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WHO NEEDS WHAT, AND WHY? REPORTING AND DISCLOSURE OBLIGATIONS IN EMERGING COMPETITIVE ELECTRICITY MARKETS

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Traditional regulation of electric utilities assumed, with few limited exceptions, that information concerning the costs, transactions, and business plans of such regulated companies must be disclosed publicly. Emerging competition in the wholesale and retail power markets raises basic questions about whether mandatory reporting and disclosure remain appropriate. Restructuring raises related questions concerning the degree of reporting and disclosure needed during the industry's transition to competition. This is an issue of increasingly greater scope and significance. On several occasions over the past four years, utilities petitioned the Federal Energy Regulatory Commission (FERC or Commission) for confidential treatment for their FERC Form 1 annual report filings on the basis that public disclosure of such information would put them at a competitive disadvantage in the wholesale power market.¹ Now, the issue is affecting the industry more broadly, as the FERC in several recent orders has compelled non-traditional market participants to file more detailed transaction information.

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1. The FERC Form 1 "Annual Report for Major Electric Utilities, Licensees and Others" is a 140-page annual report "designed to collect financial information from privately owned electric utilities and licensees who have generation, transmission and distribution facilities and sales of electricity, however produced throughout the United States and its possessions, subject to the Commission's jurisdiction." *Information Collection Submitted for Review and Request for Comments*, 63 Fed. Reg. 32,868 (1998).

The Form 1 includes general corporate information, financial statements, supporting information and operating data for the prior calendar year. More specifically, the general corporate information includes information about officers, directors, and shareholders. The financial information includes a balance sheet, income statement, retained earnings statement, and cash flow information. The supporting information includes detailed lists of electric plant investments, deferred taxes, stock, debt, operating revenues, sales by rate schedule, purchased power for resale, transmission, research projects, numbers of employees, and distribution of salaries and wages. The operating data includes monthly peak power production, output and information about electric, hydro, and pumped storage generating plant, transmission lines, distribution meters, transformers, and environmental protection facilities.

Since the Federal Power Commission first adopted the Form 1 in 1937, the reporting requirements have been amended numerous times to reflect changes in the electric power industry. Nonetheless, the reporting form has yet to be amended to reflect the significant changes that have occurred in the wake of the Energy Policy Act of 1992. The last amendments to Form 1 implemented minor changes affecting reporting on emissions allowances and regulatory assets and liabilities (58 Fed. Reg. 17,982 (1993) (to be codified at 7 C.F.R. pt. 319)) and a minor change to an instruction (58 Fed. Reg. 42,494 (1993) (to be codified at 18 C.F.R. pt. 101).

The effect of information reporting and disclosure is changing as well. Traditionally, information disclosure and reporting supported effective regulation of the cost-based rates charged by monopoly service providers. Public disclosure of costs, transactions, and business plans provided a means for ensuring that rates remained just and reasonable. Furthermore, because utilities were the monopoly providers within their franchised service territories and faced no direct competition, the assumption was that full disclosure of utility information would have little adverse consequence.

With the paradigm shift from pervasive monopoly regulation to regulation that promotes competition and economic efficiency, the validity of such assumptions is open to question. The new prevailing theory for disclosure is that where an industry is competitive, consumers are better served by the results of working market processes.² Consequently, the focus of regulatory reporting and disclosure obligations should shift from what is needed for setting cost-based rates to what is needed for maintaining a competitive market and preventing an individual competitor from exercising market power.

To date, the majority of the cases that have addressed the competitive implications of reporting and disclosure obligations have considered the issue in terms of the alleged competitive injury to the reporting company. The broader question concerns how comprehensive reporting and disclosure obligations might affect the efficiency and competitiveness of the market itself. In particular, how might the discipline of competition be undermined when market participants know each other's costs, transactions, and business plans?

Unfortunately, many of the current information reporting and disclosure requirements ignore the practical realities faced by companies doing business in the rapidly maturing competitive electric power market. These requirements place reporting companies at a competitive disadvantage and, at the same time, probably fall far short of capturing the kind of information needed for effective market monitoring.

Another practical problem with current reporting requirements is that many utilities still play a dual role as both active participants in the competitive wholesale power market and providers of bundled, wholesale requirements, and retail native load services. This creates a special challenge. On the one hand, such companies should not be placed at a disadvantage and the bulk power market should not be distorted by requiring such companies to disclose competitively sensitive proprietary information. On the other hand, there remains a legitimate interest in using information disclosure and reporting to support effective regulation of such companies' cost-based wholesale and retail rates.

This article will examine these issues by reviewing the FERC's decisions addressing information reporting and disclosure requirements for integrated utilities and non-traditional industry participants. In addressing these issues, the following basic questions should serve as a touchstone:

2. See generally Richard Pierce, *The State of the Transition to Competitive Markets in Natural Gas and Electricity*, 15 ENERGY L.J. 323 (1994); Vicky A. Bailey, *Reassessing the Role of Regulators of Competitive Energy Markets, or: Walking the Walk of Competition*, 20 ENERGY L.J. 1 (1999).

- What purpose is served by reporting and disclosure?
- Who should be reporting?
- What information should be reported?
- Who needs access to this information?

I. THE FERC'S DISCLOSURE POLICY FOR FORM 1

The information and reporting requirement debate at the FERC has focused on FERC Form No. 1 "Annual Report of Major Electric Utilities, Licensees and Others" (Form 1), a 140-page annual report that must be filed by investor-owned utilities. Over the past four years, reporting companies on several occasions have requested that the FERC revisit the Form 1 information requirements and determine whether parts of the reported data should be granted confidential treatment. In response, the Commission either has rejected such requests or deferred action.

The Commission's most recent pronouncement on this issue occurred in *PECO Energy*.³ The FERC denied confidential treatment on grounds that competition in the electric power industry had not yet advanced to the point at which the potential competitive disadvantage of disclosure outweighed the benefits of public access to Form 1 data. In doing so, the Commission relied heavily on its 1995 order in *Consolidated Edison Co.*⁴ which denied similar requests for confidential treatment.

The Commission in *PECO Energy* focused first on what it believed to be the benefits of Form 1 data for evaluating the reasonableness of wholesale power and transmission rates. It noted that Form 1 data was particularly relevant for evaluating cost-based transmission and wholesale power rates, and that such data was also useful for supporting a finding that an applicant lacked market power and was, therefore, entitled to charge market-based rates for wholesale sales. The Commission added that public access to Form 1 data was an important means of empowering customers to protect themselves from unreasonable, excessive rates and undue discrimination.

The Commission next focused on the petitioners' claim that the Commission had not complied with either the Freedom of Information Act (FOIA) or the FERC's own regulations when it rejected their claim that Form 1 data was entitled to confidential treatment. Based on its review of the filings, the Commission found the petitioners' claims to be only "general, unsubstantiated assertions" of competitive harm. The Commission also found it significant that most utilities had not filed for confidential treatment of their Form 1 data and that not all of the petitioners had filed for confidential treatment of the same data. The Commission noted that if it had granted the petitioners' requests, it would have put the other utilities, which had not requested such treatment, at a competitive disadvantage.

While the Commission rejected the rehearing petitions, it agreed to provide a generic forum to address the general policy arguments raised in those petitions:

3. *PECO Energy Co.*, 88 F.E.R.C. ¶ 61,330 (1999).

4. *Consolidated Edison Co.*, 72 F.E.R.C. ¶ 61,184 (1995).

However, we are not unmindful of the Petitioners' concerns. In order to address these concerns, we intend to initiate, in the near future, a separate, generic proceeding to explore more generally whether confidentiality of certain Form 1 data may be appropriate in the future, and what, if any, data should be kept confidential in the future. In that proceeding, we will conduct a review to ensure that the Form 1 requirements are fair to all segments of the industry and consistent with the workings of a competitive environment, while still providing the Commission the information it needs to carry out its statutory responsibilities and customers the information they need to protect against unreasonable and undue discrimination.⁵

Commissioner Bailey concurred on the basis of the Commission's intention to initiate such a proceeding. She noted her receptivity to the petitioners' concerns and her hope that as a result of the generic proceeding the Commission would "ensure that the information that it elicits from the utilities it regulates will promote a truly useful monitoring function that outweighs any commercial implications of disclosure."⁶

PECO Energy was not the first time that the Commission acknowledged the larger issue in connection with reporting and disclosure requirements. For example, three years earlier in Order No. 888, the Commission noted some commentors' concerns about the competitive implications of existing reporting and disclosure obligations, but indicated that it would review such requirements over time in separate proceedings. In language similar to that used in *PECO Energy*, the Commission stated that it would ensure that the requirements "are needed, fair to all segments of the industry, and consistent with the workings of a competitive environment."⁷

II. CONFIDENTIAL TREATMENT OF REPORTS CONTAINING COMMERCIAL INFORMATION

The Commission's confidentiality rules are premised on the Freedom of Information Act section 4(d) exemption for trade secrets and commercial or financial information. Generally, there is little dispute that the kind of information contained in the Form 1 report qualifies as commercial or financial information.⁸

5. 88 F.E.R.C. ¶ 61,330, at 62,020.

