Supporting Statement for

FERC-519, "Application for Sale, Lease or Disposition, Merger or Consolidation of Facilities or for Purchase or Acquisition of Securities of a Public Utility"
With regard to Blanket Authorization Under Federal Power Act Section 203

As proposed in Docket No. RM07-21-000
(Notice of Proposed Rulemaking Issued July 20, 2007)

The Federal Energy Regulatory Commission (Commission) (FERC) is submitting for informational purposes only a Notice of Proposed Rulemaking that modifies the requirements contained under the following collection of information: **FERC-519 "Application for Sale, Lease or Disposition, Merger or Consolidation of Facilities or for Purchase or Acquisition of Securities of a Public Utility"** *(Note: There will be no change to the reporting burden for FERC-519.)* **FERC-519** (1902-0082) is an existing information collection requirement approved by OMB through March 31, 2009. We estimate that the annual reporting-burden related to the subject NOPR will have a minimal impact on the reporting burden. The regulations proposed by the Commission do not substantially change the filing requirements with which section 203 applicants must currently apply.

In addition, in separate orders, the Commission is concurrently issuing a section 203 Supplemental Policy Statement[1] and a Notice of Proposed Rulemaking proposing to codify restrictions on affiliate transactions between franchised public utilities with captive customers and their market-regulated power sales affiliates or non-utility affiliates.[2] *(Note: We are submitting copies of these separate orders as part of this submission for informational purposes only. The proceedings in each of these documents will not have an impact on the burden for FERC-519.)*

Background

On August 8, 2005, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) was signed in to law. Section 1289 (Merger Review Reform) of Title XII, Subtitle G (Market Transparency, Enforcement and Consumer Protection) of EPAct 2005 amended section 203 of the Federal Power Act and directed FERC to adopt, by rule, procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions under section 203 of the FPA. Amended section 203 also:

- increased the value threshold for certain transactions subject to section 203 from $50, 000 to $10 million;

1 FPA Section 203 Supplemental Policy Statement, 119 FERC ¶ 61,060 (2007) (issued in Docket No. PL07-1-000).

2 Cross-Subsidization Restrictions on Affiliate Transactions, 119 FERC ¶ 61,061 (2007) (issued in Docket No. RM07-15-000).

• extends the scope of section 203 to include transactions involving certain transfers of generation facilities and certain holding companies' acquisitions with a value in excess $10 million;
• limits FERC's review of a public utility's acquisition of securities of another public utility to actions greater than $10 million; and
• requires that FERC when reviewing a proposed section 203 transaction, examine cross-subsidization and pledges or encumbrances of utility assets.

Section 203 of the FPA currently provides that Commission authorization is required for various types of dispositions and acquisitions of jurisdictional facilities, such as public utility mergers and consolidations. In 1996, the Commission issued the Merger Policy Statement, updating and clarifying the Commission's procedures, criteria, and policies concerning public utility mergers in light of continuing changes in the electric power industry and the regulation of that industry. The purpose of the Merger Policy Statement was to ensure that mergers are consistent with the public interest and to provide greater certainty and expedition in the Commission's analysis of merger applications.

In the year 2000, the Commission issued the Filing Requirements Rule,[3] a final rule updating the filing requirements under 18 CFR Part 33 of the Commission's regulations for section 203 applications. The Filing Requirements Rule implemented the Merger Policy Statement and provides detailed guidance to applicants for preparing applications. The revised filing requirements were also designed to assist the Commission in determining whether section 203 transactions are consistent with the public interest, to provide more certainty, and to expedite the Commission's handling of such applications.

The Energy Policy Act of 2005 (EPAct 2005) revised section 203(a) by amending section 203(a)(1) and directed that no public utility can sell, lease or otherwise dispose of all of its facilities subject to FERC jurisdiction or any part that has a value in excess of $10 million without FERC issuing an order authorizing such activity. In addition public utilities cannot merge or consolidate, directly or indirectly, these facilities with those of another entity without FERC authorization for purchasing, acquiring, taking any security with a value in excess of $10 million of any other public utility. Lastly, public utilities cannot purchase, lease or otherwise acquire an existing generation facility if it has a (a) a value in excess of $10 million; and (b) is used for interstate wholesale sales over which FERC has jurisdiction for ratemaking purposes with FERC authorization.

Section 203(a)(2) added a new requirement that no holding company in a holding company system that includes a transmitting utility or an electric utility is to purchase, acquire,

3 "Revised Filing Requirements under Part 33 of the Commission's Regulations" Order No. 642, 65 FR 70,983 (November 28, 2000).

or take any security with a value in excess of $10 million, or to merge or consolidate with another transmitting utility, electric utility, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company with a value in excess of $10 million without FERC authorization.

