SUPPORTING STATEMENT FOR
FERC-516 "Electric Rate Schedule Filings" and FERC-717
"Standards for Business Practices & Communications Protocols for Public Utilities"
Final Rule for Preventing Undue Discrimination and Preference in Transmission Service
In Docket Nos. RM05-25-000 & RM05-17-000

The Federal Energy Regulatory Commission (FERC or Commission) requests Office of Management and Budget review and approval of the proposed information collection requirements FERC-516, Electric Rate Schedule Filings, 1902-0096 and FERC-717, Standards for Business Practices and Communications Protocols for Public Utilities, 1902-0173. (Both FERC-516 & FERC-717 are the subject of another rule currently pending before OMB and will therefore assume temporary identifiers for this submission. Upon completion of OMB's review, the numbers attributable to these two information collection requirements in this docket will be transferred to their respective control nos., 1902-0096 and 1902-0173. FERC-516 has received the temporary designation of FERC-917 and FERC-717 has received the temporary designation of FERC-918).

The FERC is proposing to amend its regulations adopted in Order Nos. 888 and 889, and to the pro forma open access transmission tariff, to ensure that transmission services are provided on a basis that is just, reasonable and not unduly discriminatory or preferential.

In this Final Rule, the Commission estimates that the annual burden associated with the information requirements contained in this rulemaking to be 157,036 hours or a decrease from the 178,976 hours proposed in the NOPR. The decrease can be attributed to revisions to some of the proposed requirements but also due to fewer transmission providers having tariffs on file with the Commission. These estimates were based on the number of public utilities and entities who file FERC's transmission tariffs and post information on their OASIS sites. FERC-516 is currently approved through July 31, 2008 and FERC-717 is currently approved through June 30, 2009. However, as noted above, for purposes of this submission they will be designated as new information collection requirements.

Background

In the first few decades after enactment of the Federal Power Act (FPA) in 1935, the industry was characterized mostly by self-sufficient, vertically integrated electric utilities, in which generation, transmission, and distribution facilities were owned by a single entity and sold as part of a bundled service to wholesale and retail customers.

Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities connected to each utility's transmission system. Each system covered a limited service area, which was defined by the retail franchise decisions of state regulatory agencies. This structure of separate systems arose naturally due primarily to the cost and technological limitations on the distance over which electricity could be transmitted.

A number of statutory, economic, and technological developments in the 1970s led to an increase in coordinated operations and competition. Among those was the passage of the Public Utility Regulatory Policies Act of 1978 (PURPA),[1] which was designed to lessen dependence on foreign fossil fuels by encouraging the development of alternative generation sources and imposing a mandatory purchase obligation on utilities for generation from such sources. PURPA also enabled the Commission to order wheeling of electricity under limited circumstances.[2] The rapid expansion and performance of the independent power industry following the enactment of PURPA demonstrated that traditional, vertically integrated public utilities need not be the only sources of reliable power.

During this period, the profile of generation investment began to change, and a market for non-traditional power supply beyond the purchases required by PURPA began to emerge. The economic and technological changes in the transmission and generation sectors helped encourage many new entrants in the generating markets that could sell electric energy profitably with smaller scale technology at a lower price than many utilities selling from their existing generation facilities at rates reflecting cost. However, it became increasingly clear that the potential consumer benefits that could be derived from these technological advances could be realized only if more efficient generating plants could obtain access to the regional transmission grids. Because many traditional vertically integrated utilities still did not provide open access to third parties and favored their own generation if and when they provided transmission access to third parties, access to cheaper, more efficient generation sources remained limited.

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1 Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified in U.S.C. titles 15, 16, 26, 30, 42, and 43 (2000)).

2 Section 211 of the FPA, 16 U.S.C. 824j (2000). In earlier years, a few customers were able to obtain access as a result of litigation, beginning with the U.S. Supreme Court's decision in Otter Tail Power Company v. United States, 410 U.S. 366 (1973). Additionally, some customers gained access by virtue of Nuclear Regulatory Commission license conditions and voluntary preference power transmission arrangements associated with federal power marketing agencies. See, e.g., Consumers Power Co., 6 NRC 887, 1036-44 (1977); Toledo Edison Co., 10 NRC 265, 327-34 (1979); Florida Municipal Power Agency v. Florida Power and Light Company, 839 F. Supp. 1563 (M.D. Fla. 1993).

The Commission encouraged the development of independent power producers (IPPs), as well as emerging power marketers, by authorizing market-based rates for their power sales on a case-by-case basis and by encouraging more widely available transmission access on a case-by-case basis. Market-based rates helped to develop competitive bulk power markets by allowing generating utilities to move more quickly and flexibly to take advantage of short-term or even long-term market opportunities than those utilities operating under traditional cost-of-service tariffs. In approving these market-based rates, the Commission required that the seller and its affiliates lack market power or mitigate any market power that they may have possessed.[3] The major concern of the Commission was whether the seller or its affiliates could limit competition and thereby drive up prices. A key inquiry became whether the seller or its affiliates owned or controlled transmission facilities in the relevant service area and therefore, by denying access or imposing discriminatory terms or conditions on transmission service, could foreclose other generators from competing. Beginning in the late 1980s, in order to mitigate their market power to meet the Commission's conditions, public utilities seeking Commission authorization for blanket approval of market-based rates for generation services under section 205 of the FPA filed "open access" transmission tariffs of general applicability (FERC-516).[4] The Commission also approved proposed mergers under section 203 of the FPA on the condition that the merging companies remedy anticompetitive effects potentially caused by the merger by filing "open access" tariffs. The early tariffs submitted in market-based rate proceedings under section 205 and merger proceedings under section 203 did not, however, provide access to the transmission system that was comparable to the service the transmission providers used for their own purposes. Rather, they typically made available only point-to-point transmission service, i.e., service from a single point of receipt to a single point of delivery. As these early tariffs were offered only by transmission providers that volunteered to provide service to third parties, they resulted in a patchwork of open access that was not sufficient to facilitate wholesale generation markets.

In response to the competitive developments following PURPA, and the fact that limited transmission access and significant regulatory barriers continued to constrain the development of generation by independent power producers, Congress enacted Title VII of the Energy Policy Act of 1992 (EPAct 1992).[5] EPAct 1992 reduced regulatory

3 See, e.g., Dartmouth Power Associates Limited Partnership, 53 FERC ¶ 61,117 (1990); Commonwealth Atlantic Limited Partnership, 51 FERC ¶ 61,368 (1990); Doswell Limited Partnership, 50 FERC ¶ 61,251 (1990); Citizens Power & Light Co., 48 FERC ¶ 61,210 (1989); Ocean State Power, 44 FERC ¶ 61,261 (1988); and Orange and Rockland Utilities, Inc., 42 FERC ¶ 61,012 (1988).

4 See Order No. 888 at 31,644 n.52.

5 Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified at, among other places, 15 U.S.C. 79z-5a and 16 U.S.C.

barriers to entry by creating a class of "Exempt Wholesale Generators" that were exempt from the requirements of the Public Utility Holding Company Act of 1935.[6] EPAct 1992 also expanded the Commission's authority to approve applications for transmission services under sections 211 and 212 of the FPA. Though the Commission aggressively implemented expanded section 211, it ultimately concluded that the procedural limitations in section 211 thwarted the Commission's ability to effectively eliminate undue discrimination in the provision of transmission service.

Order No. 888 and Subsequent Reforms

In April 1996, as part of its statutory obligation under sections 205 and 206 of the FPA to remedy undue discrimination, the Commission adopted Order No. 888 prohibiting public utilities from using their monopoly power over transmission to unduly discriminate against others. In that order, the Commission required all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file open access non-discriminatory transmission tariffs that contained minimum terms and conditions of non-discriminatory service. It also obligated such public utilities to "functionally unbundle" their generation and transmission services. This meant public utilities had to take transmission service (including ancillary services) for their own new wholesale sales and purchases of electric energy under the open access tariffs, and to separately state their rates for wholesale generation, transmission and ancillary services.[7]

Each public utility was required to file the pro forma OATT included in Order No. 888 without any deviation (except a limited number of terms and conditions that reflect regional practices).[8] After the effectiveness of their OATTs, public utilities were allowed to file, pursuant to section 205 of the FPA, deviations that were consistent with or superior to the pro forma OATT's terms and conditions. Because certain owners and controllers or operators of interstate transmission facilities were not subject to the Commission's jurisdiction under sections 205 and 206 and thus were not subject to Order No. 888, the Commission adopted a reciprocity provision in the pro forma OATT which

796 (22-25), 824j-l (2000)).

6 15 U.S.C. 79a (2000), repealed by EPAct 2005 sec. 1263; see Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667, 70 FR 75592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005).

7 This is known as "functional unbundling" because the transmission element of a wholesale sale is separated or unbundled from the generation element of that sale, although the public utility may retain ownership over both functions. See infra Part IV.B.4.

8 See Order No. 888 at 31,769-70 (noting that the pro forma OATT expressly identified certain non-rate terms and conditions, such as the time deadlines for determining available capability in section 18.4 or scheduling changes in sections 13.8 and 14.6, that may be modified to account for regional practices if such practices are reasonable, generally accepted in the region, and consistently adhered to by the transmission provider).

conditions the use by non-public utilities of public utilities' open access services on an agreement to offer open access services in return.