6. *Id.* at 62,021.

7. *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶31,036, 61 Fed. Reg. 21,540 (1996), preamble Part IV.K; *see also* 72 F.E.R.C. ¶ 61,184, at 61,891 ("As the industry becomes increasingly competitive, the Commission will monitor its various existing reporting requirements to make sure that they are needed, fair to all segments of the industry, and consistent with the workings of a competitive environment.").

8. In *Central Me. Power Co.*, 72 F.E.R.C. ¶ 61,118 (1995), the Commission discussed the meaning of the term "commercial or financial information" in connection with Central Maine's request for confidential treatment for information concerning projected prices, expected expenses and anticipated avoided costs that had been sought by the Office of Hydropower Licensing:

There is no basis to dispute that the information qualifies as "commercial or financial" under the exemption. Courts have held that these terms should be given their ordinary meanings, that records are commercial so long as the submitter has a "commercial interest" in them, and that the term "commercial" includes anything "pertaining or relating to or dealing with commerce." Commercial or financial information has been held to include such items as profit and loss data, overhead and operating costs, and information on financial condition.

In other contexts, the courts have held that information such as short-term marketing strategies, market positions, trade sources, customer names, individual customer transactions, high profit margin activities, plant employment statistics that effectively disclose staffing and equipment use, inventory, and individual employee salaries all qualify for the section 4(d) exemption.⁹

The stumbling block to granting Form 1 data confidential treatment has been the industry's inability to demonstrate to the Commission's satisfaction that releasing this information would cause substantial harm to the competitive position of the person from whom the information was obtained. In construing FOIA, the courts have held that a party must demonstrate that it actually faces competition and that substantial competitive injury would likely result from disclosure.¹⁰ To date, the Commission has been reluctant to make such a finding in the context of competition in the wholesale power market.¹¹ Still, in what arguably is an analogous context, the Commission has previously found that natural gas producer information was entitled to confidential treatment.¹²

III. SYMMETRY IS NOT THE ANSWER

As noted earlier, investor-owned utilities have argued that they are at a competitive disadvantage because of unequal reporting obligations imposed by the FERC Form 1 filing requirement. Still, symmetry is only part of the answer, since both the wholesale power market and market participants will be harmed if reporting and disclosure obligations do not balance the needs of regulators with those of the marketplace. The Commission's May 27, 1999, order in *Southern Company Services, Inc.*¹³ brought this point into sharp focus.¹⁴

72 F.E.R.C. ¶ 61,118, at 61,680 (citations omitted).

9. See, e.g., *Board of Trade v. FTC*, 627 F.2d 392, 406 n. 96 (D.C. Cir. 1980) (legislative history citing business sale statistics, inventories, customer lists, and scientific, manufacturing processes, or developments as examples of exempt information); *Braintree Electric Light Dept. v. Department of Energy*, 494 F. Supp. 287 (D.D.C. 1980) (fuel oil wholesaler information on suppliers, purchases, costs of goods sold, inventory balances, throughput costs, selling prices, freight costs, and margin qualifies as confidential commercial information within the meaning of the exemption).

10. See, e.g., *Niagara Mohawk Power Corp. v. Department of Energy*, 169 F.3d 16 (D.C. Cir. 1999) (citing *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976)).

11. See, e.g., 88 F.E.R.C. ¶ 61,330; *AES Huntington Beach, L.L.C.*, 83 F.E.R.C. ¶ 61,100 (1998), *reh'g denied*, 87 F.E.R.C. ¶ 61,221 (1999); 72 F.E.R.C. ¶ 61,118.

12. See, e.g., *Mobile Bay Pipeline Projects*, 49 F.E.R.C. ¶ 61,006 (1989).

13. *Southern Co. Servs., Inc.*, 87 F.E.R.C. ¶ 61,214 (1999).

14. This issue also has arisen in other contexts. In 1998, the Energy Information Administration of the U.S. Department of Energy (EIA) updated its procedure on the confidential treatment of electric power data collected through its surveys. Under the new policy, some data elements that were not considered confidential in the past will now be treated as confidential. These data elements include information regarding future generating capacity, heat rates, fuel inventory, and sales to end users. The EIA also decided that some data collected from non-utility generators that formerly were treated as confidential now would be made publicly available. See Confidentiality of Information on EIA Electric Power Surveys, Energy Information Administration U.S. Department of Energy (last modified Oct. 1999) (<http://www.eia.doe.gov/cneaf/electricity/forms/sselecpower98.html>). Non-utility generators were particularly concerned about the implications for the competitiveness of the electric power market resulting from the level of disclosure proposed by the EIA. See *EPSA Wants Protection of Data Sought by EIA*, ELECTRICITY DAILY, Sept. 14, 1998.

In its request for rehearing of an earlier order,¹⁵ Southern Company Services, Inc. (Southern) requested the Commission to revise its requirement that traditional public utilities with market-based rate authority file long-term service agreements (longer than one year) with the Commission within 30 days after commencing service. Southern requested instead that such utilities be allowed to report all market-based rate transactions, both long-term and short-term,¹⁶ as part of their quarterly transaction summaries consistent with the waiver granted to power marketers.

Even though it denied Southern's request for rehearing, the Commission agreed with Southern's position that ending the disparity between the reporting requirements for traditional utilities and power marketers would advance competition. The Commission then announced that it would implement a new policy to achieve such symmetry in reporting requirements:

Specifically, with respect to any long-term transaction agreed to by a power marketer after 30 days from the issuance of a final order in this proceeding, the power marketer must file a service agreement with the Commission within 30 days after service commences, rather than merely reporting transactions thereunder in its quarterly transaction summaries.¹⁷

The Commission's decision was premised on its perception of the differences between short-term and long-term market-based rate transactions:

The current general practice of sellers in the industry, both traditional public utilities and power marketers, is to engage in short-term transactions that frequently are not the subject of separate written agreements. To require traditional utilities and power marketers to prepare, negotiate and file a written agreement for every short-term transaction would seriously diminish the flexibility and efficiency of the short-term market and burden the resources of both the reporting parties and the Commission. . . .

For long-term transactions, on the other hand, a different balance is appropriate. Long-term transactions are almost always the subject of separate written agreements and do not normally involve the same time-sensitive pressures as short-term competitive markets. Thus to require all entities engaging in long-term transactions to file written agreements for such transactions, within 30 days of the date service commences, in our judgment will neither impede flexibility and efficiency in the long-term market nor unduly burden the resources of the reporting parties and the Commission.¹⁸

The Commission's decision to treat power marketers the same as traditional public utilities was explained as follows:

Moreover, we see no reason to continue allowing power marketers a more relaxed reporting requirement for long-term transactions than that applicable to traditional utilities. Power marketers, like any other public utility, are subject to the requirement under section 205(c) of the FPA to file with the Commission for public inspection all rates, charges, classifications and practices, as well as any contracts that

15. *Southern Co. Servs., Inc.*, 75 F.E.R.C. ¶ 61,130, *clarified on other grounds*, 75 F.E.R.C. ¶ 61,353 (1996).

16. The Commission earlier had waived the transaction-specific filing requirements traditional utilities' short-term agreements (one year or less in duration) and permitted them to report such transactions on quarterly reports consistent with its treatment of power marketer transactions. *Id.*

17. 87 F.E.R.C. ¶ 61,214, at 61,847.

18. *Id.* at 61,848.

relate thereto.¹⁹

In view of the Commission's unusual announcement of a generic change in policy in the context of a company-specific order on rehearing, it delayed the effectiveness of the new policy until thirty days following the issuance of a final order in the proceeding. The Commission also made every single independent power marketer, affiliated power marketer, affiliated power producer, and other utility with market-based rates a party to the case so that they could seek rehearing of the new policy. Based on the one count, this made over 600 companies parties to the proceeding.

