Proposed Rules

Federal Register
Vol. 61, No. 26
Wednesday, February 7, 1996

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Chapter I

[Docket No. RM96–6–000]

Inquiry Concerning Commission's Merger Policy Under the Federal Power Act

January 31, 1996.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of inquiry.

SUMMARY: The Federal Energy Regulatory Commission requests comments on whether it should revise its criteria and policies for evaluating public utility mergers in light of fundamental changes in the electric industry and the regulation of that industry.

DATES: Written comments of no more than 50 pages, double-spaced, must be received no later than May 7, 1996.

ADDRESSES: Send comments to: Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Jan Macpherson, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 208–0921.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397 if dialing locally or 1–800–856–3720 if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400 or 1200 bps, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this order will be available on CIPS indefinitely in ASCII and Wordperfect 5.1 format. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in the Public Reference Room at 888 First Street NE., Washington, DC 20426.

I. Background

The Federal Energy Regulatory Commission (Commission) requests comments on whether its criteria and policies for evaluating mergers of public utilities need to be revised in light of fundamental changes in the electric industry and the regulation of that industry.

Under section 203 of the Federal Power Act (FPA),[1] no public utility may dispose of, merge, or consolidate certain facilities under the Commission's jurisdiction without the Commission's approval.[2] The Commission is to approve a merger if the merger is ''consistent with the public interest.''

The Commission presently analyzes proposed mergers by examining six non-exclusive factors that were set forth in *Commonwealth Edison Company*.[3] These factors are:

(1) the effect on the applicants' operating costs and rate levels;

(2) the contemplated accounting treatment;

(3) the reasonableness of the purchase price;

(4) whether the acquiring utility has coerced the to-be-acquired utility into acceptance of the merger;

(5) the effect on competition; and

(6) the impact on the effectiveness of state and Federal regulation.

Of these factors, the effects on costs and rates, and on competition, have been the most significant issues presented in recent merger cases.

We have used the *Commonwealth* factors for almost thirty years. However, the industry and our regulation of it have changed significantly during that time, and even greater changes are likely in the future. As we explained in detail in our proposed Open Access rule,[4] a variety of factors has created considerable competition in the generation market and structural changes in the industry itself. For instance, the advent of various non-traditional generating entities and the greater availability of transmission (brought about by the Energy Policy Act of 1992[5] and by certain utilities' ''open access'' filings) have allowed a great deal of competition, particularly in the market for new generation. Since the Open Access NOPR was issued, there have been further competitive changes. For example, thirty-one public utilities have filed transmission tariffs that provide varying degrees of open access; certain power pools have discussed adopting Independent System Operators (ISOs) or other structural changes;[6] and the California Public Utilities Commission has issued an order directing restructuring of the electric industry in California to include a spot market power exchange, an ISO and retail access, among other things.[7] With the final Open Access rule, non-discriminatory wholesale open access will be available on an even wider basis. This, in turn, will further increase competition.

In light of these fundamental changes, the Commission solicits comments on whether our criteria and policies for evaluating mergers need to be changed. We note that several entities commenting on the Open Access proposal argued that the policy needs to be updated. In general, these commenters are concerned that mergers may create ''mega-utilities'' that will have market power in generation, particularly if these utilities are able to

[1] 16 U.S.C. § 824b.

[2] In this order, we will refer to all such transactions as mergers.

[3] 36 FPC 927 (1996), *aff'd sub nom. Utility Users League* v. *FPC*, 394 F.2d 16 (7th Cir. 1968), *cert. denied*, 393 U.S. 953 (1968).

[4] Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities, 60 FR 17662 at 17668–17675 (April 7, 1995), IV FERC Stats. & Regs., Proposed Regulations ¶ 32,514 at 33,057–33,069 (1995).

[5] 16 U.S.C. §§ 824j–824l.

[6] Transcript of Commission's Conference on Power Pools Under the Open Access Proposal, vol. 1, pages 75 *et seq.* (New York Power Pool); 78 *et seq.* (New England Power Pool); 82 *et seq.* (Pennsylvania-New Jersey-Maryland Power Pool) (Dec. 5, 1995).

[7] D.95–12–063 (Dec. 20, 1995), *as modified by* D.96–01–009 (Jan. 10, 1996).

avoid the pancaked transmission rates that their competitors have to pay.[8]

II. Public Comment Procedures

The Commission invites all interested parties to submit an original and 14 copies of their comments. Comments should not exceed 50 pages, double-spaced, and should include an executive summary. Commenters should briefly describe themselves and should refer to Docket No. RM96–6–000. They should submit a copy of their comments on a 3½ inch diskette in ASCII II format. Comments must be filed with the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, no later than May 7, 1996. All comments will be placed in the Commission's public files and will be available for inspection in the Commission's Public Reference Section, 888 First Street NE., Washington, DC 20426, during regular business hours.