Section 203(a)(3) directs that upon receipt of an application for approval, FERC is to give reasonable notice in writing to the Governor and state commission of each of the states to be impacted by the application including where the physical property that will be affected is located and any other persons as may be necessary.

Section 203(a)(4) provides that after notice and an opportunity for hearing, FERC is to approve the proposed disposition, consolidation, acquisition, or change in control if FERC finds that the transaction will be consistent with the public interest. However, a new requirement was imposed on the Commission, namely that it must find that the transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless the cross-subsidization, pledge, or encumbrance is consistent with the public interest.

Section 203(a) (5) is a new requirement that directed FERC by rulemaking to adopt procedures for expeditious application of dispositions, consolidations, or acquisitions. FERC issued Order No. 669 to identify all types of transactions, or specify the criteria for transactions that meet the criteria establish in paragraph 4 of section 1289. FERC must provide expedited review of all transactions and grant or deny approval of the application 180 days after the application is filed. If the Commission cannot make a determination within 180 days, the application is considered to be approved unless FERC can find, based on good cause, that further consideration of is required to determine if the application meets the standards of paragraph (4). If such a situation exists, then FERC is to issue a tolling order which is to last no longer than 180 days, and at the end of the additional period, FERC is to grant or deny the application.[4]

Section 203(a)(6) was also a new section that provides for the terms “associate company”, “holding company” and “holding company system” as defined in the Public Utility Holding Company Act of 2005.[5].

Section 1289(b) provided that the requirements of this section are to take effect six months after the date of enactment of EPAct 2005 or February 7, 2006.

Section 1289(c) provides that the requirements of subsection (a) of section 1289 will not

4 See Paragraph no. 4, EPAct 2005 §1289, Pub. L. No. 109-58, 119 Stat. 594 (2005).
5 EPAct 2005 § 1261 et. seq.

apply to any section 203 application that was filed on or before the date of enactment of EPAct 2005.

Section 203(b) of the FPA remained unchanged.

Subject NOPR (Docket No. RM07-21-000)

On July 20, 2007, the Commission issued in Docket No. RM07-21-000, a Notice of Proposed Rulemaking (NOPR) that proposes to amend the Commission's regulations in accordance with section 203 of the Federal Power Act (FPA) to provide for a limited blanket authorization under FPA section 203(a)(1). The Commission proposes to amend 18 CFR Part 33 (Application for Acquisition, Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility) to implement section 203(a)(1) of the FPA

As noted above, EPAct 2005 expanded the scope of the corporate transactions subject to the Commission's review under section 203 of the FPA. Among other things, amended section 203: (1) expands the Commission's review authority to include authority over certain holding company mergers and acquisitions, as well as certain public utility acquisitions of generating facilities; (2) requires that, prior to approving a disposition under section 203, the Commission must determine that the transaction would not result in inappropriate cross-subsidization of non-utility affiliates or the pledge or encumbrance of utility assets;[6] and (3) imposes statutory deadlines for acting on mergers and other jurisdictional transactions.

This Notice of Proposed Rulemaking is one of three actions being taken based on the Commission's experience implementing amended FPA section 203 and PUHCA 2005, as well as the record from the Commission's December 7 and March 8 Technical Conferences regarding section 203 and PUHCA 2005 *(see item no. 8 of this justification)*. In this docket, the Commission is proposing to grant an additional blanket authorization for certain dispositions of jurisdictional facilities under FPA section 203(a)(1). In addition, in separate orders, the Commission is concurrently issuing a section 203 Supplemental Policy Statement[7] and a Notice of Proposed Rulemaking proposing to codify restrictions on affiliate transactions between franchised public utilities with captive customers and their market-regulated power sales affiliates or non-utility affiliates.[8]

6 Section 203(a)(4) is not an absolute prohibition on the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. If the Commission determines that the cross-subsidization, pledge or encumbrance will be consistent with the public interest, such action may be permitted.

