

100 FERC ¶ 61, 074
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Revised Public Utility Filing Requirements

Docket No. RM01-8-001

ORDER DENYING REQUESTS FOR REHEARING, REQUESTS FOR STAY AND
REQUEST FOR EXTENSION, AND PROVIDING CLARIFICATION

ORDER NO. 2001-A

(Issued July 18, 2002)

1. In this order, we deny various requests for rehearing of Order No. 2001,¹ but provide clarification regarding the "transaction end date" and "transaction begin date" data elements and the reporting of "book out" transactions. We also deny requests for stay and a request for a 29-day extension for the filing of the first Electric Quarterly Report (due on July 31, 2002).

BACKGROUND

2. On April 25, 2002, the Commission issued Order No. 2001, a final rule establishing revised public utility filing requirements. The rule revises the Commission's filing requirements to require public utilities to electronically file quarterly reports (Electric Quarterly Reports) summarizing pertinent data about their currently effective contracts (contract data) and data about wholesale power sales they made during the reporting period (transaction data). Electric Quarterly Reports replace the filing of: quarterly transaction reports summarizing a utility's market-based rate transactions; short and long term market-based sales agreements; and conforming cost-based agreements. The rule is intended to streamline and reduce the filing burden on public utilities, while

¹Revised Public Utility Filing Requirements, Order No. 2001, 67 FR 31043, FERC Stats. & Regs. ¶ 31,127 (April 25, 2002).

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providing greater transparency and information accessibility to the public and the Commission.

3. Timely requests for rehearing and/or clarification of this order were filed by eight parties: American Electric Power System (AEP); American Public Power Association (APPA); Constellation Power Source, Inc. (Constellation); Duke Energy North America, LLC and Duke Energy Trading and Marketing, L.L.C. (Duke Energy); Morgan Stanley Capital Group Inc. (Morgan Stanley); Reliant Resources, Inc. (Reliant); Southern Company Services, Inc. (Southern); and Williams Energy Marketing & Trading Company (Williams). Reliant, Williams, and Southern also seek a stay of Order No. 2001.

4. Collectively, the rehearing requests raise the following issues: whether to revise the dates to be reported in Electric Quarterly Reports for transaction end date, transaction begin date, and contract termination date; whether to reverse the Commission's findings in Order No. 2001 on confidentiality; whether to delay public disclosure of Electric Quarterly Reports beyond thirty days after the calendar quarter and allow data to be reported in an aggregated format; whether to grant a stay pending judicial appeal; and whether to grant a 29-day filing extension. In addition, to dispel any possible ambiguity, we will clarify that the required reporting of "book outs" includes the reporting of "wash" or "round-trip" transactions. We will discuss each of these issues separately.

5. In addition, Morgan Stanley and APPA request clarification of footnote 30 of Order No. 2001² as to whether parties can bind the Commission to a Mobile-Sierra public interest standard of review of unfiled market-based rate agreements. The Commission is vacating its discussion in footnote 30 of Order No. 2001 and instead will address Mobile-Sierra issues generically in a future proceeding.

DISCUSSION

A. Reporting of "Transaction End Date," "Transaction Begin Date," and "Contract Termination Date"

²Order No. 2001, FERC Stats. & Regs., Regulations Preambles ¶ 31,127 at 30,125, fn.30.

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6. Reliant argues that the Commission erred in requiring "transaction end date" to be reported as the later of the actual transaction end date or the last date of the quarter.³ Reliant urges the Commission to change the reported transaction end date to the earlier of the actual transaction end date or the last date of the quarter.⁴ Reliant is concerned that by reporting "transaction end date" as provided in Order No. 2001, competitors can determine a reporting party's net short or long position for any given period.⁵ Reliant further argues that, if a party takes a chance with a short position, other parties will learn this and extract higher prices.⁶

