

FERC-580 – Interrogatory on Fuel and Energy Purchase Practices – Proposed Information Collection; Comment Request))))))	Docket Nos. IC10-580 IN79-6
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Overview

EEI is the association of shareholder-owned electric utilities, international affiliates, and industry associates worldwide. Our U.S. members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry and represent approximately 70 percent of the U.S. electric power industry. EEI's members are the

primary respondents to FERC electricity-related forms, including the FERC-580, and so would be most affected by the proposed changes. As a result, EEI and its members have a direct interest in this proceeding.

The FERC-580 is a biennial information collection under the Docket No. IN79-6 investigation.¹ It is rooted in Federal Power Act (FPA) section 205(f), which was added by section 208 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

In the Notice, the Commission proposes to expand the FERC-580 to collect additional information regarding automatic adjustment clauses (AACs) used in FERC-jurisdictional cost-based tariffs and agreements. The Commission proposes to require utilities having agreements with AACs to: (1) identify docket numbers and acceptance/effective dates of the agreements; (2) provide copies of pre-1990 agreements; (3) describe the types of costs that pass through the AACs; (4) report all purchased power agreements if costs were recovered through an AAC; and (5) report certain information regarding emission allowance costs that were recovered through AACs. The Notice states that the Commission is required to examine whether the AACs "effectively provide the incentives for efficient use of resources and also whether the clauses reflect only those costs that are either 'subject to periodic fluctuations' or 'not susceptible to precise determinations' in rate cases prior to the time the costs are incurred." Notice at 66114.

In addition, the Commission "proposes to expand previous interrogatory questions regarding fuel procurement practices and adjustment clause treatment of purchased power to elicit more complete information." *Id.* at 66115.

¹ See *Investigation of Practices Under Automatic Adjustment Clauses*, 7 FERC ¶ 61,090 (1979) (instituting investigation pursuant to FPA section 307(a)).

Further, the Commission proposes several streamlining changes. The Commission proposes to remove: (1) all fuel transportation contract questions; (2) the request for fuel-related audit materials; and (3) the request for information regarding supplier identification, fuel shipped for others, and liability – noting that "this information is not currently needed for a Commission investigation." The Commission also proposes to implement a new user-friendly format suitable for electronic submission that includes drop-down menus and pre-populated fields. *Ibid.*

EEI Supports the Commission's Proposed Streamlining Measures

EEI supports the Commission's plan to make the FERC-580 reporting process simpler by providing a user-friendly electronic version of the form with pre-populated fields and drop-down menus. If properly implemented, this change should ease both submittal of the form and access to information filed using the new version.

At the same time, EEI encourages the Commission to allow respondents the option to continue submitting the form via the FERC eFiling web portal using standard word-processing software accepted by eFiling, at least until after the electronic version of the form has been field tested by respondents who elect to use it for the next reporting cycle. This would help to ensure that any bugs have been worked out of the form before its use is widely required. In addition, the new version of the form should not require resubmittal of information already filed using the old version of the form, but should apply only prospectively.

EEI also supports the proposed removal of inquiries concerning fuel-related transportation contracts, audit information, supplier identification, shipments for others, and liability. We applaud the Commission for acknowledging that this information is not

needed for a Commission investigation, and in turn for proposing not to collect such unnecessary information. The submittal of this information also raises substantial concerns with respect to harmful competitive impacts, particularly if the information is made public – concerns that are addressed by no longer collecting the information.

EEI Recommends Several Changes in the Proposed Form

1. Limit reporting to tariffs and agreements covered by FPA section 205(f)(4), excluding tariffs and agreements subject to public review and/or refund.

The Commission should ensure that the FERC-580 and its glossary, instructions, and drop-down menus carefully track the FPA section 205(f)(4) definition of “automatic adjustment clauses.” In particular, section 205(f)(4) specifies the types of rate schedules that are subject to the Commission’s interrogatory under section 205(f), noting that “automatic adjustment clause” means “a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.”²

Yet as currently proposed, the FERC-580 glossary defines AAC as “[a] provision of a rate schedule which provides for increases or decreases (or both) without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility” without the underlined section 205(f)(4) qualifier.³ That qualifier needs to be added to the glossary definition and applied throughout FERC-580. The Commission

² 16 U.S.C. § 824d(f)(4) (emphasis added). *See also* 7 FERC at 61,139.

³ Proposed FERC-580, page 11 of 12.

should not require submittal of FERC-580 with respect to fuel clauses or AACs that are subject to review and refund.

