

obligation to file the quarterly report for the quarter ending December 2005.

Filed Date: 10/28/2005.

Accession Number: 20051101-0011.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06-88-000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Co submits notice of cancellation & a cancellation tariff sheet for the purpose of canceling a Transaction Agreement with Southwestern Public Service Co.

Filed Date: 10/28/2005.

Accession Number: 20051101-0012.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06-96-000.

Applicants: American Electric Power Service Corporation.

Description: AEP on behalf of Southwestern Electric Power Co submits the executed Second Power Supply Agreement with East Texas Electric Coop, Inc. *et al.*

Filed Date: 10/28/2005.

Accession Number: 20051102-0367.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER99-830-013; ER04-925-005.

Applicants: Merrill Lynch Capital Services, Inc.; Merrill Lynch Commodities, Inc.

Description: Merrill Lynch Commodities, Inc & Merrill Lynch Capital Services, Inc reports the change in status in connection with the transfer of equity interests in Granite Ridge I SPE, LLC etc.

Filed Date: 10/28/2005.

Accession Number: 20051101-0015.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

The Commission encourages electronic submission of protests and

interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5-6632 Filed 11-28-05; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL06-16-000]

Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations; Order Proposing Revisions to Market-Based Rate Tariffs and Authorizations

Issued November 21, 2005.

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly

1. The Commission issues this order pursuant to section 206 of the Federal Power Act (FPA) ¹ to propose repeal of the Market Behavior Rules, which are currently included in all public utility sellers' market-based rate tariffs and authorizations.² The central purpose of

¹ 16 U.S.C. 824e (2000).

² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, "Order Amending Market-Based Rate Tariffs and Authorizations," 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004) at Appendix A

the Market Behavior Rules is to prohibit market manipulation. In the Energy Policy Act of 2005 (EPAct 2005),³ Congress enacted new section 222 of the FPA which specifically bars manipulation in connection with the purchase or sale of wholesale electric energy or transmission services and authorizes the Commission to promulgate rules and regulations prohibiting market manipulation. In a Notice of Proposed Rulemaking (NOPR) issued October 20, 2005, the Commission has proposed rules to implement the new statutory anti-manipulation provisions.⁴ We propose repealing the Market Behavior Rules once we have issued final regulations implementing the anti-manipulation provisions of EPAct 2005 and have incorporated other aspects of the Market Behavior Rules in appropriate Commission orders, rules, and regulations. We are also requesting comment on whether the Market Behavior Rules should be repealed prospectively.

Background

2. On November 17, 2003, acting pursuant to section 206 of the FPA, we amended all market-based rate tariffs and authorizations to include the Market Behavior Rules. We determined that sellers' market-based tariffs and authorizations to make sales at market rates would be unjust and unreasonable unless they included clearly-delineated rules governing market participant conduct, and that the Market Behavior Rules fairly apprised market participants of their obligations in competitive power markets and were just and reasonable.⁵

3. Market Behavior Rule 1 requires sellers to follow Commission-approved rules and regulations in organized power markets. These rules and regulations are part of the tariffs of Independent System Operators (ISO) or Regional Transmission Organizations (RTO), and sellers' agreements to operate within ISOs and RTOs bind them to follow the applicable rules and regulations of the organized market.

4. Market Behavior Rule 2 prohibits "actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could

(the Market Behavior Rules Order). The Market Behavior Rules are currently on appeal. See *Cinergy Marketing & Trading, L.P. v. FERC*, Nos. 04-1168 *et al.* (DC Cir., appeal filed April 28, 2004).

³ Energy Policy Act of 2005, Public Law No. 109-58, 119 Stat. 594 (2005).

⁴ *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005) (NOPR).

⁵ Market Behavior Rules Order, 105 FERC ¶ 61,218 at PP 3, 158-74.

manipulate market prices, market conditions, or market rules for electric energy or electricity products." Actions or transactions explicitly contemplated in Commission-approved rules and regulations of an organized market, or undertaken by a market-based rate seller at the direction of an ISO or RTO, however, are not violations of Market Behavior Rule 2. In addition, Market Behavior Rule 2 prohibits certain specific behavior: Rule 2(a) prohibits wash trades, Rule 2(b) prohibits transactions predicated on submitting false information, Rule 2(c) prohibits the creation and relief of artificial congestion, and Rule 2(d) prohibits collusion for the purpose of market manipulation.