In addition to imposing the functional unbundling requirement, the Commission also encouraged broader reforms through the formation of independent system operators (ISOs). The Commission stated that ISOs "have the potential to provide significant benefits (e.g., to help provide regional efficiencies, to facilitate economically efficient pricing, and, especially in the context of power pools, to remedy undue discrimination and mitigate market power) and will further our goal of achieving a workably competitive market."[9] While the Commission declined to mandate ISOs, it set forth eleven principles for assessing ISO proposals submitted to the Commission.[10]

Order No. 888 also clarified the Commission's interpretation of the federal/state jurisdictional boundaries over transmission and local distribution. While it reaffirmed that the Commission has exclusive jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities, it nevertheless recognized the legitimate concerns of state regulatory authorities regarding the transmission component of bundled retail sales. The Commission therefore declined to extend its unbundling requirement to the transmission component of bundled retail sales. On appeal, the U.S. Supreme Court affirmed this element of Order No. 888, finding that the Commission made a statutorily permissible choice.[11]

The same day it issued Order No. 888, the Commission issued a companion order, Order No. 889, addressing both the separation of vertically integrated utilities' transmission and merchant functions, the information transmission providers were required to make public and the electronic means they were required to use to do so. Order No. 889 imposed Standards of Conduct governing the separation of, and communications between, the utility's transmission and wholesale power functions, to prevent the utility from giving its merchant arm preferential access to transmission information. All public utilities that owned, controlled or operated facilities used in the transmission of electric energy in interstate commerce were required to create or participate in an Open Access Same-Time Information System (OASIS)(FERC-717) that was to provide existing and potential transmission customers the same access to transmission information.

Among the information required to be posted by Order No. 889 was the transmission provider's calculation of ATC. Though the Commission acknowledged that

9 Order No. 888 at 31,655.
10 Id. at 31,730-32.
11 New York v. FERC, 535 U.S. 1 (2002).

before-the-fact measurement of the availability of transmission service is "difficult," it concluded that it was important to give potential transmission customers "an easy-to-understand indicator of service availability."[12] Because formal methods did not then exist to calculate ATC and total transfer capability (TTC), the Commission encouraged industry efforts to develop consistent methods for calculating ATC and TTC.[13] Order No. 889 ultimately required transmission providers to base their calculations on "current industry practices, standards and criteria" and to describe their methodology in their tariffs.[14] The Commission noted that the requirement that transmission providers purchase only ATC that is posted as available "should create an adequate incentive for them to calculate ATC and TTC as accurately and as uniformly as possible."[15]

The electric industry continued to undergo economic and regulatory changes in the years following the issuance of Order No. 888. Retail access was adopted by approximately 25 states in the late 1990s.[16] This state restructuring activity spurred significant changes at the wholesale level as well by encouraging or requiring the divestiture of generation plants by traditional electric utilities and the development of ISOs that could manage short-term energy markets necessary to support retail access. At the same time, there was a significant increase in the number of mergers between traditional electric utilities and between electric utilities and gas pipeline companies, and large increases in the number of power marketers and independent generation facility developers entering the marketplace. Trade in bulk power markets increased significantly and the Nation's transmission grid was used more heavily and in new ways as customers took advantage of the pro forma OATT and purchased power from competitive sellers.

In the wake of these changes, in December 1999, the Commission adopted Order No. 2000.[17] This rulemaking recognized that Order No. 888 set the foundation upon which competitive electric markets could develop, but did not eliminate the potential to engage in undue discrimination and preference in the provision of transmission service.[18] The rulemaking also recognized that Order No. 888 did not address the regional nature of the grid, including the treatment of parallel flows, pancaked rates, and congestion management. Thus, the Commission encouraged the creation of RTOs to address

12 Order No. 889 at 31,605.
13 Id. at 31,607.
14 Id.
15 Id.
16 See Energy Information Administration, Retail Unbundling – U.S. Summary (2005), http://www.eia.doe.gov/oil_gas/natural_gas/restructure/state/us.html.
17 See supra note Error: Reference source not found.

18 Order No. 2000 at 31,015.

important operational and reliability issues and eliminate any residual discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility. The Commission found that RTOs would increase the efficiency of wholesale markets by eliminating pancaked rates, internalizing parallel flows, managing congestion efficiently and operating markets for energy, capacity and ancillary services. The Commission established an open, collaborative process that relied on voluntary regional participation to design RTOs tailored to the specific needs of each region. The Commission noted, however, that "[i]f the industry fails to form RTOs under this approach, the Commission will reconsider what further regulatory steps are in the public interest."[19]

Following Order No. 2000, RTOs were approved in several regions of the country including the Northeast (PJM Interconnection, Inc.; ISO New England), the Midwest (MISO) and the South (SPP). In most cases, RTOs have assumed responsibility for calculating ATC across the footprint of the RTO, as well as the planning and expansion of the transmission grid, at least for facilities necessary for maintaining system reliability. However, large areas of the Nation have not developed RTOs using the voluntary structure adopted by the Commission in Order No. 2000. Moreover, transmission customers have complained that even in RTO markets there are instances when comparable transmission service is not provided, particularly in the area of transmission planning.

EPAct 2005 and Recent Developments

EPAct 2005, [20] enacted on August 8, 2005, added a number of new authorities and priorities for the Commission and emphasized certain of its existing obligations. Specifically, EPAct 2005 recognized the importance of adequate transmission infrastructure development and its role in facilitating the development of competitive wholesale markets. For example, Congress required the Commission to adopt a rule establishing incentive ratemaking for transmission infrastructure to help promote reliability and reduce congestion.[21] Congress further directed the Commission to "exercise its authority" under EPAct 2005 "in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities."[22] Congress also gave the Commission certain "backstop" transmission siting authority, and authorized the creation of interstate compacts establishing transmission

19 Id. at 30,993.
20 See supra note Error: Reference source not found.
21 EPAct 2005 sec. 1241 (to be codified at section 219 of the FPA, 16 U.S.C. 824s).
22 EPAct 2005 sec. 1233(a) (to be codified at section 217(b)(4) of the FPA, 16 U.S.C. 824q).

siting agencies.[23] EPAct 2005 also authorized the Commission to require unregulated transmitting utilities (except for certain small entities) to provide access to their transmission facilities on a comparable basis.[24] Congress further ordered the Department of Energy (DOE) to study the benefits of economic dispatch and required the Commission to convene regional joint boards to develop a report to Congress containing recommendations for the use of security constrained economic dispatch within each region.[25] Congress also directed the Commission to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers, and it authorized the Commission to prescribe rules to provide for the dissemination of information about the availability and price of wholesale electric energy and transmission service.[26] Finally, Congress emphasized compliance with the Commission's regulations, increasing the civil and criminal penalties for violations of Commission-administered statutes and regulations.[27]

Recognizing the need for reform of Order No. 888 in light of these developments, the Commission issued an NOI in September 2005 seeking comments on the reforms needed to the Order No. 888 pro forma OATT to prevent undue discrimination and preference in the provision of transmission services. In the NOI, the Commission expressed its preliminary view that reforms to the pro forma OATT and public utilities' OATTs are necessary to avoid undue discrimination or preference in the provision of transmission service. The NOI sought comments on how best to accomplish the Commission's goals, specifically with respect to enhancements that are needed to: (1) remedy any unduly discriminatory or preferential application of the pro forma OATT or (2) improve the clarity of the Order No. 888 pro forma OATT and the individual public utility tariffs in order to more readily identify violations and facilitate compliance.

The Commission received over 4,000 pages of initial and reply comments on the NOI. Based on these comments, the comments submitted in response to the ATC NOI, the Commission's experience in implementing Order No. 888, and the changes in the industry since FERC adopted it, the Commission concluded that reform of the pro forma OATT is necessary, for the reasons discussed in the proposed rule.

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23 EPAct 2005 sec. 1221(a) (to be codified at section 216 of the FPA, 16 U.S.C. 824p).
24 EPAct 2005 sec. 1231 (to be codified at section 211A of the FPA, 16 U.S.C. 824j-1).
25 EPAct 2005 sec. 1234 (to be codified at 42 U.S.C. 16432); EPAct 2005, sec. 1298 (to be codified at section 223 of the FPA, 16 U.S.C. 824w). EPAct 2005 defined economic dispatch as "the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities." EPAct 2005 sec. 1234 (b).
26 EPAct 2005 sec. 1281 (to be codified at section 220 of the FPA, 16 U.S.C. 824t).
27 EPAct 2005 sec. 1284(d) (to be codified at section 316 of the FPA, 16 U.S.C. 825o); EPAct 2005 sec. 1284(e) (to be codified at section 316A of the FPA, 16 U.S.C. 825o-1).

RM05-25-000 NOPR PREVENTING UNDUE DISCRIMINATION AND PREFERENCE IN TRANSMISSION SERVICE

On May 19, 2006, the Commission issued a Notice of Proposed Rulemaking (NOPR). The purpose of the NOPR was to strengthen the pro forma OATT to ensure that it achieves its original purpose – remedying undue discrimination – not to create new market structures. The Commission proposed to achieve this goal by increasing the clarity and transparency of the rules applicable to the planning and use of the transmission system and by addressing ambiguities and the lack of sufficient detail in several important areas of the pro forma OATT. The lack of specificity in the pro forma OATT creates opportunities for undue discrimination as well as making the undue discrimination that does occur more difficult to detect. First, the Commission proposed to improve transparency and consistency in several critical areas, such as the calculation of available transfer capability (ATC).[28] The Commission proposed to direct public utilities, under the auspices of the North American Electric Reliability Council (NERC) and the North American Energy Standards Board (NAESB), to provide for greater consistency in ATC calculation. By reducing unnecessarily broad discretion in this and other areas, FERC intends to reduce the ability of transmission providers to unduly discriminate and provide them greater certainty to facilitate compliance with its regulations.

Second, the Commission proposed to reform the transmission planning requirements of the pro forma OATT to eliminate potential undue discrimination and support the construction of adequate transmission facilities to meet the needs of all load-serving entities. The pro forma OATT contains only minimal requirements regarding transmission planning, which have proven to be inadequate as the Nation faces inadequate transmission investment in many areas. The Commission proposed to require public utilities to engage in an open and transparent planning process at both the local and regional levels.

