

## **SUPPORTING STATEMENT FOR FERC-582, ELECTRIC FEES AND ANNUAL CHARGES**

The Federal Energy Regulatory Commission (Commission) is submitting for informational purposes only, a Notice of Inquiry (NOI) for the Office of Management and Budget (OMB) review concerning **FERC-582, ELECTRIC FEES AND ANNUAL CHARGES**. FERC-582 (OMB Control No. 1902-0132) is an existing data collection (filing requirement) whose filing requirements are contained in Title 18 C.F.R., Sections 382.201, 381.105, 381.106 as authorized by the Independent Offices Appropriation Act of 1952 (31 U.S.C. 9701) and the Omnibus Budget Reconciliation Act of 1986. FERC-582 is currently approved through November 30, 2010.

The estimated reporting burden for FERC-582 remains unchanged as reported in the Commission's submission in 2007. The Commission expects the estimate to be on average 500 hours per year over the next three years. The average burden per filing is estimated to be 4 hours per respondent. However, depending on the comments received in response to the NOI and whether the Commission decides to revise the current methodology, then the estimate will be revised to reflect the changes.

### **A. Justification**

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

The Commission is required by section 3401 of the Omnibus Budget Reconciliation Act of 1986 (Budget Act)<sup>1</sup> to “assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred . . . in that fiscal year.”<sup>2</sup> The annual charges must be computed based on methods which the Commission determines to be “fair and equitable.”<sup>3</sup> The Conference Report accompanying the Budget Act provides the Commission with the following guidance as to this phrase's meaning:

[A]nnual charges assessed during a fiscal year on any person may be reasonably based on the following factors: (1) the type of Commission regulation which applies to such person such as a gas pipeline or electric utility regulation; (2) the

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1 42 U.S.C. 7178 (2000).

2 This authority is in addition to that granted to the Commission in sections 10(e) and 30(e) of the FPA. See 16 U.S.C. 803(e), 823a(e).

3 42 U.S.C. 7178(b).

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total direct and indirect costs of that type of Commission regulation incurred during such year;[<sup>4</sup>] (3) the amount of energy--electricity, natural gas, or oil--transported or sold subject to Commission regulation by such person during such year; and (4) the total volume of all energy transported or sold subject to Commission regulation by all similarly situated persons during such year.[<sup>5</sup>]

The Commission's annual charges do not enable the Commission to collect amounts in excess of its expenses, but merely serve as a vehicle to reimburse the United States Treasury for the Commission's expenses.<sup>6</sup>

### **Current Annual Charges Billing Procedure**

As required by the Budget Act, the Commission's regulations provide for the payment of annual charges by public utilities to fund the Commission's electric regulatory program.<sup>7</sup> The Commission intends that these annual charges in any fiscal year will recover the Commission's estimated electric regulatory program costs (other than the costs of regulating Power Marketing Administrations (PMAs) and the electric

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4 The Commission is required to collect not only all its direct costs but also all its indirect expenses such as hearing costs and indirect personnel costs. See H.R. Conf. Rep. No. 99-1012 at 238 (1986), reprinted in 1986 U.S.C.C.A.N. 3868, 3883 (Conference Report); see also S. Rep. No. 99-348 at 56, 66 and 68 (1986).

5 See Conference Report at 238. The Commission may assess these charges by making estimates based upon data available to it at the time of the assessment. 42 U.S.C. 7178(c).

6 42 U.S.C. 7178(f). Congress approves the Commission's budget through annual and supplemental appropriations.

7 18 CFR Part 382 (2007); see Revision of Annual Charges Assessed to Public Utilities, Order No. 641, FERC Stats. & Regs. ¶ 31,109 (2000), order on reh'g, Order No. 641-A, 94 FERC ¶ 61,290 (2001). The Commission's regulations define its electric regulatory program as "the Commission's regulation of the electric industry under Parts II and III of the Federal Power Act; Public Utility Regulatory Policies Act; Power plant and Industrial Fuel Use Act; Department of Energy Organization Act; Energy Security Act; Regulatory Flexibility Act; Pacific Northwest Electric Power Planning and Conservation Act; Flood Control and River and Harbor Acts; Bonneville Project Act; Federal Columbia River Transmission Act; Reclamation Project Act; Nuclear Waste Policy Act; National Environmental Policy Act; and the Public Utility Holding Company Act." 18 CFR 382.102.

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regulatory program costs recovered through electric filing fees) for that fiscal year. In the next fiscal year, the Commission adjusts its annual charges up or down, as appropriate, both to eliminate any over- or under-recovery of the Commission's actual costs and to eliminate any over- or under-charging of any particular person.<sup>8</sup>

When the Commission first developed an annual charge methodology for public utilities in response to the Budget Act, it assessed charges based on two types of wholesale electricity service: transmission and wholesale sales in interstate commerce.<sup>9</sup> However, in Order No. 641, the Commission determined that the sweeping changes in the industry occurring in the late 1980's and the 1990's had changed the industry landscape, which consequently changed the nature of the Commission's work.

