

Supporting Statement for  
**FERC Form 423, Monthly Report on Cost and Quality of Fuels for Electric Plants,**  
As Proposed In Docket No. RM07-18-000  
(Notice of Proposed Rulemaking Issued November 2, 2007)

The Federal Energy Regulatory Commission (Commission) requests Office of Management and Budget (OMB) review and approval of **FERC Form 423, Monthly Report on Cost and Quality of Fuels for Electric Plants**, an existing data requirement. FERC Form 423 is contained in 18 CFR 141.61 of the Commission's regulations. The Commission is proposing to discontinue the Form 423 in a Notice of Proposed Rulemaking (NOPR) in Docket No. RM07-18-000 as issued on November 2, 2007. FERC Form 423 (OMB Control No. 1902-0024) is currently approved through December 31, 2008.

### Summary

The Commission's infrequent use of the information collected in the Form 423 no longer justifies the cost of collecting it. Conversely, the Energy Information Administration (EIA) has expressed a need for this information and, upon cessation of the Commission's collection, proposes to collect the information as part of its newly proposed EIA-923 survey.<sup>1</sup>

We estimate the discontinuance of Form 423 as specified in the subject NOPR will result in the reduction of 6,828 burden hours. This is equivalent to an average of 12 hours per company.

All of the proposed changes in the subject NOPR are provided for under section 205 of the Federal Power Act (FPA) as amended by section 208 of the Public Utility Regulatory Policies Act (PURPA).<sup>2</sup>

### Background

The Commission's regulation of wholesale electric rates under section 205 of the FPA includes the requirement that such rates be just and reasonable. To determine just and reasonable rates for electric service it is necessary to investigate and analyze the various costs, including fuel costs, incurred in providing the service. Fuel costs typically accounts for two-thirds of a fuel plant's total annual operating expenses.

Section 205 of the FPA, as amended, requires the Commission to conduct a review every two years of utility fuel procurement practices under automatic fuel adjustment clauses to assure

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<sup>1</sup> Energy Information Administration Electric Power Survey, OMB Control No. 1905-0129, Supporting Statement A, (submitted to the Office of Management and Budget for review on October 4, 2007), available at: [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=200709-1905-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200709-1905-003).

<sup>2</sup> 16 U.S.C. 824 and 16 U.S.C. 825j.

economic purchase of fuels. In the past, most jurisdictional utilities included in their wholesale rate structures automatic fuel adjustment clauses (FAC) under which changes in fuel costs are permitted to be passed on to customers as they occur, without the regulatory review that would occur with the filing of new rates. However, the issuance of Order No. 888<sup>3</sup> and the public utility industry's increasing reliance on market-based rates has resulted in less reliance on cost-based rates and less need to evaluate rates by reference to the utility's costs. In short, there are fewer public utilities with cost-based rates<sup>4</sup> and particularly with FACs as part of their rates.

When the Commission does need data concerning fuel purchases, this can be obtained on a case-by-case basis through special reports, investigations, or in formal proceedings.<sup>5</sup>

### **Energy Information Administration**

The Energy Information Administration (EIA) in a notice published in the Federal Register on April 4, 2007,<sup>6</sup> announced their intentions to begin collecting the FERC Form 423 information upon cessation of the Commission's collection. In that notice, they state that they propose to consolidate their existing EIA-423 with the FERC Form 423 data and create a new information collection EIA-923 "Power Plant Operations Report." EIA states that this will allow them to "capture all of the fossil fuel receipts data on one form for the entire industry."<sup>7</sup> Further, they maintain that combining two collections on a single form will potentially increase the overall efficiency of the Federal program to collect monthly fuel information as well as improve the utility of the resulting information products. EIA indicated in its notice:

"By merging the forms, the information can be collected and checked at the same time."

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<sup>3</sup> 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, 62 FR 64688 (December 9, 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), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>4</sup> A review of data from the Electric Quarterly Reports for calendar year 2006 indicates that market-based power sales constituted ninety percent of jurisdictional power sales (reported as energy sales and booked out transactions). Five percent were at cost-based rates, and the other five percent could not be readily categorized given the information reported.

<sup>5</sup> See, e.g., 16 U.S.C. 825e, 825f.

<sup>6</sup> 72 FR 16337.