Third, the Commission proposed to remedy certain portions of the pro forma OATT that may have permitted utilities to discriminate against new merchant generation, including intermittent generation. For example, FERC proposed to modify the energy imbalance provisions of the pro forma OATT and adopt certain other tariff modifications.

28 The Commission used the term "Available Transmission Capability" in Order No. 888 to describe the amount of additional capability available in the transmission network to accommodate additional requests for transmission services. To be consistent with the term generally accepted throughout the industry, the Commission is proposing to revise the pro forma OATT to adopt the term "Available Transfer Capability."

Fourth, the Commission provided for greater transparency in the provision of transmission service to allow transmission customers better access to information to make their resource procurement and investment decisions, as well as to increase its ability to detect any remaining incidents of undue discrimination. Finally, the Commission provided for reform and greater clarity in areas that have generated recurring disputes over the past 10 years, such as rollover rights, "redirects," and generation redispatch.

Although the reforms proposed in these areas are significant, the Commission made it clear that it proposed to maintain many of the core elements of Order No. 888.

RM05-25-000 FINAL RULE PREVENTING UNDUE DISCRIMINATION AND PREFERENCE IN TRANSMISSION SERVICE

On February 17, 2007, the Commission issued a final rule to revise the pro forma Open Access Transmission Tariff (OATT). The final rule addresses and remedies opportunities for undue discrimination under the OATT adopted in 1996 by Order No. 888.[29] Order No. 888 fostered greater competition in wholesale power markets by reducing barriers to entry in the provision of transmission service. In the ten years since Order No. 888, however, the Commission has found that the OATT contains flaws that undermine realizing its core objective of remedying undue discrimination. In the Notice of Proposed Rulemaking (NOPR) issued on May 19, 2006, the Commission proposed to remedy those flaws.[30] (See discussion above)

First, the Final Rule will increase nondiscriminatory access to the grid by eliminating the wide discretion that transmission providers currently have in calculating available transfer capability (ATC).[31] The calculation of ATC is one of the most critical functions under the OATT because it determines whether transmission customers can

29 Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (TAPS v. FERC), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

30 Preventing Undue Discrimination and Preference in Transmission Service, Notice of Proposed Rulemaking, 71 FR 32,636 (Jun. 6, 2006), FERC Stats. & Regs. ¶ 32,603 (2006).

31 The Commission used the term "Available Transmission Capability" in Order No. 888 to describe the amount of additional capability available in the transmission network to accommodate additional requests for transmission services. To be consistent with the term generally accepted throughout the industry, the Commission revises the pro forma OATT to adopt the term "Available Transfer Capability."

access alternative power supplies. Despite this, the existing OATT does not prescribe how ATC should be calculated because the Commission sought to rely on voluntary efforts by the industry to develop consistent methods of ATC calculation. This voluntary industry effort has not proven successful. The Commission is therefore requiring public utilities, working through the North American Electric Reliability Corporation (NERC), to develop consistent methodologies for ATC calculation and to publish those methodologies to increase transparency. This important reform will eliminate the wide discretion that exists today in calculating ATC and ensure that customers are treated fairly in seeking alternative power supplies.

Second, the Final Rule increases the ability of customers to access new generating resources and promote efficient utilization of transmission by requiring an open, transparent, and coordinated transmission planning process. Transmission planning is a critical function under the pro forma OATT because it is the means by which customers consider and access new sources of energy and have an opportunity to explore the feasibility of non-transmission alternatives. Despite this, the existing pro forma OATT provides limited guidance regarding how transmission customers are treated in the planning process and provides them with very little information on how transmission plans are developed. These deficiencies are serious, given the substantial need for new infrastructure in this Nation.[32] The Commission has acted to remedy these deficiencies by requiring transmission providers to open their transmission planning process to customers, coordinate with customers regarding future system plans, and share necessary planning information with customers.

Third, the Final Rule will also increase the efficient utilization of transmission by eliminating artificial barriers to use of the grid. The existing pro forma OATT allows a transmission provider to deny a request for long-term point-to-point service if the request cannot be satisfied in only one hour of the requested term. This practice discourages the efficient use of the existing grid and precludes access to alternative power supplies. The Commission is reforming this practice by requiring that a conditional firm option be

32 Congress placed special emphasis on the development of transmission infrastructure, including the consideration of advanced transmission technologies, in the Energy Policy Act of 2005 (EPAct 2005). See Pub. L. No. 109-58, 119 Stat. 594 (to be codified in scattered titles of the U.S.C.). The Commission has taken steps to implement that goal in numerous contexts, including recent rulemaking proceedings that address the promotion of transmission investment through pricing reform and the siting of certain transmission facilities. See Promoting Transmission Investment through Pricing Reform, Order No. 679, 71 FR 43294 (Jul. 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006), order on reh'g, Order No. 679-A, 72 FR 1152 (Jan. 10, 2007), FERC Stats. & Regs. ¶ 31,236 (2007), reh'g pending; Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, Order No. 689, 71 FR 69440 (Dec. 1, 2006), FERC Stats. & Regs. ¶ 31,234 (2006), reh'g pending.

offered to customers seeking long-term point-to-point service, i.e., conditional firm service. The Commission also modifies the redispatch obligations of transmission providers to increase the efficient utilization of the grid, while also ensuring that reliability to native load customers is maintained.

Fourth, by adopting these and other reforms, the Final Rule facilitates the use of clean energy resources such as wind power. Conditional firm service is particularly important to wind resources that can provide significant economic and environmental value even if curtailed under limited circumstances. Open and coordinated transmission planning will enhance the ability of customers to access clean energy resources as part of their future resource portfolio. The Final Rule also benefits clean energy resources by reforming energy and generator imbalance charges. These reforms are particularly important to intermittent resources such as wind power because these resources have limited ability to control their output and, hence, must be assured that imbalance charges are no more than required to provide appropriate incentives for prudent behavior.

Fifth, the Final Rule will strengthen compliance and enforcement efforts. The Commission is increasing the transparency of pro forma OATT administration, thereby increasing the ability of customers and the Commission's Office of Enforcement to detect undue discrimination. The Commission is also adopting operational penalties for clear violations of an OATT, thereby enhancing compliance while also reducing the burdens on our Office of Enforcement. Further, the Commission also increases the clarity of many other OATT requirements, thereby facilitating compliance by transmission providers with its regulations. The Final Rule reflects the close integration of the Office of Enforcement into policy development at the Commission. Several of the reforms adopted in the final rule are based on the Commission's experience with OATT administration through oversight, audits, and investigations performed by the Office of Enforcement.

Finally, the Commission modifies and improves several provisions of the pro forma OATT using its experience over the past ten years and clarifies others that have proven ambiguous. For example, the final rule reforms the Commission's rollover rights policy to ensure that the rights and obligations of rollover customers are consistent with the resulting obligations of transmission providers to plan and upgrade the system to accommodate rollovers. The Final Rule removes the price cap on reassigned capacity because it is not necessary to remedy market power and doing so will otherwise increase the efficient use of existing capacity. The Final Rule increases the efficient use of existing capacity by providing a priority to certain "pre-confirmed" requests for service. The Final Rule increases certainty by providing greater clarity regarding the wholesale

contracts that qualify as network resources. The Final Rule also adopts numerous clarifications that should assist transmission providers and customers in implementing and using the pro forma OATT

. JUSTIFICATION

. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

FERC-516

Section 205(c) of the FPA requires that every public utility have all of its jurisdictional rates and tariffs on file with the Commission and make them available for public inspection, within such time and in such form as the Commission may designate. Section 205(d) of the FPA requires that every public utility must provide notice to FERC and the public of any changes to its jurisdictional rates and tariffs, file such changes with FERC, and make them available for public inspection, in such manner as directed by the Commission. In addition, FPA section 206 requires FERC, upon complaint or its own motion, to modify existing rates or services that are found to be unjust, unreasonable, unduly discriminatory pr preferential. FPA section 207 further requires the Commission upon complaint by a state commission and a finding of insufficient interstate service, to order the rendering of adequate interstate service by public utilities, the rates for which would be filed in accordance with FPA sections 205 and 206.

The Commission has a statutory obligation under Section 205 and 206 of the Federal Power Act (FPA) to prevent unduly discriminatory practices in transmission access. In Order No. 888, the Commission required public utilities to provide others with comparable access to transmission lines, and continued in Order No. 2000 with the establishment of Regional Transmission Organizations. When fully implemented, appropriate regional transmission organizations can benefit customers through lower electricity rates as a result of a wider choice of services and service providers. The Commission believes that formation of RTOs should result in the following:

(a) improved efficiencies in transmission grid management;
(b) improved grid reliability;
(c) removal of remaining opportunities for discriminatory transmission practices;
(d) improved market performance;
(e) and development of lighter handed regulations.

Ten years have passed since the Commission issued its landmark Order No. 888.[33] Order No. 888 sought to eradicate undue discrimination in the provision of transmission service in interstate commerce. It did so by requiring that each public utility that owns, operates, or controls facilities used for transmission in interstate commerce offer unbundled transmission service pursuant to a standard Open Access Transmission Tariff (pro forma OATT) and separate its transmission and merchant generation functions pursuant to a companion order issued that same day, Order No. 889.[34] These remedies reduced barriers to entry, led to greater competition in bulk power markets and provided the foundation for subsequent regulatory reforms at both the federal and state level.

FERC-717

In Order No. 888, the Commission required public utilities to establish OASIS sites to provide transmission customers with equal and timely access to information about transmission and ancillary services provided in the tariffs. The Commission did not believe that open-access nondiscriminatory transmission services can be completely realized until it removed real-world obstacles that prevent transmission customers from competing effectively with the Transmission Provider. One of the obstacles is unequal access to transmission information. The Commission believes that transmission customers must have simultaneous access to the same information available to the Transmission Provider if truly nondiscriminatory transmission services are to be a reality.