Similarly, the proposed drop-down menu for “Type/s of AAC” under question 2(a) includes “formula rates.” However, many formula rate tariffs and agreements on file with the Commission are subject to public true-up proceedings and/or refund. Such tariffs and agreements seem clearly covered by the second sentence of section 205(f)(4) and thus not within the statutory definition of AAC for purposes of FERC-580. As the Commission recognized in Order No. 715, annual informational filings required under comprehensive formula rate tariffs or individual formula rate contracts involve a section 205 rate review process with “transparency provided by requiring utilities to make information on costs underlying rates publicly available. This cost information is, in turn, used by the Commission, state commissions, and customers to review and monitor a utility’s rates....”⁴ To conform with section 205(f)(4), such tariffs and agreements should not be treated as AACs for purposes of FERC-580 or otherwise subject to the form. This approach would be consistent with the Commission’s recent modification of FERC Form 1 in Order No. 715, which states that the new Form 1 formula rate requirements “will only apply to utilities with formula rates that do not make regular (i.e., at least annual) informational filings of cost data with the Commission.”⁵ EEI believes this clarification is necessary so that the Commission’s proposed changes do not add an unnecessary, duplicative burden on respondents.

⁴ *Revisions to Forms, Statements and Reporting Requirements for Electric Utilities and Licensees*, 124 FERC ¶ 61,273 (2008), at P 40.

⁵ *Id.* at P 36.

2. Do not require reporting of information already collected elsewhere, in particular as to formula rates and fuel costs.

The Commission should ensure that the FERC-580 does not collect information the Commission or other agencies already collect elsewhere. The Paperwork Reduction Act, under which this current review of the FERC-580 is being conducted, requires agencies to avoid collecting unnecessary or duplicative information.⁶

In particular, the Commission should exclude reporting in the FERC-580 of information on formula rates that is already reported elsewhere. In Order No. 715, the Commission has required companies to report certain information related to their formula rate tariffs in the FERC Form 1 unless already reported in annual or more frequent informational filings required when the Commission approved the rates. The formula rate information is centralized in a new schedule at page 106 of Form 1, in which filers (a) indicate whether they have formula rates, (b) provide certain details about those formula rates, and (c) indicate whether the filer makes regular informational filings and the location of those filings.⁷ Thus, detailed information about formula rates, including a centralized location for reporting certain information about those rates and associated informational filings, is already required as part of other Commission-required reports and is sufficient to enable the Commission to assure the consistency of charges under formula rates comply with the just and reasonable standard under FPA section 205. The Commission should not require duplicative reporting of such formula rate information in the FERC-580.

⁶ 44 U.S.C. §§ 3501 *et seq.* (requiring federal agencies to strive to minimize the reporting burden and avoid duplicative reporting requirements).

⁷ Order No. 715 at P 45.

In addition, proposed question 6 asks for the total delivered cost and origin cost for coal and natural gas. This information is already provided on a monthly basis to the Energy Information Administration (EIA) on form EIA-923. The Commission should not require it to be reported again on the FERC-580.

3. Avoid collecting unnecessary and burdensome information, such as energy and capacity purchases involving AACs in organized markets and power pools, and fuel procurement policies and practices.

Proposed question 3 of the FERC-580 asks for detailed information about energy or capacity purchases under contracts or agreements with AACs. Specifically, question 3 asks respondents to identify purchase agreements where “all or any portion of the purchase costs were passed through the AAC.” However, to the extent such transactions occur in organized markets, prices are set by the market and the purchaser has no opportunity to bargain for or obtain a different price. Any information related to such transactions would be of no real use to the Commission in analyzing the operation of an AAC. Furthermore, these data often would be very burdensome, if not impossible, to provide, in particular for organized markets and power pools. Many organized markets and power pools do not directly match purchases with sales, so the information the Commission seeks often will not be available. In addition, if the data are available, the data are likely to be voluminous because purchases from the market are made hour-by-hour throughout the 2-year FERC-580 reporting period. Also, to the extent this question requests data not requested under the old form 580, it may include data the respondent had no way of knowing that it would need for reporting purchases and to which the respondent may no longer have access or which may be unduly burdensome to obtain. At a minimum, question 3 should be modified to exclude purchases made through organized

markets and power pools, and for other purchases to require reporting of a representative sample of data using only current data that are readily available.

For similar reasons, the FERC-580 should exclude reporting of market pass-through costs and uplift charges in organized markets. Participation in organized markets carries with it the burden of such pass-through costs and uplift charges. Just as energy and capacity charges in organized markets are set by the market, so are the related pass-through costs. It would be burdensome and inefficient to require reporting of these types of charges in the FERC-580.