7 FPA Section 203 Supplemental Policy Statement, 119 FERC ¶ 61,060 (2007) (issued in Docket No. PL07-1-000).

8 Cross-Subsidization Restrictions on Affiliate Transactions, 119 FERC ¶ 61,061 (2007) (issued in Docket No. RM07-15-

In the Order No. 669 rulemaking proceeding (*see RM05-34-000 et. al.)*, the Commission set forth several blanket authorizations under which participants to FPA section 203-jurisdictional transactions need not seek ex ante Commission approval. These authorizations included a blanket authorization under section 203(a)(2) under which certain holding companies may acquire the voting securities of a public utility if the acquisition would give the holding company less than 10 percent ownership of the outstanding voting securities of such public utility.[9] The Commission found in Order No. 669 that several classes of transactions covered by amended section 203(a)(2) would not harm competition or captive customers, including acquisitions of voting securities that would give the acquiring entity not more than 9.99 percent ownership of the outstanding voting securities of the acquired utility or company.[10] While parties sought an additional blanket authorization under section 203(a)(1) to parallel that provided under section 203(a)(2), the Commission could not make a determination with respect to section 203(a)(1) at that time. Specifically, with regard to the request for parallel blanket authorization under section 203(a)(1) for equity ownership interests in public utilities that result in a change in control over the underlying public utility, the Commission found in Order No. 669-A that such a blanket authorization would not address the "[c]oncerns with control, markets and protections of captive customers or customers receiving transmission service over jurisdictional transmission facilities"[11] implicated by section 203(a)(1). However, in Order No. 669-B, in response to comments that the lack of a parallel section 203(a)(1) authorization could thwart utility investment, the Commission stated that this issue would be included in the forthcoming technical conferences.[12]

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9 The section 203(a)(2) blanket authorization states:

> Any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to purchase, acquire, or take: . . . (ii) Any voting security in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric utility company if, after the acquisition, the holding company will own less than 10 percent of the outstanding voting securities.

18 CFR 33.1(c)(2)(ii). Because a "transmitting utility" or "electric utility company" may also be a "public utility" as defined in the FPA, the public utility may need to obtain separate authorization for the same transaction under FPA section 203(a)(1), which requires authorization for public utilities to dispose of jurisdictional facilities.

10 Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 141.

11 Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 103.

12 Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at P 26.

Based on the record from the technical conferences (including both oral and written comments) and the Commission's experience under amended section 203 to date, the Commission proposes to provide for a limited blanket authorization to public utilities under section 203(a)(1). This blanket authorization would work in conjunction with the blanket authorization granted to holding companies under section 203(a)(2) in 18 CFR§ 33.1(c)(2)(ii).[13] Under this limited blanket authorization, a public utility would be pre-authorized to dispose of less than 10 percent of its voting securities to a public utility holding company but only if, after the disposition, the holding company and any associate company in aggregate will own less than 10 percent of that public utility. The Commission noted that this proposed blanket authorization would not entirely "parallel" the section 203(a)(2) authorization since the section 203(a)(2) authorization does not contain the "in aggregate" limitation. However, the Commission believes this limitation would provide better protection against possible transfer of "control" of a public utility. The Commission is seeking in the NOPR comment on this limitation.

The Commission believes that the disposition of such limited voting interests (less than 10 percent), with the proposed "in aggregate" restriction and the existing reporting requirements applicable to holding companies,[14] will not harm competition or captive customers. Moreover, this 10 percent threshold is consistent with the definition of "holding company" under section 1262(8)(A) of PUHCA 2005. Under that definition, any company that has the power to vote 10 percent or more of the securities of a public utility company (or a holding company of a public utility company) triggers holding company status and thus is presumed to raise sufficient concerns about controlling influence over a subsidiary public utility that regulatory oversight is needed. The 10 percent threshold is also consistent with the blanket authorization granted under section 203(a)(2) in the Order No. 669 rulemaking proceeding, under which holding companies are pre-authorized to acquire up to 9.99 percent of voting securities of a public utility. As noted, as part of the existing "parallel" blanket authorization under section 203(a)(2), the Commission already requires the holding company to provide to the Commission copies of any Schedule 13D, Schedule 13G and Form 13F at the same time and on the same basis, as filed with the SEC in connection with any securities purchased, acquired or taken pursuant to the blanket authorization under section 203(a)(2) provided in § 33.1(c)(2) of the Commission's regulations.[15] Importantly, a Schedule 13 filer must acquire the subject securities "in the

13 See supra note 10.

14 See, e.g., 18 CFR 33.1(c)(4) (requiring the filing of Securities and Exchange Commission (SEC) Schedule 13D, Schedule 13G, and Form 13F, if applicable); 18 CFR 35.42(a) (effective 60 days after publication in the Federal Register of Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities, Order No. 697, 72 FR 39903 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007)) (requiring a notification of any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority); 18 CFR 366.4(a) (requiring Form FERC-65 (notification of holding company status)).