<sup>7</sup> Energy Information Administration Electric Power Survey, OMB Control No. 1905-0129, Supporting Statement A, (submitted to the Office of Management and Budget for review on October 4, 2007), available at [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=200709-1905-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200709-1905-003).

This tacit acknowledgement of the intention to implement the EIA Form 923 reporting requirements prompts the Commission to issue a notice of proposed rulemaking at this time. The Commission's issuance of a final rule will ensure continuity between the reporting regime of the Form 423 and the new EIA Form 923 and avoid possible data lapses.

### **Subject NOPR (Docket No. RM07-18-000)**

On November 2, 2007, the Commission issued a Notice of Proposed Rulemaking to amend its regulations to eliminate the Form No. 423. The Commission's infrequent use of the information no longer justified the burden and cost of collecting it. Conversely, the Energy Information Administration has expressed a need for this information and, upon cessation of the Commission's collection, proposes to collect the information, as part of its newly proposed EIA-923.

The Commission proposes to collect Form 423 information ending with the December 2007 report, due February 15, 2008, to coordinate with the initiation of EIA's collection of that information. However, if EIA is not prepared to collect the information at that time, to prevent a gap in data continuity, the Commission will continue to collect the information, until such time as EIA is prepared to begin collection, but not to extend beyond the December 2008 report, due in February 2009.

#### **A. Justification**

##### **1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY**

Form 423 gathers information on the cost and quality of fuels delivered to steam electric generating plants of 50 MW or greater. This information has been used over the years for a variety of purposes, including: (1) to conduct fuel reviews under Federal Power Act (FPA) sections 205(a) and (e);<sup>8</sup> (2) to address fuel costs and fuel purchase practices affecting public utility rates under FPA sections 205 and 206;<sup>9</sup> and (3) to detect abnormally high fuel costs in public utility fuel purchases indicative of affiliate preference under FPA sections 205 and 206 as amended by section 208 of the Public Utility Regulatory Policy Act of 1978 (PURPA).<sup>10</sup>

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

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<sup>8</sup> 16 U.S.C. 824d(a), (e).

<sup>9</sup> 16 U.S.C. 824d, 824e.

<sup>10</sup> Id.

Through the Form 423, the Commission collects, from every electric power producer having electric generating plants with a rated capacity of 50 megawatts or greater, monthly data on the cost and quality of fuel delivered to each generating plant. The Form 423 is required to be submitted to the Commission no later than 45 days after the end of the reporting month. Currently, there are approximately 569 generating plants filing with the Commission.

Form 423 data has been used by the Commission staff to conduct mandated fuel reviews rate investigations under Section 205 and 206 of the FPA, to analyze the performance of the electric wholesale market, in affiliate preference determinations and to evaluate policy issues. The data is also used by other government agencies to track the supply, disposition and prices of fuel on a regional and national basis, to determine the environmental effects of power generated by various fuels, and by the public in determining how fuel costs affect electricity rates.

However, as the Commission and the electric industry are moving from traditional cost-based rates to market-based rates for power sales, certain cost-based data becomes less important to the Commission. Under traditional cost-based regulation, where the Commission establishes a cost-based rate for a particular public utility, the Commission requires the utility to periodically file cost-based information useful to the rate-setting process. Under market based-pricing this is not necessary. Consequently, the Commission, in the subject NOPR, now proposes to eliminate the Form 423 collection.

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

Currently, Form 423 is submitted to the Commission electronically on a monthly basis. As electronic filing has been in operation for several years, the Commission has taken steps to reduce the burden on reporting entities. However, if the Form 423 is eliminated, no additional steps will be necessary to reduce burden.

### **4. 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 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. To date, no duplication of the proposed data requirements has been found. The Commission staff is continuously reviewing its various filings in an effort to alleviate duplication.

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

This data collection imposes the least possible burden on small entities while collecting the information necessary for the Commission to carry out its responsibilities under Sections 205 and 206 of the FPA as amended by Section 208 of PURPA.

## **6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY**

Since EIA proposes to collect the information, the Commission believes there will be little if any negative impact on data users.

## **7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION COLLECTION**

This proposed program meets all of OMB's section 1320.5 requirements. As noted above, the elimination of this information collection achieve the objectives of the PRA to not only minimize the burden on the public but also ensure that the Commission only collects information that will have practical utility in accomplishing its mission.