By direction of the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 96–2548 Filed 2–6–96; 8:45 am]

BILLING CODE 6717–01–P

[8] *E.g.*, American Public Power Association initial comments at 4, reply comments at 9–10; National Rural Electric Cooperative Association initial comments at 20–21; National Independent Power Producers reply comments at 5–6; Indiana Utility Regulatory Commission initial comments at 36–7.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1220

[Docket No. 96N–0011]

Tea Importation Act; Tea Standards

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is announcing how it intends to implement the Tea Importation Act (the Act) in the wake of the agency's appropriation for fiscal year (FY) 1996, which provides that none of the funds appropriated may be used to operate the Board of Tea Experts (the board). Without a board to provide recommendations for standards of purity, quality, and fitness for consumption of imported teas, FDA has decided to solicit public recommendations for the tea standards that will be effective beginning May 1, 1996. In addition, FDA requests comments on the appropriateness of this approach to setting such standards.

DATES: Written comments and other material considered relevant, including samples that the agency may use as standards, by April 8, 1996. FDA proposes that any final standards that are adopted in this proceeding will be effective on May 1, 1996.

ADDRESSES: Submit written comments and any tea samples to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Michelle A. Smith, Center for Food Safety and Applied Nutrition (HFS–158), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5099.

SUPPLEMENTARY INFORMATION: Section 3 of the Act (21 U.S.C. 43) states:

> The Secretary of [Health and Human Services], upon the recommendation of the board of experts provided in section 2 of this title, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of tea imported into the United States, and shall procure and deposit in the customhouses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards.

Under the Act and the regulations that FDA has adopted to implement it, FDA sets such standards annually (see 21 U.S.C. 42 and 21 CFR 1220.40). No tea that is inferior in purity, quality, or fitness for consumption to the standard established by FDA may be brought into this country (21 U.S.C. 41).

Public Law 104–37, which contains FDA's appropriation for FY 1996, states that: ''None of the funds appropriated or made available to the Food and Drug Administration in this Act shall be used to operate the Board of Tea Experts.'' This provision creates a significant problem for the agency since members of the board cannot be appointed, nor its activities supported by FDA. Nonetheless the Act remains in effect. Thus, FDA has a continuing obligation to implement it. This obligation is underscored by the fact that Congress rejected a broader limitation on the agency's ability to expend funds to implement the Act that appeared in the version of the appropriations bill that passed the Senate (see H. Rept. 104–268, 104th Cong., 1st sess. 38 (1995)). However, without the benefit of the advice of the board, the agency is faced with the question of how it will arrive at the standards required under the Act for imported teas.

In considering this question, FDA identified three options. First, it could do nothing to implement the Act. The agency rejected this option because it would be inconsistent with the apparent intent of Congress, and because it would mean that it would ostensibly be unlawful to bring or import into the United States any merchandise identified as tea. Even though the agency could, as an exercise of its enforcement discretion, do nothing about the latter fact, FDA considers it unfair and unwise to allow such a situation to emerge. Thus, the agency considers it incumbent on itself to continue to implement the Act in a manner that is consistent with law.

The second option that the agency identified was to ask the Department of Health and Human Services, of which FDA is a part, to operate the board with funds not appropriated in Pub. L. 104–37. The agency rejected this option because it is not consistent with the spirit of Congress's action, and because the Department is likely to have little ability to assume this financial and resource obligation.

The third option that FDA considered was to substitute public input for the recommendations of the board. This option is not inconsistent with the law. The requirement in 21 U.S.C. 43 is that the Secretary (and, by delegation, FDA) fix and establish standards for teas. While the law provides that the board is to provide recommendations to FDA, there is nothing in the Act that says that the agency can only establish such standards based on the board's recommendations. Thus, the agency is not precluded from relying on other sources of information. The agency considers it likely that the information that it receives in response to a request for comments will allow it to set appropriate standards for tea. Moreover, once the agency sets such standards, tea can continue to come into this country lawfully, limited only by the standards that FDA sets.

Based on these considerations, FDA is seeking public comment on the standards of purity, quality, and fitness for consumption of tea that it is to set under 21 U.S.C. 43 for the year beginning on May 1, 1996. FDA requests that interested persons submit all material that they consider relevant, including samples that the agency may use as standards. FDA will evaluate the information that it receives, and, based on that evaluation, it intends to arrive at the standards that will apply to tea shipped from abroad after May 1, 1996, until April 30, 1997.

In addition to comments on what the standards should be, FDA solicits comment on the process that it has instituted. FDA solicits comments on its