

DEPARTMENT OF ENERGY

Federal Energy Regulatory
Commission

18 CFR Part 35

[Docket No. RM01-12-000]

Remedying Undue Discrimination
Through Open Access Transmission
Service and Standard Electricity
Market Design

November 26, 2002.

AGENCY: Federal Energy Regulatory
Commission, DOE.

ACTION: Request for comments.

SUMMARY: In the Standard Market Design Notice of Proposed Rulemaking, (67 FR 55452, Aug. 29, 2002), the proposed open access transmission tariff imposes an obligation on an Independent Transmission Provider, if a request for transmission service cannot be accommodated, to use due diligence to expand or modify its transmission system. The Commission invites all interested persons to file comments with respect to whether a merchant transmission provider should have an obligation to expand its merchant transmission facilities.

COMMENTS DUE: Initial comments are due on or before January 10, 2003. Reply comments are due on or before February 17, 2003. (Comments on this issue should be filed in conjunction with any January 10, 2002 comments on transmission planning and pricing, including participant funding).

ADDRESSES: Comments may be filed in paper format or electronically. Address comments to: Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Lodi D. White, (202) 502-6193.

SUPPLEMENTARY INFORMATION: In the Standard Market Design (SMD) Notice of Proposed Rulemaking, the proposed open access transmission tariff imposes an obligation on an Independent Transmission Provider, if a request for transmission service cannot be accommodated, to use due diligence to expand or modify its transmission system.¹ The Commission invites all interested persons to file comments with respect to whether a merchant transmission provider should have an

obligation to expand its merchant transmission facilities (MTF).

In the September 6, 2002 NEPOOL Order,² the Commission approved a tariff provision (Section 7 of Schedule 18) dealing with the TransEnergie U.S. Ltd. (TransEnergie) Cross Sound Cable (CSC) which states:

7. *No obligation to build.* MTF Provider status under the Tariff shall not impose an obligation to build transmission facilities on the MTF Provider [TransEnergie U.S. Ltd.'s CSC MTF]. The offering of MTF Service under the Tariff shall not impose an obligation to build transmission facilities on the Participants [NEPOOL], [New England] Transmission Owners or System Operator [ISO-New England].

The Commission stated in *NEPOOL* that, while it accepted Section 7 as exempting the CSC MTF in NEPOOL from the obligation to build and as not expanding NEPOOL's obligation to build, NEPOOL's tariff will be subject to change, pursuant to section 206 of the Federal Power Act, if the Commission's policy changes in the future. In light of the NEPOOL order, we seek comment on the following issues:

1. For independent merchant transmission companies would there be any concerns regarding comparability or undue discrimination that would merit an expansion obligation for merchant transmission providers?

2. Are there non-competitive structural conditions that apply to independent merchant transmission companies such as barriers to entry or economies of scale which would justify an obligation to expand? For example, could the control of certain rights of way, such as underwater trenches, be a barrier to entry in some circumstances? Could the control of certain equipment, such as strategically placed interconnection facilities, be a barrier to entry? If so, is an obligation to expand the appropriate regulatory requirement?

3. If an expansion obligation is extended to merchant transmission providers, is it appropriate to limit it to an obligation to allow or facilitate other parties to use the critical entry barrier facilities to expand transmission capability?

4. Should merchant transmission providers that acquire land rights through the use of eminent domain be subject to different obligations than those that do not?

5. How would an expansion obligation impact new investment in transmission infrastructure? How would an expansion obligation impact a merchant transmission provider's business strategy and financing needs?

6. Are there bases other than market power that are relevant to extending an expansion obligation to merchant transmission providers?

7. How should merchant transmission projects be treated in the SMD rule? If the Commission retains the obligation to expand in the SMD rule, should it nevertheless exempt already-approved merchant projects? Should such projects be "grandfathered" in order to minimize the financial consequences of regulatory risk?

8. The Commission has approved negotiated rates for merchant transmission facilities based on the premise that the negotiated rates would be capped at the cost of transmission expansion. If there is no obligation to build, should the Commission reconsider whether the negotiated rates remain just and reasonable?

All comments are due no later than January 10, 2003, and reply comments are due on February 17, 2003. Comments on this issue should be filed in conjunction with any January 10, 2002 comments on transmission planning and pricing (including participant funding).

Comments may be filed in paper format or electronically. Those making paper filings should submit the original and 14 copies of their comments to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission strongly encourages electronic filings. Commenters filing their comments via the Internet must prepare their comments in WordPerfect, MS Word, Portable Document Format, or ASCII format (*see* <http://www.ferc.gov/documents/electronicfilinginitiative/efi/efi.htm>, in particular "User Guide"). To file the document, access the Commission's Web site at www.ferc.gov and click on "e-Filing" and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's E-Mail address upon receipt of comments. User assistance for electronic filing is available at (202) 502-8258 or by E-mail to efiling@ferc.gov. Do not submit comments to the E-mail address.