15 18 CFR 33.1(c)(4).

ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect" over entities whose securities it holds.[16] It is also required to file a notification with the SEC of any acquisition of beneficial ownership of more than five percent of a class of equity securities.[17] Because the Commission already receives these filings from the holding company, the Commission proposes not to require additional reporting on the part of individual public utilities to duplicate the reporting of information it is already getting about the same transaction. However, the Commission is seeking comments in the NOPR on whether any additional reporting by the public utility should be required.

Docket No. RM07-15-000 Cross-Subsidization Restriction on Affiliate Transactions -

In RM07-15-000 a NOPR issued simultaneously with RM07-21-000, the Commission is proposing to amend its regulations to revise Part 35 of Title 18 of the Code of Federal Regulations (CFR) and in accordance with sections 205 and 206 of the Federal Power Act (FPA),[18] to codify affiliate restrictions that would be applicable to all power and non-power goods and services transactions between franchised public utilities with captive customers and their market-regulated power sales and non-utility affiliates.[19] The Commission's goal in proposing these preventive restrictions is to protect against inappropriate cross-subsidization of market-regulated and unregulated activities by the captive customers of public utilities. The proposed restrictions are based upon those already imposed by the Commission in the context of certain FPA section 203-[20] and 205 approvals, but expand the transactions and entities to which

16 17 CFR 240.13d-1(b)(1)(i).

17 17 CFR 240.13d-1(a).

18 16 U.S.C. 824d, 824e.

19 For purposes of this Notice of Proposed Rulemaking, a "market-regulated" power sales affiliate means any power sales affiliate, other than a franchised public utility, whose power sales are regulated in whole or in part on a market basis. This would include, e.g., a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate permitted to make some or all of its power sales at market-based rates. A "non-utility" affiliate would include an affiliate that is not in the power sales or transmission business, e.g., a coal mining company, construction company, real estate company, energy-related technology company, communications systems company, among others. While the Commission, in previous documents, has referred to both categories of affiliates as "non-regulated," consistent with the discussion on cross-subsidization issues in our recent Market-Based Rate Final Rule, the Commission believes the term "market-regulated" more accurately describes power sellers with market-based rates since they remain subject to regulation. Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities, Order No. 697, 72 FR 39903 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 490 (2007) (Market-Based Rate Final Rule). Accordingly, the Commission has modified its terminology in the Notice of Proposed Rulemaking.

20 16 U.S.C. 824b, amended by Energy Policy Act of 2005, Pub. L. No. 109-58, 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005).

they apply.

Docket No. PL07-1-000 FPA Section 203 Supplemental Policy Statement

The Commission is also issuing PL07-1-000, a Policy Statement as a supplement to the Commission's rulemakings issued in 2006 to implement provisions of the Energy Policy Act of 2005 and also as a supplement to its 1996 Merger Policy Statement. The 2006 rulemakings addressed amendments to the Commission's corporate review authority under section 203 of the Federal Power Act (FPA),[21] the repeal of the Public Utility Holding Company Act of 1935[22] and the enactment of the Public Utility Holding Company Act of 2005.[23] Based on the Commission's experience in implementing the new laws thus far, and on the two technical conferences in which industry participants and state commissioners provided input on key issues, including the protection of captive customers against inappropriate cross-subsidization and the need to provide sufficient flexibility to encourage industry investment that benefits customers, the Commission finds that it is appropriate to provide guidance in this Policy Statement regarding future implementation of section 203. The Commission is clarifying that this Policy Statement supplements, and does not replace, any part of the Commission's 1996 Merger Policy Statement.

A. Justification

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

The Commission is obligated by statute to regulate key economic aspects of the electric, natural gas and oil industries. The law requires the Commission's economic regulatory activity because the transmission of electricity, natural gas, and oil has often been a natural monopoly. In enacting Part II of the Federal Power Act (FPA) in 1935, one of the primary Congressional goals was to protect electric ratepayers from abuses of market power. To accomplish this goal, Congress directed the FERC to oversee sales for resale and transmission service provided by

21 16 U.S.C. 824b (2000), amended by EPAct 2005, Pub. L. No. 109-58, 1289, 119 Stat. 594, 982-83 (2005). See also Transactions Subject to FPA section 203, Order No. 669, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), order on reh'g, Order No. 669-A, 71 FR 28422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214, order on reh'g, Order No. 669-B, 71 FR 42579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

22 16 U.S.C. 79a et seq. (PUHCA 1935).