In Order No. 641, the Commission noted that open access transmission, functional unbundling, and the rapid movement to market-based power sales rates brought about by Order No. 888, state retail unbundling, and Order No. 2000 encouraging the formation of regional transmission organizations (RTOs) caused the Commission's time and effort to be increasingly devoted to assuring open and equal access to public utilities' transmission systems. Order No. 641 anticipated that wholesale power rates would be increasingly disciplined by competitive market forces and less by direct regulation, and the Commission's workload had, in fact, moved away from its traditional focus on review of bilateral power sales agreements and instead focused increasingly on transmission. In order to reflect those changes, Order No. 641 changed the Commission's annual charges methodology to recover its electric regulatory program costs by assessing charges solely on the MWh of electric energy transmitted in interstate commerce by public utilities providing transmission service, rather than on both jurisdictional power sales and transmission volumes, as in the past.<sup>10</sup>

As such, sections 382.201(a) and (b) of the Commission's regulations provide that the costs of the Commission's administration of its electric regulatory program (excluding the costs of regulating the PMAs such as the Bonneville Power

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<sup>8</sup> 18 CFR 382.201; accord Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, Order No. 507, FERC Stats. & Regs. ¶ 30,839, at 31,263-64 (1988); Texas Utilities Electric Company, 45 FERC ¶ 61,007, at 61,027 (1988).

<sup>9</sup> See Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, Order No. 472, FERC Stats. & Regs. ¶ 30,746 (1987), clarified, Order No. 472-A, FERC Stats. & Regs. ¶ 30,750, order on reh'g, Order No. 472-B, FERC Stats. & Regs. ¶ 30,767 (1987), order on reh'g, Order No. 472-C, 42 FERC ¶ 61,013 (1988).

<sup>10</sup> Order No. 641, FERC Stats. & Regs. ¶ 31,109 at 31,848-49; accord Annual Charges Under the Omnibus Budget Reconciliation Act of 1986 (Phibro Inc.), 81 FERC ¶ 61,308, at 31,843-56 (1997) (Phibro Inc.).

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Administration,<sup>11</sup> and electric regulatory program costs recovered through electric filing fees<sup>12</sup>) are assessed to public utilities that provide transmission service based on the comparative amount of transmission that they provide;<sup>13</sup> those that have provided more transmission service (i.e., more MWhs) are charged more, and those that have provided less transmission service (i.e., less MWhs) are charged less.<sup>14</sup>

In calculating annual charges, the Commission first determines the total costs of its electric regulatory program and subtracts all PMA-related costs and electric filing fee collections to determine total collectible electric regulatory program costs. It then uses the data submitted under FERC Reporting Requirement No. 582 (FERC-582) to determine the total volume of transmission and exchanges for all public utilities to be assessed.<sup>15</sup> The Commission divides that transaction volume into its collectible electric regulatory program costs to determine the unit charge per megawatt-hour. Finally, the Commission multiplies the transaction volume for each public utility to be assessed by the unit charge per megawatt-hour to determine the annual charges for each public utility.<sup>16</sup>

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11 The PMAs such as the Bonneville Power Administration are the subject of a separate assessment. 18 CFR 382.201(d).

12 The Commission's case-specific filing fees are spelled out in Part 381 of the Commission's regulations. 18 CFR Part 381.

13 18 CFR 382.201(a), (b).

14 See Order No. 641-A, 94 FERC ¶ 61,290 at 62,038.

15 The Commission's regulations define public utility, for the purpose of assessing annual charges, as "any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II and III of the Federal Power Act, and who has rate schedule(s) on file with the Commission and who is not a 'qualifying small power producer' or a 'qualifying cogenerator,' as those terms are defined in section 3 of the Federal Power Act, or the United States or a state, or any political subdivision of the United States or a state, or any agency, authority, or instrumentality of the United States, a state, political subdivision of the United States, or political subdivision of a state." 18 CFR 382.102.

In addition, the current electric annual charges are assessed based on transmission service, and thus exclude power marketers, which typically do not provide transmission service.

16 18 CFR 382.201; see Phibro Inc., 81 FERC ¶ 61,308 at 62,424-25.

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The Commission amended its regulations at 18 CFR and added Part 382 to implement a program of annual charges that it assesses against interstate natural gas and oil pipelines, electric utilities, electric cooperatives, power marketers and power marketing agencies. The Commission implemented the annual charges program in a final rule in Docket Number RM87-3 to complement the existing fees program.

