revising § 34.1(c)(1) by clarifying that section. No one commented on this proposed change; we will incorporate the proposed change in the final rule to make it clear that if an agency of a state in which a utility is organized and operating approves or authorizes, in writing, the issuance of securities prior to their issuance, the utility is exempt from the provisions of sections 19, 20 and 204 of the FPA and the regulations under 18 CFR part 34 with respect to the issuance of such securities.

## 2. Section 34.1(c)(2)—Exemptions for Short-Term Notes or Drafts

The NOPR proposed amending § 34.1(c)(2), which relates to exempting from the Commission's requirements the issuance or renewal of short-term notes or drafts, to simplify the provisions and to delete an unnecessary, after-the-fact filing requirement. The Commission proposed to revise the language of this regulation to read as follows:

Under section 204(e) of the FPA, the issuance, renewal or assumption of liability on a note or draft maturing not more than one year after such issuance, renewal or assumption of liability is not subject to the provisions of this Part if the note or draft aggregates, along with all other thenoutstanding notes and drafts, not more than five percent of the:

- (A) Par value of the then-outstanding securities of the utility and,
- (B) In the case of no par value securities, the fair market value of such securities.

Baltimore Gas & Electric, EEI, Gulf States, and Pennsylvania P&L commented on the proposed change. Baltimore Gas & Electric, EEI and Gulf States suggest revising the proposed language to make it clear that the exemption does not apply to notes and drafts with maturities of more than one year.

We agree with these comments and will amend the text of § 34.1(c)(2) to avoid any confusion as to the securities to which the regulations apply.

EEI and Gulf States suggest that the regulations not use the "par value" of the then-outstanding securities in determining the value of a company's then-outstanding securities because the par value may be significantly lower than the issue price or current market value of securities. Pennsylvania P&L

Under section 204(f) of the FPA, a public utility does not require Commission authorization to issue securities or assume debt if the State commission in which it is organized and operating regulates the issuance of its securities.

also recommends that the Commission provide a valuation date.

The arguments with regard to the use of par value are not persuasive. Section 204(e) of the FPA refers to "par value of the other securities then outstanding." 8 It is clear from this language that the statute requires the use of "par value" if the security has a par value. We have no authority to recognize current market value or issue price as the measure of the amount of securities "then outstanding" if there is a par value stated. However, in the case of securities having no par value, we believe that fair market value is appropriate.

As to a specific date for the 5 percent measurement, although the precise timing of the issuance of securities is wholly within the purview of utility management, we will clarify the language to indicate that the 5 percent test would be applied as of the date of the issuance or renewal of the securities or assumption of the liabilities.

## 3. Section 34.2—Placement of Securities

The NOPR proposed amending § 34.2, to rename the section and to allow for the placement of securities by either competitive bid or negotiated placement. The proposed amendment recognized exemptions from these requirements, simplified the placement procedures and streamlined the regulatory process. The Commission proposed to revise the title and language of this regulation as follows:

## Section 34.2—Placement of Securities

- (a) Method of issuance. Upon obtaining authorization from the Commission, utilities may issue securities by either a competitive bid or negotiated placement, provided that:
- (i) Competitive bids are obtained from at least two prospective dealers, purchasers or underwriters; or
- (ii) Negotiated offers are obtained from at least three prospective dealers, purchasers or underwriters; and
  - (iii) The utility:
- (A) Accepts the bid or offer that provides the utility with the lowest cost of money for fixed or variable interest or dividend rate securities, or
- (B) Accepts the bid or offer that provides the utility with the greatest net proceeds for securities with no specified interest or dividend rates or.
- (C) Has filed for and obtained authorization from the Commission to accept bids or offers other than those specified in (iii)(A) or (iii)(B) above.
- (b) *Exemptions*. (i) Multiple bids or offers are not required for the issuance of securities:

- (A) To existing holders of securities on a pro rata basis;
- (B) When the utility receives an unsolicited proposal to purchase its securities; or
- (C) With maturities of one year or less.
  (ii) The utility may request exemption from the multiple bid or offer rule when the utility believes such an exemption is appropriate, based on the facts and circumstances of the particular issuance.
- (c) *Prohibitions.* No securities shall be placed with any person who:
- (i) Has performed any service or accepted any fee or compensation with respect to the proposed issuance of securities; or
- (ii) Would be in violation of section 305(a) of the FPA.

Baltimore Gas & Electric suggests that we change § 34.2(b) so that this section will clearly provide exemptions from the multiple bid or offer requirements of § 34.2(a). EEI, Gulf States and UtiliCorp suggest that we include within the exemptions from negotiated bid and placement requirements particular types of securities (treasury stock and securities "backing up" pollution control debt issued by a third party, for instance).

These comments have merit, and we will modify the final rule accordingly. We will not, however, include treasury stock among the list of exempted securities; we are not persuaded that a blanket exemption is justified for treasury stock. For all practical purposes, the issuance of treasury stock is not substantially different from the issuance of new shares of common stock.

EEI and Gulf States suggest that we delete the prohibition in § 34.2(c)(1) against accepting bids from or entering into negotiations with persons that have accepted a fee for services performed in connection with the proposed issuance of securities. We reject this recommendation. However, we note that proposed § 34.2(c)(1) did not include language (which is currently in this paragraph of our regulations) indicating that it involves services performed prior to the submission of bids or the beginning of negotiations. The proposed rule, like the existing rule, should contain this language. Upon further consideration, the final rule will include this language in the regulations.

EEI and Gulf States suggest that we codify the Commission's policy of allowing utilities to issue securities or assume obligations or liabilities over a two-year period. EEI and Gulf States are correct that it is the Commission's policy to allow companies to issue securities at any time within a two-year

Under section 318 of the FPA, a utility that is subject to the requirements of the Public Utility Holding Company Act is not subject to the requirements of the FPA with respect to the issue, sale, or guarantee of a security, or assumption of obligation or liability.

<sup>816</sup> U.S.C. 824c(e).