23 EPAct 2005, Pub. L. No. 109-58, 1261, et seq., 119 Stat. 594, 972-78 (PUHCA 2005). See also 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), order on reh'g, Order No. 667-A, 71 FR 28446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213, order on reh'g, Order No. 667-B, 71 FR 42750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006), order on reh'g, Order No. 667-C, 72 FR 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007).

public utilities in interstate commerce. Under Section 203 of the FPA, the FERC must review proposed mergers, acquisitions and dispositions of jurisdictional facilities by public utilities, if the value of facilities exceeded $50,000, *(now $10 million for certain transactions due to EPACT 2005, see above)* and must approve such transactions if they are consistent with the public interest. Today, one of FERC's overarching goals is to promote competition in wholesale power markets, having determined that effective competition, as opposed to traditional forms of price regulation, can best protect the interests of ratepayers. Market power, however, can be exercised to the detriment of effective competition and exercise of market power in bulk power markets.

Market power can be created or enhanced by mergers. Mergers can eliminate a competitor from the market and concentrate control of generating assets. Mergers can also enhance vertical market power, by giving the merged company a new or increased ability or incentive to restrict inputs to power production. The Commission considers market power issues in reviewing applications for mergers or other jurisdictional acquisitions or dispositions of assets. If a merger will create market power or enhance the applicant's market power significantly, mitigation of these effects is required in order to ensure that the merger is consistent with the public interest.

As noted above, Section 203 of the FPA provides that FERC approval is required for transactions in which a public utility disposes of jurisdictional facilities, merges such facilities with facilities owned by another person, or acquires the securities of another public utility. Under the statute, FERC must find that the proposed transaction will be consistent with the public interest. The filing requirements under review define the terms of information necessary to investigate the possible impact of the proposed transaction on public interest.

The basis for current practices with respect to Section 203 applications is Federal Power Commission Opinion No. 507 issued in the 1966 Commonwealth Edison Company, proceeding, 36 FPC 907. In that proceeding FERC set forth the criteria to be applied when determining whether the proposed transaction is consistent with the public interest.

This proposed rule proposes codification of a limited blanket authorization under FPA section 203(a)(1), providing for a category of jurisdictional transactions under section 203(a)(1) for which the Commission would not require applications seeking before-the-fact approval.

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

Since 1935, the Commission has regulated certain electric utility activities under

the Federal Power Act (FPA). Under FPA sections 205 and 206, FERC oversees the rates, terms and conditions of sales for resale of electric energy and transmission service in interstate commerce by public utilities. The Commission must ensure that those rates, terms and conditions are just and reasonable, and not unduly discriminatory or preferential. Under FPA section 203, the Commission reviews mergers and other asset transfers involving public utilities.

The information from FERC-519 enables the FERC to exercise its authority for public utility disposition, merger, consolidation of facilities, purchase or acquisition oversight and enforcement responsibilities in accordance with the FPA as referenced above. Without this information, FERC would be unable to employ examine and approve or modify these actions. The FERC may employ enforcement proceedings when violations occur.

The requisite information includes descriptions of corporate attributes of the party or parties to the proposed transaction (a sale, lease, or other disposition, merger, or consolidation of facilities, or purchase of other acquisition of the securities of a public utility and the facilities or other property involved in the transaction), statements as to the effect of the transaction or current contracts, and the applicant's showing that the transaction will be consistent with the public interest.

FERC in response to rapid development of new market institutions is looking at ways to promote competition in regional power markets. It must also ensure that competitive market structures continue to deliver just and reasonable rates. By law, FERC reviews changes in ownership or control of electric power facilities. These reviews become even more important in a more competitive environment. Companies are finding it necessary to repackage their assets by building on their strengths and reducing their vulnerabilities and FERC must ensure that changes in ownerships patterns do not create market power problems.

Competition led to significant merger activity in many industries, but mergers can create or enhance market power by reducing the number of energy providers. The FERC's challenge is first to decide whether particular mergers are in the public interest and then to monitor them for overly concentrated markets and exercises of market power by those companies. Many parties have bought and sold electric generating plants-asset acquisition can raise important market power issues. Convergence between the gas and electric industries has also led to mergers and alliances across two industries.

However, in light of scandals that have plagued the energy industry, the number of merger applications has declined dramatically. Many energy companies are shedding assets on a massive scale. This sell-off is predominately driven by an industry-wide "back to basics" strategy and the need for some companies to regain liquidity as they struggle with industry overcapacity and illiquid trading markets

This information collection is the minimum necessary to comply with the statutes. The consequences of any failure to collect the specified data would prevent Commission determination of these jurisdictional corporate activities which is adverse to public interest. If this information were not collected, there would be no data available to determine whether violations of the law had occurred and the Commission would not have all of the regulatory mechanisms necessary to ensure customer protection.