5. Market Behavior Rule 3 requires sellers to provide accurate and factual information, and not to submit false or misleading information or to omit material information, in any communication with the Commission, market monitors, ISOs, RTOs, or jurisdictional transmission providers.

6. Market Behavior Rule 4 deals with reporting of transaction information to price index publishers. It requires that if a seller reports transaction data, the data be accurate and factual, and not knowingly false or misleading, and be reported in accordance with the Commission's Policy Statement on price indices.⁶ Rule 4 also requires that sellers notify the Commission of whether they report transaction data to price index publishers in accordance with the Policy Statement, and to update any changes in their reporting status.

7. Market Behavior Rule 5 requires that sellers retain for a minimum three year period all data and information upon which they billed the prices charged for electricity and related products in sales made under their market-based rate tariffs and authorizations or in transactions the prices of which were reported to price index publishers.

8. Finally, Market Behavior Rule 6 directs sellers not to violate, or to collude with others in actions that violate, sellers' market-based rate codes of conduct or the Standards of Conduct under Part 358 of our regulations.⁷

9. At the same time that the Market Behavior Rules were adopted for jurisdictional wholesale electric transactions, the Commission issued Order No. 644, which introduced parallel provisions in part 284 of our regulations under the Natural Gas Act governing pipelines and holders of

blanket certificate authority that sell natural gas at wholesale.⁸ Not every aspect of the electric Market Behavior Rules was applicable in the natural gas sales context, however. The part 284 regulations encompass Market Behavior Rule 2, including wash sales and collusion to manipulate, and Market Behavior Rules 4 and 5.

EPAct 2005 and Proposed New Rules

10. As noted, section 1283 of EPAct 2005 amended the FPA to add a new section 222, which prohibits the use or employment of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of electric energy or transmission services subject to the jurisdiction of the Commission. In order to implement the anti-manipulation provisions of FPA section 222, we issued the NOPR proposing new regulations (proposed part 47 regulations) to make it unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.⁹

11. In the NOPR we recognized that Market Behavior Rule 2 also prohibits manipulative conduct. We noted that conduct that violates both Market Behavior Rule 2 and the proposed part 47 regulations will be treated as one violation of anti-manipulation rules, and that we will not apply duplicative penalties for the same conduct in the event that conduct were to violate both Market Behavior Rule 2 and the proposed part 47 regulations. We also indicated that we would seek comment on whether Market Behavior Rule 2 should be revised or repealed in light of the proposed part 47 regulations.

Discussion

12. Our goal is to provide firm but fair enforcement of the statutes, orders, rules, and regulations we administer. To do so, it is important that our rules be as clear as possible so that market participants and entities subject to our rules and regulations understand what

conduct is proscribed and can act accordingly.¹⁰ We propose to repeal the Market Behavior Rules in light of the proposed part 47 regulations to implement the new anti-manipulation provisions contained in section 222 of the FPA and of the Commission's other rules and regulations.¹¹ All market-based rate sellers are "entities" subject to EPAct 2005 and therefore will be subject to the new regulations prohibiting manipulation, deceit, and fraud in connection with wholesale electricity transactions. Other aspects of the Market Behavior Rules either reflect existing requirements or can be incorporated into other rules, making it unnecessary to retain the separate list of rules in each seller's tariff.

13. We think that repeal of the Market Behavior Rules will simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry. At the same time, we think that the behaviors described in the Market Behavior Rules will still be addressed through other rules and regulations. We emphasize our belief that repeal of the Market Behavior Rules is intended to take into account the passage of EPAct 2005, which has provided the Commission with expanded anti-manipulation authority, and to simplify and streamline the rules and regulations sellers must follow, not to eliminate beneficial rules governing market behavior.

