

101 FERC ¶ 61, 098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Bank Of America, N.A.

Docket No. ER02-2536-000

ORDER CONDITIONALLY ACCEPTING MARKET-BASED RATE SCHEDULE

(Issued October 30, 2002)

1. In this order, the Commission accepts for filing, without suspension or hearing, the proposed market-based rate schedule filed by Bank of America, N.A. (Bank of America or Applicant), to become effective on the date of this order.¹ As discussed below, we also grant Applicant's requests for certain blanket waivers and authorizations under the Commission regulations consistent with those granted other power marketers with market-based rate authorization. This order benefits customers by authorizing a new seller in the electricity marketplace.

Background

2. On September 3, 2002, Bank of America filed an application under Rules 205 and 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § § 385.205 and 385.207 (2002) and section 35.12 of the Commission's Regulations, 18 C.F.R § 35.12 (2002), requesting that the Commission: (i) accept its Rate Schedule FERC No. 1; (ii) grant blanket authorization for it to make wholesale sales of electric power in interstate commerce at market-based rates to be negotiated with the purchaser; and (iii) grant such waivers and other authorizations as have been granted to other power marketers. Bank of America also asks that the Commission issue a declaratory order confirming that the acquisition-of-securities clause under section 203(a) of the Federal Power Act does not apply to the acquisition of securities by Bank of America in the course of its banking business or, alternately, requests authorization for such acquisitions subject to certain

¹The rate schedule designations is: Bank of America - Original Rate Schedule FERC No. 1; Original Sheet No. 1.

conditions.² Bank of America states that it would remain subject to the strictures of section 203(a) that would require it to seek Commission approval to acquire control over any public utility.

3. Bank of America, a wholly-owned subsidiary of Bank of America Corporation, is a national banking association subject to the primary regulation supervision and examination of the U.S. Office of the Comptroller of the Currency (OCC).³ Its principal business is commercial banking and financial services. Directly and through various subsidiaries, Bank of America provides a diversified and comprehensive range of commercial and investment banking and non-banking financial services and products, including deposit-taking and other funds generation, corporate, mortgage and consumer lending, corporate advisory services, brokerage, fund management, and intermediation of transactions in all types of financial instruments.

Notice of Filing, Interventions and Protests

4. Notice of the filing was published in the Federal Register, 67 Fed. Reg. 58,782 (2002), with comments, protests or interventions due on or before September 24, 2002. On September 23, 2002, UBS filed a timely motion to intervene in support of the filing. No other protests, comments or interventions were filed.

5. UBS states that Bank of America's requests for either a declaratory order or authorization under Section 203(a) are similar to the requests made by UBS in Docket Nos. EL02-105 and EC02-91 and that Bank of America has proposed the same conditioning language as proposed by UBS in the event that the Commission finds that section 203(a) applies to the acquisition of public utilities' securities by Bank of America in the course of its banking business. UBS further states that the relief it seeks in its request for a declaratory order or authorization to acquire securities of public utilities will enable UBS and Bank of America to provide capital to public utilities in the course of

²Bank of America notes that UBS AG (UBS) has made a similar request. UBS's application is pending before the Commission in Docket Nos. EL02-102-000 and EC02-91-000. The Commission will address in a future order Bank of America's request for a declaratory order that the acquisition-of-securities clause of section 203(a) of the Federal Power Act (FPA), 16 U.S.C. § 824b(a) (2000), does not apply to the acquisition of securities by Bank of America in the course of its banking business.

³Bank of America Corporation is a bank holding company and a financial holding company under the Gramm-Leach-Bliley Act.

their banking activities without raising concerns that they would thereby acquire control over the management or operations of those utilities. According to UBS, granting the requested declaratory order or authorization to acquire securities would serve the public interest by, among other things, enabling UBS and Bank of America to compete with other financial institutions as a source of capital for traditional franchised electric utilities, affiliated and independent generators, and power marketers, thereby tending to increase the pool of available capital, and to lower the cost of capital, to such businesses. Moreover, UBS states that by interpreting and applying section 203(a) in a manner that does not deter banks from becoming power marketers, the Commission can encourage the entry of well-capitalized, financially secure institutions with strong credit ratings into the business of energy trading.

Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the timely motion to intervene serves to make UBS a party to this proceeding.

Discussion

Overview

7. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. For an affiliate of a transmission-owning public utility to demonstrate the absence or mitigation of market power, the public utility must have on file with the Commission an open access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing. As discussed below, we find that Bank of America's proposed market-based rate schedule meets these standards, subject to the conditions discussed below. Accordingly, we will accept the proposed rate schedule for filing, without suspension or hearing, to become effective on the date of this order.

8. On November 20, 2001, in Docket No. EL01-118-000, the Commission instituted a proceeding pursuant to section 206 of the Federal Power Act in which it proposes to revise all existing market-based rate tariffs and authorizations to condition public utility sellers' market-based rate authority to ensure that such rates remain just and reasonable and do not become unjust or unreasonable as a result of anticompetitive behavior or

abuse of market power.⁴ The Commission's acceptance of Bank of America's market-based rate schedule is subject to any tariff conditions adopted by the Commission in Docket No. EL01-118-000. Within 15 days of the date of issuance of an order adopting a tariff condition in EL01-118-000, Bank of America is directed to make a compliance filing in the instant proceeding to amend its tariff accordingly. Bank of America states that it will submit such a compliance filing.

Generation Market Power

9. Bank of America indicates that it intends to engage in the wholesale trading of electricity in the United States. Bank of America further states that it does not own or control any generation facilities.

10. By order issued on November 20, 2001, in AEP Power Marketing, Inc., et al.,⁵ the Commission announced a new generation market power screen, the Supply Margin Assessment (SMA) to be applied to market-based rate applications on an interim basis pending a generic review of new analytical methods for analyzing market power. We find that no SMA screen is required for Bank of America because Bank of America is not affiliated with any entity that owns or controls generation resources and has no long-term purchase power agreements in place.

Transmission Market Power

11. When an affiliate of a transmission-owning public utility seeks authorization to charge market-based rates, the Commission has required the public utility to have an open access transmission tariff on file before granting such authorization. Bank of America states that neither it nor its affiliates own or control any transmission facilities, nor is it affiliated with any entity which owns a franchised service territory. Accordingly, the Commission finds that Bank of America meets the Commission's transmission market power standard for approval of market-based rates.

Other Barriers to Entry/Reciprocal Dealing

⁴See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 97 FERC ¶ 61,220 (2001).

⁵97 FERC ¶ 61,219 (2001), reh'g pending.

12. Bank of America states that neither it nor any of its affiliates has the ability to erect barriers to entry to markets for sales of power and energy. As an example, Bank of America states that neither it nor any of its affiliates has sufficient ownership of essential inputs so as to have market power with respect to these inputs, and thus has no ability through ownership of such inputs to erect any barrier or restrict market entry by competing power suppliers. We are satisfied that Bank of America and its affiliates cannot erect barriers to entry or engage in reciprocal dealing. However, should Bank of America or any of its affiliates deny, delay or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Bank of America's authority to sell power at market-based rates.⁶

Affiliate Abuse

13. Bank of America states that neither it nor any of its affiliates has a franchised service area for the sale of electricity. The Commission finds that Bank of America's application does not raise any affiliate abuse concerns.

Waivers, Authorizations and Reporting Requirements

14. Bank of America requests that the Commission grant the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101 and 141 of the Commission's regulations; (3) permission to make abbreviated filings under Part 45 of the Commission's regulations relating to interlocking directorates; and (4) blanket authorization under Part 34 of the Commission's regulations of all future issuances of securities and assumptions of liabilities. We will grant these requested waivers and authorizations consistent with those granted other entities with market-based authorization.⁷

⁶See, e.g., Louisville Gas & Electric Co., 62 FERC ¶ 61,016 (1993).