Commissioner Bailey concurred in the Commission's *Southern Company Services* order on the basis that, while she supported eliminating the disparity between the reporting requirements applicable to marketers' and traditional utilities' market-based rate transactions, she questioned the means used to achieve this result. In particular, Commissioner Bailey questioned the decision to achieve parity by the means of increasing the reporting burden imposed on marketers and believed that a better approach would have been to decrease the reporting burden imposed on traditional utilities to match that formerly required of marketers. In her view, the Commission's order did not explain "how the filing requirements (as opposed to quarterly reporting) of long-term agreements by marketers and traditional utilities alike will materially help the Commission in its monitoring of competitive markets and in its responsibility to ensure that all wholesale rates are just and reasonable."²⁰

The Commission has also shown little sympathy for the competitive implications of reporting and disclosure obligations for non-traditional market participants that have acquired power plants divested by traditional utilities. In *AES Huntington Beach, L.L.C.*,²¹ the Commission denied the request of AES Huntington Beach (AES) for the same waivers and authorizations granted to power marketers with market-based rate authority. AES had acquired the generators from Southern California Edison as part of the California restructuring and had applied for market-based rate authority to sell electric capacity in excess of what was required under "must run" agreements. The Commission offered no specific reasons for rejecting AES's request for a blanket waiver of the requirement to file transaction-specific sales contracts as well as the alternative request to file such contracts in redacted form.²²

On rehearing, AES specifically requested confidential treatment for the parts of its Tolling Agreement with Williams Energy Services Co. (Williams) that reflected pricing, the term of the agreement, bargained-for performance ob-

19. 87 F.E.R.C. ¶ 61,214, at 61,848 (citations omitted).

20. *Id.* at 61,850.

21. 83 F.E.R.C. ¶ 61,100.

22. The Commission's succinct statement of reasons was as follows:

We have rejected similar requests in the past and Applicants have not justified a different conclusion here. The filing requirements we impose on power marketers are necessary to ensure that contracts relating to rates and services are on file as required by section 205(c) of the FPA, and to allow the Commission to evaluate the reasonableness of the charges and to provide for ongoing monitoring of the marketer's ability to exercise market power.

83 F.E.R.C. ¶ 61,100, at 61,483 (citations omitted).

ligations, and the identities of certain third-party vendors and consultants. AES stated that, while it would suffer no adverse effects from filing the tolling agreement, Williams could be irreversibly harmed by disclosure of the commercially sensitive economic terms of the Tolling Agreement. It explained that, as a result of the filing obligation, traders working for Williams' competitors would immediately have information about Williams' cost structures, while Williams would not have comparable information about its competitors. This would enable competing traders to exploit the information advantage by altering their bids. AES also contended that allowing competitors to observe such highly sensitive information would serve no valid public purpose. It noted further that the Commission always would have the benefit of the information filed by Williams as part of its quarterly summary of long-term transactions.

The Commission denied rehearing on grounds that:

The AES Companies have not persuaded us to grant them an exception to our filing requirements, or, at this time, to establish an inquiry to revisit our policy. With respect to fulfilling the requirements of section 205(c) of the Federal Power Act (FPA), the Tolling Agreement is a contract providing for the sale for resale of electricity in interstate commerce, and the AES Companies have not supported a finding that the Tolling Agreement may be filed under the FPA in redacted, confidential form.²³

In response to AES's suggestion that Williams' quarterly summary of long-term transactions would provide adequate information for the Commission to fulfill its regulatory responsibilities, the Commission noted that it was contemporaneously issuing the *Southern Company Services* order, in which it announced a new policy on the filing of long-term market-based rate agreements. Furthermore, the Commission stated in a footnote that even in the absence of the new filing policy, AES differed from power marketers, because it owned power plants:

Moreover, even in the absence of our disposition in *Southern*, the AES Companies would still be required to file the Tolling Agreement in unredacted, non-confidential form. Even though prior to *Southern*, we permitted less rigorous filing requirements for power marketers that do not own any generating facilities and engage only in power marketing, the AES Companies are not in this category. Rather, they are more like traditional public utilities, because they do own physical generating facilities through which they have the potential to gain market power.²⁴

The Commission dismissed as "vague" AES's assertions about how Williams could be harmed by the disclosure of information in the Tolling Agreement. It found equally vague AES's assertions that the competitive market in California warranted revisiting the filing requirements for utilities with market-based rate authority. Finally, the Commission rejected AES's argument that its role under the tolling agreement was analogous to cases in which the Commission found that it lacked jurisdiction over a contractor performing power plant operations and maintenance under the facility owner's direction.²⁵

23. 87 F.E.R.C. ¶ 61,221, at 61,877 (citations omitted).

24. *Id.* at 61,877 n.11.

25. 87 F.E.R.C. ¶ 61,221, at 61,877 (citing *Bechtel Power Corp.*, 60 F.E.R.C. ¶ 61,156 (1992)).

A. The Harm Caused by Disclosure

The potential for competitive harm caused by public disclosure of FERC Form 1 data was summarized quite well in comments filed by a coalition of reporting companies in a proceeding initiated by the Commission in 1998 under the Paperwork Reduction Act. Under that statute, a federal agency must obtain reauthorization from the Office of Management and Budget (OMB) every three years for each information requirement that it imposes. The Commission proposed keeping Form 1 in place for an additional three years without any substantive changes.²⁶ In their comments, the Concerned Reporting Companies (CRC)²⁷ framed the issue as follows:

To the maximum extent possible, CRC requests that the Commission not collect information unless the Commission truly needs the information to perform its statutory responsibilities – taking into account the changing nature of those responsibilities as generation and sale of electricity move to a competitive market. We would ask a basic question: In light of competition in the generation and sale of electricity, what minimum information does the Commission actually need to accomplish its responsibilities under the Federal Power Act (FPA), recognizing that those responsibilities are changing from regulating the rates of reporting companies to ensuring efficient competition in the marketplace for electricity?²⁸

CRC argued that reporting companies are placed at a particular disadvantage by the Form 1 disclosure requirements, because not all market participants are required to file a Form 1. In particular, state and municipal utilities, rural cooperatives that receive federal funding, independent power producers, exempt wholesale generators, and power marketers are all exempt from the requirement. CRC argued that this asymmetry of reporting obligations creates a situation where not all competitors bear the same burdens or face the same competitive pressures. The reporting obligation places an unequal burden on reporting companies, because they must bear a cost not borne by exempt companies. The reporting obligation also places them at a competitive disadvantage, because Form 1 provides a reporting company's competitors, suppliers, and customers with details about its costs and operations. CRC asserted that Form 1 requires a reporting company to disclose information that in virtually any other context would be protected by the FOIA's section 4(d) exemption for trade secrets and privileged or confidential commercial or financial information.

CRC also argued that the competitive market itself is harmed by the Form 1 disclosure requirements. In anticipation of the argument that Form 1 disclosure was pro-competitive, CRC stated:

Public disclosure of information about company internal operations and costs of production is not needed for the market to function well. On the contrary, a truly

26. *Proposed Information Collection and Request for Comments*, 63 Fed. Reg. 7777 (1998).

27. The members of the Concerned Reporting Companies coalition were: Allegheny Energy, Inc., American Electric Power Company, Inc., Central and Southwest Corporation, Central Hudson Gas & Electric Corporation, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Consumers Energy Company, Duke Energy Corporation, Entergy Corporation, Florida Power & Light Company, Florida Power Corporation, Long Island Lighting Company, New York State Electric & Gas Corporation, PECO Energy Company, Puget Sound Energy, Inc., SCANA Corporation, and Wisconsin Public Service Corporation.

28. Comments of Concerned Reporting Companies at 31-32, FERC Form 1, Annual Report of Major Electric Utilities, Licensees and Others, No. IC98-001-000 (Apr. 20, 1996) [hereinafter CRC Comments].

competitive marketplace spurs all participants to press for the most efficient operations and lowest costs possible, uncertain what others may be able to accomplish, rather than merely matching or gaming another's known internal practices and costs. Such internal corporate information rightly tends to be closely guarded by competitive industries.²⁹

A concrete example of the harm to the competitive market that could result would be if a competitor manipulated its bid strategy based upon the information disclosed by a reporting company. In this case, disclosure diminishes competition among sellers, because the advantaged competitor can target the disclosing company's known costs when structuring its pricing. In sum, consumer welfare suffers because comprehensive reporting and disclosure obligations, imposed by regulation, diminish market efficiency compared to what would prevail in an unregulated, competitive market.