7. Duke Energy and Constellation seek the same clarification for basically the same reasons.⁷ Constellation adds that the Commission should clarify that "transaction begin date" should be reported as the later of "the actual transaction begin date or the first day of the quarter."⁸ In addition, Duke Energy urges that the Commission make the same revision to "contract termination date."⁹

Commission Conclusion

8. We agree with the movants that the Transaction End Date should be reported as the earlier of the actual transaction end date or the end of the reporting quarter and that the language of Order No. 2001 should be revised to accomplish that. For example, if a transaction ends on May 15, 2002, the public utility will show May 15, 2002 as the transaction end date in its July 31, 2002 Electric Quarterly Report. However, if a transaction is not scheduled to end until October 15, 2002, the public utility will show

³Reliant Rehearing Request at 1. As mentioned above, Reliant seeks a stay of Order No. 2001 if its request for clarification of this issue is denied. Reliant Rehearing Request at 5.

⁴Reliant Rehearing Request at 2-3. In the alternative, Reliant argues that this information should be treated as confidential. Reliant Rehearing Request at 1.

⁵Reliant Rehearing Request at 1.

⁶Reliant Rehearing Request at 4.

⁷Duke Energy Rehearing Request at 2-3. Constellation Rehearing Request at 3.

⁸Constellation Rehearing Request at 3.

⁹Duke Energy Rehearing Request at 2-3.

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June 30, 2002 as the transaction end date in its July 31, 2002 Electric Quarterly Report. Similarly, the Transaction Begin Date should be reported as the later of the actual transaction begin date or the first day of the reporting quarter.

9. We agree with Reliant, et al., that the current instructions for transaction begin date and transaction end date in Order No. 2001 do not reflect the Commission's intention to receive reports on transactions that occur within the quarter. Accordingly, we will clarify Attachment C of Order No. 2001 as follows:

transaction begin date	Transaction begin date must be prior to the end of the reporting quarter and no earlier than the beginning of the reporting quarter. Date must contain hours, minutes, seconds, and time zone (MM.DD.YYYY.HH.MM.SS.TZ). Where minutes and seconds are not provided, default to zeros.
transaction end date	Transaction end date and time must be after the beginning of the reporting quarter and no later than the end of the reporting quarter. Date must contain hours, minutes, seconds, and time zone (MM.DD.YYYY.HH.MM.SS.TZ). Where minutes and seconds are not provided, default to zeros.

10. As to Duke Energy's request that we revise contract termination date for the same reasons, this is an unrelated issue. The contract data to be reported in Electric Quarterly Reports is designed to capture the pertinent information previously available in the contracts that public utilities filed with the Commission and publicly disclosed before the contracts become effective. Each publicly disclosed contract divulged the date the contract would begin, the term of the contract, and when it would expire. Duke Energy's request is silent as to any harmful consequence that resulted from disclosure of this information in the past. Indeed, it does not even allege such a consequence. The Commission also is denying Duke Energy's request for the reasons discussed in the confidentiality section below.

B. Confidentiality

11. AEP and Southern renew the arguments on confidentiality that they and others previously made in comments to the NOPR, but now add a focus on the impact of disclosure on long-term contracts and exposing forward positions.¹⁰

¹⁰See AEP Rehearing Request at 1-14 & attached affidavit from Dr. Andrew Joskow. See Southern Rehearing Request at 4-22.

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12. Williams also renews its arguments seeking confidential treatment, but its concern is with spot market sales, rather than with long-term contracts.¹¹ Williams and Southern both focus on the Commission's acknowledgment in Order No. 2001 that the Commission has discretion under the FPA in devising filing requirements.¹² They argue that the fact that the Commission has discretion shows that disclosure is not compulsory.¹³ Thus, they argue, confidentiality should be granted. Williams also argues that the requirement that public utilities make unfiled agreements available on request for public inspection and copying at their offices is particularly troublesome.¹⁴ Williams would prefer to make this information available to the Commission without public disclosure.¹⁵