By its Final Rule in Docket No. RM95-9-000, issued April 24, 1996, the Commission adopted certain standards/information requirements for OASIS to be maintained by Public Utilities. More specifically, the Commission added Part 37 of Title 18, Code of Federal regulations (CFR). The Standards of Conduct were designed to prevent employees of a public utility (or any of its affiliates) engaged in marketing functions from preferential access to OASIS-related information or from engaging in unduly discriminatory business practices. Companies were required to separate their transmission operations/reliability functions from their marketing/merchant functions and

33 Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (TAPS v. FERC), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

34 Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996), order on reh'g, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), order on reh'g, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

prevent system operators from providing merchant employees and employees of affiliates with transmission-related information not available to all customers at the same time through public posting on the OASIS.

When the Commission developed its OASIS regulations, OASIS Standards and Communication Protocols, Data Dictionary, and Business Practice Standards, it relied heavily on the assistance provided by all segments of the wholesale electric power industry and its customers in the ad hoc working groups that came together and offered consensus proposals for the FERC's consideration. While this process was very successful, it became apparent to FERC that ongoing issues remained that would be better addressed by an ongoing industry group dedicated to drafting consensus industry standards to implement the Commission's OASIS-related policies and policies on other industry business practices. The policies would benefit from the implementation of generic industry standards rather than by continued reliance on an ad hoc approach.

In Order No. 676, RM05-5-000 "Standards of Business Practices and Communication Protocols for Public Utilities" the Commission incorporated by reference and placed into operation, standards developed by the North American Energy Standards Board's (NAESB's) Wholesale Electric Quadrant (WEQ). These standards cover Open Access Same-Time Information Systems (OASIS) business practice standards, including the posting requirements; OASIS Standards and Communication Protocols and Data Dictionary; and business practice standards.

Incorporating these standards by reference into the Commission's regulations is intended to benefit wholesale electric customers by streamlining utility business practices and transactional processes and OASIS procedures and adopting a formal ongoing process for reviewing and upgrading the Commission's OASIS standards and other electric business industry business practices. These practices and procedures will benefit from the implementation of generic industry standards. In order to incorporate the electric business practices and generic industry standards, the Commission changed the name of FERC-717 from the requirements that pertained to Open Access Same-Time Information Systems and standards of conduct to Standards for Business Practices and Communication Protocols for Public Utilities.

Final Rule

Although Order No. 888 has been successful in many important respects, the need for

reform of the Order No. 888 pro forma OATT has been apparent for some time. In 1999, the Commission held, in adopting Order No. 2000,[35] that the pro forma OATT could not fully remedy undue discrimination because transmission providers retained both the incentive and the ability to discriminate against third parties, particularly in areas where the pro forma OATT left the transmission provider with significant discretion.[36] The Commission in Order No. 2000 thus encouraged utilities to voluntarily join independent regional transmission organizations (RTOs) that would operate their transmission facilities on a non-discriminatory basis and administer the OATT. The Commission based Order No. 2003 on a similar finding, explaining that the interconnection process includes opportunities for undue discrimination that may lead to delays that benefit generation-owning transmission utilities and undermine competition.[37] While many regions of the country now have independent grid operators, not all do, and changes to the pro forma OATT are necessary to reduce the opportunity for transmission providers to engage in undue discrimination. In the past ten years new investment has faltered and many regions now experience chronic transmission congestion and inadequate infrastructure. Congress, through the Energy Policy Act of 2005 (EPAct 2005),[38] recognized this problem and provided the Commission not only new tools to encourage infrastructure but also made clear that the Commission should use its existing authority to ensure an adequate infrastructure to support a vibrant economy.

. HOW, BY WHOM, AND FOR WHAT PURPOSE THE INFORMATION IS TO BE USED AND THE CONSEQUENCES OF NOT COLLECTING THE INFORMATION

The Federal Power Act (FPA) requires that all rates charged by public utilities for the transmission or sale for resale of electric energy be just and reasonable.[39] In Order No. 2000, the Commission found that "opportunities for undue discrimination continue to exist that may not be remedied adequately by [the] functional unbundling [remedy of

35 Regional Transmission Organizations, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

36 Order No. 2000 at 31,015.
37 See Order No. 2003 at P 11-12.
38 Pub. L. No. 109-58, 119 Stat. 594 (to be codified in scattered titles of the U.S.C.).
39 16 U.S.C. 824d(a) (2000).

Order No. 888]."[40] The Commission made a similar finding in Order No. 2003, holding that opportunities for undue discrimination continue to exist in areas where the pro forma OATT leaves transmission providers with substantial discretion.[41] The Commission has a responsibility under section 206 of the FPA to remedy undue discrimination. FERC's action in the Final Rule fulfills that responsibility by instituting reforms to the pro forma OATT that will address remaining opportunities for undue discrimination.

As the Commission noted in Order No. 888, it is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves.[42] Such an incentive can lead to unduly discriminatory behavior against third parties, particularly if public utilities have unnecessarily broad discretion in the application of their tariffs. This discretion also can create problems for transmission providers seeking to comply with FERC's regulations in good faith because so many issues are left for their interpretation, thereby increasing the possibility of disputes with transmission customers and enforcement actions by the Commission.[43] Transmission customers also have found ways to use the tariffs to their own advantage, particularly in the scheduling and queuing processes. Finally, tariff provisions have been modified in numerous ways on a company-by-company basis, leading to uncertainties within the industry as to the proper interpretation of those provisions and to unnecessarily inconsistent treatment of transmission customers across public utilities.

Without this information, the Commission would be unable to discharge its responsibility to approve or modify electric utility tariff filings and would delay the effective implementation of nationwide open access to transmission by wholesale electric customers. Failure to issue these requirements would permit discrimination in interstate transmission services by public utilities.

. DESCRIBE ANY CONSIDERATION FOR THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN AND TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN

There is an ongoing effort to determine the potential and value of improved information technology to reduce the burden. The Commission has adopted user friendly

40 Order No. 2000 at 31,105.
41 Order No. 2003 at P 11-12.
42 Id. at 31,682.
43 See, e.g., Order No. 2003 at P 11-12.

electronic formats and software in order to facilitate the required electronic formats for rate filings and will develop formats for any subsequent filings. In Order No. 614 (65 FR 18221, April 7, 2000) the Commission amended its regulations to streamline rate schedules sheet designation procedures for electric industry schedules.

In Order No. 2001, (67 FR 31043, May 8, 2002) the Commission revised the format through which traditional public utilities and power marketers must satisfy their obligation, in accordance with Section 205 of the FPA and Part 35 of the Commission's regulations, to file agreements with the Commission. Public utilities that have standard forms of agreement in their transmission tariffs, cost-based power sales tariffs, or tariffs for other generally applicable services no longer have to file conforming service agreements with the Commission. The filing requirement for conforming agreements is now satisfied by filing the standard form of agreement and an electronic Electric Quarterly Report. Order No. 2001 also lifted the requirement that parties to an expiring conforming agreement file a notice of cancellation or a cancellation tariff sheet with the Commission. The public utility can simply remove the agreement from its Electric Quarterly Report.

Non-conforming agreements, which are agreements for transmission, cost-based power sales and other generally applicable services that do not conform to an applicable standard form of agreement in a public utility's tariff, must continue to be filed with the Commission for approval before going into effect. This category excludes unexecuted agreements and agreements that do not precisely match the applicable standard form of service agreement.

In RM01-5-000, FERC proposed that future tariff filings be made over the Internet with software developed (and distributed to public utilities for their use at no cost) software to be downloaded at the users' sites) to enter data manually (for small data sets

and to edit corrections) and/or to download spreadsheet data, or other properly formatted system output, directly into the application. In addition, the software will perform edit checks at the utility site to ensure a complete filing and a successful upload at the Commission. The proposed tariffs will change from a tariff-sheet format to a section-based forma that is better suited for electronic filing. The software has undergone testing and refinements to reflect industry comments that were given in several technical conferences held in the summer of 2005 and during testing periods. Integration of eTariff with FERC's internal business process software is proceeding with a target date of the third calendar quarter 2007.

As the Commission increases its use of electronic media for filing, storage, retrieval, and tracking of information and documents, greater uniformity in filing procedures, wherever practical, will greatly expedite and simplify the conversion to electronic media.

. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2.

Electric Rate schedules and tariffs contain rate information are not available from other sources and therefore, no use or other modification of the information can be made to perform oversight and review responsibilities under applicable legislation (e.g. Federal Federal Power Act, Energy Policy Act of 1992, Energy Policy Act of 2005). All of the Commission's public information collections are subject to analysis and review by

Commission staff and are examined for redundancy. Further, Commission staff conducted an internal review of this collection of information to determine the necessity of the Commission's strategic objectives.

. METHODS USED TO MINIMIZE BURDEN IN COLLECTION OF INFORMATION INVOLVING SMALL ENTITIES

The Commission has reviewed those public utilities that constitute "small business concerns" under the Regulatory Flexibility Act for compliance with the proposed rule. FERC does not believe that the final rule will have an impact on small entities. This rule applies to public utilities that own, control or operate interstate transmission facilities other than those that have received waiver of the obligation to comply with Order Nos. 888 and 889. The total number of public utilities that, absent waiver, would have to modify their current OATTs by filing the revised pro forma OATT is 116.[44] Of these only six public utilities, or less than two percent, have output of four million MWh or less per year.[45] The Commission does not consider this a substantial number and, in any event, each of these entities retains its rights to waiver of these requirements.[46] The

44 The Commission has identified 116 transmission providers with tariffs on file. The Commission has noted that this figure is lower than its initial estimate in the NOPR, based on FERC Form No. 1 and FERC Form No. 1-F data.