## **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, 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.

As noted above, the Commission is proposing to discontinue collecting the information on Form 423. In a notice of proposed information collection and request for comments published in the Federal Register on September 22, 2006, the Commission proposed several options on the continued use of the Form 423 and the possible transfer to EIA. Among the options proposed were the following: elimination of some of the data collected; preference for the use of the FERC filing software over that of EIA's and whether the collections could be combined. For purposes of the record, we repeat those comments and the Commission's responses here in this submission.

**Comments:** EEI suggested that the Commission consider whether it should continue collecting any or all of the Form 423 data. APPA and USCHPA were supportive of the Commission's request to continue the Form 423 data collection and the continued public disclosure of the data.

**Commission's Response:** The data collected has been the minimum necessary to conduct fuel reviews and investigations to ensure that rates charged to wholesale electric rate customers continue to be just and reasonable and to protect customers from undue discrimination. Thus, the continued collection of all of this data is important as long as respondents continue to have wholesale power sales contracts containing FACs that automatically track changes in fuel costs, cost based rates with fuel cost recovery components, and/or retain some form of control over other power market participants.

**Comment:** EEI stated that their member utilities are concerned about the possible transfer of the Commission's Form 423 collection responsibilities to EIA because they feel the parameter checks that EIA employs, trigger "unnecessary requests for further information" from member utilities.

**Commission's Response:** Without an example or more detail, the Commission is uncertain as to what EEI's members are referring to in this comment. However, for example, with regard to fuel costs, the parameters EIA uses in their 423 software are adjusted with rising and falling fuel prices. Costs outside of EIA's set bounds justifiably trigger inquiries. The bounds are set so that EIA can carry out their Congressional mandate to collect the most accurate information possible. Further, EIA in its submission to OMB has also addressed EEI's concerns.

**Comment:** EEI stated that because the FERC Form 423 and EIA Form 423 are filed by separate, non-overlapping groups of respondents, there does not appear to be a "reduction in burden" benefit to having current FERC Form 423 respondents file the information at EIA instead.

**Commission's Response:** EIA and the Commission both staff teams to manage their collection of these data. Many of the same duties are duplicated, for instance both have programmers to handle any electronic filing issues. If EIA alone collects the information, EIA's programming staff will not have to be doubled in size, instead, the small incremental amount of additional work they would have to pick up might be handled by their current staff or at the most, a small increase in staffing would be able to manage.

The most significant benefit of EIA collecting the Commission's Form 423

information along with their own non-utility 423 information is that many users of this information will be able to look at all categories of generators together, simplifying a process where they are frequently combining FERC and EIA data to provide complete coverage. Having the data collected by a single entity would speed the public release of data, provide more timely access to it and result in more reliable data.

In addition, in EIA's submission to OMB, they declared that merging several data collections will result in being able to collect and check the data at the same time. This consolidation into one form "is expected to facilitate reporting, and respondents will be able to review and correct their data prior to submission, thereby improving the quality and timeliness of the data." (P. 23 of the Supporting Statement, September 2007)

## **9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS**

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

## **10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS**

The Commission generally does not consider the data filed to be confidential. However, as more fully explained below, the issue of public disclosure has been raised in court proceedings and in issuances by the Commission.

In Alabama Power Co. v. FPC, 511 F.2d 383 (1974), public utilities alleged that public disclosure of the information would adversely affect their ability to get the best price for their fuel. The court noted that utilities showed no specific proof as to the existence of injury resulting as to the existence of injury resulting from these disclosures (511 F. 2d 391).

The Commission followed this decision with the issuance of Order No. 22 (March 7, 1979) which used Alabama Power Co. as a basis for denying a petition by public utilities to either eliminate the collection in Form 423 of the same "confidential" data cited in Alabama, or restrict the availability of those data to the public. The Commission indicated that the companies showed no actual or potential competitive injury as result of reporting this information, and without such proof, the information could be collected by the Commission and be made public.

In its submission to OMB, EIA stated that the original proposal was to release certain Form 923 data (commodity prices, delivered prices, fuel stocks) after 9 months however will now not be released in individually-identifiable form for non-utilities and

will instead be protected. However, EIA also stated that delivered price data for utilities will continue to be placed in the public domain and not protected consistent with the current practice of Form 423.