In Docket No. RM92-17-000, the Commission amended its regulations to eliminate certain filing fees and also revised its current methodology for annual adjustments to its filing fees and direct billing. In the Notice of Proposed Rulemaking (NOPR), the Commission proposed to eliminate most filing fees, with the exception of six, and to recover the costs associated with filings for which it eliminated fees in the annual charges assessed in accordance with 18 CFR Part 382. The Commission reserved the option of ordering direct billing for filings that may be unusually extensive in scope and/or present complex factual, legal or policy issues requiring an extraordinary amount of time and effort to process them. In the final rule, issued January 7, 1993, the Commission amended its regulations in Part 346 and 381 to eliminate certain filing fees and retained the requirements for filing fees for petition for issuance of a declaratory order and fees for blanket certificate applications made by Hinshaw pipelines and local distribution companies. In addition, the Commission retained filing fees for petitions for rate approval and for extension reports for Title III transactions plus the six filing fees identified in the NOPR.

In Docket No. RM00-7-000 issued on October 26, 2000, the Commission amended its regulations to establish a new methodology for the assessment of annual charges to public utilities. The new regulations resulted in the Commission now assessing annual charges on transmission rather than on both power sales and transmission. The reason for the change was to reflect the changes in the industry and the nature of the work performed by Commission staff. The Commission's regulatory efforts are predominately focused on ensuring nondiscriminatory, open access transmission services as opposed to power sales and power exchanges. With open-access transmission, functional unbundling and the movement to market-based power sales rates brought about by the Commission's Order No. 888, state retail unbundling efforts, the creation of Regional Transmission Organizations in Order No. 2000, the Commission's efforts are increasingly devoted to assuring open and equal access to public utilities' transmission systems. Wholesale power sales rates have been increasingly disciplined by competitive market forces and less by the Commission directly. For these reasons, the Commission felt that it should assess its regulatory program costs solely on the MWh of electric service transmitted in interstate commerce by public utilities providing transmission service, rather than, as in the past on both jurisdictional power sales and transmission volumes.

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In AD08-7-000, issued on April 21, 2008, the Commission seeks comments on its current methodology for the assessment of electric annual charges to public utilities, in particular, whether that methodology remains fair and equitable, and on alternative methodologies. As provided in its current regulations, the Commission recovers the costs of its electric regulatory program through filing fees and, as particularly relevant here, annual charges assessed to public utilities that provide transmission service, based on the volume of electricity transmitted. This methodology reflects that regulation of transmission providers, transmission facilities and transmission service is central to Commission regulation, and that the transmission grid is the interstate highway system for wholesale power sales. This Notice will enable the Commission to determine whether its current methodology remains fair and equitable, and to review alternative methodologies.

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

The information collected by the Commission on FERC-582 is used by Commission staff to obtain total megawatt-hours of transmission of electric energy in interstate commerce, which for purposes of computing the annual charges are measured by the sum of the megawatt-hours of all unbundled transmission (including MWh delivered in wheeling transactions and all bundled wholesale power sales (to the extent these latter megawatt-hours are not separately reported as unbundled transmission)). All parties involved in the generation and sale of electric energy rely on the transmission system to move their product. Power sellers will be contributing to the Commission's recovery of electric regulatory program costs in that, they will be using the transmission system and, in any cost-based rates that they pay for transmission service that they may take, they will pay, albeit indirectly, their share of the Commission's costs.

As noted above, Congress has directed the Commission to collect fees and annual charges equal to its annual appropriation. The Commission deposits the fees and annual charges it collected into the Department of Treasury's general fund.

The Commission's electric regulatory program includes: administering the provisions of Parts II and III of the Federal Power Act (FPA)<sup>17</sup> as they apply to the activities of public utilities (traditionally, principally investor-owned utilities);<sup>18</sup>

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<sup>17</sup>16 U.S.C. 824-825r.

<sup>18</sup>Under sections 211, 212 and 213 of the FPA, 16 U.S.C. 824j-1, the Commission also has authority over transmitting utilities that are not public utilities. Compare 16 U.S.C. 796(23) with 16 U.S.C. 824(b), (e).

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discharging its responsibilities under various statutes involving the PMAs; and implementing various provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>19</sup> involving qualifying cogenerators and small power producers (QFs).

Pursuant to section 205 of the FPA,<sup>20</sup> the Commission regulates the rates, terms and conditions of service of public utilities making sales for resale or transmitting electric energy in interstate commerce. All jurisdictional rates, terms and conditions must be on file with the Commission, and may be approved by the Commission only if they are just and reasonable and not unduly discriminatory or preferential. Under section 206 of the FPA,<sup>21</sup> the Commission may change any rates, terms or conditions that it finds to be unjust, unreasonable, or unduly discriminatory or preferential.