CRC identified three specific categories of Form 1 data where it believed that public disclosure causes competitive harm.³⁰ The first category was information on sales, purchases, and transmission of electricity,³¹ especially when reporting companies must disclose data about specific customers and transactions. The second category was information about operating capabilities, production costs, and business practices. Such information is of critical significance, because competition in the electric generation market is driven by marginal production costs. The third category was information about reporting company assets, capital expenditure strategies, and research and development. In other industries, such strategic information is highly sensitive. For example, information regarding a reporting company's planned future capacity additions and prospective sites for the location of new generating plants would be of great value to a competing merchant power plant developer.

As part of its request for relief, CRC highlighted three pivotal issues that it recommended the Commission consider in connection with reassessing information reporting and disclosure requirements in view of the emerging competitive electricity markets. CRC requested that the Commission: (1) treat the previously discussed categories of Form 1 data as confidential; (2) identify Form 1 data that can be eliminated or reduced; and (3) impose equal reporting obligations on all participants in the market.³²

In the end, the Office of Management and Budget (OMB) reauthorized Form 1 for another three years without any change. In support of its request for reauthorization, the Commission noted (consistent with its rationale in *PECO Energy*) that, while the electricity market is changing, regulated companies still provide jurisdictional services for which information is needed in connection with the Commission fulfilling its statutory responsibilities.

29. *Id.* at 10.

30. CRC Comments, *supra* note 28, at 16-20.

31. While CRC identified transmission data as part of the Form 1 data that causes competitive harm, the author questions whether any alleged harm to the reporting company can ever outweigh the need for such information in connection with effective enforcement of the FERC's mandatory open access requirement and the market's need for transparency of information regarding the transmission system. In the author's view, there is a critical distinction between information pertaining to the competitive generation and sales function as opposed to information pertaining to the monopoly transmission function.

32. CRC Comments, *supra* note 28, at 21-34.

IV. THE LEGALITY OF THE FERC'S POLICY ON CONFIDENTIALITY

Could the Commission's denials of confidential treatment for FERC Form 1 data withstand judicial scrutiny? The standard for agency discretion in denying confidentiality under section 4(d) of FOIA was articulated by the U.S. Court of Appeals for the Fifth Circuit in *Pennzoil Co. v. Federal Power Commission*.³³ The case involved an order issued by the Commission's predecessor, the Federal Power Commission (FPC), requiring offshore natural gas producers to make certain data public. The FPC rejected the producers' claims that such data comprised trade secrets and confidential geophysical information, the publication of which would significantly damage their financial interests. The Fifth Circuit held that while the FOIA was not an absolute bar on disclosure of data, congressional intent in creating exemptions from FOIA disclosure was relevant to evaluating whether an agency had abused its discretion in compelling release of information. The court found that the FPC had abused its discretion, because it had not adequately articulated its reason for finding that disclosure of the information served a legitimate regulatory function. The court stated that the FPC should consider three additional factors:

First, the Commission should consider whether disclosure of this type of detailed information will significantly aid the Commission in fulfilling its functions Secondly, the Commission should consider not only the harm done to the producers by releasing the information but the harm to the public generally. . . . Finally, and most importantly, the Commission should consider whether there are alternatives to full disclosure that will provide consumers with adequate knowledge to fully participate in the Commission's proceedings but at the same time protect the interests of the producers.³⁴

It remains to be seen whether, if challenged, the Commission's order in *PECO Energy*, rejecting several utilities' requests for confidential treatment of selected portions of their FERC Form 1 filings, can satisfy the *Pennzoil* criteria. The petitions for rehearing provide a glimpse of the arguments that may be raised on appeal.

The rehearing petitions argued that confidentiality of selected Form 1 data would not impair the Commission's ability to evaluate reasonableness of cost-based wholesale rates. They argued that public disclosure of Form 1 data is not necessary to assist State regulators, because regulators have full authority to require utilities with retail sales obligations to provide the information needed to fulfill statutory obligations. Also, because of wholesale requirements, customers can be provided with access to data subject to a protective order, so there is no need for public disclosure. On the other hand, revealing the information would cause competitive harm to the reporting company by providing proprietary commercial and financial data to that company's potential competitors. The petitions further contend that the Commission's finding of the general public's need for Form 1 data is overstated, because this interest can be met just as well with aggregated, industry-wide data.³⁵

33. *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976).

34. *Id.* at 632.

35. Petition for Rehearing of Virginia Electric and Power Company, Consolidated Edison Company of New York, Inc., Florida Power & Light Company and Florida Power Corporation, Nos. AC99-138-000 *et al.*

The rehearing petitions also argued that Form 1 data is unnecessary for monitoring abuses of market power, because market power is evaluated in terms of price and market share and not a seller's cost. They noted that the Commission monitors market power by means of quarterly reports of sales at market-based rates and the requirement that a utility with market-based rate authority must refile a market power study every three years. Finally, even if the Commission needed the Form 1 data to monitor for market power abuse, the rehearing petitions noted that the agency could do so while still providing confidential treatment.³⁶

The rehearing petitions also noted that public disclosure of Form 1 data is inconsistent with the Commission's rationale in *Southern Company Services*,³⁷ which required that all market-based sellers be treated on comparable terms. While comparable treatment for all market-based sellers arguably eliminates the competitive disadvantage created by asymmetrical reporting and disclosure obligations, it does not necessarily address the larger question of whether the market's efficiency and competitiveness are diminished as a result of comprehensive reporting and disclosure obligations.³⁸ Indeed, the petitioners pointed to the widespread negative reaction to the requirement in *Southern Company Services* that both utilities and marketers file long-term contracts with the Commission as evidence of the competitive harms that can result from the disclosure of proprietary commercial and financial information.³⁹

V. MANDATORY DISCLOSURE AND MARKET EFFICIENCY

On rehearing of the *Southern Company Services* order, the Commission was taken to task for its rationale supporting the decision requiring marketers to file long-term contracts in the same manner as traditional public utilities. The Commission was criticized for its focus on the written nature of such agreements, and the fact that they are not as time-sensitive as short-term agreements, as the factors supporting different treatment for long-term agreements. Similarly, the petitioners for rehearing took great exception to the Commission's statement that the filing requirement would not impede the flexibility or efficiency of the long-term market.

In support of their arguments that the Commission's order was not the product of reasoned decision making, the petitioners for rehearing explained at great length how the Commission had failed to consider the likely effects of its order. For example, in contrast to the Commission's narrow focus on the burden created by the requirement actually to file long-term agreements, the petitioners focused on the much broader burden created by the compelled publication of such agreements.

Publication injures the parties because competitors can appropriate the value-added innovations without compensation and because of the damage to

(filed July 23, 1999) [hereinafter Virginia Power Rehearing Petition].

36. *Id.*

37. 87 F.E.R.C. ¶ 61,214.

38. See *infra* Part V.

39. Virginia Power Rehearing Petition, *supra* note 35.

such parties' future negotiating positions.⁴⁰ The Commission's misplaced focus on the burden of filing misses the critical differences between short-term agreements, which are mostly simple commodity transactions, and long-term deals, which often are shaped by more complex economic considerations and where significant value and competitive advantage may be gained through innovative pricing, risk management, and other terms.⁴¹ As a result, the Commission failed to address the likely loss of market efficiency that would result from its new policy. In particular, the compelled publication of long-term agreements would create a serious disincentive for investing the time and resources necessary for tailoring provisions to meet the parties' long-term needs and risk profiles.⁴²

The petitioners also focused on how the *Southern Company Services* decision might affect the continued applicability of other Commission policies. For example, they pointed out that the Commission's new policy undermined the grounds for its order in *Southern Energy Marketing, L.P.*⁴³ In that case, the Commission held that agreements reported in power marketers' quarterly summaries are not subject to the requirement under the Commission's regulations for sixty days advance notice of the termination or cancellation of a filed rate schedule. Should this exception no longer apply, power marketers would be seriously injured in their ability to manage market risk. In particular, they would be unable to obtain timely termination of service agreements upon a counterparty's default. This, in turn, would injure the market as a whole, because all contracting parties would be forced to shoulder the costs associated with this new risk.⁴⁴

The absence of any explanation of how the new policy would assist the Commission in evaluating the reasonableness of rates or in monitoring for market power also was cited to demonstrate the lack of reasoned decision making in the *Southern Company Services* order. For example, the order did not include any discussion of whether the benefits of the new filing policy outweighed its costs or whether alternatives, such as confidential treatment for long-term agreements, would accomplish the Commission's goals while at the same time minimizing marketplace disruption.⁴⁵ The order also did not cite any record evidence in support of the need to increase the reporting obligations imposed on power marketers. For example, given the level of price transparency that already exists in the wholesale power market, there was no demonstrated basis for concluding that the market required greater transparency with respect to the innovative terms and conditions contained on long-term market-based rate contracts.⁴⁶

40. Motion to Intervene and Application for Rehearing of the Coalition for a Competitive Electricity Market and the National Energy Marketers Association, No. ER96-2573-001 (filed June 28, 1999).