Commission Conclusion

13. The issue of the confidentiality of information to be reported in Electric Quarterly Reports was one of the main issues addressed by the parties in their comments on the NOPR and by the Commission in Order No. 2001. As we stated in Order No. 2001,

[t]he argument that the rule calls for the disclosure of commercially sensitive information that should be given confidential treatment overlooks the key fact that nearly all of the information claimed to be confidential is already being publicly disclosed on a quarterly basis pursuant to the Commission's regulations and as set forth in prior determinations.[¹⁶]

We also found that,

¹¹Williams Rehearing Request at 10.

¹²Williams Rehearing Request at 5, Southern Rehearing Request at 10.

¹³Id.

¹⁴Williams Rehearing Request at 3.

¹⁵Williams Rehearing Request at 20. Duke Energy requests that, if the Commission does not clarify contract termination date and transaction end date as requested, it should alternatively not disclose ongoing long-term bilateral forward contracts. Duke Energy Rehearing Request at 2-3.

¹⁶Order No. 2001 at paragraph 88.

The controversy over disclosure is limited to those [elements] that concern rates and does not concern the new elements. But FPA section 205(c) requires public utilities to disclose their rates and contracts for all transmission and sales subject to the jurisdiction of the Commission. As a result, these rate elements as well as the data public utilities currently file are not protected from disclosure under Exemption 4 of the FOIA or by the Trade Secrets Act. Although the Commission has discretion to determine the time and form for disclosure, the underlying decision to disclose rate and contract information was made by Congress.¹⁷

14. On rehearing, the movants make no attempt to rebut the Commission's conclusions on these issues. They merely rehash arguments previously considered and rejected in Order No. 2001. FPA section 205(c) provides, in pertinent part, that every public utility shall keep open in a convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale, and the classification, practices, and regulations affecting such rates, "together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." The FPA section 205(c) requirement that pertinent information on rates and contracts must be made publicly available does not exclude long-term market-based rate contracts or spot market sales.

15. Moreover, we are unpersuaded by the argument that disclosure of Electric Quarterly Reports would discourage the use of long-term market-based contracts. The information divulged in Electric Quarterly Reports is comprised of contract data and transaction data. As clarified in this order, all transaction data are reported on an historic basis, although contract data may contain information about prospective events (i.e., rates and contract termination dates that extend beyond the reporting quarter), such information is already publicly available and does not harm the long-term market.

16. Further, customers need (and FPA section 205(c) provides) information about contracts and transactions so that they can identify and seek remedies for undue preference or undue discrimination. The confidentiality that Duke Energy, Williams, and others request is contrary to the mandate of the FPA.

17. Likewise, the Commission finds Williams' argument seeking confidentiality for spot market sales and contracts is equally unpersuasive. Williams merely rehashes arguments already rejected in Order No. 2001. Moreover, Williams has shown no

¹⁷Id. at paragraph 92.

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persuasive reason to treat spot sales differently from any other sales. The Commission is focused on compliance with FPA section 205 and the needs of the overall market and promoting competition, rather than on protecting the market niche of certain competitors.

C. Extend Lag or Allow Aggregate Data

18. AEP argues that, contrary to the Commission's findings in Order No. 2001, disclosure of utilities' Electric Quarterly Reports will have unintended anticompetitive consequences.¹⁸ To prevent these problems, AEP seeks an extra 60 days before contract and transaction data are publicly disclosed.¹⁹ In the alternative, it seeks public disclosure of the data in an aggregated format.²⁰

Commission Conclusion

19. AEP's proposals to extend the lag before Electric Quarterly Reports are posted was specifically considered and rejected in Order No. 2001. Regarding this issue, we stated,

The revised filing requirements also reflect the Commission's careful balancing of the need for data transparency against the concern that price information can be used for anti-competitive purposes. The Electric Quarterly Reports will be filed 30 days after each calendar quarter. This time delay will greatly reduce the usefulness of the data as a tool for collusion but gives customers data they need for long-term decision making.^[21]

In addition to preventing the improper use of the data, the Commission's choice of a 30-120 day lag before the information in Electric Quarterly Reports becomes publicly

¹⁸AEP Rehearing Request at 2-6.

