DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM93–24–000; Order No. 600]

Revision of Fuel Cost Adjustment Clause Regulation Relating to Fuel Purchases From Company-Owned or Controlled Source

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to state that where a regulatory body has jurisdiction over the price of fuel purchased from a company-owned or controlled source, and exercises that jurisdiction to approve such price, the Commission will presume, subject to rebuttal, that the cost of fuel so purchased is reasonable and includable in the fuel adjustment clause.

EFFECTIVE DATE: This final rule is effective November 6, 1998.

FOR FURTHER INFORMATION CONTACT: Wayne W. Miller, Federal Energy Regulatory Commission, Office of the General Counsel, 888 First Street, N.E., Washington, D.C. 20426, (202) 208–0466.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

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Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending the second sentence of 18 CFR 35.14(a)(7) to make clear that where a regulatory body has jurisdiction over the price of fuel purchased by a utility from a company-owned or controlled source, and exercises that jurisdiction to approve such price, the cost of fuel so purchased shall be presumed, subject to rebuttal (rather than conclusively ''deemed''), to be reasonable and includable in the fuel adjustment clause.[1]

II. Discussion

In the Notice of Proposed Rulemaking (NOPR), issued September 24, 1993,[2] the Commission explained that 18 CFR 35.14(a)(7) has been interpreted by the United States Court of Appeals for the District of Columbia, in *Ohio Power Company* v. *FERC*, 954 F.2d 779 (D.C. Cir.), *cert. denied*, 506 U.S. 981 (1992) (*Ohio Power*), to establish a conclusive presumption that the price of fuel purchased from an affiliate, subject to the jurisdiction of another regulatory body, is just and reasonable. The Commission stated that the proposed revision to § 35.14(a)(7) was intended to provide that the Commission would instead employ a rebuttable, rather than a conclusive, presumption, and thus make clear that the Commission had no intention (through a conclusive presumption of reasonableness) of abdicating its statutory responsibility to independently review wholesale rates (including fuel adjustment clauses) subject to its jurisdiction to ensure that they are just and reasonable. The Commission explained, however, that the proposed revision would not affect the other, independent basis of the *Ohio Power* decision; *i.e.*, when a public utility member of a registered public utility holding company system buys fuel from an affiliate in accordance with section 13(b) of the Public Utility Holding Company Act of 1935 (PUHCA),[3] the Commission may not deny recovery of those costs in the utility's wholesale rates.

The Commission received comments on the NOPR from the following: Municipal Resale Service Customers of Ohio Power Company (Municipal Customers); Coalition for Full Oversight and Regulation of Public Utility Holding Companies and Affiliates (Coalition FOR PUHCA, or Coalition); Florida Cities (including the Florida Municipal Power Agency and the Cities of Alachua, Bartow, Havana, Mount Dora, Newberry, Quincy, and Williston, Florida); Registered Systems (including American Electric Power Service Company, GPU Service Corporation and New England Power Company, each of which is associated with a registered public utility holding company under PUHCA); Public Utilities Commission of Ohio (Ohio Commission); Allegheny Power Service Corporation (Allegheny) (on behalf of Monongahela Power Company, Potomac Edison Company and West Penn Power Company, wholly-owned subsidiaries of Allegheny Power System, Inc., a registered public utility holding company under PUHCA); the law firm of Paul, Hastings, Janofsky & Walker (Paul, Hastings); Transok, Inc. (Transok) (a wholly-owned subsidiary of Central and South West Corporation, a registered public utility holding company under PUHCA); Wisconsin Wholesale Customers (Wisconsin Customers) (consisting of Wisconsin Public Power Incorporated SYSTEM, Badger Power Marketing Authority, 41 municipal electric systems and four rural electric cooperatives); Edison Electric Institute (EEI); American Public Power Association (APPA); West

[1] This Final Rule addresses only the fuel adjustment clause and fuel cost recovery through the fuel adjustment clause. It does not address Commission review of fuel costs and fuel cost recovery in base rates.