41. Request for Rehearing of the Ad Hoc Marketing and Power Producer Group, Nos. ER96-2573-001 *et al.* (filed June 28, 1999) [hereinafter Ad Hoc Marketing Rehearing Request].

42. Request for Rehearing of PG&E Energy Trading Power, L.P., Lake Road Generating Co., L.P., Millenium Power Partners, L.P., Pittsfield Generating Co., L.P., Logan Generating Co., L.P., USGen New England, Inc., Sithe Power Marketing, Inc., and Constellation Power Source, Inc., Nos. ER96-2573-001 *et al.* (filed June 28, 1999) [hereinafter Southern Co. Rehearing Request].

43. *Southern Energy Mkt'g, L.P.*, 86 F.E.R.C. ¶ 61,131 (1999).

44. Southern Co. Rehearing Request, *supra* note 42.

45. Ad Hoc Marketing Rehearing Request, *supra* note 41.

46. Southern Co. Rehearing Request, *supra* note 42.

The petitioners also took issue with the Commission's suggestion that it was statutorily bound to compel the filing of long-term market-based rate contracts. They cited the Commission's past waivers of this requirement and its acceptance of quarterly transaction reports as proof of the agency's authority to waive the filing requirements under section 205 of the Federal Power Act.⁴⁷

While the Commission in *Southern Company Services* did not offer any detailed explanation why filing all long-term contracts would benefit either the market or the Commission in fulfilling its regulatory responsibilities, a possible explanation is found in its orders implementing the Order No. 889 Open Access Same-Time Information System (OASIS) requirements. In the course of responding to requests for clarification from the industry working groups that it had tasked with developing standards and protocols for OASIS, the Commission decided that information routinely provided by potential transmission customers regarding the location of the generators (the source) and the location of the ultimate loads (the sink) should be publicly disclosed. While acknowledging the potential business sensitivity that power marketers attached to such source and sink information, the Commission decided that such concerns were outweighed by the benefits of promoting the overall competitiveness of the electricity market and ensuring openness, confidence, and nondiscrimination in the use of interstate transmission facilities.⁴⁸

In a footnote to its discussion of the benefits resulting from unmasking source and sink information, the Commission cited a 1974 decision by the U.S. Court of Appeals for the D.C. Circuit as support for the proposition that the needs of the overall market come before the needs of individual competitors in those markets.

Our decision to require that certain potentially sensitive business information be disclosed is consistent with judicial directives to focus on the needs of the overall market, instead of on individual competitors within the market. In *Alabama Power Company v. Federal Power Commission*, 511 F.2d 383, 390-91, D.C. Cir. (1974), we had refused to amend our rule that required affected utilities to publicly disclose their monthly Form No. 423 reports of fuel purchases. The court considered various arguments to the effect that, on the one hand, "disclosure on information would lead to bargaining disadvantages in future fuel contract negotiations" (511 F.2d at 390), and on the other hand, any bargaining disadvantage as a result of disclosure would merely reflect the removal of information imperfections in an otherwise competitive market thereby facilitating efficient allocation of resources. [Id.]

Notably, the court found that, a sudden improvement in the availability of information may deprive a buyer of an advantage he enjoyed when, under more imperfect dissemination, he exploited a seller's ignorance of the market price Generally, however, laws and practices to safeguard competition assume that its prime benefits do not depend on secrecy of agreements reached in the market. [Id. at 391, n.13.]⁴⁹

On rehearing, Enron Power Marketing argued that the Commission had not

47. Motion to Intervene and Request for Rehearing of the Coalition for a Competitive Electricity Market and the National Energy Marketers Association, No. ER96-2573-001 (filed June 28, 1999); Request for Rehearing of PG&E Energy Trading Power, L.P., No. ER96-2573-001 (filed June 28, 1999).

48. *Open Access Same-Time Information System and Standards of Conduct*, 83 F.E.R.C. ¶ 61,360, at 62,456 [hereinafter *OASIS*].

49. *Id.*, n. 48.

considered how unmasking would harm the short-term market. Specifically, Enron argued that as a result of unmasking, power marketers would lose the benefit of follow-on, short-term transactions and that this would drive them out of the market. The Commission disagreed, stating that "our decision to require that certain arguably sensitive business information be disclosed is consistent with judicial directives to focus on the needs of the overall market, rather than focusing on protecting the interests of individual competitors within the market."⁵⁰ Following a restatement of the *Alabama Power* discussion contained in the underlying order, the Commission dismissed Enron's concerns as representing those of an individual market participant that did not take into account the balance of benefits to the market as a whole.

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. As in *Alabama Power*, by requiring disclosure, the Commission is merely removing information imperfections in an otherwise competitive market, thereby facilitating the efficient allocation of resources.

While not specifically mentioning the *Alabama Power* case in its rehearing request, EPMI seeks to sidestep *Alabama Power*'s precedent by characterizing the potential harm to itself and other power marketers (that it argues might result from unmasking source and sink information) as harmful to the short-term market as a whole. This characterization ignores that power marketers are but one category of participant in the short-term market, and that their interests may not be entirely consonant with those of the short-term market as a whole.⁵¹

Commissioner Bailey dissented from those parts of the *OASIS* orders that required the public disclosure of source and sink information.⁵² In her dissent from the order on rehearing, Commissioner Bailey highlighted the point that, in dismissing Enron's concerns as being focused only on the plight of power marketers, the Commission had not adequately considered how disclosure might affect other categories of market participants or the market at large.

I view the majority's disposition as overly dismissive of the role of power marketers and intermediaries in competitive markets. I am not prepared to decide, as does the majority, that the competitive interest of power marketers is or may be inconsistent with the competitive interest of the power market as a whole. I am not willing to dismiss cavalierly the objections of Enron and EPSA that marketers may be driven out of short-term markets if forced to disclose immediately the details of transactions they arrange. Neither I nor any of my colleagues can be entirely sure whether immediate disclosure of this type of sensitive information will drive market participants out of certain markets, or whether the "overall market" is improved or degraded with the combination of more market information and fewer market participants.⁵³

In sum, while the Commission was correct in its premise that the needs of the overall market come before the needs of individual competitors, its curt rejection of the power marketers' concerns provided no indication that it had thor-

50. *Open Access Same-Time Information System and Standards of Conduct*, 86 F.E.R.C. ¶ 61,139, 61,491-92.

51. *Id.* at 61,492 (citations omitted).

52. *OASIS*, *supra* note 48, 83 F.E.R.C. ¶ 61,360, at 62,467-69 (Comm'r Bailey, dissenting in part).

53. 86 F.E.R.C. ¶ 61,139, at 61,493 (citations omitted).

oroughly analyzed whether competition and market efficiency would suffer as a result of the mandatory disclosure of source and sink information.⁵⁴

As noted by the Commission in the unmasking decision, the court in *Alabama Power*⁵⁵ affirmed the Federal Power Commission's dismissal of a petition seeking amendment of a regulation, Order No. 453, that had been promulgated seven months earlier. Order No. 453 required utilities subject to the FPC's jurisdiction to file detailed fuel purchasing information on a monthly basis and provided for the public disclosure of such information. Several electric utilities petitioned to amend Order No. 453 on the basis that disclosure had placed them at a competitive disadvantage in negotiating for fuel supplies. The FPC dismissed the application on the basis that the utilities had failed to "identify with any degree of specificity, the evidence to be presented" in support of their claim of injury.⁵⁶

In reviewing the agency's action, the court expressed some concern that the FPC had not provided an adequate articulation of its reasons for denying the petition on the grounds of the lack of specific evidence supporting the utilities' claims. The court noted, however, that when the FPC's action was viewed against the backdrop of the Order No. 453 rulemaking, which thoroughly considered many of the same issues, the agency's approach became reasonably clear. In that rulemaking, the utilities raised essentially the same objection that they later made in their petition to amend the regulation. Other parties' rulemaking comments advocated the purported benefits of detailed disclosure of fuel purchasing information, including better data for research and analysis and promoting more perfect competition in fuel markets. With the issue having been joined, the court found it significant that the utilities failed to provide more detailed information supporting their claims that reporting and disclosure would produce anticompetitive behavior.