### **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 neither private nor proposed in the subject NOPR. Specific requests for confidential treatment to the extent permitted by law will be entertained pursuant to 18 C.F.R. Section 388.112.

### **12. ESTIMATED BURDEN OF COLLECTION OF INFORMATION**

As noted above, 18 CFR Section 141.61 of the Commission's regulations require electric power producers having electric generating plants with a rated capacity of 50 MW or greater during a reporting month to file Form 423 data on or before the 45th day after the end of each reporting month. Each month, Form 423 data is submitted by approximately 569 electric generating plants. Over the last six years, the average number of submittals received each month by the Commission has declined from 735 to 569 because of mergers and disposition of various utility's generating assets, plant retirements and the transfer of generating assets to power marketers and other entities with market-based rate authority who have been granted a waiver of the Commission's reporting requirements.

Through extensive staff involvement with this form, it is estimated that the burden hours range from 0.50 hours for smaller utilities with just a few plants to report, to 1.5 hours for utilities with a larger number of plants to report, resulting in an average overall response time of about 1 hour. The frequency of the response is monthly.

Estimated number of respondents:	569 respondents
Estimated number of hours per response:	1 hour/response
Frequency of responses:	12/year
Total estimated annual burden:	6,828 burden hours
Burden hours in OMB Inventory:	6,828 burden hours

However, if the changes proposed in this NOPR are adopted in a final rule, this should result in the following changes to OMB's inventory:

Program Change:	-6,828 burden hours
Adjustment Change:	

Proposed burden hours in OMB inventory:

0 burden hours

**13. ESTIMATE OF THE TOTAL ANNUAL COST BURDEN TO RESPONDENTS**

Total Respondent	÷	Number of Hours per Staff year	x	Cost per Staff Employee <sup>11</sup>	=	Total Annualized Cost
<u>Burden Hours</u>		<u>Staff year</u>		<u>Employee</u> <sup>11</sup>		<u>Cost</u>
6,828	÷	2,080	x	\$122,137	=	\$400,938

However, if the changes proposed in this NOPR are adopted in a final rule, these costs will be eliminated.

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<sup>11</sup> The "Cost per Staff Employee" estimate is based on the estimated annual allocated cost per Commission employee for Fiscal year 2007. In the Commission's last submission of Form 423 for OMB review, it based the total estimated cost or \$385,128 on the estimated "cost" of \$117,321(2006). This cost consisted of approximately \$96,235 in salaries and benefits and \$21,086 in overhead. The 2007 figure reflects an inflationary adjustment of \$15,810.

#### **14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT**

The estimated annualized cost to the Federal government related only to the data collections/requirements as proposed in the subject NOPR are shown below:

(a) Forms Clearance Review	\$ 941
(b) Dissemination of data (1.6 FTE)	\$187,714
Year of Operation	\$188,655

However, if the changes proposed in this NOPR are adopted in a final rule, these costs will be eliminated.

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.

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

As noted above, the issuance of Order No. 888 resulted in a diminished need for the data. There are fewer public utilities filing fuel adjustment clauses as part of their rates. This in turn has resulted in fewer complaints filed with the Commission. When the Commission does need data concerning fuel purchases, this can be obtained through discovery in a formal proceeding. In addition, the introduction and greater use of market-based rates has improved competition and created less reliance on cost-based determinants.

#### **16. TIME SCHEDULE FOR PUBLICATION OF THE DATA**

Form 423 data are made available within 48 hours after filing through the Commission's online e-Library repository.

#### **17. DISPLAY OF EXPIRATION DATE**

Not applicable. An expiration date is currently shown on Form 423 which can be downloaded from the Commission's website: <http://www.ferc.gov/docs-filing/eforms/form-423/form-423.pdf>. If this proposed rule is adopted in a final rule, the Commission will discontinue collecting the information for Form 423 as by December 2008. This discontinuance of the information collection will result in no longer having to provide both the OMB control number and the expiration date.

**18. EXCEPTIONS TO THE CERTIFICATION STATEMENT**

There is an exception to the Paperwork Reduction Act Submission Certification. The Commission does not use statistical methodology for Form 423.

**B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS**

Not applicable to Form 423.