[2] Revision of Fuel Cost Adjustment Clause Regulation Relating to Fuel Purchases From Company-Owned or Controlled Source, 58 FR 51259 (October 1, 1993), IV FERC Stats. & Regs. ¶ 32,502 (1993).

[3] 15 U.S.C. 79m(b).

Virginia Public Service Commission and the National Association of Regulatory Utility Commissioners (NARUC).

While either supportive of or at least neutral concerning the intention of this rulemaking, the commentors suggest various modifications to the proposed rule. The suggested modifications principally involve three concerns: (a) whether the relevant sentence of § 35.14(a)(7) should simply be eliminated altogether, rather than revised to set forth a rebuttable presumption; (b) the meaning of the term ''regulatory body;'' and (c) retroactivity.

A. Need for the Change in the Regulation

In light of *Ohio Power,* the Commission believes that it is necessary to amend 18 CFR 35.14(a)(7) to clearly specify that when a regulatory body has jurisdiction over the price of fuel purchased by a utility from a company-owned or controlled source and exercises that jurisdiction by approving such price, the cost shall be ''presumed, subject to rebuttal'' (rather than conclusively ''deemed'') to be reasonable and includable in the fuel adjustment clause. By amending § 35.14(a)(7) in this manner, the Commission is making clear that it has no intention of abdicating its regulatory responsibilities under sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. 824d, 824e.

As the Commission previously stated in the NOPR:

> [t]he Commission has an independent obligation under sections 205(a) and 206(a) of the FPA to ensure that rates are ''just and reasonable.'' This obligation requires the Commission to independently review rates subject to its jurisdiction to ensure that they are ''just and reasonable.'' While the Commission can give deference to decisions of another regulatory body and still fulfill its statutory obligation, it cannot in effect delegate its jurisdictional responsibilities to others. In addition the Commission must exercise greater regulatory scrutiny when affiliate fuel costs are at issue; while there may be a presumption of reasonableness as to costs incurred in arm's-length bargaining, there is no such presumption of reasonableness as to affiliate costs * * *. Thus, the Commission believes that § 35.14(a)(7) should be amended to provide that for affiliate transactions the presumption of reasonableness provided for by the regulation is merely rebuttable and is not conclusive.

Amending § 35.14(a)(7) is also consistent with the Commission's mandate under section 205(f) of the FPA to undertake review of automatic adjustment clauses, including fuel cost adjustment clauses, to ensure ''economical purchase and use of fuel.'' Given an express Congressional mandate to ensure ''economical purchase and use of fuel,'' the Commission believes § 35.14(a)(7) should be amended to eliminate what otherwise would be an absolute bar to Commission inquiry into affiliate fuel prices.[4]

B. Response to Comments: Whether the Presumption Should Be Eliminated

The Municipal Customers, the Coalition, the Wisconsin Customers and NARUC request the Commission to eliminate any presumption of reasonableness of the price of fuel purchased from company-owned or controlled sources, even if that price has been previously reviewed and approved by another regulatory body. [5] This can be done, they argue, by eliminating entirely the relevant sentence of § 35.14(a)(7), rather than by revising it to provide for a rebuttable presumption. By eliminating the relevant sentence, they argue, this Commission would be able to exercise its full statutory authority over affiliate fuel costs passed through wholesale fuel adjustment clauses, while still continuing to take the relevant decisions of other regulatory bodies into account on a case-by-case basis.

In this respect, the Municipal Customers also argue that it is not clear when or to what the presumption of reasonableness attaches because many state regulatory authorities have standards which differ from this Commission's FPA standards. They maintain that elimination of the presumption altogether would avoid litigation over when and to what deference attaches.[6] Additionally, according to NARUC, the proposal would create a rebuttable presumption of reasonableness only when a state commission has jurisdiction over and approves the *price* of fuels sold by an affiliated supplier to a public utility. NARUC points out, however, that state commissions do not exercise authority over a fuel seller's *prices,* but, instead, regulate a fuel buyer's ability to recover prudent expenditures, *i.e.*, recovery of fuel *costs.* NARUC states that while the recovery of a public utility buyer's costs in its rates may be determined by reference to competitive prices available in the marketplace, the affiliate seller's actual prices are not set by the state commission.