Further information on these matters was an essential part of any demonstration that disclosure of transaction data would pose risks of antitrust significance. Yet no additional material was adduced by either the utilities or fuel suppliers – the parties who were both in a position to provide evidence and had an incentive to do so. Their failure to make any additional proffer allowed the reasonable inference that disclosure posed no substantial risks of anticompetitive behavior.⁵⁷

After reviewing the record of the Order No. 453 rulemaking, the court concluded that the utilities' petition to amend the regulation had raised only one new allegation: that the utilities actually had experienced the bargaining disadvantage predicted in their rulemaking comments. Still, as had occurred in the rulemaking, the utilities failed to provide any details in support of their claim. The court found that the FPC treated the utilities' petition as a renewal of the same parties' rulemaking comments and, because no new evidence was introduced, rested its

54. In a subsequent order in the case, Commissioner Hebert joined in Commissioner Bailey's dissent urging that the FERC delay disclosure for 30 days. *Open Access Same-Time Information System and Standards of Conduct*, 87 F.E.R.C. ¶ 61,382, 62,420 (Comm'rs Bailey and Hebert, dissenting).

55. *Alabama Power Co. v. FPC*, 511 F.2d 383 (D.C. Cir. 1974).

56. *Id.* at 387-88.

57. *Alabama Power*, 511 F.2d at 390-91 (citations omitted).

denial on what it had said when promulgating Order No. 453.⁵⁸ The court held that the FPC had satisfied its obligation to engage in reasoned decision making “when it examined the utilities’ petitions for amendment and found no new material bearing on the harm caused by disclosure of detailed transaction information.”⁵⁹

In citing *Alabama Power* in support of its unmasking decision, the Commission relied heavily on a single footnote in the court’s decision.⁶⁰ This was a footnote to a sentence in which the court observed that it would have been essential for the utilities to create a record supporting their claim that the disclosure of fuel purchasing data would create an antitrust concern.⁶¹ A part of that footnote, which the Commission neither quoted nor paraphrased when addressing the unmasking issue, speaks in terms of the role of information in the economic model of perfect competition.

In general, information is of anticompetitive concern only where market structure does not tolerably approximate that of perfect competition. Perfect information available to all buyers and sellers is, indeed, one of the conditions of the economic model of “perfect competition,” and where the remaining conditions are satisfied, dissemination of information tends to facilitate prompt adjustment to the market clearing price by all parties to transactions.⁶²

Still, neither the court in *Alabama Power* nor the Commission in its unmasking order explored whether the market structures for either utility fuel purchasing or wholesale power “tolerably approximate[d] that of perfect competition” for it to conclude that information disclosure would not harm competition.

In contrast to the implication in *Alabama Power* and the unmasking decision that the economic model of perfect competition should be the benchmark for analyzing the competitive effects of disclosure and the appropriateness of market intervention, economists analyzing the electric power market have made the point that this “textbook” approach is both unrealistic and counterproductive. For example, in comments submitted in the Commission’s 1998 inquiry on independent system operator policy, Gregory J. Werden, the Director of Research for the Economic Analysis Group of the U.S. Department of Justice Antitrust Division, stated:

Although it certainly is feasible to assess the extent to which market power is being exercised, it is not particularly useful to do so. As market power is defined in economics and antitrust law, the exercise of some market power in electric power markets is both a foregone conclusion and not necessarily a significant cause for concern. Competitive spot market pricing assures that prices will cover operating cost at all times, but there is no assurance that scarcity rents will be sufficient to cover the substantial fixed costs associated with generation assets. Any excess of prices over short-run marginal cost, providing no more revenue than necessary for the recovery of fixed costs, is termed a “quasi-rent” by economists. Quasi-rents are nec-

58. *Alabama Power*, 511 F.2d at 391-92.

59. *Id.* at 392.

60. *OASIS*, *supra* note 48, 83 F.E.R.C. ¶ 61,360, at 62,456, n.51.

61. The sentence to which footnote 13 was appended reads: “Further information on these matters was an essential part of any demonstration that disclosure of transaction data would pose risks of antitrust significance.” *Alabama Power*, 511 F.2d at 390-91.

62. *Id.* at 391, n.13.

essary to attract capital into the industry, either to replace units that are no longer economical or to serve growing demand. Market intervention should not be considered unless market power is being exercised to the degree that "monopoly rents" are generated. Monopoly rents are the excess of prices over the *long-run* marginal cost of generation. [footnote omitted]

When market intervention is considered, the existence of some monopoly rents may not warrant any remedy because the costs of imposing such a remedy may exceed the benefits. I trust that there is now a consensus that the direct costs of regulation, and far greater indirect costs from inflexibilities and pricing distortions, generally make market-based pricing preferable only modest monopoly rents are being earned.⁶³

At the public conference in the same proceeding, the panel on independent system operators (ISOs) and market monitoring was unanimous in its view that it was a mistake for ISOs' market monitoring groups to use the paradigm of perfect competition as the standard for acceptable market conduct.⁶⁴ It was pointed out that if deviation from behavior that would be expected in a perfectly competitive market were presumed to be an exercise of market power deserving of sanction, the result would be a form of regulation that would be far more intrusive than traditional cost-of-service regulation.⁶⁵ The panel also expressed concerns regarding competitive implications of the reporting and disclosure obligations that could be imposed by ISOs' market monitoring groups.⁶⁶ There was general opposition to imposing obligations to report cost data, and the representative of the Department of Justice expressed concern over the immediate publication of bid data.

As noted earlier, the issue in the FPC proceeding that was on appeal in *Alabama Power* was whether the publication of fuel procurement information would place the reporting utilities at a competitive disadvantage and potentially lead to anticompetitive conduct by fuel suppliers. The Commission's reliance on this twenty-five-year old appellate decision is ironic in view of how the Federal Trade Commission (FTC) treated an analogous issue in a recent proceeding. In a consent order issued in 1998, the FTC found that the disclosure of third-party fuel cost information was a significant issue in connection with a proposed merger between an electric utility and a coal producer. The FTC's consent order regarding PacifiCorp's proposed acquisition of The Energy Group PLC analyzed the issue in connection with utility fuel purchasing information in the possession of The Energy Group's affiliate, Peabody Western Coal Company.

Competition in the wholesale electricity market could be adversely affected by this acquisition throughout the United States because PacifiCorp may gain access, through Peabody's coal contracts and coal supply relationships, to highly sensitive data on competitors' costs and to real-time information relating to operating condi-

63. Comments of Gregory J. Werden, Director of Research, Economic Analysis Group, Antitrust Division, U.S. Department of Justice, No. PL98-5-000, Inquiry Concerning the Commission's Policy on Independent System Operators at 5-6 (filed Apr. 21, 1998) (emphasis in original).

64. Inquiry Concerning the Commission's Policy on Independent System Operators, No. PL98-5-000, Public Conference Before the Commissioners, transcript at 341-91 (Apr. 15, 1998) [hereinafter FERC Transcript].

65. *Id.* at 353 (Statement of William Hieronymous representing the New York Power Pool).

66. FERC Transcript, *supra* note 64, at 384-90.

tions of competing generators of electrical power . . . by acquiring Peabody, PacifiCorp will gain an invaluable window on real-time information relating to operating conditions and production plans at many of the approximately 150 power plants supplied by Peabody. By enabling PacifiCorp to predict supply shifts and consequent price movements in the market, this information gives PacifiCorp a significant competitive advantage in power marketing.

PacifiCorp will be able to trade on that information at the expense of other traders of wholesale electricity. Expected profits for both incumbents and prospective entrants will be lower if PacifiCorp possesses inside information regarding competitors' costs, supply conditions, and future operating plans. Consequently, as a result of PacifiCorp's perceived information advantage regarding electricity supply and costs, competitive entry in power marketing will be discouraged, and existing power marketing companies may defer greater investment in such enterprises and perhaps even exit, making the market for wholesale electricity less efficient.⁶⁷

In contrast to the premise in *Alabama Power* and the unmasking decision that information disclosure issues should be considered in the context of the economic model of perfect competition, the FTC looked at the issue from a market dynamics perspective. The FTC recognized that access to highly sensitive information about its competitors could increase PacifiCorp's unilateral market power, artificially depress prices in the wholesale power market, and create disincentives for innovation and market entry. In short, the competitive issues identified by the FTC in connection with PacifiCorp's access to its competitors' fuel supply and operating data are very similar to the issues identified by CRC, AES, Enron, and other parties that have taken issue with the Commission's reporting and disclosure policies.