45 Id.

46 The Regulatory Flexibility Act defines a "small entity" as "one which is independently owned and operated and which is not dominant in its field of operation." See 5 U.S.C. 601(3) and 601(6); 15 U.S.C. 632(a)(1). In Mid-Tex Elec. Coop. v. FERC, 773 F.2d 327, 340-43 (D.C. Cir. 1985), the court accepted the Commission's conclusion that, since virtually all of the public utilities that it regulates do not fall within the meaning of the term "small entities" as defined in the Regulatory Flexibility Act, the Commission did not need to prepare a regulatory flexibility analysis in connection with its proposed rule governing the allocation of costs for construction work in progress (CWIP). The CWIP rules applied to all public utilities. The revised pro forma OATT will apply only to those public utilities that own, control or operate interstate transmission facilities. These entities are a subset of the group of public utilities found not to require preparation of a regulatory flexibility analysis for the CWIP rule.

criteria for waiver that would be applied under this rulemaking for small entities is unchanged from that used to evaluate requests for waiver under Order Nos. 888 and 889. Thus, small entities who have received waiver of the requirements to have on file an open access tariff or to operate an OASIS would be unaffected by the requirements of this proposed rulemaking. This rule applies to public utilities that own, control or operate interstate transmission facilities, not to electric utilities per se.

. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY

It is not possible to collect this data less frequently. If the collection were conducted less frequently, the Commission would be unable to perform its mandated oversight and review responsibilities with respect to electric rates. Furthermore, Section 205 of the FPA mandates that the information be filed every time a licensee or public utility proposes to change its rates.

. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION COLLECTION

Public Utilities and licensees make electric rate schedule filing applications only when they have developed new electric rate schedules or revisions to existing rate

schedules. Section 205 of the Federal Power Act requires the Commission to take action on these applications within 60 days of the filing. This proposed program meets all of OMB's section 1320.5 requirements with the exception of part "d" thereof. Section 1320.5(d)(2)(iii) limits the collection of data to an original and two copies of any document. The data provided for under FERC-917(516) includes service agreements and transaction reports and would be filed by the respondents to comply with the provisions as indicated in Item A (1.). Currently an original and five copies are required to be submitted to the Commission. This is the minimum necessary to permit processing within the statutory time frame for Commission action. The original is routed to eLibrary for public viewing over the Commission's web site. One copy is distributed to the Public Reference and Files Maintenance Branch for public inspection in the Commission's Public Reference Room. An additional copy is distributed to the Office of General Counsel for legal review. Three copies are distributed to the Office of Energy Markets and Reliability for technical review by analysts in rate filings, rate investigations and financial analysis.

However, if the eTariff NOPR referenced above is adopted and electronic filing is put into place, this will eliminate the need for paper copies entirely for service agreements and transactional reports. During this transitional period, however, the traditional number of hard copies will still be needed for efficient processing of the data.

In addition, section 1320.5(d)(2)(iv) directs that respondents should not be required to retain records for more than three years, other than for health, medical,

government contract, grant-in-aid, or tax records purposes. The final rule requires transmission information kept on OASIS to be retained for audit purposes for five years. Congress provided the Commission with specific anti-manipulation authority in sections 315 and 1283 of the Energy Policy Act of 2005 (EPAct 2005).[47] To implement this new authority, the Commission issued Order No. 670, where it said that it would adhere to the generally applicable five-year statute of limitations when it seeks civil penalties for violations of the new anti-manipulation rules.[48] The extension of the record retention requirement adopted in the final rule is necessary to ensure consistency with the requirements prohibiting market manipulation adopted in Order No. 670 and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the new anti-manipulation rules or other rules, regulations, or orders as to which the data may be relevant. The expansion of the Commission's enforcement powers pursuant to EPAct 2005 directly augmented its ability to enforce the OATT by, among other things, providing authority to assess civil penalties of up to $1 million for each day that an OATT violation continues. The Commission intends to use its enforcement powers with respect to the OATT in a fair and even-handed manner, pursuant to the principles set forth to the Commission's Policy Statement on Enforcement.

As noted above, the information collected under FERC 918(717) is not filed with the Commission but instead posted on their OASIS sites.

. DESCRIBE EFFORTS TO CONSULT OUTSIDE THE AGENCY: SUMMARIZE PUBLIC COMMENTS AND AGENCY'S RESPONSE TO THESE COMMENTS

The Commission's procedures require that the rulemaking notice be published in the Federal Register, thereby allowing all pipeline companies, state commissions, federal agencies, and other interested parties an opportunity to submit comments, or suggestions concerning the proposal. The rulemaking procedures also allow for public conferences to be held as required. Comments are due 60 days from publication of the NOPR in the Federal Register.

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47 Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), sections 315 and 1283.

48 Prohibition of Energy Market Manipulation, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, p. 30,069 at P 63 (2006) (Order No. 670). In Order No. 670, the Commission did not adopt a specific statute of limitations on complaints or enforcement actions that may be brought pursuant to the Commission's anti-manipulation authority, but it did note that, when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations (as is the case with respect to the Commission's anti-manipulation authority), a five-year limitation period applies. Id. citing 28 U.S.C. 2462 (2000).

In proposing to reform Order No. 888, the Commission relied heavily on the comments received in response to its notices of inquiry and found them very informative and useful in drafting the NOPR. The NOPR incorporated many of the commenters' suggestions. The Commission also held technical conferences to more fully address the topics of ATC calculation and transmission planning.

After receiving approximately 6,500 pages of comments from close to 300 parties in responding to the NOPR, the Commission now implements reforms and revisions with the issuance of the final rule.

Need for Reform of Order No. 888

Many commenters agreed with the Commission that reforms to the pro forma OATT are needed because there continue to be both the opportunity and incentive for transmission providers to engage in undue discrimination.[49]

Several commenters offered examples of their experiences with transmission providers, where they believe transmission providers have acted in an unduly discriminatory fashion.[50] Constellation claimed that on multiple occasions it has been denied a transmission request when the transmission provider's OASIS indicates that ATC is available, but Constellation had no effective and timely way to challenge that determination because of the ATC "black box." Constellation stated that given that its needs for transmission service are often near-term or immediate – e.g., to facilitate a load-serving obligation or wholesale transaction that must be consummated quickly – seeking redress at the Commission for improperly denied service generally is not time- or cost-effective. Instead, Constellation asserted, it is often forced to accept the determination of the transmission provider that ATC is not available (even though its OASIS may indicate otherwise) and seek alternate transmission paths and/or products to consummate its transaction.

Powerex also described instances where a transmission provider has granted short-term firm point-to-point transmission service requests to transmission customers who have been allowed to remain in the queue, even when zero ATC is posted, in the hopes that a transmission provider's OASIS site wrongly indicates zero ATC or will soon be updated. Powerex asserted that such practices clog the short-term point-to-point transmission queue with multiple requests and result in duplicative requests for service

49 E.g., APPA, EPSA, East Texas Cooperatives, Fayetteville, NRG, Occidental, TAPS, TDU Systems, Williams, Entegra Reply, and NRECA Reply.
50 See, e.g., Dow, Fayetteville, Occidental, and Williams.

that reflect customers' attempts to secure service, rather than the actual quantity of service needed. Moreover, Powerex argued, transmission provider discretion in this area and the lack of transparency raise customer concerns about preferential treatment.

Occidental claimed that it has first-hand experience with a vertically integrated transmission provider that, despite having an OATT, appears to have persistently used its transmission system to preferentially benefit its merchant function. Similarly, Williams alleged that its interests have been consistently and significantly compromised by the discretion afforded transmission providers in the interpretation of the OATT and the lack of transparency in requesting, scheduling and interrupting of transmission service.

Other commenters, however, argued that the Commission's proposed reforms are based on unsupported allegations of undue discrimination. EEI maintained that any opportunities to engage in undue discrimination have been largely mitigated by current regulatory policies and changes in the industry. EEI explained that, unlike the situation that existed when the Commission enacted Order No. 888, much of the country's transmission facilities are now under the control of RTOs and ISOs. In addition, EEI stated, other transmission providers have transferred (or are in the process of transferring) the administration of their OATTs and OASIS functions to independent transmission service coordinators. Even among the transmission providers who have taken neither of those steps, EEI argued that the open access requirements of Order No. 888 and the Standards of Conduct of Order Nos. 889 and 2004 have largely eliminated the ability of transmission providers to engage in undue discrimination in the provision of transmission

service. In addition, EEI stated, the Commission's expanded civil penalty authority added to the FPA by EPAct 2005 gives the Commission a powerful tool that will further eliminate any remaining incentive of transmission providers to engage in undue discrimination in the provision of transmission service. Therefore, EEI asserted, any modifications to the OATT should be narrowly tailored to address the perceptions of residual undue discrimination. To the extent that such perceptions exist, however, Community Power Alliance stated that, in the absence of concrete record evidence, they are just that – perceptions.

Although Duke strongly supports, as a policy matter, OATT reforms that will eliminate the perception that undue discrimination is possible and/or likely, Duke argued that the FPA does not provide the Commission the authority to remedy mere "opportunities" to discriminate. Duke stated that, in some cases, the Commission is attempting to remedy an opportunity for undue discrimination that does not exist or is proposing to impose a remedy that does not actually remedy the perceived opportunity. Duke noted, however, that some OATT terms and conditions are subject to multiple interpretations and argued that the Commission can, and should, justify the OATT reforms proposed in the NOPR as reforms needed to provide clarity to existing policies.