The Municipal Customers and the Coalition further argue that amending § 35.14(a)(7) to set forth a rebuttable presumption would impose an unreasonable burden on the public utility's ratepayers who seek to challenge that utility's rates. Because a utility may, for example, request that its records be kept confidential,[7] the ratepayers may not be able to obtain access to information needed to challenge the justness and reasonableness of affiliate fuel costs.[8] On the other hand, they argue, elimination of the relevant sentence of § 35.14(a)(7), and thus elimination of any presumption, would place the burden of demonstrating justness and reasonableness on the utility, ensuring comparable treatment between the rates of utility subsidiaries of registered public utility holding companies and the rates of all other utilities.

In this regard, the APPA further requests that this Commission make FERC Form 580 (General Interrogatory on Fuel and Energy Purchase Practices),[9] and FERC Form 423 (Monthly Report of Cost and Quality of Fuels for Electric Plants) [10] available to

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[4] NOPR, IV FERC Stats. & Regs. at 32,803–04 (citations and footnotes omitted).

[5] The Ohio Commission notes that the proposed rule does not correct the essential jurisdictional problem created as the result of *Ohio Power,* and urges the Commission to continue to direct its efforts toward legislation required to solve this problem. *See also* NOPR, IV FERC Stats. & Regs. at 32,803 n.1, 32,804 n.7.

[6] The Coalition also argues that to base a rebuttable presumption on another agency's review, without independently evaluating the quality of that review, is an abdication of this Commission's authority.

[7] 18 CFR 388.112.

[8] The Municipal Customers and the Coalition submit that the Commission's policy is to deny requests for hearing unless complainants meet their initial burden of coming forward and presenting evidence casting serious doubt as to the reasonableness of the challenged costs, citing Municipal Resale Service Customers v. Ohio Power Co., 63 FERC ¶ 61,336 at 63,201 (1993). The Municipal Customers and the Coalition argue, however, that complainants cannot meet this burden unless a hearing is first ordered and discovery of the company's documents and data is thereafter obtained. Thus, they contend, complainants are in a ''chicken and egg'' quandary, or a ''Catch-22'' situation, and have no practical way to rebut the presumption.

[9] The Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 2601, *et seq.,* amended section 205 of the FPA, 16 U.S.C. 824d, by adding subsection (f)(2), which requires the Commission to review, at least once each two years, the practices of public utilities using automatic adjustment clauses to ensure that each such public utility makes efficient use of resources (including fuel). 16 U.S.C. 824d(f)(2). In response, the Commission instituted an investigation, in Docket No. IN79–6, of practices under automatic adjustment clauses. *See* Investigation of Practices Under Automatic Adjustment Clauses, 7 FERC ¶ 61,090 (1979); *see also* Consolidated Edison Company of New York, 39 FERC ¶ 61,329 (1987); Kentucky Utilities Company, 29 FERC ¶ 61,159 at 61,338 (1984). Pursuant to this investigation, the Commission (through its staff) has issued interrogatories on Form 580 and its predecessors (Forms 560 and 565) every two years, beginning in 1979. The Form 580 interrogatories are currently mailed to the over 120 public utilities with significant fuel trades and with wholesale rates that may contain automatic adjustment clauses.

[10] A separate form must be completed by every electric power producer for each of its electric

the public in the absence of ''conclusive evidence'' that disclosure of the information on those forms will damage the business interests of the reporting utility. APPA argues that without the information in these forms, the Commission's staff, as well as the general public, are unable to rebut the presumption of reasonableness of fuel costs.