The Commission will place all comments in the Commission's public files and they will be available for inspection in the Commission's Public Reference Room at 888 First Street, NE., Washington, DC 20426, during regular business hours. Additionally, all comments may be viewed, printed, or downloaded remotely via the Internet

¹ See Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 FR 55452 (Aug. 29, 2002), FERC Stats. & Regs. 32563 (2002).

² *NEPOOL*, 100 FERC ¶ 61,259 (2002).

through FERC's Home page using the FERRIS link.

Linwood A. Watson, Jr.,

Deputy Secretary.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-209500-86, REG-164464-02]

RIN 1545-BA10,1545-BB79

Reductions of Accruals and Allocations because of the Attainment of any Age; Application of Nondiscrimination Cross-Testing Rules to Cash Balance Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that would provide rules regarding the requirements that accruals or allocations under certain retirement plans not cease or be reduced because of the attainment of any age. In addition, the proposed regulations would provide rules for the application of certain nondiscrimination rules to cash balance plans. These regulations would affect retirement plan sponsors and administrators, and participants in and beneficiaries of retirement plans. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written comments, requests to speak and outlines of oral comments to be discussed at the public hearing scheduled for April 10, 2003, at 10 a.m., must be received by March 13, 2003.

ADDRESSES: Send submissions to: CC:ITA:RU (REG-209500-86), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered to: CC:ITA:RU (REG-209500-86), room 5226, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by submitting comments directly to the IRS Internet site at: www.irs.gov/regs. The public hearing will be held in room 4718, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Linda S. F.

Marshall, (202) 622-6090, or R. Lisa Mojiri-Azad, (202) 622-6030; concerning submissions and the hearing, and/or to be placed on the building access list to attend the hearing, Sonya Cruse, 202-622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under sections 401 and 411 of the Internal Revenue Code of 1986 (Code). Section 411(b)(1)(H), which was added in subtitle C of the Omnibus Budget Reconciliation Act of 1986 (OBRA '86) (100 Stat. 1874), provides that a defined benefit plan fails to comply with section 411(b) if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age. Under section 411(b)(2)(A), added by subtitle C of OBRA '86, a defined contribution plan fails to comply with section 411(b) unless, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.

Section 411(b)(1)(H)(iii) provides that any requirement of continued accrual of benefits after normal retirement age is treated as satisfied to the extent benefits are distributed to the participant or the participant's benefits are actuarially increased to reflect the delay in the distribution of benefits after attainment of normal retirement age. Section 411(a) requires a qualified plan to meet certain vesting requirements. In the case of a participant in a defined benefit plan who works after attaining normal retirement age, these vesting requirements are not satisfied unless the plan provides an actuarial increase after normal retirement age for accrued benefits, distributes benefits while the participant is working after normal retirement age, or suspends benefits as described in section 411(a)(3)(B) (and the regulations of the Department of Labor at 29 CFR 2530.203-3). Section 401(a)(9)(C)(iii), added to the Code by the Small Business Job Protection Act of 1996 (110 Stat. 1755) (1996), requires that the accrued benefit of any employee who retires after age 70½ be actuarially increased to take into account the period after age 70½ during which the employee is not receiving benefits.

Section 4(i) of the Age Discrimination in Employment Act (ADEA) and sections 204(b)(1)(H) and 204(b)(2) of the Employee Retirement Income

Security Act of 1974 (ERISA) provide requirements comparable to those in sections 411(b)(1)(H) and 411(b)(2) of the Code. Section 4(i)(4) of ADEA provides that compliance with the requirements of section 4(i) with respect to an employee pension benefit plan constitutes compliance with the requirements of section 4 of ADEA relating to benefit accrual under the plan.

Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Therefore, these regulations apply for purposes of the parallel requirements of sections 204(b)(1)(H) and 204(b)(2) of ERISA, as well as for section 411(b) of the Code.

The Equal Employment Opportunity Commission (EEOC) has jurisdiction over section 4 of ADEA. Section 9204(d) of OBRA '86 requires that the regulations and rulings issued by the Department of Labor, the Treasury Department, and the EEOC pursuant to the amendments made by subtitle C of OBRA '86 each be consistent with the others. It further requires the Secretary of Labor, the Secretary of the Treasury, and the EEOC to each consult with the others to the extent necessary to meet the requirements of the preceding sentence. Executive Order 12067 requires all Federal departments and agencies to "advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity." The IRS and Treasury have consulted with the Department of Labor and the EEOC prior to the issuance of these proposed regulations under sections 411(b)(1)(H) and 411(b)(2) of the Code.

The EEOC published proposed regulations interpreting section 4(i) of ADEA in the **Federal Register** on November 27, 1987 (52 FR 45360). Proposed regulations REG-209500-86 (formerly EE-184-86) under sections 411(b)(1)(H) and 411(b)(2) were previously published by the IRS and Treasury in the **Federal Register** on April 11, 1988 (53 FR 11876), as part of a package of regulations (the 1988 proposed regulations) that also included proposed regulations under sections 410(a), 411(a)(2), 411(a)(8) and 411(c) (relating to maximum age for participation, vesting, normal retirement age, and actuarial adjustments after normal retirement age). The IRS, Treasury, the Department of Labor, and