VI. THE NEED FOR DISCLOSURE OBLIGATIONS TO REGULATE UTILITIES WITH COST-BASED RATES

Even if one accepts that integrated utilities are at a disadvantage in the wholesale power market as a result of their reporting and disclosure obligations, there remains a legitimate question about the need for information disclosure to support effective regulation of such utilities' traditional utility sales function, that is, their bundled retail sales and wholesale requirements sales. Still, a case can be made that even with respect to the traditional sales function some re-examination of reporting and disclosure is in order.

First, the utility sales function is in the midst of significant changes. In states that have adopted retail access,⁶⁸ competition and default rates protect customers. Therefore, in such cases the rationale that comprehensive disclosure is necessary for retail consumer protection no longer applies.

Second, even where utilities remain the sole providers of retail electric service, performance-based regulation (PBR) is replacing traditional cost-of-service regulation.⁶⁹ For example, if a utility has a PBR with an earnings-

67. *In the Matter of PacifiCorp*, No. 971-0091, slip op. at 36-38 (Feb. 18, 1998).

68. As of April 5, 2000, 24 states had either enacted restructuring legislation or had a comprehensive restructuring order issued by the state's utility regulatory commission. *Status of State Electric Restructuring Activity as of April 5, 2000*, Energy Information Administration, U.S. Department of Energy <http://www.eia.doe.gov/cneaf/electricity/chg_str/regmap.html>.

69. For example, according to one tabulation, state regulators had approved PBR plans for 16 electric

sharing mechanism, customers share in the benefits of increased utility earnings. State regulators often look at utility cost data when setting a starting point for a PBR plan and when re-calibrating rates after a pre-determined interval. Still, once the PBR plan is implemented, continuous scrutiny of the individual elements of a utility's cost structure is unnecessary because, when the plan is in effect, rates are adjusted based on performance and not cost. Even in a more limited PBR, the need for disclosure may be diminished. For example, if a utility replaces its fuel adjustment clause with an index-based fuel cost recovery mechanism, this would eliminate the need to scrutinize the utility's individual fuel and transportation contracts.

Finally, even where the utility sales function remains based on traditional cost-of-service regulation, there can be less intrusive means for ensuring consumer protection without adversely affecting the utility's competitive position in wholesale power markets. For example, providing confidential treatment of a utility's proprietary data would allow for access by regulators and customers without disclosing the data to the utility's potential competitors.

In considering this issue from the perspective of a utility's native load customers, one might ask: Why should customers in states without retail competition care about their utility's competitiveness in the wholesale market? The reason is that such customers benefit from off-system sales, either through an off-system sales tracker, an earnings sharing mechanism, or merely the fact that off-system sales make it less likely that a utility will need to raise retail rates.

VIII. MARKET MONITORING: THE NEW CONTEXT FOR REPORTING AND DISCLOSURE OBLIGATIONS

In supporting its decisions not to modify the current reporting and disclosure requirements, the Commission has relied both on its traditional rationale that such information is required to regulate cost-based monopoly services and on statements that such information also is necessary to support market-based rates and market power monitoring. Still, the Commission has yet to articulate in detail how its current reporting and disclosure requirements effectively support market power monitoring. This issue, along with countervailing arguments about the harm to competition and market efficiency that result from mandatory disclosure of competitively sensitive data, is likely to be a focal point when the Commission initiates the generic proceeding announced in the *PECO Energy* order.

This issue will also be highlighted in connection with the Commission's Order No. 2000 final rule on Regional Transmission Organizations (RTOs),⁷⁰ because market monitoring is one of the eight mandatory functions that must be

utilities and six combined gas and electric utilities as of the summer of 1998. When PBR plans for telecommunications companies and natural gas distribution companies were included, PBR plans had been approved by at least 32 different state commissions as of the summer of 1998. See also Testimony of Mark Newton Lowry, Vice President-Regulatory Strategy, Christensen Associates, In the Matter of Application of Louisville Gas and Electric Company for Approval of an Alternative Method of Regulation of its Rates and Services, Case No. 98-426, Commonwealth of Kentucky Public Service Commission (filed Oct. 12, 1998).

70. Order No. 2000, *Regional Transmission Organizations*, 89 F.E.R.C. ¶ 61,285, 65 Fed. Reg. 809 (1999) [hereinafter Order No. 2000].

performed by an RTO. The new regulations promulgated pursuant to Order No. 2000 describe the market monitoring function as follows:

To ensure that the RTO provides reliable, efficient, and not unduly discriminatory transmission service, the RTO must provide for objective monitoring of markets it operates or administers to identify design flaws, market power abuses and opportunities for efficiency improvements, and to propose appropriate actions.⁷¹

In comments filed in response to the market monitoring proposal in the Notice of Proposed Rulemaking that preceded Order No. 2000, several parties expressed concern about providing an RTO with commercially sensitive data in connection with the market monitoring function.⁷² The Commission in the final rule addressed these concerns by pointing out that the market monitoring requirement did not necessarily require the collection of any data beyond that required for the RTO to perform its operational responsibilities:

We are not requiring a plan that necessarily involves the collection of data the RTO would not collect in its ordinary course of business. We believe that the information collected through an RTO market monitoring plan will reflect data that the RTO will collect or have access to in the normal course of business (*e.g.*, bid data, operational information).⁷³

The final rule, however, requires an RTO to monitor the behavior of all market participants in its region and assess on a periodic basis how RTO operations are affected by behavior in markets operated by others, such as bilateral power markets and unaffiliated power exchanges.⁷⁴ It remains to be seen whether an RTO can perform these functions without having access to additional data that reporting companies are likely to consider commercially sensitive. The dilemma created by this requirement is demonstrated by the Commission's experience reviewing the market monitoring functions proposed by ISOs. In addressing the proposal for an ISO submitted by the member systems of the New York Power Pool, the Commission characterized the issue as follows:

[T]he Commission will have to balance the need for the ISO to collect market data with concerns regarding commercial sensitivity of such data, and we will do so at the same time we act on the ISO's detailed proposed plan. The current proposal limits the ISO's ability to collect commercially sensitive data (such as cost data from generators), but it is precisely such data that might indicate whether a unit with market power would have an incentive to use it.⁷⁵

Also, for the stated purpose of improving the ISO's ability to identify generators that exercise market power through bidding, the Commission in an earlier order directed the New England ISO to compare marginal cost information from companies it considered likely to have market power.⁷⁶ In that case, however, the New England Power Pool participants already had agreed voluntarily as part of the ISO Agreement to provide the ISO with any information it deemed neces-

71. 35 C.F.R. § 35.34(k)(6) (1999).

72. Order No. 2000, *supra* note 70, slip op. at 439.

73. *Id.* at 465.

74. 35 C.F.R. § 35.34(k)(6)(i), (ii).

75. *Central Hudson Gas & Elec. Corp.*, 86 F.E.R.C. ¶ 61,062, 61,238 (1999).

76. *New England Power Pool*, 85 F.E.R.C. ¶ 61,379 (1998).

sary to perform its obligations, subject to confidentiality limitations.⁷⁷ In sum, based on the experience with the market monitoring proposals submitted by ISOs, the assurances in Order No. 2000 that the data required for market monitoring will be limited to that which the RTO would collect in the ordinary course of business are likely to be tested.

IX. REPORTING AND DISCLOSURE REQUIREMENTS IN COMPETITIVE MARKETS

In determining the reporting and disclosure obligations that will be needed to support effective market monitoring, the Commission must address the following threshold questions:

- What purpose do reporting and disclosure serve?
- Who should be reporting?
- What information should be reported?
- Who needs access to this information?

In the context of competitive electricity markets, the purposes served by reporting and disclosure might include promoting competition through greater transparency of information, detecting the exercise of market power, and monitoring for evidence of market design flaws. With respect to the first suggested purpose, regulators should be required to get over the hurdles of establishing the purpose of such transparency, that the marketplace is not already providing such transparency, that such transparency can be achieved cost effectively, and that its achievement would not be counterproductive. For example, reporting and disclosure requirements intended to promote greater information transparency regarding the transmission function would pass all of these screens. In contrast, regulatory requirements to promote greater information transparency about pricing in short-term energy markets arguably are unnecessary, because the market is already performing this function. Similarly, as demonstrated by the outcry over the *Southern Company Services* order, there are serious concerns that requirements mandating reporting and disclosure requirements for the terms and conditions of long-term electricity contracts touch upon an area where greater transparency would be counterproductive.