Similarly, if the Commission decides to adopt a rebuttable presumption, the Municipal Customers request that in addition the Commission also revise the fourth sentence of § 35.14(a)(7). The Municipal Customers request that the Commission require the filing of all contracts, terms, conditions, and procedures (and all amendments) relating to the purchase of fuel from company-owned or controlled sources, whether or not the prices are subject to the jurisdiction of another regulatory body. This revision, the Municipal Customers argue, will allow ratepayers access to contracts where prices are subject to regulatory authority (and thus to a presumption of reasonableness) so that the ratepayers can have an opportunity to rebut the presumption.[11]

The Florida Cities argue that the Commission should clearly state that the proposed revision represents a clarification that this Commission will not conclusively presume reasonable affiliate fuel costs subject to state jurisdiction.[12] Similarly, the Wisconsin Customers argue that the rule as currently drafted could be read to limit this Commission's ability to review costs related to wholesale sales when a regulatory body dealing with retail jurisdiction has approved the fuel purchases at issue.

Commission Ruling

We decline to eliminate the presumption. The Commission's intent in this proceeding was to address *Ohio Power's* reading of § 35.14(a)(7) as creating a conclusive presumption. The revision adopted here accomplishes that—creating a rebuttable presumption when another regulatory body both has and exercises its jurisdiction to approve the price of affiliate fuel.

This is not to suggest that we are either abdicating our responsibility or doing more than we are permitted. While we will retain a presumption, it will apply only when another regulatory body has jurisdiction and exercises that jurisdiction by approving the price of the affiliate fuel, and even in that circumstance it will be rebuttable; the reasonableness, and thus the recovery in Commission-jurisdictional rates, of affiliate fuel costs will ultimately be for the Commission to determine.[13]

Likewise, we are not doing more than we are permitted to do. The D.C. Circuit's alternate ground for its decision in *Ohio Power*—that this Commission is barred, in the case of affiliate fuel purchases among the members of registered public utility holding company systems (where, under PUHCA, the SEC is authorized to review the prices of such purchases), from either altering the affiliate fuel price or from disallowing full recovery of the affiliate fuel price in Commission-jurisdictional rates—remains. That alternative ground continues to bar Commission review of both the reasonableness of registered public utility holding company affiliate fuel costs, and of the recovery of such costs in Commission-jurisdictional rates.

The relevant sentence of § 35.14(a)(7) refers to the *price* of affiliate fuel being subject to the jurisdiction of a regulatory body, and that sentence as amended here also refers to the *price* of affiliate fuel being approved by such a body. NARUC, however, notes that the states normally do not possess jurisdiction to regulate the *price* of affiliate fuel, *i.e.*, the price charged by the fuel supplier (as opposed to rate recovery of the *costs* of affiliate fuel). NARUC then questions the precise reach of that sentence in § 35.14(a)(7) and of the presumption found there. Section 35.14(a)(7) has always drawn an express distinction between the price charged for affiliate fuel by the affiliate fuel supplier, and the cost of that affiliate fuel incurred by

generating plants (including leased plants) that has a rated steam-electric generating capacity of 50 MW or greater. 18 CFR 141.61.

[11] The fourth sentence now reads as follows: With respect to the price of fuel purchases from company-owned or controlled sources pursuant to contracts which are *not* subject to regulatory authority, the utility company shall file such contracts and amendments thereto with the Commission for its acceptance at the time it files its fuel clause or modification thereof. (emphasis added)

The Municipal Customers propose the following modification: With respect to the price of fuel purchases from company-owned or controlled sources pursuant to contracts or other terms, conditions, and procedures, *whether subject to another regulatory authority or not,* the utility company shall file such contracts, terms, conditions, procedures and amendments thereto with the Commission at the time it files its fuel clause (or within 30 days of the effective date of this regulation if the fuel clause is already on file) or modifications thereof. (emphasis added)

[12] The Florida Cities point to an ''Order on Motion of Florida Cities to Compel Production of Certain Coal-Related Data,'' issued July 16, 1993 in *Florida Power Corporation,* Docket Nos. ER93–299–000 and EL93–18–000. The presiding administrative law judge rejected Florida Power Corporation's (Florida Power) argument that, consistent with *Ohio Power,* § 35.14(a)(7) should be construed as conclusively foreclosing this Commission from deciding for itself the prudence and reasonableness of the cost of fuel purchased from Florida Power's affiliates since the Florida Public Service Commission (Florida Commission) had ruled on those issues. The judge found that if § 35.14(a)(7) is construed, as claimed by Florida Power, as conclusively foreclosing this Commission from ruling on the justness and reasonableness of costs associated with the utility's fuel purchases from affiliates, it would ''stand the FPA on its head.'' The judge found that, under Florida Power's construction of § 35.14(a)(7), this Commission would have unlawfully delegated to the state commission, and thus abdicated, its statutory responsibility under the FPA. The judge thus limited the application of *Ohio Power's* interpretation of § 35.14(a)(7) to situations involving FERC/SEC jurisdiction only. He stated the following, at page 7 of the order:

Given the SEC's independent statutory authority under PUHCA to set inter-affiliate fuel sales prices *for all purposes* it would be lawful if that authority was recognized by FERC in 35.14(a)(7). However, this is not the case if the section were applied to the [Florida Commission] since that agency lacks any federal statutory authority over affiliate fuel sales prices and at most it has Florida State authority over such prices for retail rate setting purposes only.

It would be anomalous if the section were applied to foreclose FERC determination of the reasonableness and prudence of affiliate fuel purchases. Such transactions are not arms length and are more suspect than fuel purchases from non-affiliates. Yet section 35.14(a)(7), on its face applies to affiliate but not to non-affiliate fuel purchases. We should not extend that anomalism by interpreting 35.14(a)(7) in the manner sought by Florida Power.

[13] The FPA requires this Commission, not other regulatory bodies such as state commissions, to determine the justness and reasonableness of wholesale rates. This Commission will not and, indeed, cannot tie itself to state determinations involving retail rates, but must independently determine the justness and reasonableness of wholesale rates. As we stated in Southern California Edison Co., Opinion No. 361, 55 FERC ¶ 61,074 at 61,223, *reh'g denied*, Opinion No. 361–A, 56 FERC ¶ 61,117 (1991), *petition for review denied*, City of Vernon v. FERC, 983 F.2d 1089 (D.C. Cir. 1993), ''the Commission must fulfill its statutory responsibilities and cannot defer to the actions of a state regulatory agency. Even where the wholesale customer agrees for wholesale ratemaking purposes to abide by the decision of a state ratemaking authority, this Commission has an independent responsibility to review such an agreement.''

Accord, Bangor Hydro-Electric Co., 35 FERC ¶ 61,200 at 61,473 (1986) (in refusing to bind itself to state treatment of Seabrook-related abandonment charges, the Commission stated: ''this Commission cannot simply rely on the state commission's evaluation . . . ; rather, we must make our own, independent evaluation.''); Union Electric Co., 36 FERC ¶ 61,234 at 61,573 (1986) (prudence disallowances by, *inter alia,* three state commissions do not support a finding that wholesale rates that include contested costs were substantially excessive and warranted a five-month suspension; the Commission stated: ''[a]s to the decisions of the State commissions, while they may bring into question the prudence of [a utility's] expenditures, they are not controlling upon this Commission for suspension or other purposes.''). *Cf.* Alabama Power Co. v. FERC, 993 F.2d 1557, 1564 (D.C. Cir. 1993) (''We know of no doctrine that requires the Commission, in determining a just and reasonable rate for an off-system sale, to give dispositive weight to the fact that a state commission has assumed, for purposes of establishing native load rates, that the off-system rate would be higher. In other contexts, the Commission has not done so, and we see no reason why it should here'').

the public utility buyer and passed through to ratepayers. Thus, the second sentence has always provided that only when the ''price'' of affiliate fuel is subject to the jurisdiction of a regulatory body, ''such cost'' was deemed to be reasonable and includable in the fuel adjustment clause.[14] This distinction pre-dated *Ohio Power*, and the Commission has not proposed to change it, and is not changing it, here.