14. The heart of the Market Behavior Rules are Rules 2 and 3, prohibiting manipulation and requiring complete, accurate, and factual representations. We recognize that there is overlap between Market Behavior Rules 2 and 3 and the proposed part 47 regulations. We are concerned that this could cause unnecessary confusion and regulatory uncertainty once the proposed part 47 regulations are in place. It is our view that the scope of the new statutory prohibition on manipulation and the reach of the proposed part 47 regulations eliminate the need for Market Behavior Rules 2 and 3.

15. We recognize there are some differences, but the differences do not seem to require keeping the Market Behavior Rules once the new part 47

¹⁰ As discussed in the NOPR (at P 14), section 222 of the FPA, as added by section 1283 of EPAct 2005, and the proposed part 47 regulations are patterned after section 10(b) of the Securities Exchange Act of 1934 and related regulations, which provides a level of certainty as to how the proposed rules will operate that is not typically available.

¹¹ Concurrently with this order, we are issuing a Notice of Proposed Rulemaking in Docket No. RM06-5-000 to consider similar changes in our part 284 regulations promulgated in Order No. 644.

⁶ *Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121 (2003).

⁷ 18 CFR part 358 (2005).

⁸ 18 CFR 284.288 and 284.403 (2005).

⁹ The proposed part 47 regulations are also provided in Attachment A hereto.

regulations are final.¹² For instance, there is a difference in the standard of proof between Market Behavior Rule 2 and the proposed part 47 regulations. In new section 222 of the FPA, Congress used the terms “manipulative or deceptive device or contrivance” and directed that they be given the same meaning as used in section 10b of the Securities Exchange Act of 1934.¹³ Those terms have been interpreted to require a showing of scienter, that is, an intent to deceive, manipulate or defraud.¹⁴ In other words, knowing, intentional, or reckless conduct is proscribed.¹⁵ In contrast, Market Behavior Rule 2 does not require a showing of scienter, as it prohibits actions or transactions that “foreseeably” could manipulate market prices, conditions, or rules. The “foreseeably” requirement has generated controversy and uncertainty, however. We believe the use of a scienter standard, given the precedent in other regulatory contexts, will draw a clearer line between acceptable and prohibited behavior.

16. We also note that the new authority granted to the Commission in section 222 of the FPA and our proposed part 47 regulations cover more transactions and more entities than is the case for Market Behavior Rule 2, which governs only market-based rate sellers. More precisely, Congress made the anti-manipulation provisions of section 222 applicable to “any entity” and in connection with both the purchase and sale of electric energy, as well as the purchase and sale transmission services subject to our jurisdiction. Market Behavior Rule 2, on the other hand, is applicable only to sales by “public utilities” that have market-based rate authority, a smaller subset of the entities and types of transactions subject to the section 222 prohibition of manipulation.

17. Market Behavior Rule 2 also includes a statement that actions or transactions explicitly contemplated in

Commission-approved rules and regulations of an organized market, or undertaken by a market-based rate seller at the direction of an ISO or RTO, are not violations of Market Behavior Rule 2. Actions or transactions pursuant to Commission-approved rules and regulations of an organized market, or pursuant to the direction of a Commission-approved RTO or ISO, are an affirmative defense to a claim of manipulation under the proposed part 47 regulations, and therefore we will presume that such actions or transactions are not a violation of the proposed part 47 regulations. However, we seek comment on whether it is necessary to retain this provision in market-based rate tariffs.

18. Similarly, it is our view that it is not necessary to retain the explicit prohibitions against certain conduct set forth in Market Behavior Rule 2 (wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation). These are examples of prohibited manipulation, all of which are manipulative or deceptive devices or contrivances. Thus, all would be barred by the proposed part 47 regulations. For example, wash trades or transactions to create and relieve artificial congestion would be devices or schemes to defraud (proposed § 47.1(a)(1)). Transactions predicated on false information would also involve untrue statements of material facts (proposed § 47.1(a)(2)). It is our view that market participants are on notice that these are prohibited activities under the proposed part 47 regulations, subject to penalty and remedial action.

19. Similarly, with respect to Market Behavior Rule 3, if a seller fails to provide accurate and factual information, or acts in a misleading way, that conduct would be a deceit or fraud and would be a violation of the proposed part 47 regulations. Our view is that, like Market Behavior Rule 2, conduct subject to Market Behavior Rule 3 would also be covered by the proposed part 47 regulations. Here too, it would be confusing to retain a duplicative set of rules governing market conduct.