With regard to specific allegations made by commenters, several transmission providers responded that the examples given by transmission customers do not illustrate instances of undue discrimination. Rather, they asserted, these examples demonstrate the transmission customers' lack of understanding of the OATT requirements, and the data available on OASIS.[51]

New Mexico Attorney General's office argued that the traditional state-regulated, vertically-integrated cost-of-service world is not in need of reform. Contrary to the "conspiracy theorists" who argue that utilities have an incentive to engage in undue discrimination and preference in transmission services, New Mexico Attorney General asserted that utilities have an incentive to maximize throughput and revenue between state-level rate cases because incremental transmission revenue is not deducted from the state-jurisdictional retail revenues between rate cases. Similarly, Southern, in its reply comments, asserted that broad claims of undue discrimination fail to take into consideration that vertically-integrated utilities have more of an incentive to act appropriately than do independent utilities because the former have more to lose (e.g., loss of market-based rates, state prudence reviews of costs, etc.) if they are found to have engaged in wrong-doing. Southern stated that any OATT revisions ultimately adopted by the Commission must be reasonably tailored to address an identified problem or to

51 See, e.g., Entergy Reply, Progress Energy Reply, and Southern Reply.

provide a specific improvement.

Other commenters argued that the Commission's focus should be on transmission providers in non-organized markets, arguing that remaining concerns about undue discrimination have already been addressed in the world of ISOs and RTOs.[52] According to ISO/RTO Council, this proceeding provides an opportunity for the Commission to harmonize the worlds of organized and non-organized markets in a manner that encourages competition, promotes non-discriminatory access, and maximizes the flow of electricity across various ISO/RTO and non-ISO/RTO regions. ISO/RTO Council stated that, in the existing regulatory environment, a utility that is not a member of an ISO or RTO can sell into, or purchase from, an ISO or RTO market even though the non-ISO/RTO utility operates under tariff rules that are less open and transparent, particularly in terms of access to generation resources and pricing/system information, than their competitors that belong to an ISO or RTO. Such asymmetry, ISO/RTO Council argued, operates as an impediment to fair and non-discriminatory transmission access and management of grid congestion.

ISO/RTO Council stated that its members do not seek to impose their market designs on the rest of the nation. At the same time, ISO/RTO Council argued that meaningful reform should ensure a level of transparency (of both price and the dispatch

52 E.g., Indicated New York Transmission Owners, ISO/RTO Council, and Northeast Utilities.

utilized by non-ISO/RTO vertically-integrated entities) in regions without an ISO or RTO that can assist the flow of electricity and enhance reliability and planning in both ISO/RTO and non-ISO/RTO regions.

Exelon urges the Commission to hold the transmission providers outside ISOs or RTOs to the same standard of non-discrimination that exists within those organizations. Further, MISO/PJM States argue that in order to achieve some level of independence in non-RTO regions, non-independent transmission providers should be encouraged to turn over operational control of their transmission systems to an independent coordinator of transmission whose functions would include security coordination, determination of ATC, granting of transmission service and oversight for transmission planning.

Finally, EPSA suggested that the Commission establish a one-year review period for the reformed pro forma OATT. EPSA urged the Commission to revisit this Final Rule after one year of operation under the reformed pro forma OATT to ensure that the revisions adopted in the Final Rule do, in fact, protect against non-discriminatory or

preferential behavior by transmission providers. NRECA responded that, after this comprehensive rulemaking process, there is simply no need for another major look at the OATT in one year. Moreover, NRECA stated, one year is likely too short a period for the Commission and industry participants to fully appreciate all of the consequences of those elements of OATT reform resulting from this proceeding. At the same time, NRECA agreed that the Commission should carefully monitor implementation of the reformed OATT. This monitoring, NRECA stated, must be an ongoing process and cannot wait a year to begin.

Commission Determination

The Commission concludes that reforms are needed to address deficiencies in the pro forma OATT that have become apparent since 1996, by limiting remaining opportunities for undue discrimination. As the Commission found in Order No. 888, it is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide to themselves.[53] Such an incentive can lead to unduly discriminatory behavior against third parties, particularly if public utilities have unnecessarily broad discretion in the application of their tariffs. This discretion also can create problems for transmission providers seeking to comply with the Commission's regulations in good faith because so many issues are left for their interpretation, thereby increasing the possibility of disputes with transmission customers and enforcement actions by the Commission.[54] Transmission customers also have found ways to use the tariffs to their own advantage, particularly in the scheduling and queuing processes.[55]

As some commenters noted, opportunities for undue discrimination persist, particularly in areas where the pro forma OATT leaves the transmission provider with substantial discretion. The Commission has a responsibility under section 206 of the FPA to remedy undue discrimination. The court concluded in Associated Gas Distributors v. FERC,[56] that, like the Natural Gas Act,[57] the FPA "fairly bristles" with

53 Order No. 888 at 31,682.
54 See, e.g., Order No. 2003 at P 11-12.
55 See, e.g., Potomac Economics, Ltd., 2004 State of the Market Report: Midwest ISO at 30-31, 34-35 (Jun. 2005), http://www.midwestmarket.org/publish/Document/2b8a32_103ef711180_-7bf20a48324a/2004%20MISO%20SOM%20Report.pdf?action=download&_property=Attachment (explaining that the queuing process, by giving customers the opportunity to submit multiple requests for service, provides a low or no-cost option that restricts other customers' access to congested interfaces, and the scheduling process, by allowing customers to leave transmission requests unconfirmed, provides a free option that may invite hoarding or result in underutilized capacity).
56 824 F.2d 981 (D.C. Cir. 1987) (AGD).
57 15 U.S.C. 717.

concern over undue discrimination. Based on AGD, the Commission determined in Order No. 888 that:

> The Commission has a mandate under sections 205 and 206 of the FPA to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. We must determine whether any rule, regulation, practice or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and must prevent those contracts and practices that do not meet this standard. . . . AGD demonstrates that our remedial power is very broad and includes the ability to order industry-wide non-discriminatory open access as a remedy for undue discrimination.

Order No. 888 at 31,669. Through the Final Rule, the Commission exercises its remedial authority again to limit further opportunities for undue discrimination, by minimizing areas of discretion, addressing ambiguities and clarifying various aspects of the pro forma OATT.

The Commission disagrees with commenters who assert that the Commission is relying on unsubstantiated allegations of discriminatory conduct to justify OATT reform. The courts have made clear that the Commission need not make specific factual findings of discrimination in order to promulgate a generic rule to eliminate undue discrimination.[58] In AGD, the court explained that the promulgation of generic rate criteria involves the determination of policy goals and the selection of the means to achieve them and that courts do not insist on empirical data for every proposition upon which the selection depends: "[a]gencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[59] During the multi-year proceeding of these rules, the Commission has received many comments arguing that commenters have either experienced or perceived that they have experienced unduly discriminatory conduct by transmission providers. Even transmission providers have acknowledged that there is a continuing perception that there is the opportunity for them to unduly discriminate against their competitors and, accordingly, they state their support for the Commission's reform effort.[60] Moreover, it is undisputed that the existing pro forma OATT provides wide discretion in implementing some of its basic requirements, such as the assessment of whether sufficient ATC exists to grant third party access to the

58 TAPS v. FERC, 225 F.3d at 667, 688; National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006) (National Fuel).
59 824 F.2d at 1008.
60 See, e.g., Duke and EEI.

grid and the manner in which new facilities are planned to satisfy third party needs. This wide discretion, when coupled with a transmission provider's incentive to discriminate, creates opportunities for discrimination under the pro forma OATT. The Commission has an obligation under section 206 to remedy that discrimination.

It is clear to the Commission that, notwithstanding its efforts in Order No. 888, opportunities to engage in undue discrimination can and will persist unless the existing pro forma OATT is reformed. The Commission therefore exercises its broad remedial authority to limit these remaining opportunities for undue discrimination. The Commission concludes that any additional costs incurred by transmission providers to implement the reforms required in the Final Rule are fully justified by the need to ensure open, transparent and non-discriminatory access to transmission service. The Commission also believes it is appropriate to adopt these reforms by rulemaking, rather than rely on complaints filed by transmission customers or other parties. Case-by-case application of the reforms adopted in the Final Rule would be inappropriate since the most fundamental problems addressed in the Final Rule arise from deficiencies in the pro forma OATT itself, not simply the implementation of the pro forma OATT by a few transmission providers. Also, the Commission declines to establish a one-year review period for the reformed pro forma OATT, as EPSA recommended. The Commission will continue to actively monitor compliance with its orders and, as necessary, institute further proceedings to meet its statutory obligation to remedy undue discrimination.

ISO and RTO Public Utility Transmission Providers and Transmission Owner Members of ISOs and RTOs

With respect to an Independent System Operator (ISO) or Regional Transmission Organization (RTO) public utility transmission provider, the Commission recognized in the NOPR that such an entity may already have tariff terms and conditions that are superior to the pro forma OATT. The Commission also noted that the purpose of this rulemaking is not to redesign approved, fully-functioning RTO or ISO markets. Thus, the Commission proposed to require ISO and RTO transmission providers to submit FPA section 206 compliance filings, within 90 days after the publication of the Final Rule in the Federal Register, that contain the non-rate terms and conditions set forth in the Final Rule or that demonstrate that their existing tariff provisions are consistent with or superior to the revised provisions to the pro forma OATT. The Commission also proposed to allow ISO and RTO transmission providers, after making their FPA section 206 compliance filings, to submit filings under FPA section 205 proposing rates for the services provided for in their tariffs, as well as non-rate terms and conditions that differ from their existing tariffs and those set forth in the Final Rule if those provisions are

consistent with or superior to the pro forma OATT. The Commission did not address the specific obligations of transmission owning members of ISOs and RTOs.