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

There is an ongoing effort to determine the potential and the value of improved information technology to reduce the burden. Specifically, in order to increase the efficiency with which it carries out its program responsibilities, the Commission has been implementing measures to use information technology to reduce the amount of paperwork required in its proceedings. In Order No. 619, FERC established an electronic filing initiative to meet the goals of the Government Paperwork Elimination Act, which directed agencies to provide for optimal use and acceptance of electronic documents and signatures and electronic recordkeeping, where practical, by October 2003. Among the qualified documents that can now be filed electronically are comments on a filing. "Comments on a Filing" is a document filed in response to a FERC public notice or order in a specific FERC docketed proceeding. It includes comments on applications, comments filed with environmental documents, protests or statements of positions.

In Order No. 617, July 27, 2000, FERC amended its records' retention regulations to reduce the burden of maintaining records for regulated companies. The Commission did not establish specific media type in order to give the regulated entities the flexibility in the selection of media in order to adapt quickly to changes in technology without the necessity of obtaining FERC approval on the use of media not provided for in the regulations.

In Final Rule RM98-4-000, Order No. 642, the Commission required in 18 CFR 33.6 that applicants submit a form of notice for publication in the Federal Register announcing the submission of the application to FERC and providing a notice in electronic format. Likewise in 18 CFR 33.8 applicants are required to provide copies of the competitive screen analysis in both hard copy and electronic versions. The FERC must have the ability to perform within a reasonable amount of time, an independent verification of the horizontal or competitive analysis presented by the application. To do so, both the Commission and the intervenors to its proceedings must have the data underlying the analysis in a useful format. Both of these measures were instituted to expedite review and processing of the application and to disseminate the information to the public as soon as possible. Further, as the Commission increases its use

of electronic media for filing, storage, retrieval, and tracking of information and documents, greater uniformity in filing procedures, where practical, will greatly expedite and simplify the conversion to electronic media. The issuance of the final rule streamlined filing requirements and reduced the information burden for mergers and other dispositions of jurisdictional facilities that raised no competitive concerns and eliminated filing requirements that were outdated or longer useful to the Commission.

In RM07-16-000 issued July 19, 2007, the Commission is proposing to revise its regulations to implement the latest version of its eFiling system. The upgraded system will permit most documents filed with the Commission to be submitted via the Internet. This will include, among other things, large documents such as maps and some confidential documents. The Commission also is proposing to extend the filing deadline for documents submitted to its eFiling system to midnight, rather than the close of business.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATON 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.

Commission filings and data requirements are periodically reviewed in conjunction with OMB clearance expiration dates. This includes a review of the Commission's regulations and data requirements to identify any duplication. In certain cases, some of the required data in 18 CFR 33.3 is available from other FERC information collections. In these cases, the applicant may request a waiver of the filing requirements which is typically granted.

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

The information requirements under FERC-519 apply to all jurisdictional entities. The FERC realizes that not all applications require the same amount of information (e.g., regarding an applicant’s organizational structure and business arrangement activities) to allow the Commission to evaluate whether the transaction is consistent with the public interest. Applicants may request a waiver of specific sections accompanied by support for why they believe that FERC does not need such information. For example, as to the requirement of 18 CFR 33.2(c)(3) to provide organizational charts, an applicant can seek waiver of this requirement based on a demonstration that the proposed transaction does not affect the corporate structure of any party to the transaction.

Most public utilities to which the requirements in this NOPR apply do not fall within the Regulatory Flexibility Act's definition of a small entity.[24] In particular, this proposed rule proposes codification of a limited blanket authorization under FPA section 203(a)(1), providing for a category of jurisdictional transactions under section 203(a)(1) for which the Commission would not require before-the-fact approval. Thus, filing requirements are reduced by the rule. In addition, the proposed rule does not substantially change the current requirements and regulations that applicants must comply with for transactions subject to FPA Section 203.