20. Turning to the other Market Behavior Rules, it appears that the requirements imposed there either are duplicative of other rules or regulations or can be incorporated into other rules of general applicability. For instance, Market Behavior Rule 1 is essentially a restatement of existing obligations to comply with Commission rules and regulations in organized markets. These

are tariff requirements of the ISOs and RTOs, and failure of a market participant to follow these rules and regulations is enforceable through the organized market’s tariff and related agreements.

21. The first part of Market Behavior Rule 4, requiring sellers to provide accurate data to price index publishers if the seller is reporting transactions to such publishers, calls for accurate and truthful representations. It is our view that failure to do so would be a violation of the proposed part 47 regulations. Market Behavior Rule 4 also includes a requirement that sellers notify the Commission of their price reporting status and any changes in that status. This does not appear elsewhere in our current or proposed regulations. We note, however, that price transparency is also addressed by EAct 2005, which adds new section 220 to the FPA.¹⁶ Section 220 gives us authority to promulgate rules and regulations necessary to facilitate price transparency. We intend to address market transparency issues in a separate proceeding, and anticipate that rules adopted in that proceeding will address the Market Behavior Rule 4 requirements for providing transaction information to price index publishers and informing the Commission of price reporting status.

22. Market Behavior Rule 5 requires sellers to maintain certain records for a period of three years to reconstruct prices charged for electricity and related products. The Commission has a number of specific record retention requirements applicable to public utilities subject to the jurisdiction of the Commission in part 125 of our regulations.¹⁷ In many cases, these requirements are for time periods longer than three years. The part 125 requirements are largely related to cost-of-service rate requirements, however. We believe it is important that all market-based rate sellers retain the data and information described in Market Behavior Rule 5. We intend to address this retention requirement in the context of our rules under the FPA, such that there will be no gap in the retention

¹² The timing of proposed repeal is important. We do not intend to leave any gap in our regulations prohibiting manipulation of energy markets or other requirements of the Market Behavior Rules.

¹³ 15 U.S.C. 78j(b)(2005).

¹⁴ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

¹⁵ *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir.), cert. denied, 434 U.S. 875 (1977) (defining recklessness in the section 10(b) and Rule 10b-5 context as “a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.”); accord *In Re Silicon Graphics Securities Litigation*, 183 F.3d 970, 977 (9th Cir. 1999).

¹⁶ In addition, EAct 2005 section 1282 enacted new FPA section 221, which contains a new prohibition on providing false information. No entity, including an FPA section 201(f) entity, “shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity * * * to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.” This prohibition is wider in scope than current Market Behavior Rule 4 because it applies to any “entity” and is not restricted to jurisdictional sales or transmission services.

¹⁷ 18 CFR part 125 (2005).

requirement. We believe that doing so would eliminate the need to retain Market Behavior Rule 5.

23. Finally, Market Behavior Rule 6 requires adherence to codes of conducts and the Standards of Conduct, and prohibits collusion to violate the codes of conduct or the Standards of Conduct. The codes of conduct are issued specifically to each market-based rate seller as part of their authorization, and the Standards of Conduct are applicable by rule to all market-based rate sellers engaged in or having affiliates engaged in transmission services. Our view is that Market Behavior Rule 6 restates requirements independently applicable to market-based rate sellers, except for the prohibition on colluding to violate the codes of conduct or Standards of Conduct. But collusion is a type of fraud,¹⁸ and thus collusion to violate codes of conduct or Standards of Conduct would be subject to the proposed part 47 regulations.

24. In addition to simplifying our behavior rules, avoiding confusion, and providing more regulatory certainty, it is also our view that a smooth transition from the existing Market Behavior Rules to the proposed part 47 regulations and other rules and regulations achieves our original goal in adopting the Market Behavior Rules, that is, to assure that wholesale market rates for electric energy are just, reasonable, and not unduly discriminatory or preferential. In EPAct 2005, Congress has provided broad and strong prohibitions of market manipulation, and reliance on rules implementing these statutory prohibitions will likewise assure that wholesale markets reflect competitive forces and produce just and reasonable rates.