Several commenters supported applying the revised pro forma OATT to ISOs and RTOs and requiring ISOs and RTOs to justify any variations there from. MidAmerican argued that universal application of the revised pro forma OATT is important because not every ISO or RTO transmission provider has existing tariff terms and conditions that are consistent with or superior to the OATT. Old Dominion also supported the Commission's compliance proposals for ISOs and RTOs. NRECA similarly stated that RTOs, ISOs and ITCs should not be automatically exempt from any aspect of the rules governing open access transmission service, including the planning requirements. APPA asserted that in their filings, RTOs should be required to show how their transmission service packages, including features such as long term transmission rights, ancillary services, and treatment of losses, are consistent with or superior to the newly revised pro forma OATT. Moreover, APPA argued, the Commission should not allow RTOs to use their avowed independence as a justification for transmission services that in fact do not meet the consistent with or superior to standard.

On the other hand, numerous commenters argued that the proposed compliance process is burdensome and could require ISOs and RTOs to have to relitigate already-approved OATT provisions. The ISOs and RTOs generally argued that, given the nature of the services they offer, many of the proposed revisions do not apply to their OATTs. Many commenters urged the Commission to adopt a more limited compliance filing process. Some commenters, for example, argued that the Commission should only require ISOs and RTOs to submit compliance filings that are limited to the specific pro forma tariff revisions set forth in the Final Rule. Duke argued that ISOs and RTOs should only be required to make a single filing that revises their OATTs in a manner that takes into account the nature of the OATT service provided by that ISO or RTO and

whether a reform adopted in the Final Rule is relevant to the ISO's or RTO's OATT. EEI urged the Commission to require ISOs and RTOs to adopt only those OATT reforms that are necessary to improve the quality of transmission service that is provided by an ISO or RTO. EEI added that those who protest an ISO's or RTO's assertion that an existing provision is consistent with or superior to the revised pro forma OATT should have the burden to demonstrate otherwise. The ISOs and RTOs similarly argued that, absent a specific demonstration that an ISO's or RTO's OATT provisions are unjust and unreasonable, the compliance filing requirements should not apply to ISOs and RTOs.

EEI urged the Commission to clarify that the 90-day filing should include the following materials: revisions of tariff provisions that conform to the revisions in the pro forma OATT that are appropriate, given the ISO or RTO's market structure; statements supporting the provisions of the tariff that the ISO or RTO believes are consistent with or superior to the revised pro forma OATT; and justifications that support excluding revisions of the provisions that the ISO or RTO believes are not consistent with or superior to the revised pro forma OATT. EEI also interpreted the NOPR proposal to mean that an ISO or RTO immediately may make a separate filing proposing further modifications, including revisions to the newly-effective provisions of the pro forma OATT, that are consistent with or superior to the just-filed modifications.

Commission Determination

The Commission has adopted the compliance procedures proposed in the NOPR, with certain revisions and clarifications. The Commission will require ISO and RTO transmission providers to submit FPA section 206 compliance filings, within 210 days after the publication of the Final Rule in the Federal Register, that contain the non-rate terms and conditions set forth in the Final Rule or that demonstrate that their existing tariff provisions are consistent with or superior to the revised provisions of the pro forma

OATT. As with non-ISO/RTO transmission providers, however, the Commission will not require ISO and RTO transmission providers to "rejustify" existing provisions in their OATTs that are not affected in a substantive manner by the revisions to the pro forma OATT in the Final Rule. The Commission finds that such a process is unnecessary, given that it has already found these provisions to be consistent with or superior to the Order No. 888 pro forma OATT and these provisions are not substantively affected by the reforms the Commission adopts in the Final Rule.

The Commission also recognizes, as it did in the NOPR, that some of the changes adopted in the Final Rule may not be as relevant to ISO/RTO transmission providers as they are to non-independent transmission providers. For example, many ISOs and RTOs use bid-based locational markets and financial rights to address transmission congestion, rather than the first-come, first-served physical rights model set forth in the pro forma OATT. As the Commission indicated in the NOPR, nothing in the Final Rule is intended to upset the market designs used by existing ISOs and RTOs. The Commission also recognizes that ISOs and RTOs may well have adopted practices that are already consistent with or superior to the reforms adopted here. For example, ISOs and RTOs tend to have transmission planning processes that are significantly more open and transparent than the processes used by non-independent transmission providers. The Commission encouraged ISOs and RTOs to meet with their stakeholders to discuss whether any improvements are necessary to comply with the Final Rule.

CBM/TRM Posting Requirements

NOPR Proposal

The Commission's OASIS regulations currently require transmission providers to calculate and post ATC and TTC for each posted path, but makes no requirement for

CBM and TRM postings. In the CBM Order, however, the Commission required transmission providers, with respect to each path for which the utility already posts ATC, to post (and update) the CBM figure for that path. The Commission also required transmission providers to make any transfer capability set aside for CBM available on a non-firm basis and to post this availability on OASIS. In the NOPR, the Commission proposed to incorporate these CBM posting requirements into its regulations. The Commission also proposed that transmission providers post (and update) the TRM values for the paths on which the transmission provider already posts ATC, TTC, and CBM.

Several commenters strongly supported the Commission's proposal to require transmission providers to post TRM and CBM.[61] APPA and EPSA agreed that the posting of TRM for near term transmission services would provide greater assurance that ATC calculations are being performed according to established procedures. Since transmission providers already have this information, First Energy stated that it does not appear to be unduly burdensome for them to post such information. Bonneville indicated that it currently posts TRM values in its Business Practices Forum, which is useful for examining curtailment events, supporting transmission planning objectives, and validating posted ATC values.

EPSA also recommended that the Commission provide guidance on standards that should be developed to require each transmission provider to notify the Commission in writing and post a notice on its OASIS within 24 hours of a transmission provider's use of CBM to import emergency power. EPSA also requested that the amount of CBM reserved for each interface be posted on OASIS.

Commission Determination

The Commission has adopted the CBM posting requirements proposed in the

61 E.g., Powerex, PJM, PPL, Seattle, and Pinnacle.

NOPR. In doing so, the Commission amends its OASIS regulations to incorporate the directives established in the CBM Order. Accordingly, the Commission requires transmission providers to post (and update) the CBM amount for each path. In addition, the Commission requires transmission providers to make any transfer capability set aside for CBM but unused for such purpose available on a non-firm basis and to post this availability on OASIS. Furthermore, the Commission requires transmission providers to post (and update) the TRM values for the paths on which the transmission provider already posts ATC, TTC, and CBM.

The Commission rejects EPSA's request to require transmission providers to notify the Commission in writing and post a notice on OASIS within 24 hours of a transmission provider's use of CBM to import emergency power and transfer capability set aside as CBM at each of the transmission provider's interfaces. The additional transparency of CBM-related information provided in the Final Rule, along with the reforms related to consistency of CBM, will cause sufficient information to be made available to customers concerning the use of CBM. The use and allocation of CBM and TRM will be more transparent to transmission customers, thus reducing the potential for undue discrimination.

Documentation for Network Resources

NOPR Proposal

In the NOPR, the Commission noted that transmission providers are responsible for verifying that the network customer has provided all the information required in section 29.2, but that transmission providers are not responsible for verifying that the generating units and power purchase agreements network customers designate as network resources satisfy the requirements in sections 30.1 and 30.7 of the pro forma OATT. However, the Commission also explained that the transmission provider continues to

have the responsibility to verify that third-party transmission arrangements to deliver the purchase to the transmission provider's system are firm.

The Commission proposed to require the transmission provider's merchant function as well as network customers to include a statement with each application for network service or to designate a new network resource that attests that, for each network resource identified in the application for service, (1) the transmission customer owns or has committed to purchase the designated network resource, and (2) the designated network resource comports with the requirements for designated network resources.

If the network customer does not include an attestation when it confirms its request, the Commission proposed that the transmission provider will notify the network customer within 15 days of confirmation that its request is deficient and that, wherever possible, the transmission provider will attempt to remedy deficiencies in the request through informal communications with the network customer. If such efforts are unsuccessful, the Commission further proposed that the status of the request on OASIS will be changed to "retracted" and the network customer's request will be terminated without prejudice to the network customer submitting a new request that includes the required attestation, after which the network customer will be assigned a new priority consistent with the date of the new request.

In the event that the transmission provider or any network customer designates a network resource that it does not own or has not committed to purchase, or that does not otherwise comport with the requirements for designated network resources, the Commission proposed that it will deem the network customer to be in violation of the pro forma OATT and will consider assessing civil penalties on a case-by-case basis consistent with the Commission's Policy Statement on Enforcement. The Commission encouraged the transmission provider and other market participants to use the Commission's Enforcement Hotline to report instances when they believe a network

customer has designated as a network resource a resource that does not meet the criteria for network resources.

Several commenters support the overall proposed changes involving attestation requirements, claiming the proposal should help to eliminate abuse, including the practice of some utilities denying transmission requests in order to accommodate its merchant function's plans to engage in future short-term purchases to serve native load.[62] Entegra explicitly supports the Commission's proposal to treat failures to comply as violations of the pro forma OATT subject to enforcement. Pinnacle notes that customers should make such attestations in good faith, such that an inadvertent error or omission would not automatically result in recourse to a legal remedy if it can be corrected without adverse impacts.

Dynegy argues in its reply comments that transmission customers who knowingly provide false or inaccurate information in their network resource designations not only jeopardize reliability, but are essentially engaging in theft. Dynegy argues that such parties should be subject to the sanctions and penalties under the Market Behavior Rule,[63] including revocation of the violator's market-based rate authority. APPA and TAPS argue that the new attestation requirements should be consistently applied to all network customers, including the transmission provider's merchant function and affiliates.

Several commenters support the Commission's determination that transmission providers are not required to independently verify the accuracy of an application for network service.[64] Some commenters request that the Commission clarify that transmission providers or transmission owners can voluntarily seek information which verifies that contractual terms meet the requirements in section 30.1 and 30.7 of the pro forma OATT.[65] In its reply comments, Duke argued that, without the ability to request the contracts supporting the compliance with the requirement that the designated network resources are firm enough, the Commission may have not authority to require that the network customer support its designation in situations where the network customer is nonjurisdictional.

