

Information Disclosure and Competitive Electric Markets: Why Is Enough Never Enough?

Presented by:

Donald F. Santa, Jr.

Senior Vice President and Deputy General Counsel

LG&E Energy Corp.

Harvard Electricity Policy Group

Newport, Rhode Island

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The Problem: Who Needs What and Why?

- Current information requirements are based on traditional public utility ratemaking models.
- What is the fundamental purpose of regulation and does information disclosure help or hinder the process?
- Current requirements ignore the practical realities of a rapidly maturing competitive marketplace.

Traditional Assumption: Regulated Utility Information Must Be Publicly Disclosed.

- Rates based entirely on utility's cost to serve its native load customers, plus an allowed rate of return.
- Full disclosure of transaction information inconsequential because of monopoly franchise protection.

Competition Renders Traditional Assumption Faulty.

- Rates no longer based entirely on utility's cost of service.
 - Market-based rates premised competition among traditional and non-traditional suppliers.
 - Alternative regulation, or performance-based ratemaking, shifts emphasis from cost of service to production and operational efficiency.

- Utility generation being sold to non-traditional owners with no obligation to serve captive, native load customers.
- Substantial erosion of franchise monopoly through increased retail competition.

While Markets Are Evolving, Regulators Aren't - A Boilerplate Response.

- Coalition of concerned regulated utilities raised issue last year in requesting confidential treatment of certain FERC Form 1 data. FERC has not responded.
- FERC has denied other requests for confidential treatment, citing need for accurate, timely data.
 - Determine reasonableness of rates.
 - Monitor for abuses of market power.
- Needs of regulators and public greatly outweigh any harm resulting from disclosure.

The Boilerplate Response Makes No Sense In A Competitive Environment.

- FERC does not have access to accurate, timely data from all market participants.
- Market-based rate authority removes from regulator responsibility for determining the cost basis for just and reasonable rates.
- Market-based rate authority dependent on showing of no market power, or mitigation of any market power that may have existed.

Disclosure Does Harm Regulated Utilities.

- Requires public disclosure of highly sensitive competitive business information.
- Reporting burden unequal because not all market participants subject to FERC Form 1 filing requirements.
 - Unaffiliated power marketers;
 - Munis, coops, PMA's.

Competitive Disadvantage Results From Form 1 Disclosure of:

- Data pertaining to sales, purchases, and transmission of electricity, including data on specific customer transactions.
- Information pertaining to operating capabilities, costs, and business practices.
- Information about company assets, capital expenditure strategy, and research and development efforts.

FERC and FOIA

- FERC's confidentiality rules premised on FOIA - information clearly of a commercial or financial character, but
- FERC refuses to find that disclosure of information would cause substantial harm.
 - Party must demonstrate existence of actual competition; and
 - Substantial competitive injury would result.

FERC, FOIA and the Pennzoil Test: Something Doesn't Add Up.

- FERC has been reluctant to make these findings in the electric power context, despite having done so for natural gas producers.
- Fifth Circuit decision in Pennzoil v. Federal Power Commission, 534 F.2d 627 (5th Cir. 1976) suggests that disparate treatment between natural gas producers and electric power might not be justified.

The Pennzoil Test.

- The disclosing agency must:
 - Determine that disclosure will significantly aid the agency in fulfilling its mandates;
 - Consider not only the harm done to those supplying the data, but the potential harm to the public as well; and
 - Consider the existence of alternatives to disclosure that will balance the public's need for information with the provider's interests in confidentiality.

Does Public Disclosure of Regulated Utility Information Assist FERC in Fulfilling its Statutory Mandate?

- The utility sales function has changed completely since FERC established its public disclosure policies.
 - Competition and default rates protect customers in states that have adopted retail competition.
 - Even where monopoly franchise remains, alternative ratemaking is shifting analysis from a utility's costs to its operational and production efficiencies.

- Less intrusive means of protecting consumers interests exist even where utilities remain subject to full cost of service based ratemaking.
 - FERC could still require the reporting of data on the Form 1 for purposes of monitoring the justness and reasonableness of cost of serviced based rates.
 - To protect competitive customers, however, FERC could protect the confidentiality of that data unless or until such time that disclosure was necessary for ratemaking purposes.

So, Why Should Retail Customers Care About the Competitiveness of Their Utility in the Wholesale Market?

- Enhanced competitiveness of utility increases benefits flowing to customer through off-system sales trackers, and ESM.
- If no such mechanism exists, retail customers still benefit through increased competitiveness because of reduced likelihood that utility will seek an increase in its retail rates.

Need To Balance the Interests of Regulators and the Marketplace: Symmetry In Who Must Report and What Must Be Reported.

- FERC achieved symmetry in Southern Company Services, 87 FERC ¶61,214, except in the wrong direction.
- All jurisdictional market participants must now disclose long-term wholesale contracts.
- FERC never stated the rationale for its order. It only made blanket statements about promoting competition and fulfilling its statutory obligations.

- One possible rationale can be found in an earlier order denying requests for rehearing of OASIS and Standards of Conduct, 86 FERC ¶61,139 (1999). There, FERC relied on single footnote in a 25 year old D.C. Circuit case as the basis for requiring the disclosure of sensitive business information.
- The promotion of competition does not depend on the secrecy of agreements reached.

Saying So Doesn't Necessarily Make It So.

- FERC relied on a perceived need for more information, but never suggested why.
- FERC has yet to articulate valid reasons for distinguishing between utility and power marketer sales made at market-based rates.
 - No evidence that FERC was impeded in fulfilling its statutory duty by not receiving information relative to long-term power market contracts.

In Reality, Disclosure More Likely To Harm Competition.

- FERC continues to ignore distortion arising from lack of symmetry in reporting obligations for all market participants.
 - Asymmetrical reporting obligations provides non-reporting entities with valuable competitive information.
 - Market prices based on utilities' perceived marginal costs may not be truly competitive.
- No other competitive market where such data must be disclosed.

Irony At Its Best.

- Up until Southern Company Services, non-utility marketers had no reason to be concerned, and in fact, may have benefited greatly from required utility disclosure of long-term contracts.
- After Southern Company Services, however, non-utility power marketers now making the same arguments as utilities with respect to protecting critical information.

Finally, Does This Really Make Sense?

“EPMI would have the Commission protect a market niche that some market participants may have enjoyed by virtue of possessing market-related information that has not been available to others. . . . by requiring disclosure, the Commission is merely removing imperfections in an otherwise competitive market, [footnote omitted] thereby facilitating the efficient allocation of resources.” OASIS and Standards of Conduct, 86 FERC ¶61,139.