Proposed question 5 of the FERC-580 asks about utility fuel procurement policies and practices. However, most company procurement policies and practices are not engraved in stone but depend on each company's view of the market, and those policies and practices change or evolve frequently depending on changes in the market. The practices and procedures are aimed at day-to-day buyer activities and responsibilities, the knowledge of which would be of little value to anyone outside the organization, except for inappropriate purposes such as leverage by counter-parties in fuel-procurement negotiations. Furthermore, state public service commissions generally monitor company practices and procurements. To submit such information to FERC every two years would take significant company resources but produce little or no benefit. In addition, as discussed below, the information sought in this question is highly commercially sensitive. The Commission should eliminate the question.

4. Clarify that the FERC-580 applies only to power sale tariffs or agreements.

Because respondents have to file the proposed FERC-580 only if they own 50MW or more of steam generation, EEI assumes that the new form does not cover non-power

tariffs or agreements such as transmission tariffs (e.g., open access transmission tariffs) that contain AACs. Otherwise, the FERC-580 would be discriminatory, requiring transmission owners/providers that own steam generation to report on their non-power tariffs and agreements, while not requiring competing transmission owners/providers that do not own steam generation to do so. Moreover, given that the FERC-580 is titled “Interrogatory on Fuel and Energy Purchase Practices,” if its purpose is to cover all cost-based AACs including non-power AACs, the title is misleading and provides inadequate notice that non-power AACs fall within its scope. FERC-580 has never been applied to transmission owner/provider tariffs and agreements, and if this is the intent of the revised form, this proceeding should be re-noticed with an appropriate form title, an explanation of the need for the additional information, and an opportunity for comment.

5. Clarify that the FERC-580 is not required to be completed for AACs that have not been transacted under during the reporting period.

Proposed question 2 requires utilities to provide “information regarding the wholesale automatic adjustment clauses” that were “on file with the Commission during calendar years 2008 and 2009.” However, many utilities have old or inactive tariffs on file with the Commission. As a result, the proposed expansion of the FERC-580 would require some respondents to submit information about AACs that have not been used during the reporting period. To avoid unnecessary burden on respondents, and to better use FERC’s time and resources, the Commission should clarify that tariffs or agreements on file but that were not transacted under during the reporting period are not subject to the proposed reporting requirements.

6. Clarify that AACs do not include simple pass-through components of formula rates.

The Commission should clarify that the definition of AACs does not capture the simple pass-through components of formula rates. As defined in the Commission's proposal, an AAC is "[a] provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, *in rates* reflecting increases or decreases (or both) in costs incurred by an electric utility."⁸ Because an AAC allows for the "increase or decrease" "in rates" without a prior hearing, there must be a pre-established *rate* that is being adjusted. As such, a simple pass-through component, which does not include a pre-established rate, should not be considered an AAC under the proposed changes.

7. Make other changes to clarify or assist in responding to questions.

In proposed question 2.a, about wholesale automatic adjustment clauses: Add "for cost-based agreements" after "(AACs)." The "Types of AAC" drop-down box should allow selection of multiple options. "Types of AAC" should clearly indicate which selection would apply to tolling agreements (i.e. agreements under which a utility purchases fuel used by a third party to generate power). The "Types of costs passed through AAC" drop-down box also should allow selection of multiple options. Does "fuel" include just fossil fuels or all fuels? To the extent this question seeks information about pass-through of RTO/ISO charges, appropriate drop down boxes should be provided.

If proposed question 5 is retained: Collect information only about practices related to purchased fuels whose costs actually go through an AAC. The old version of form 580 dealt only with Fuel Adjustment Clauses, which reflected all fuel costs. But not all AACs work the same way. For example, fuel-related AAC contracts often look at fuel

⁸ Proposed FERC-580, page 11 of 12 (emphasis added).

costs just from certain of a company's coal plants. Collecting gas and oil costs would shed little light on the workings of the company's AAC, except to the extent that the company's cost for oil and gas used for plant start-up are reflected in fuel costs at those plants. Question 5 should be limited to costs of fuels that are passed through an AAC and should be limited to costs of primary fuels, not costs from incidental use of other fuels for auxiliary or start-up purposes. Also, which fuels are covered by this question – fossil, wood, nuclear? Are studies, etc. that must be provided limited to those generated during the period covered by the report? What studies, review, and reports of a utility's fuel procurement procedures and practices etc. are intended to be covered by this question? The Notice indicates that the Commission will no longer require provision of audit reports; however, the scope of the request is broad enough to encompass audit reports and similar types of reports that may contain confidential or competitively sensitive information. What is the significance of the review information requested in question 5c? Will the form provide optionality for different responses depending on fuel type? We assume that questions i1-i7 are limited to arrangements extending longer than a period of one month – is this correct? In question j1, what is an "associated" company?

If proposed question 6 is retained: Under fuel quality for gas, most contracts do not specify gas based on BTUs but rather require that the gas be "pipeline quality." The form should reflect this industry convention and not require reporting in BTUs. In section 6.b, why is information needed by facility? EEI is concerned that facility-level information is competitively sensitive, as discussed further below.

