiliation as they pertain to the Commission's market-based rate requirements under section 205 of the Federal Power Act (FPA) and the requirements of section 203 of the FPA.

In its petition,¹ EPSA asks that the Commission state that investments in publicly-held companies by investors owning less than 20 percent of such companies' voting securities and making filings with the Securities and Exchange Commission (SEC) on Schedule 13G, certifying that the investment is not for the purpose of controlling the company, will not be deemed to convey "control" or to result in "affiliation" for market-based rate or FPA section 203 purposes. EPSA also seeks confirmation that Commission findings that a given entity does not "control" another entity made in the FPA section 203 setting apply equally in the market-based rate setting to affected market-based rate sellers. Finally, EPSA requests that the Commission state that investments by entities upstream of a publicly-held company in entities not otherwise related to the publicly-held company will not be deemed to be within the knowledge and control of the publicly-held company's subsidiaries with market-based rate authorization, and, therefore, those market-based rate subsidiaries will not be required to file a notification of change in

¹ See Petition of the Electric Power Supply Association For Guidance Regarding "Control" and "Affiliation," Docket No. EL08-87-000, re-docketed as PL09-3-000 (Sept. 2, 2008) (Petition).

status or to include generation or inputs to generation owned or controlled by the other entities in future market power analyses.

In light of the issues raised by EPSA, participants are invited to address some or all of the following questions:

1. Should the Commission reconsider its decision in FPA Section 203 Supplemental Policy Statement, 120 FERC ¶ 61,060 (2007) not to rely solely on a Schedule 13G filing as evidence of a lack of control and instead to consider the totality of the facts and circumstances on a case-by-case basis? If so, why?
2. How does compliance with the intent to not exercise control for purposes Schedule 13G address the Commission's concerns under section 203 of the FPA and the Commission's market-based rate program?
3. What statutory and policy purposes is a Schedule 13G filing intended to fulfill under the SEC's regulatory program and how do they compare with the statutory and policy purposes of section 203 of the FPA and the Commission's market-based rate program under sections 205 and 206 of the FPA? Are the SEC and this Commission seeking to fulfill fundamentally different goals with respect to an entity's possible exercise of control, such that the Commission's reliance on the SEC's Schedule 13 filing requirements would be insufficient to help protect against the potential exercise of control as relevant to the Commission's concerns under sections 203, 205 and 206 of the FPA? If the answer to the prior question is yes, that reliance on the Schedule 13 filing requirements are insufficient, what if any additional filings or requirements might supplement the Schedule 13 requirements in this regard?
4. What actions can an investor take with respect to the management, operation or policies of a company in which it holds an investment and still be considered eligible to file a Schedule 13G? To what extent could taking any of those actions directly or indirectly in some way affect some aspect of the day-to-day operation of a public utility in which the investor holds an interest, either directly or through a holding company?
5. Using EPSA's hypothetical example shown on page 9 of the Petition, how far upstream should a seller go when determining whether an entity is an affiliate?
6. Using EPSA's hypothetical example shown on page 9 of the Petition, which of the IPPs should be considered to be under common control, and therefore affiliates, under the Commission's regulations?

7. Should a finding under FPA section 203 that an entity does not “control” another entity apply equally in the market-based rate setting? Conversely, should a finding under section 203 that an entity does “control” another entity necessarily apply equally in the market-based rate setting? If not, under what conditions or circumstances would the Commission have a reasonable basis to conclude that the same finding should not apply in the market-based rate setting?
 - a. For example, if an upstream owner has been found to not have control for section 203 purposes over two large IPPs in the same relevant market, should the IPPs be required to study one another’s generation for purposes of their individual horizontal and vertical market power analyses? Would the IPPs remain unaffiliated?
 - b. If the upstream owner has control over both IPPs for section 203 purposes, should the IPPs be required to study one another’s generation for purposes of their individual horizontal and vertical market power analyses?
8. Should the Commission revise its requirements under FPA section 203 and the market-based rate program, in light of the concern raised by EPSA that electric utilities may not know when their upstream owners acquire ownership interests in other electric utilities? If so, what changes can both address these concerns and still permit the Commission to carry out its responsibilities under sections 203 and 205 of the FPA?

All interested persons are invited to participate in this workshop. Those interested in participating are asked to register no later than November 28, 2008. To register or for additional information, please contact Christina Hayes at (202) 502-6194 or at christina.hayes@ferc.gov.

Nathaniel J. Davis, Sr.,
Deputy Secretary.