25. We seek comment on whether the Market Behavior Rules should be repealed prospectively, including responses to the following questions:

1. Are there any aspects of the Market Behavior Rules that should be retained in market-based rate sellers' tariffs and authorizations, or can all substantive provisions of the Market Behavior Rules be reflected in the proposed part 47 regulations and other Commission rules and regulations?

2. Is there a need or basis for retaining existing Market Behavior Rule 2 in light

of the anti-manipulation provisions set forth in the proposed part 47 regulations?

3. Should the Commission incorporate the qualification that no action or transaction explicitly contemplated by Commission rules, or undertaken at the direction of an ISO or RTO, is a violation of Market Behavior Rule 2 into the proposed part 47 regulations?

4. Should the affirmative defense of "legitimate business purpose" in existing Market Behavior Rule 2 be retained in any form?

5. Is there any aspect of behavior forbidden by Market Behavior Rule 3 that would not act as a fraud or deceit in connection with the purchase or sale of electric energy or transmission services subject to the Commission's jurisdiction?

6. Is the requirement of Market Behavior Rule 4 to report transaction information accurately, to the extent a seller reports such information to price index publishers, necessary in light of the proposed part 47 regulations?

7. Is there any aspect of Market Behavior Rule 6 that is not covered directly and explicitly by each seller's code of conduct as contained in tariff authorizations, or by the Standards of Conduct in part 358 of our regulations, or by the proposed part 47 regulations?

26. We encourage responses to the specific questions above as well as additional relevant comments regarding whether the Market Behavior Rules should be repealed.

27. The Commission invites interested persons to submit comments on the matters, issues, and specific questions identified in this order. Comments are due thirty (30) days from the date of publication of this order in the **Federal Register**, and reply comments are due fifteen (15) days from the date that initial comments are due. To facilitate the Commission's review of the comments, the Commission requests that commentors provide an executive summary of their position. In addition, the Commission requests that commentors identify each specific question addressed by their comments and use appropriate headings.

The Commission Orders

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 CFR Chapter I), the

Commission proposes to revise all public utility sellers' market-based rate tariffs and authorizations as discussed in the body of this order.

(B) Interested entities may file comments and reply comments regarding the proposed prospective repeal of the Market Behavior Rules set forth herein. Initial comments will be due 30 days from the date this order is published in the **Federal Register**, and reply comments will be due 15 days from the date that initial comments are due to be filed.

(C) The Secretary shall promptly publish this order in the **Federal Register**.

By the Commission.

Magalie R. Salas,

Secretary.

[FR Doc. 05-23467 Filed 11-28-05; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL06-4-000]

Informal Staff Advice on Regulatory Requirements; Interpretive Order Regarding No-Action Letter Process

Issued November 18, 2005.

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suede G. Kelly

1. The Commission clarifies that section 388.104(a) of its regulations¹ may be used to obtain informal staff advice regarding certain matters. Specifically, this regulation may be used to request and obtain staff "no-action" letters, effective immediately, with respect to whether staff will recommend that the Commission take no enforcement action with respect to specific proposed transactions, practices or situations that may raise issues under the Commission's regulations relating to the Standards of Conduct for Transmission Providers,² Market Behavior Rules³ and, when a final rule is effective, the Commission's proposed Prohibition of Energy Market

¹⁸ Fraud and collusion are often used interchangeably. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 772 (1989). The Supreme Court long ago found fraud to be implicit in collusion. *Wheeler v. Denver*, 229 U.S. 342, 350 (1913) ("of course, the existence of collusion implies the existence of fraud"); *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190 (1900) ("Collusion * * * implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose * * *").

¹ 18 CFR 388.104(a) (2005).

² 18 CFR part 358 (2005).

³ *Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 (2003) at Appendix A, *reh'g denied*, 107 FERC ¶ 61,175 (2004) (electric power); 18 CFR 284.288 and 284.403 (2005) (natural gas); appeal as to both electric power and natural gas Market Behavior Rules filed *sub nom. Cinergy Marketing & Trading, L.P. v. FERC*, Nos. 04-1168 *et al.* (DC Cir., appeal filed April 28, 2004).