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLELCTION WERE CONDUCTED LESS FREQUENTLY

Section 203 of the FPA requires a filing every time a public utility disposes of jurisdictional facilities, merges such facilities, or acquires the securities of another public utility. If the collection were conducted less frequently, the Commission would be unable to perform its mandated oversight and review responsibilities with respect to facilities, mergers and securities transactions under Section 203 of the FPA.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

There are no special circumstances requiring the collection of information to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5, except as provided below:

a) There is no time schedule for the information collection. Public utilities make corporate application filings when they seek to:
- Dispose of or acquire jurisdictional facilities;
- Merge such facilities with another person or
- Acquire securities of another public utility.

b) Section 1320.5(d) limits the collection of data to an original and two copies of any document. The data currently provided under FERC-519 includes an original and eight copies. The original is routed to *e*- Library for public dissemination over FERC's web site. One copy is distributed to the Office of the Executive Director for public inspection in the Commission's Public Reference Room. An additional copy is distributed to the Office of the General Counsel for legal review. Three copies are distributed to the Office of Markets, tariffs and Rates for technical review and an additional copy is forwarded for review of accounting transactions. Order No. 642 increased the number of copies from five to eight because of the increasing complexity of Section 203 applications being filed.

24 5 U.S.C. § 601(3) (2000).

> In order for the Commission to be able to process Section 203 applications as expeditiously as practicable, with a stated goal of issuing an initial order for most merger applications within 150 days of a completed application, it could only be achieved by distributing copies simultaneously to the respective staff within the Office of Markets, Rates and Tariffs.

With further development of the Commission's electronic filing system (see above), staff will be able to conduct these review functions with fewer hard copies in a timely manner.

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

The Commission's procedures require that the rulemaking notice be published in the Federal Register, thereby allowing all public utilities, 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 30 days from publication in the Federal Register.

On December 7, 2006, the Commission held a technical conference (December 7 Technical Conference) to discuss several of the issues that arose in the Order No. 667 and Order No. 669 rulemaking proceedings. The December 7 Technical Conference discussed a range of topics. The first panel discussed whether there are additional actions, under the FPA or the NGA, that the Commission should take to supplement the protections against cross-subsidization that were implemented in the Order No. 667 and Order No. 669 rulemaking proceedings. The second panel discussed whether, and if so how, the Commission should modify its Cash Management Rule[25] in light of PUHCA 2005 and whether the Commission should codify specific safeguards that must be adopted for cash management programs and money pool agreements and transactions. The third panel discussed whether modifications to the specific exemptions, waivers and blanket authorizations set forth in the Order No. 667 and Order No. 669 rulemaking proceedings are warranted.

On March 8, 2007, the Commission held a second technical conference (March 8 Technical Conference) to discuss whether the Commission's section 203 policy should be revised and, in particular, whether the Commission's Appendix A merger analysis is sufficient to identify market power concerns in today's electric industry market environment. The first panel discussed whether the Appendix A analysis is appropriate to analyze a merger's effect on

25 Regulation of Cash Management Practices, Order No. 634, 68 FR 40500 (July 8, 2003), FERC Stats. & Regs. ¶ 31,145, revised, Order No. 634-A, 68 FR 61993 (Oct. 31, 2003), FERC Stats. & Regs. ¶ 31,152 (2003) (Cash Management Rule).

competition, given the changes that have occurred in the industry (e.g., the development of Regional Transmission Organizations (RTOs)) and statutory changes (e.g., as a result of the repeal of the Public Utility Holding Company Act of 1935[26] and new authorities given to the Commission in EPAct 2005[27]). The second panel assessed the factors the Commission uses in reviewing mergers and the coordination between the Commission and other agencies (including state commissions) with merger review responsibility.

In addition, certain participants to the technical conferences argued that a blanket authorization under section 203(a)(1) should be granted for transactions in which a public utility or a holding company is acquiring or disposing of a jurisdictional contract where the acquirer does not have captive customers and the contract does not convey control over the operation of a generation or transmission facility. These commenters argued that because acquisition of these contracts cannot create competitive or rate concerns, the Commission should grant blanket authorization under section 203(a)(1) for such transactions. Because the specific request for blanket authorization may present concerns where the transferor has captive customers, the Commission through this NOPR is seeking comment on whether the Commission should grant a generic blanket authorization under section 203(a)(1) for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers and the contract does not convey control over the operation of a generation or transmission facility.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to respondents in the requirements contained in the proposed rule.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

The Commission generally does not consider the data filed in Section 203 filings to be confidential. However, the Commission realizes the commercial sensitivity of specific information (e.g. with regard to products that applicants plan to sell) and the harm that may come to applicants by the potential disclosures to competitors. Applicants are free to claim confidentiality for this information under the Commission's regulations. (18 CFR 388.112) Recognizing the sensitivity of particular information, the Commission will presume that the information falls within exemption from public disclosure under the Freedom of Information Act for "trade secrets and commercial or financial information obtained from a person and

26 16 U.S.C. 79a et seq. (PUHCA 1935).