EEI Requests that the Commission Treat Certain Information as Confidential

Though the Commission is proposing to delete several data elements from the FERC-580 that have raised confidentiality concerns in the past, the Commission is proposing to add or retain a number of data elements in the revised form that will still raise such concerns. We are particularly concerned that much of the data being requested in proposed questions 5, 6, 7, and 8 is competitively sensitive. EEI requests that the Commission recognize these concerns and provide confidential treatment for these data.

Most of the information requested in proposed question 5, if question 5 is retained, should not be made publicly available. For example:

- Questions 5.a-d and 5.i ask for highly sensitive information about company fuel purchase policies and practices. If publicly disclosed, this information would give potential fuel sellers a road map to a purchaser's buying policies and practices and would significantly compromise the purchaser's ability to negotiate favorable contract terms. The eventual losers would be the entities purchasing under the AACs and their wholesale and retail customers.
- Question 5.d asks about inventory policy. If it was publicly known that a company's inventory policy designated levels at which it would conserve fuel by purchasing electricity, potential sellers could raise the prices they would otherwise quote the company knowing that the company was under duress.
- Question 5.e asks about practices associated with contract negotiations. Disclosure of this information would place FERC-580 respondents at a disadvantage in negotiations with fuel suppliers. The suppliers would know company procedures for market investigation and be able to determine what the

company did or did not know about the market. On the other hand, there would be no requirement for the fuel suppliers to divulge their procedures. In any form of negotiation, information or lack thereof can have major ramifications.

- Question 5.f asks about environmental constraints that influenced fuel purchase practices. If it became publicly known that a particular facility was constrained to a very limited set of supplies, the facility's suppliers could extract economic rents.
- Questions 5.i.1-7 ask about bidding and bid evaluation practices. Public disclosure of this information could facilitate "gaming" by potential suppliers. Fuel suppliers would quickly move to extract maximum economic rents. Public disclosure also could subject the utility to a greater risk of litigation from fuel suppliers. Ultimately this would increase the cost of energy for consumers.

Respondents should be granted confidential status for responses to at least these parts of question 5, if the question is retained.

Likewise, proposed question 6 asks for commercially sensitive information that should be treated as confidential:

- Pre and post transportation costs – The Notice indicates that the proposed FERC-580 "remove[s] all of the transportation contract questions," thus assertedly eliminating the need for confidential treatment. However, question 6.b requires data that would indirectly reveal fuel transportation costs, namely the fuel price paid "FOB origin" and "FOB plant." All one has to do is to subtract the first from the second to arrive at the cost of transportation. If the Commission needs such information, the FERC-580 should ask for one or the other (preferably the

second), but not both, unless the Commission treats the information as confidential.

- Fuel purchase quantities by contract – This provides a lot of valuable information to competitor suppliers and is potentially harmful to company procurement strategies.
- Delivered characteristics of fuel may be competitively sensitive, especially at a facility-by-facility level.

This information also should be treated as confidential.

Lastly, questions 7 and 8 deal with shortfalls and buy-throughs, which can be very commercially sensitive if reported when identified instead of when later settled. At the earlier identification stage, disclosure of such information would impair a company's bargaining power. Again, such information should be treated as confidential.

Conclusion, Contact Information

In conclusion, EEI supports the Commission's proposals to streamline the fuel and energy purchase practices interrogatory form FERC-580, by deleting several categories of information no longer needed by the Commission, and providing a simplified electronic filing mechanism. We recommend offering the new electronic filing mechanism as an option, especially until field tested by volunteers this round.

We also encourage the Commission to further improve the form by: (1) limiting it to the tariffs and agreements covered by the authorizing FPA section 205(f)(4), and reflecting this in the form, glossary, and drop-down menus; (2) not collecting information already collected elsewhere, in particular as to formula rates, and coal and gas cost information; (3) not collecting information that is unnecessary, intrusive, and

burdensome, in particular as to energy and capacity transactions in organized markets and power pools and for every hour of the two-year reporting period, and as to company fuel procurement practices and policies; (4) clarifying that the FERC-580 applies only to power sale tariffs or agreements; (5) clarifying that the FERC-580 is not required to be completed for AACs that have not been transacted under during the reporting period; (6) clarifying that AACs do not include simple pass-through components of formula rates; and (7) clarifying and providing assistance in responding to several questions, in particular as to fuel information relating to AACs.

Lastly, we request that the Commission provide confidentiality to information that is commercially sensitive, in particular as to company fuel purchase policies and practices, fuel transportation costs, and shortfalls and buy-throughs.

If the Commission or staff have any questions, please contact me or Henri Bartholomot on EEI staff.

Respectfully submitted,

- signature -

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