⁷It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141 (2002)), as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities, (18 C.F.R. Part 34 (2002)). Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities, See Order No. 627, Docket No. RM02-3-

15. Consistent with procedures we have adopted in other cases, Bank of America must file Electric Quarterly Reports detailing the purchase and sale transactions undertaken in the prior quarter (including risk management transactions if they result in actual delivery of electricity).⁸ The first quarterly report will be due within 30 days of the end of the calendar quarter ending December 31, 2002.⁹

16. Additionally, we direct Bank of America to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving this market-based rate schedule. These characteristics include, but are not limited to: (i) ownership of generating or transmission facilities or inputs to electric power production other than fuel supplies; or (ii) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised

⁷(...continued)

000 at P 23 and P 24, III FERC Stats. & Regs. ¶ 32,558 (Oct. 10, 2002). The continued applicability of these waivers and blanket authorizations will be reevaluated as a result of Commission activities in that proceeding.

The waiver of the accounting and reporting requirements here notwithstanding, we expect that Bank of America will keep its accounting records in accordance with generally accepted accounting principles.

⁸See Revised Public Utility Filing Requirements, Order No. 2001, 67 Fed. Reg. 31,043, FERC Stats. & Regs. ¶ 31,127, reh'g denied, Order No. 2001-A, 100 FERC ¶ 61,074, reconsideration denied, Order No. 2001-B, 100 FERC ¶ 61,342 (2002).

⁹Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in a report, may result in forfeiture of market-based rate authority, and a new application for market-based rate authority may be required if applicant wishes to resume making sales at market-based rates.

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service area.¹⁰ Alternately, Bank of America may elect to report such changes in the updated market analysis it will be required to file every three years.¹¹

Effective Date

17. Bank of America requests waiver of notice, if necessary, to allow the proposed rates to go into effect 60 days after filing or upon issuance of the Commission's order, whichever, occurs first. We will conditionally accept Bank of America's proposed market-based rate schedule for filing, to become effective on the date of this order.

The Commission orders:

(A) Bank of America's market-based rate schedule is hereby conditionally accepted for filing, as discussed in the body of this order, to become effective on the date of this order.

(B) Bank of America's request for waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§385.14, .15 (2002) (providing for the filing of both the Form No. 80 and of the Annual Conveyance Report).

(C) Within 30 days of the date of issuance of this order, any person desiring to be heard to protest the Commission's issuance of securities or assumptions of liabilities by Bank of America should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2002).

¹⁰See, e.g., Morgan Stanley Capital Group, Inc., 69 FERC ¶ 61,695 (1994), order on reh'g, 72 FERC ¶ 61,082 (1995); InterCoast Power Marketing Co., 68 FERC ¶ 61,248, at p. 62,134 (1994), order clarified, 68 FERC ¶ 61,324(1994).

¹¹We reserve the right to require such an analysis at any time.

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(D) Absent a request to be heard within the period set forth in Ordering Paragraph (C) above, Bank of America is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person, provided that such issue or assumption is for some lawful object within the corporate purposes of Bank of America, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(E) Until further notice of this Commission, the requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Bank of America. Any such person, instead, shall file a sworn application providing the following information: (1) his or her full name and business address; and (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(F) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Bank of America's issuances of securities or assumptions of liabilities, or by the continued holding of interlocks.

(G) Bank of America's request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of 35.12(a), 35.13(b), 35.15, 35.16, is hereby granted.

(H) Bank of America must file Electric Quarterly Reports containing transaction summaries of specific sales. The first quarterly report of transactions undertaken by Bank of America will be due within 30 days of the calendar quarter ending December 31, 2002.

(I) Bank of America is hereby directed to file an updated market analysis within three years of the date of this order and every three years thereafter.

(J) Bank of America is hereby directed to inform the Commission of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing.

By the Commission.

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Linwood A. Watson, Jr.,
Deputy Secretary.