¹⁹AEP Rehearing Request at 4,10, Joskow Affidavit at 11-12.

²⁰Id.

²¹Order No. 2001 at paragraph 17.

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available was chosen in part to reduce any potential harm to competitors that could result from the disclosure of price data.²²

20. Regarding AEP's contention that the Commission should authorize the use of aggregated data to prevent the data from being misused, this proposal was also previously considered and rejected by the Commission. On this issue, we stated:

Customers of market-based rate transactions are not each charged the same rate. Aggregated data do not provide sufficient disclosure of rates to the public. Further, market power is possible not just over a market area. It can also be exercised over individual customers. Aggregated data would prevent customers from detecting (and filing a complaint with the Commission about) improper conduct and would be less helpful in promoting competition. We conclude that section 205(c) does not allow the aggregation of this information.^[23]

21. AEP (through Dr. Andrew Joskow's affidavit) has highlighted the Department of Justice's approach to antitrust matters and its concerns over the misuse of shared information. Order No. 2001 has taken measures to ensure that the information divulged in Electric Quarterly Reports will not be useful for anticompetitive purposes. The 30-120 lag in reporting provided in Order No. 2001 balances the need for timely data for the Commission and the public on one hand and preventing possible harm to competitors and misuse of data on the other. While we agree with AEP that these factors need to be considered, we are not persuaded that the balance we struck in Order No. 2001 needs revision. The Commission must take its overall approach from the FPA, which provides for public disclosure of rate and contract information.

D. Clarification That the Reporting of Book Outs Includes the Reporting of So-Called "Wash" Transactions

22. Order No. 2001 requires the reporting of "book out" transactions.²⁴ Order No. 2001 defines book outs as the offsetting of opposing buy-sell transactions at the same

²²Order No. 2001 at paragraph 122.

²³Order No. 2001 at paragraph 123.

²⁴No rehearing was requested on the requirement in Order No. 2001 to report book out transactions.

time and place and gives examples of transactions that must be reported in Electric Quarterly Reports.²⁵ For example, if A sells 50MW of power to B, and for the same time period and location B sells 50MW of power back to A, the transactions would be booked out in their entirety and no transmission would be required. Nonetheless, the transactions must both be reported in Electric Quarterly Reports. Likewise, using the example given in Order No. 2001, if A sells 50MW to B and, for the same time period and location B sells 60MW back to A, then all of these separate transactions must be reported in Electric Quarterly Reports even though only 10MW would be transmitted to A. A would report a 50MW power sale to B, and B would report a 60MW power sale to A. By contrast, an option to purchase power in the future at a specified price would be a purely financial transaction that would not be reported.

23. Recent disclosures have highlighted the question of whether the so-called "wash" or "round-trip" transactions that sellers have made are book out transactions that would be reported in Electric Quarterly Reports.²⁶ As Order No. 2001 did not expressly address this issue, to avoid confusion, we will clarify that such transactions are book outs that must be reported in Electric Quarterly Reports.

24. In Order No. 2001, at paragraph 285, we stated:

We believe that the power sales transactions that make up book out transactions fall within this category [arrangements involving a public utility selling or exchanging wholesale power in interstate commerce] and should be reported to us. As noted above, the agreements obligate the parties to deliver power at a specified price and, but for the subsequent offsetting power sales, transmission of power would be made. Moreover, such transactions in the marketplace plainly affect or relate to those transactions and the prices paid for power sales that do go to delivery. Thus, under FPA section 205(c), we find that the power sales transactions that make up book out transactions must be reported to us in Electric Quarterly Reports.