Several of the commentors object to the continued use of a presumption because complaining parties will not have access to the data necessary to challenge the utility's recovery in rates of the price of affiliate fuel, and utilities may, in fact, invoke claims of privilege to keep this data confidential.[15] Put simply, our past experience suggests that there does not seem to have been any unreasonable barriers to complainants making a sufficient showing to justify an investigation before *Ohio Power*, and we are not aware of any reason why that may have changed since *Ohio Power*. [16]

C. Response to Comments: The Meaning of the Term ''Regulatory Body''

Allegheny, EEI, the Registered Systems, Paul, Janofsky and Transok contend that the Commission's use of the term ''regulatory body'' in the NOPR and the proposed revision is confusing, since that term can be construed to apply to the SEC as well as to state commissions. They request that, to eliminate confusion and avoid litigation, the Commission expressly acknowledge in the text of § 35.14(a)(7) that it has no authority to review affiliate fuel prices for registered public utility holding company systems.[17]

Commission Ruling

The term ''regulatory body'' appears in the current § 35.14(a)(7), and we did not propose any change to it. We thus decline to modify the proposed rule in the manner requested by these commentors. We also believe that at this time there is no reason to distinguish expressly among various regulatory bodies in the text of the regulation. Our silence, however, should not be construed to imply a failure on our part to follow the alternate ground for decision in *Ohio Power*, discussed above—*i.e.*, that in instances involving a conflict between this Commission and the SEC over affiliate fuel prices for registered public utility holding company systems under *Ohio Power*, the SEC ruling controls.[18]

D. Response to Comments: Retroactivity Concerns

The Florida Cities observe that *Ohio Power* unsettled the otherwise settled law that affiliate fuel purchases subject to state jurisdiction were also subject to this Commission's review for wholesale rate purposes. The Florida Cities argue that the Commission should provide for retroactive application of the proposed revision, or at least its application to pending and future cases involving past fuel clause collections, to ensure that the Commission's responsibilities are not abandoned with regard to past fuel adjustment clause collections. If the Commission decides not to make the proposed rule retroactive, the Florida Cities request that the Commission steer clear of prejudging the issue of the applicability of *Ohio Power* to affiliate fuel transactions that have been subject to state retail ratemaking jurisdiction. Instead, the Florida Cities argue, this issue should be addressed when it is squarely presented to the Commission in a pending case.[19]

The Registered Systems request that if the Commission, as the result of new legislation, ultimately is afforded jurisdiction over the type of transaction at issue in *Ohio Power*, it should only apply the proposed revision of § 35.14(a)(7) to affiliate fuel contracts entered into after both the conferral of jurisdiction on this Commission through new legislation and the effective date of this rule. The Registered Systems explain that prior investments by registered public utility holding company systems in affiliate fuel operations were based on the SEC's findings that the fuel supply arrangements were in the public interest. Moreover, they argue, since 1974, the registered public utility holding company systems made these investments knowing that this Commission's regulation ensured the inclusion in the utility's wholesale fuel adjustment clause of the prices paid pursuant to SEC approval; the Registered Systems object to retroactive application of a rule change that would result in cost-trapping. Further, the Registered Systems argue, considerations of fairness preclude altering profoundly the rules upon which investors relied when they financed the previously-approved arrangements.[20]

Commission Ruling

As to challenges to affiliate fuel prices recovered in rates after the effective date of this rule change (and which are not subject to the alternate ground for

[14] *See* 954 F.2d at 783 (''adopt[ing] Judge Mikva's approach'' that ''[u]nder the regulation, because the prices of Ohio Power's fuel from its affiliate are subject to the jurisdiction of the SEC, such costs must be conclusively presumed reasonable,'' and ''agree[ing] with Judge Mikva that 'section 35.14(a)(7) establishes as a policy matter, that if another regulatory body has already passed on the fuel price, then FERC will abide by that determination' ''); *accord*, *id.* at 784 (''By precluding FERC from declaring a SEC-approved price unreasonable, our interpretation of § 35.14(a)(7) provides Ohio Power with some succor . . . .''), 786 (''[W]e hold that 18 CFR § 35.14(a)(7) prevents FERC from finding the coal price approved by the SEC not includable in determining Ohio Power's wholesale rate.''); *see also* Fuel Adjustment Clauses in Wholesale Rate Schedule, 52 FPC 1304, 1306 (1974) (in explanatory discussion of text of § 35.14(a)(7), Commission distinguished between price paid to a fuel supplier and costs incurred by a utility buyer); Wholesale Rate Schedules Fuel Adjustment Clause, 39 FR 28,910, 28,911 (1974) (in Notice of Proposed Rulemaking, in discussing proposed text of what would become § 35.14(a)(7), Commission drew distinction between prices charged on the one hand and costs incurred and recovered in rates on the other hand).