The second and third purposes of reporting and disclosure – detecting exercises of market power and monitoring for market design flaws – often are referred to in tandem. Still, there are significant differences between collecting information for analyzing market structure and collecting information for determining whether an individual participant has exercised excessive market power.⁷⁸ Given the relative immaturity of competitive electric power markets, there is a legitimate need for the kind of information that can enable regulators and other interested observers to analyze market structure and correct structural

77. *Id.* at 61,478.

78. The term “excessive market power” was used purposefully in view of the earlier discussion of when economists consider market intervention to be appropriate. As noted earlier, economists do not consider the exercise of some market power, as defined in economics and antitrust law, to be a significant concern in electric power markets. Rather, the exercise of market power is a cause for regulatory intervention only to the extent that it leads to the collection of long-run monopoly rents and the benefits of intervention outweigh costs of the inefficiencies created by regulation.

flaws should they be detected.⁷⁹ Furthermore, for purposes of public disclosure, such information likely can be disseminated in aggregate form.

A wholly different set of issues, however, arises in connection with the obligation to report and disclose information in order to make it possible for the RTO market monitoring organization to detect the exercise of excessive market power. First, the information collected in connection with this policing function will involve a single competitor and, depending on the information collected, could be the kind of information that goes to the heart of that company's ability to compete. In particular, this would be information concerning a company's cost structure and competitive strategy. Such a requirement would create a dilemma for the reporting company. On the one hand, the company may need to make full disclosure to regulators (or the regulators' surrogates) in order to exonerate itself from claims that it has exercised excessive market power. On the other hand, if it were made public, such disclosure likely would do significant damage to the company's competitive position. Second, given the authority that may be vested in the new "competition police,"⁸⁰ there must be standards clearly articulating how market power will be analyzed and the due process that will be accorded to a company under investigation. As noted earlier, many have expressed concern over the implications of market monitoring organizations using the paradigm of perfect competition as the standard for acceptable market conduct.⁸¹

With the new focus on monitoring market performance and detecting market power abuses, the distinction between traditional regulated utilities and new entrants becomes much less relevant.⁸² The line will blur even further as more utilities divest some or all of their generation and as more marketers acquire or control generating assets.⁸³ Consequently, it is likely that the focus of the Commission's information reporting and disclosure requirements will shift from traditional, integrated utilities to the broader class of electric energy suppliers in general. As demonstrated by the requests for rehearing of the *Southern Company Services* order, once non-traditional suppliers begin feeling the brunt of the reporting and disclosure requirements, their positions begin to have a lot in common with those previously voiced by the utilities.

The new focus on market monitoring and market power detection also requires a fresh analysis of what must be reported and who needs access to such information. The Commission has asserted that some of the information that had been reported in connection with traditional cost-of-service regulation is now useful for making market-based rate determinations and monitoring for market

79. FERC Transcript, *supra* note 64, at 341-91.

80. This article will not address the critical issue of whether RTO monitoring organizations should have the authority to take corrective action against a market participant found to have exercised market power.

81. FERC Transcript, *supra* note 64, at 341-91.

82. Of course, there remains the issue of whether different reporting and disclosure obligations should attach in connection with the remnants of the traditional regulated merchant function, *i.e.*, cost-based, bundled sales to captive retail customers and wholesale requirements customers.

83. For example, as noted earlier, the Commission in *AES Huntington Beach, L.L.C.* asserted that non-traditional market participants that own physical generating facilities are more like traditional utilities because such ownership provides the potential to acquire market power.

power.⁸⁴ Still, the Commission and the industry should start with a clean slate when determining precisely what information is needed to perform these functions effectively.

One commentor has suggested that a logical starting point would be the level of information that is publicly available in other markets that are competitive. Typically, information regarding prices and quantities is publicly available in such markets, while information regarding market participants' costs and the terms and conditions of negotiated transactions is not publicly available.⁸⁵ While ultimately more information may be required for effective market monitoring, the burden should be on those seeking greater reporting and disclosure to establish the need for information beyond that typically available in competitive markets.

The assumption that, once it has been reported, such information automatically enters the public domain also must be revisited. The basis for this assumption has been that the public benefits of disclosure far outweigh the competitive injury to the regulated company. This may have been the case in the context of regulated companies that were the sole providers of monopoly services within their exclusive service territories; however, that model no longer accurately depicts the industry.

Rather, as noted, the likelihood is that the kind of information needed for policing market power will be the same information that is central to a regulated company's ability to compete. Still, when presented with claims that competition in wholesale power markets necessitates confidential treatment for reported information, the Commission has placed the burden on the individual reporting company to demonstrate that disclosure would cause it to suffer substantial competitive harm.⁸⁶ This has proven to be an exceedingly difficult standard to meet in any context, and the Commission has yet to make such a finding in the context of competition in the wholesale power market. In fact, given the Commission's demonstrated lack of receptivity to such claims,⁸⁷ it may be that no company could ever satisfy this standard unless it willingly subjected itself to substantial competitive injury (and loss to its shareholders) merely to prove the point. In the end, however, it would be far more productive for both the Commission and the industry to focus their attention on the broader and more important issue of whether the reporting and disclosure of proprietary information adversely affects the competitiveness and efficiency of wholesale power markets.

Finally, there is the question of the difference, if any, between the level of reporting and disclosure required during the industry's transition to competition versus the level needed once the industry achieves a restructured equilibrium. In Order No. 2000, the Commission declined the requests by some commentors that it set a sunset date for the RTO market monitoring function. Still, the Commission acknowledged that, as power markets evolve and become more competitive,

84. 88 F.E.R.C. ¶ 61,330.

85. FERC Transcript, *supra* note 64, at 386-87 (comments of Frank Felder on behalf of Sithe Energies, Inc.).

86. See *supra* Part I (discussion of *PECO Energy Company* order), Part II (discussion of FOIA standard).

87. See *supra* Part II..

it might revisit the need for the type of market monitoring required by the final rule.⁸⁸ Newly created electricity markets require close monitoring to ensure that significant design problems can be identified and rectified quickly. As markets mature and competition increases, however, the need for market monitoring and the associated reporting and disclosure by market participants may decrease. For example, once market design flaws (and the resulting opportunities to exercise market power) have been addressed, the balance between the need for reporting and disclosure to fulfill legitimate public policy needs and the loss in market efficiency that results from such reporting and disclosure may tip in favor of eliminating the reporting and disclosure obligations imposed on the industry.

X. CONCLUSION

Information reporting and disclosure rapidly is becoming a central issue in connection with the Commission's policies for regulating a restructured electric power industry. While the traditional rationale for information reporting and disclosure may be of increasingly limited applicability as the industry restructures, access to industry information clearly remains necessary for federal and state regulators to fulfill their statutory obligations. Still, as part of the paradigm shift from pervasive monopoly regulation to promoting robust competition in those parts of the industry where competition is possible, regulators must reassess the information and reporting obligations imposed on the electric power industry.

In particular, they must focus on the level of disclosure and reporting needed for monitoring the performance of newly competitive power markets and detecting the exercise of market power. At the same time, however, they also must focus on how reporting and disclosure might affect the efficiency and competitiveness of such power markets. Finally, regulators should recognize that the level of reporting and disclosure needed during the industry's transition to competition may not be the same as that needed once the industry achieves its restructured end state.

While the Commission on occasion has commented on the industry-wide significance of this issue, so far it has been reluctant to address the issue substantively. In dealing with the reporting and disclosure issue episodically, the Commission has rejected case-specific requests for relief and has begun incrementally expanding the scope of its reporting requirements to include non-traditional merchants and generators.

The confluence of several related proceedings now provides the Commission with a chance to deal with reporting and disclosure issues in comprehensive fashion. Together, the *Southern Company Services* rehearing, the generic proceeding announced in the *PECO Energy* order, and implementation of the market monitoring function adopted in the Order No. 2000 final rule on RTOs offer the Commission an opportunity to craft a coordinated policy for dealing with reporting and disclosure obligations in the context of an increasingly competitive electric power market.

88. Order No. 2000, *supra* note 70, slip op. at 466.