²⁵By contrast, Order No. 2001 did not require the reporting of "net outs," an accounting device to minimize offsetting payments. See Order No. 2001 at fn. 168.

²⁶In a "wash" transaction, the parties agree in advance to offsetting transactions such that no power is delivered. Typically, the sales are made at the same price, so that no money changes hands.

25. Wash transactions are a subcategory of book outs where the parties have agreed in advance to offsetting transactions at the same time and location such that the transactions offset each other and no transmission is needed to effectuate the power sale. On its face, a wash transaction is indistinguishable from any other exchange transaction. These transactions are distinguishable from options to purchase power in the future at specified prices that would be purely financial transactions that would not be reported in Electric Quarterly Reports. In a purely financial transaction, the buyer does not make a power purchase; the buyer merely acquires the right to make a power purchase at a future time at a specified price.

26. To avoid any possible confusion, we hereby clarify that “wash” or “round-trip” transactions fall within the transactions required by Order No. 2001 to be reported in Electric Quarterly Reports. Moreover, we believe that data on “wash” transactions may be useful (in conjunction with other information) to determine whether such transactions have an impact on rates and markets. We believe that collecting and disclosing these data pursuant to FPA sections 205, 307 (16 U.S.C. 825f), and 311 (16 U.S.C. 825j) will promote confidence in the integrity of markets and will be helpful for market monitoring purposes to detect improper conduct.

E. Requests for Stay

27. Southern has argued that the Commission erred in failing to determine that bilateral long-term market-based rate power sales agreements are confidential and proprietary and requests that the Commission issue a stay, so it can pursue judicial review of this issue and not suffer irreparable injury by public disclosure of these agreements.²⁷ Southern argues it meets the Commission’s stay criteria and that issuance of a stay would be in the the public interest.²⁸

²⁷Southern Rehearing Request at 4, 22.

²⁸Southern Rehearing Request at 25.

28. Williams also seeks a stay of Order No. 2001 pending judicial review.²⁹ Williams argues a stay is needed to allow it a reasonable opportunity to pursue judicial review.³⁰ Williams argues that, at a minimum, the case raises a difficult legal question and it contends that it will suffer irreparable injury absent a stay. Williams argues that, once competitive sensitive information is publicly disclosed, it cannot be undisclosed. Thus, Williams argues, if it prevails, it will be denied an effective remedy on appeal.

29. Williams argues that the Commission granted a stay in Central Maine Power Company, 71 FERC ¶ 61,217 at 61,789 (1995) under similar circumstances.³¹ Williams also argues a stay would not result in substantial harm to other parties and that a stay is in the public interest, because disclosure may result in harm to competitive markets.

Commission Conclusion

30. The Commission's standard is to issue a stay where justice so requires. See, e.g., City of Tacoma, 85 FERC ¶ 61,130 at 61,478 (1998), order denying reh'g and granting stay, 87 FERC ¶ 61,197 at 61,732 (1999). In deciding whether justice so requires, the Commission considers various factors, including whether: (1) the moving party will suffer irreparable injury absent a stay; (2) issuance of a stay would substantially harm other parties; and (3) issuance of a stay is in the public interest.³²

31. After a comparison of movants' stay requests with the Commission's stay criteria, we conclude that there is no basis for the Commission to issue a stay. The first criterion is whether movants will suffer irreparable harm absent a stay. We find movants' claims in this regard to be conclusory and unsubstantiated. For example, Williams argues that it should be given an opportunity to show on a case-by-case basis that it will be harmed by

²⁹Reliant requested a stay in the event the Commission denied its request for clarification of transaction end date. Reliant Rehearing Request at 5. Given the Commission's clarification of this data element, Reliant's stay request is now moot.

³⁰Williams Rehearing Request at 1, 17-20.

³¹Williams Rehearing Request at 19-20.