[15] On November 24, 1993, in Treatment of Responses to FERC Form No. 580 Interrogatories, 58 FR 63312 (Dec. 1, 1993), IV FERC Stats. & Regs., Proposed Regulations ¶ 32,503 (1993), the Commission issued a Notice of Proposed Rulemaking in which it proposed to amend its regulations to codify an existing requirement that each public utility with a steam-electric generating station of 50 megawatts or more file responses to FERC Form 580 interrogatories, and explicitly disqualifying these responses to Form 580 interrogatories from claims of privilege under 18 CFR 388.112. The Commission also proposed to make public past responses to Form 580 interrogatories. That Notice is pending.

[16] *E.g.*, Kentucky Utilities Company, 29 FERC ¶ 61,159 (1984) (order on complaint instituting investigation regarding fuel costs). While this particular case involved non-affiliate fuel costs, we are not aware of any reason why access to the relevant information would be any more or less difficult in the case of affiliate fuel costs.

[17] The Municipal Customers, the Coalition and NARUC also argue that it is unclear what is meant by the term ''approve'' as it applies to SEC determinations, since the SEC currently conducts no review of individual affiliate fuel contracts and makes no findings regarding the reasonableness of affiliate fuel prices.

Given the alternate ground for decision in *Ohio Power*, discussed above, the issue of whether the SEC has ''approved'' affiliate fuel prices within the meaning of § 35.14(a)(7) as amended here is presently moot. As to whether other regulatory bodies may have ''approved'' such prices, that is a matter best left to determination on a case-by-case basis.

[18] *See, e.g.*, Municipal Resale Service Customers v. Ohio Power Company, 62 FERC ¶ 61,207, *reh'g denied*, 64 FERC ¶ 61,034 (1993), *petition for review denied*, Municipal Resale Serv. Customers v. FERC, 43 F.3d 1046 (6th Cir. 1995) (declining to order an investigation of affiliate fuel prices for registered public utility holding company as a consequence of *Ohio Power*).

[19] The Florida Cities argue that such an issue was pending in Florida Power Corporation, Docket Nos. ER93–299–000 and EL93–18–000. *See supra* n.11. This Commission, by letter-order issued March 30, 1994 in Florida Power Corporation, 66 FERC ¶ 61,365 (1994), approved a settlement agreement filed by the parties and terminated these dockets.

[20] The Registered Systems also note that all of their affiliate fuel supply arrangements were in place well before the Commission announced its preference for a market-based rate recovery standard in Public Service Co. of New Mexico, Opinion No. 133, 17 FERC ¶ 61,123 (1981), *order on reh'g*, Opinion No. 133–A, 18 FERC ¶ 61,036 (1982), *aff'd*, 832 F.2d 1201 (10th Cir. 1987).

decision in *Ohio Power*, discussed above), we will apply this rule change; our responsibility under the FPA to ensure that wholesale rates are just and reasonable, as discussed at length above, permits us to do nothing less. As to challenges to affiliate fuel prices recovered through the fuel adjustment clause prior to the effective date of this rule change (and which are not subject to the alternate ground for decision in *Ohio Power*, discussed above), we believe that whether we should apply this rule change or not is best decided in each individual case in which the issue arises rather than generically in the abstract.[21]

Finally, we do not believe that it is appropriate for the Commission, at this time, to address in the abstract the Registered Systems' concern regarding retroactivity in the event future legislation gives this Commission, rather than the SEC, authority to determine the reasonableness of the recovery in rates of affiliate fuel costs for registered public utility holding company systems.

III. Environmental Statement

Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment.[22] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[23] No environmental consideration is necessary for the promulgation of a rule that involves electric rate filings that public utilities submit under sections 205 and 206 of the FPA and the establishment of just and reasonable rates. [24] Because this final rule involves such filings submitted under sections 205 and 206 of the FPA and the establishment of just and reasonable rates, no environmental consideration is necessary.