27 These include new authorities through amended FPA section 203 as well as PUHCA 2005.

privileged or confidential." (18 CFR 388.107(d)) If parties seek access to the information, and the Commission determines that limited disclosure is necessary to satisfy the due process rights of intervenors to challenge relevant evidence relied upon by applicants, then the Commission will allow access to parties' attorneys and experts only under the terms of appropriate protective order.

11. PROVIDE ADDITIONAL JUSTIFICAITON FOR ANY QUESTIONS OF A SENSITIVE NATURE

There are no questions of a sensitive nature associated with the reporting and recordkeeping requirements proposed in the subject NOPR.

12. ESTIMATED BURDEN COLLECTION OF INFORMATION

Filings vary in length and complexity depending on the nature of the transaction, the financial arrangements, the number of parties involved and whether a facility's disposition includes leaseback arrangements. Because of the vast variability of the filings, the inclusion of a typical filing here as an attachment is not provided. Instead, the reviewer is referred to FERC's web site at http://www.ferc.gov.elibrary and proceed to either "General Search" or "Advanced Search" and choose a docket number on the menu for one of the following:

Docket Number	
EC04-5-000	Calpine Eastern Corp. and Bethpage Energy Center (Disposition of Facilities)

For a merger application, the following is a representative example:

EC03-53-000	Ameren Corporation, Dynegy Inc., Illinova Corporation and Illinova Generating Company.

Data Requirement (FERC-519)	**Current OMB Inventory**	**As Proposed in NOPR**
Estimated number of respondents:	134	134
Estimated number of responses (per respondent)	1	1
Estimated number of responses per year:	134	134
Estimated number of hours per response:	395	395
Total estimated burden hours:	52,390*	52,930

*OMB inventory as of 6/30/2007

With respect to the NOPR, the Commission is proposing amendments to the Commission's regulations to provide for a limited blanket authorization under FPA section 203(a)(1). The regulations that the Commission proposes should have a minimal impact on the current reporting burden associated with an individual application, as they do not substantially change the filing requirements with which section 203 applicants must currently comply. Further, the Commission does not expect the total number of section 203 applications under amended section 203 to increase, but rather expects the total number of section 203 applications to decrease. This is due to the proposed rule providing for a category of jurisdictional transactions for which the Commission would not require applications seeking before-the-fact approval. This would reduce the burden on the electric industry because it will reduce the number of applications that need to be made with the Commission.

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

Current costs:

Data Collection	Number of Respondents	Annualized ongoing costs (operations. & maintenance)	Total Annualized Costs
FERC-519			
a)w/o analysis	132	$ 37,200	$ 4,910,400.00
b)simple merger	2	$615,528	$ 1,231, 056.00
c)complex merger	0	$5,123,400	$ 0.00
Totals	134		$ 6,141,456.00

As noted in item 12 of this submission, the proposed rule will not substantially change the filing requirements with which section 203 applicants must currently comply. Therefore, the Commission does not anticipate a substantial change to the costs for performing the different activities identified above.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT:

(a) Forms Clearance Review	$ 6,235
(b) Analysis of Data (12 FTE)	$1,465,644
Year of Operation	$1,471,879

The estimate of the cost to the Federal Government is based on salaries for professional and clerical support, as well as direct and indirect overhead costs. An "FTE" is a "Full Time Equivalent" employee that works the equivalent of 2,080 hours per year.

Salary represents the allocated cost per electric program employee at the Commission based on its appropriated budget for fiscal year 2007. The $122,137 "salary" represents the staff responsible for processing Section 203 filings.

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

While the Commission is implementing the amended provisions of section 203 (See reasons for change in Background section above), the changes do not substantially change the filing requirements, and also the changes will result in offsetting changes to the reporting burden.

16. TIME SCHEDULE FOR PUBLICATION OF DATA

Schedule for Data Collection and Analysis

Application Filed	On Occasion
Initial Commission Order	60 days (w/o analysis and or simple merger) 150 days (complex merger)

17. DISPLAY OF EXPIRATION DATE

It is not appropriate to display the expiration date for OMB control of the information collection. The information 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 mergers or for the disposition of facilities or the acquisition of securities. In addition, the information contains a mixture of narrative descriptions and empirical support that caries depending on the nature of the application.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

There is an exception to the Paperwork Reduction Act statement. The Commission will not be using statistical survey methodology for these information collections.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not Applicable. Statistical methods are not employed for these data collections.