³²Southern characterizes the consideration of these factors as a three prong test and argues that these factors dictate that issuance of a stay would be in the public interest. Southern Rehearing Request at 23-25.

disclosure of the information to be reported in Electric Quarterly Reports.³³ A request to make a showing of irreparable harm on a case-by-case basis in the future is not adequate to show irreparable harm now.

32. Williams also argues that once data are disclosed they cannot later be undisclosed. This point holds true for any public disclosure of information claimed to be confidential. This does not mean, however, that a stay should be issued in every such instance. Williams has failed to show that disclosure will cause it irreparable harm.

33. Southern argues that the disclosure of bilateral long-term market-based power sales agreements will discourage companies from entering new such agreements in the future. However, its arguments fail to establish that it would suffer any immediate harm if agreements of this type are disclosed. As to its arguments that such disclosure will be harmful to the market in general, Southern is merely rehashing arguments that we already fully considered in Order No. 2001. Specifically, we concluded:

We also disagree with predictions that disclosure would be harmful to the market generally. To the contrary, we believe disclosure will promote competition and make the market operate more efficiently. We agree with NARUC that competitive and robust markets demand more, not less, transparency of data and this final rule advances that goal.³⁴

34. Southern and Williams each argue that other parties will not be harmed by issuance of the stay. We disagree. Unlike a case involving a contractual dispute between two parties, which holds no direct interest to the public or to any third party, the revised public utility filing requirements adopted by the Commission in Order No. 2001 have a direct impact not only on the public utilities filing them, but also on the customers that obtain access to the information disclosed in Electric Quarterly Reports. Nondisclosure of the contract and transaction data reported in Electric Quarterly Reports will deprive customers of these benefits. As we stated in Order No. 2001,

³³Williams Rehearing Request at 17.

³⁴Order No. 2001 at paragraph 94.

The data should provide greater price transparency, promote competition, enhance confidence in the fairness of markets, and provide a better means to detect and discourage discriminatory practices.^{35]}

35. Finally, the Commission finds that issuance of a stay would not be in the public interest. The Commission replaced its prior filing and reporting requirements for good reason. The information reported by public utilities in Quarterly Transaction Reports was inconsistent and often lacked sufficient information to allow customers to file complaints. The new filing and reporting requirements adopted in Order No. 2001 constitute a large improvement in terms of price transparency, data usability, and specificity as to information to be provided. Going back to the old reporting requirements at this point would be a large step backwards. Given the improvements achieved by the Commission in its revised public utility reporting requirements, we conclude that delaying implementation of these improvements would not serve the public interest. We therefore conclude, for all these reasons, that it would not be in the public interest to issue a stay and will deny the requests that we do so.

F. Request for a 29-day Extension for July 31st Electric Quarterly Report Filing

36. Duke Energy argues that it will need 90 days from the issuance of the Instruction Manual,³⁶ which was issued on May 31, 2002, to prepare its July 31, 2002 Electric Quarterly Report filing.³⁷ Thus, it requests an extension until August 29, 2002.

Commission Conclusion

37. The request for an extension is premature. We expect public utilities to make best efforts to meet the Commission's deadlines. The Instruction Manual was issued a full two months prior to the filing deadline, which should provide sufficient time for public utilities to prepare and submit their Electric Quarterly Reports on a timely basis. Accordingly, we will deny Duke Energy's request for an extension of the July 31, 2002 date for submittal of the first Electric Quarterly Report.

³⁵Order No. 2001 at paragraph 31.

³⁶Revised Public Utility Filing Requirements, Order Issuing Instruction Manual for Electronic Filing of Electric Quarterly Reports, 99 FERC ¶ 61,238 (2002).

³⁷Duke Energy Rehearing Request at 3.

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The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) The requests for clarification are hereby granted in part and denied in part, as discussed in the body of this order.

(C) Footnote 30 of Order No. 2001 is hereby vacated, as discussed in the body of this order.

(D) The requests for stay and the request for extension are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.