IV. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA)[25] requires rulemakings to either contain a description and analysis of the impact the rule will have on small entities or to certify that the rule will not have a substantial economic impact on a substantial number of small entities. Because most of the entities that would be required to comply with this rule are large public utilities that do not fall within the RFA's definition of small entities, [26] the Commission certifies that this rule will not have a ''significant impact on a substantial number of small entities.''

V. Information Collection Statement and Public Reporting Burden

The Office of Management and Budget (OMB) regulations in 5 CFR 1320.11 require that OMB approve certain information collection requirements imposed by an agency. This rule neither contains new information collection requirements nor significantly modifies any existing information collection requirements in Part 35; [27] therefore, it is not subject to OMB approval. However, the Commission will submit a copy of this rule to OMB for information purposes only.

Interested persons may send comments regarding collections of information to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426 [Attention: Michael Miller, (202) 208–1415]; and to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) [Attention : Desk Officer for the Federal Energy Regulatory Commission]. Telephone: (202) 395–3087. FAX: (202) 395–7285.

VI. Effective Date and Congressional Notification

This Final Rule will take effect on November 6, 1998. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a ''major rule'' within the meaning of section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.[28] The Commission will submit the rule to both houses of Congress and the Comptroller General prior to its publication in the **Federal Register**.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Electricity, Reporting and recordkeeping requirements.

By the Commission.

David P. Boergers,

Secretary.

In consideration of the foregoing, the Commission amends part 35, chapter I, title 18, *Code of Federal Regulations*, as set forth below.

PART 35—FILING OF RATE SCHEDULES

1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

2. Section 35.14 is amended by revising the second sentence of paragraph (a)(7) to read as follows:

§ 35.14 Fuel cost and purchased economic power adjustment clauses.

(a) * * *

(7) * * * Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, and where the price of such fuel has been approved by that regulatory body, such costs shall be presumed, subject to rebuttal, to be reasonable and includable in the adjustment clause. * * *

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DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 655

Radiation Sources on Army Land

AGENCY: Office of the Director of Army Safety, Department of the Army, DoD.

ACTION: Final rule.

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[21] The fuel adjustment clause allows public utilities to pass through to their ratepayers increases or decreases in the cost of their fuel, without having to make separate filings to reflect each change in fuel cost, and without having to obtain prior Commission review of each change in fuel cost. Missouri Public Service Company, Opinion No. 327, 48 FERC ¶ 61,011 at 61,078 (1989); Fuel Adjustment Clauses in Wholesale Rate Schedules, 52 FPC 1304, 1305–06 (1974); *see also* Public Service Co. of New Hampshire v. FERC, 600 F.2d 944, 947, 952 (D.C. Cir.), *cert denied*, 444 U.S. 990 (1979). Consequently, the Commission has sanctioned after-the-fact review and refunds in later proceedings. *See, e.g.*, Central Vermont Public Service Corporation, 44 FERC ¶ 61,127 at 62,027 (1988); Alamito Co., 33 FERC ¶ 61,286 at 61,574 (1985); see also Louisiana Power & Light Company, Opinion No. 366, 57 FERC ¶ 61,101 at 61,388–89 (1991). Without later review and the ability to order refunds, overcharges collected through the fuel adjustment clause would be exempt from all scrutiny and refunds. *See* Kansas Municipal and Cooperative Electric Systems, 16 FERC ¶ 61,227 at 61,488, *reh'g denied*, 17 FERC ¶ 61,141 (1981).

[22] Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–90 ¶ 30,783 (1987).

[23] 18 CFR 380.4.

[24] 18 CFR 380.4(15).

[25] 5 U.S.C. 601–12.

[26] 5 U.S.C. 601(3) (citing section 3 of the Small Business Act, 15 U.S.C. 632). Section 3 of the Small Business Act defines a small business concern as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. 632(a).

[27] These requirements were previously submitted to OMB and assigned control number 1902–0096.

[28] 5 U.S.C. 804(2).