Commission Determination

62 E.g., Ameren, Entegra, Pinnacle, Public Power Council, and Southern.
63 See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003).
64 E.g., Ameren, EEI, Suez Energy NA, Nevada Companies, and Utah Municipals.
65 E.g., Ameren, Duke Reply, Entergy, and Pinnacle.

The Commission adopts the NOPR proposal that transmission providers continue to be responsible for verifying that third-party transmission arrangements to deliver the purchase to the transmission provider's system are firm, but that transmission providers are not responsible for verifying that the generating units and power purchase agreements network customers designate as network resources satisfy the requirements in sections 30.1 and 30.7 of the pro forma OATT. The Commission also adopts the proposal to require both the transmission provider's merchant function and network customers to include a statement with each application for network service or to designate a new network resource that attests, for each network resource identified, that (1) the transmission customer owns or has committed to purchase the designated network resource and (2) the designated network resource comports with the requirements for designated network resources. The network customer should include this attestation in the customer's comment section of the request when it confirms the request on OASIS.

If the network customer does not include the attestation when it confirms the request, the transmission provider must notify the network customer within 15 days of confirmation that its request is deficient, in accordance with the procedures in section 29.2 of the pro forma OATT. Whenever possible, the transmission provider shall attempt to remedy deficiencies in the request through informal communications with the network customer. If such efforts are unsuccessful, the transmission provider shall terminate the network customer's request and change the status of the request on OASIS to "retracted." This termination shall be without prejudice to the network customer submitting a new request that includes the required attestation. The network customer shall be assigned a new priority consistent with the date of the new request.

In the event that the transmission provider or any other network customer designates a network resource that it does not own or has not committed to purchase or that does not comport with the requirements for designated network resources, we will deem the network customer to be in violation of the pro forma OATT and will consider assessing civil penalties on a case-by-case basis, consistent with the Commission's Policy Statement on Enforcement. The Commission encourages the transmission provider and other market participants to use the Commission's Enforcement Hotline to report

instances where they believe a network resource has been designated that does not meet the Commission's requirements.

In response to Pinnacle's request that an inadvertent error or omission should not automatically result in a penalty if it can be corrected without adverse impacts, the Commission reiterates the policy established in its Policy Statement on Enforcement that enforcement actions will not be imposed "automatically." Enforcement actions are instead considered on a case-by-case basis after consideration of a number of factors which may result in penalties being reduced or eliminated.[66] Among the many factors to be considered pursuant to the Policy Statement on Enforcement is whether the violation is willful.[67] At the same time, consideration is provided for other factors that may weigh for assessing civil penalties, even in circumstances of inadvertent violations. For instance, the Commission considers whether the violator has a history of violations and whether the actions were recklessly or deliberately indifferent to the results.[68] While enforcement actions will not be automatic, and the inadvertence of a violation would be a consideration when determining what, if any, penalty to impose, there may be some instances where inadvertent violations would be found, after consideration as established in the Policy Statement on Enforcement, to warrant a penalty.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

Not applicable. The Commission does not provide compensation or remuneration to entities subject to its jurisdiction.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

The Commission generally does not consider the data filed in rate filings to be confidential. There are no confidentiality provisions associated with the data requirements proposed in the subject Final Rule. Specific requests for confidential treatment to the extent permitted by law will be entertained pursuant to 18 C.F.R. Section 388.110. Section 205(c) of the FPA requires that every public utility have all of its jurisdictional rates and tariffs on file with the Commission and make them available for public inspection, within such time and in such form as the Commission may designate. Section 205(d) of the FPA requires that every public utility must provide notice to the Commission and the public of any changes to its jurisdictional rates and tariffs, file such

66 Policy Statement on Enforcement at P 13.
67 Id. at P 20.
68 Id.

changes with the Commission, and make them available for public inspection, in such manner as directed by the Commission.[69][70]

11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE THAT ARE CONSIDERED PRIVATE.

There are no questions of a sensitive nature that are considered private.

12. ESTIMATED BURDEN ON COLLECTION OF INFORMATION

The Commission's regulations in 18 CFR Part 35 specifies those reporting requirements that must be followed in conjunction with the filing of rate schedules under the FPA. The information provided to the Commission under Part 35 includes electric rate schedule filings, market power analyses, tariff submission, triennial updates, and reporting requirements for changes in status for public utilities with market-based rate authority. The public reporting and records retention burdens as contained in the Final Rule for reporting and the records retention requirements are as follows.

Data Collection	Number of Respondents	Number of Responses	Hours per Response	Total Annual Hours
Part 35 (FERC-516)				
Conforming tariff changes	116	1	25	2,900
Revision of Imbalance Charges	116	1	5	580
ATC revisions	116	1	40	4,640
Planning (Attachment K)	116	1	200	23,200
Congestion studies	116	1	300	34,800
Attestation of network resource commitment	116	1	1	116

69 See The Power Company of America, L.P. v. FERC, 245 F.3d 839 (D.C. Cir. 2001) (PCA). In PCA, the court found, 245 F.3d at 846, that the Commission may alter its view of what information is required to be on file under section 205(c) of the FPA and 35.15 of the Commission's regulations.

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Capacity reassignment	116	1	100	11,600
Operational Penalty annual filing	116	1	10	1,160
Creditworthiness – include criteria in the tariff	116	1	40	4,640
Sub Total Part 35	-	-	-	83,636
Part 37 (FERC-717)				
ATC-related standards: NERC/NAESB Team to develop Review and comment by utility Implementation by each utility	1 116 116	1 1 1	1,920 20 40	1,920 2,320 4,640
Mandatory data exchanges	116	1	80	9,280
Explanation of change of ATC values	116	1	100	11,600
Reevaluate CBM and post quarterly	116	1	20	2,320
Post OASIS metrics; requests accepted/denied	116	1	90	10,440
Post planning redispatch offers and reliability redispatch data	116	1	20	2,320
Post curtailment data	116	1	10	11,160

Post Planning and System Impact Studies	116	1	5	580
Posting of metrics for System Impact Studies	116	1	100	11,600
Post all rules to OASIS	116	1	5	580
Sub Total (Part 37)	-	-	-	68,760
Total (Part 35 + Part 37)	-	-	-	140,476
Recordkeeping	116	1	40	4,640

Total Annual Hours for Collection:

Reporting + recordkeeping hours = 152,396 + 4,640 = 157,036 hours.

13. ESTIMATED OF THE TOTAL COST BURDEN TO RESPONDENTS

The Commission sought comments on anticipated costs for implementing these requirements. No comments were received regarding the Commission's estimate of costs to comply with these requirements. The Commission has projected costs of compliance as follows:

Reporting = $17,373,144
152,396 hours @ $114 an hour (average cost of attorney ($200 per hour), consultant ($150), technical ($80), and administrative support ($25))
Recordkeeping = $7,478,888
Labor (file/record clerk @ $17 an hour) 4,640 hours @$17/hour = $78,880
Storage 8,000 sq. ft. x $925 (off site storage) = $7,400,000
Total costs = $24,852,024
Labor $ ($17,373,144 + $78,880) + Recordkeeping Storage Costs ($7,400,000)
(Using the hourly rate figures of the Bureau of Labor Statistics, occupational series and market rates as applicable, the hourly rate is a composite of the respondents who will be responsible for implementing and responding to the Final Rule (support staff, engineering and legal).

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

The costs to the Commission are estimated to be $1,578,738 (14 FTE (full time equivalent employees x $112,767).

15. REASONS FOR CHANGES IN BURDEN INCLUDING THE NEED FOR ANY INCREASE

The reforms adopted in this Final Rule provide greater clarity in the terms and conditions of the pro forma OATT, resolving ambiguities in the existing pro forma OATT that have made undue discrimination easier to accomplish and more difficult to detect. The Commission's new civil penalty authority under EPAct 2005 provides ample power to remedy tariff violations, but it also places upon the Commission an increased responsibility to make the rules as clear as possible. The Commission fulfills that responsibility in the Final Rule by providing greater clarity where appropriate to several critical OATT provisions. The Final Rule also adopts a number of posting and reporting requirements that will provide the Commission and market participants with information about each transmission provider's performance of pro forma OATT obligations. For example, the Commission requires transmission providers to post specific performance metrics related to their completion of studies required under the pro forma OATT. The Commission will continue to audit compliance with the pro forma OATT, and toward that end the final rule requires transmission information kept on OASIS to be retained for audit purposes for five years. Finally, the Final Rule adopts a number of reforms to operational penalties assessed under the pro forma OATT, including so-called "over-use" penalties and the treatment of operational penalty revenues collected from transmission providers and their affiliates.

16. TIME SCHEDULE FOR THE PUBLICATION OF DATA

Schedule for Data Collection and Analysis

Tariff Amendment Filed	60 days after publication in Federal Register
Initial Commission Order	60 days

17. DISPLAY OF EXPIRATION DATE

It is not appropriate to display the expiration date for OMB approval of the information collected. Currently, the information on the tariff filings is not collected on a standard, preprinted form which would avail itself to this display. Rather, public utilities and licensees prepare and submit filings that reflect the unique or specific circumstances related to rates and services involved in the filing. In addition, the information contains a mixture of narrative descriptions and empirical support that varies depending on the nature of the services to be provided.

18. EXCEPTION TO THE CERTIFICATION STATEMENT

There are exceptions to the Paperwork Reduction Act Submission certification. Because the data collected for these reporting and recordkeeping requirements are not used for statistical purposes, the Commission does not uses as stated in item 19(I) "effective and efficient statistical survey methodology." In addition, as noted in no. 17, this information collection does not fully meet the standard set in 19 (g) (vi.).

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS.

This is not a collection of information employing statistical methods.