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Magalie R. Salas,
Secretary.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL01-118-000 and EL01-118-001]

Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations; Order Addressing Application of Ex Parte Rule and Requests for Extension of Time

Issued: July 25, 2003.

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell. 104 FERC ¶ 61,132.

1. This order addresses requests related to the Commission's earlier order in these dockets, issued June 26, 2003, under Section 206 of the Federal Power Act,¹ requesting comments on a proposal to condition all new and existing market-based rate tariffs and authorizations to include a provision prohibiting the seller from engaging in anticompetitive behavior or the exercise of market power. Order Seeking Comments on Proposed Revisions to Market-Based Rate Tariffs and Authorizations, 103 FERC ¶ 61,349 (2003). The Commission has received two requests that it find that its *ex parte* rule² does not apply, from the Electric Power Supply Association (EPSA) and jointly from the Edison Electric Institute and the Alliance of Energy Suppliers (EEI/AES). EEI/AES also requests an extension of the time for comments and the scheduling of a technical conference.

Background

2. The Commission issued its June 26 order as part of the electric dockets indicated in the caption above. The order proposed market behavior rules that would apply to all market-based tariffs and rate authorizations. 103 FERC ¶ 61,349, ¶ 16. The Commission solicited comments from all interested entities. *Id.*, ¶ 52.

3. On the same date, the Commission issued a proposal to amend the blanket certificates for unbundled gas sales services by interstate natural gas pipelines and the blanket marketing certificates held by persons making

sales for resale of gas at negotiated rates. This proposal was similar in intent to the electric proposal issued in this proceeding; the Commission proposed to require that pipelines and all sellers for resale adhere to a code of conduct with respect to gas sales. The gas proposals was issued in a new docket, which was designated as a rulemaking docket, No. RM03-10-000.

Amendments to Blanket Sales Certificates, 103 FERC ¶ 61,350 (2003). Like the June 26 electric order, the gas order sought comment from interested persons. *Id.*, ¶ 31.

Discussion

4. EPSA and EEI/ESA both request that the Commission treat this proceeding as a rulemaking, thus making its *ex parte* rule inapplicable. See 385.2201(c)(1)(ii) (*ex parte* rules do not apply to notice-and-comment rulemakings). EEI/ESA note that the electric proposal is generic in nature, and state that treatment as a rulemaking will better facilitate open discussion between the Commission and interested parties. EEI/ESA Motion at p.3. EPSA points out that the only effective difference between the electric and gas proposals, for purposes of the comment procedures, is the differing docket designations. EPSA states that, because the Commission in this proceeding is contemplating measures that would apply generally, and not just to specific parties in a contested proceeding, the purposes of the *ex parte* rules would not be served by their application here. EPSA Motion at pp. 2-4.

5. The Commission concludes that the approach adopted in the June 26 order is the functional equivalent of a rulemaking with respect to the applicability of Rule 2201. The order seeks comments and reply comments from interested entities, and does not limit participation to parties. To that end, the order was published in the **Federal Register**, as is the case with notice-and-comment rulemakings. More to the point, the Commission is not conducting an adjudication between parties, and intends the outcome here to have generic effect. See 103 FERC ¶ 61,349, ¶ 6, note 5.³ Therefore, for the reasons that the Commission found appropriate when it excluded rulemakings from the coverage of the prohibitions on off-the-record proceedings, the Commission believes that this proceeding should also be excluded from the coverage of Rule

³ The Commission still does not intend, however, to amend Title 18 of the Code of Federal Regulations. The approach proposed in the June 26 order focuses on changes to the sellers' tariffs, and does not include regulatory changes.

2201.⁴ In particular, the Commission believes that robust debate in what is essentially a legislative proceeding will be enhanced by removing the restrictions of the *ex parte* rule.

6. EEI/ESA made two further requests. They asked that the Commission extend the deadlines for comments by 60 days. Currently, initial comments are due on August 8, 2003, and reply comments on September 8. EEI/ESA state that an extension will allow interested parties sufficient time to prepare detailed and constructive comments. EEI/ESA Motion at pp. 2-3. EEI/ESA also ask that the Commission schedule a technical conference. *Id.* at p. 4.

7. The Commission does not believe that the requested extension is warranted and does not wish to delay proceedings significantly. However, it will grant a limited extension as follows. Comments will be due on August 18, 2003. Reply comments will be due on September 18, 2003.

The Commission orders:

(A) The requests to treat this proceeding as a rulemaking for the purposes of the applicability of Rule 2201, are granted;

(B) The motions for extension are granted as discussed;

(C) The Commission will determine at a later time whether to convene a technical conference;

(D) The Secretary shall promptly publish this Order in the **Federal Register**.

By the Commission.

Linda Mitry,

Acting Secretary.

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ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-6642-5]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564-7167 or <http://www.epa.gov/compliance/nepa/>.

Weekly receipt of Environmental Impact Statements

Filed July 21, 2003 through July 25, 2003

Pursuant to 40 CFR 1506.9.

EIS No. 030341, Draft EIS, IBR, CA, Lower Santa Ynez River Fish Management Plan and Cachuma Project, Biological Opinion for

⁴ See Order No. 607, 88 FERC ¶ 61,225 (1999), at pp. 15-16.

¹ 16 U.S.C. 824e (2000).

² 18 CFR 385.2201 (2003) (Rule 2201).