The Commission also regulates certain accounting and corporate activities of public utilities pursuant to the FPA. Examples include the following: Under section 203,<sup>22</sup> the Commission reviews applications filed by public utilities seeking to merge or to dispose of jurisdictional facilities. Pursuant to section 204,<sup>23</sup> the Commission reviews the proposed securities issuances of public utilities whose securities issuances are not regulated by a state commission within the meaning of section 204(f). Under sections 301 and 302,<sup>24</sup> the Commission has authority over a public utility's accounting and its depreciation. Section 304 outlines the Commission's authority to direct public utilities (and also licensees) to report information, including information on transmission of electric energy to the Commission.<sup>25</sup>

### Federal Power Marketing Agencies

The Commission reviews the rates established by the Department of Energy for the PMAs (Bonneville Power Administration (BPA), Southeastern Power Administration, Southwestern Power Administration, and Western Area Power Administration). While regulation of public utility rates is guided by the FPA, regulation of the PMAs' rates is

1916 U.S.C. 2601-2645.

2016 U.S.C. 824d.

2116 U.S.C. 824e.

2216 U.S.C. 824b.

2316 U.S.C. 824c.

2416 U.S.C. 825, 825a.

2516 U.S.C. 825c.

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subject to the standards enumerated in a number of other statutes.<sup>26</sup> Essentially, the statutes require that the rates established by the PMAs must be devised with regard for the recovery of the cost of generation and transmission of electric energy, the encouragement of the most widespread use of the power, the provision of the lowest possible rates to customers consistent with sound business principles, and the protection of the interests of the United States in amortizing its investment in the projects within a reasonable period of time. The Commission is also authorized, pursuant to the Northwest Power Act, to review the Average System Cost methodology used to determine rates for exchange sales by utilities to BPA.

### Qualifying Facilities

Section 210 of PURPA<sup>27</sup> requires the Commission to prescribe rules to encourage cogeneration and small power production of electricity. In particular, the section directs the Commission to adopt rules requiring utilities to purchase power from and sell power to qualifying cogeneration and small power production facilities. The Commission reviews applications filed by cogenerators and small power producers requesting QF certification and either grants or rejects such applications based on criteria set forth in the Commission's regulations.<sup>28</sup>

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

The Commission now accepts as part of its "efiling" initiative, the electronic submission of reports under FERC-582. The Commission has also converted the information filed under 18 CFR 382.201(b) to an automated file for computation of annual charges for electric utilities. Further, applicants seeking an order for a waiver may make their request electronically over the Commission's web site.

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<sup>26</sup>Flood Control Act of 1944, 16 U.S.C. 825s; Federal Columbia River Transmission System Act, 16 U.S.C. 838g; Pacific Northwest Power Preference Act, 16 U.S.C. 837; Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. 839; Bonneville Project Act, 16 U.S.C. 832f (Northwest Power Act); Reclamation Act of 1939, 43 U.S.C. 485h; Department of Energy Organization Act, 42 U.S.C. 7101; see also DOE Delegation Order No. 0204-108, 48 FR 55664 (Dec. 14, 1983); 18 CFR Parts 300 and 301.

<sup>27</sup>16 U.S.C. 824a-3.

<sup>28</sup>18 CFR Part 292.



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### **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 NO. 2.**

The Commission periodically reviews notice requirements as OMB review dates arise or as the Commission may see fit in carrying out responsibilities under the OBRA in order to eliminate duplication and minimize the filing burden. There is no duplication that has been found. To avoid duplication the Commission, in RM87-3-000, proposed to use existing data annually submitted on FERC Form 1, “Annual Report of Major Public Utilities, Licensees and Others,” (1902-0021) and FERC Form 1-F, “Annual Report of - Nonmajor Public Utilities and Licensees,” (1902-0029) for the computing of annual charges. But because the two forms had data elements that required redefinition in computing annual charges, the Commission concluded that the FERC Forms 1 and 1-F would not be appropriate and added filing requirements at 18 CFR 382.201(c) instead to the final rule.

In addition, the Commission had proposed the use of natural gas sales and transportation volumes reported on FERC Form 2 “Annual Report of Major Natural Gas Companies” (1902-0028) and FEC Form 2-A “Annual Report of Nonmajor Natural Gas Companies” (1902-0030) for computation of annual charges. However, comments to the proposed rule persuaded the Commission that the data it proposed to use was not appropriate.

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

FERC-582 is a regulatory filing requirement pertaining to the filing of fees for use by the Commission in its computation of annual charges. The data required imposes the least possible burden for small and large entities while collecting the information required to carry out the responsibilities under OBRA. The Commission provides as noted, waiver provisions (18 CFR 381.106 and 382.105(a)) and requests for exemption (18 CFR 381.108) from fees and annual charges, respectively, on the basis of financial hardship.

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

FERC-582 is an annual filing. The information collected cannot be discontinued nor collected less frequently due to statutory requirements. The information required

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in 18 CFR 382.201(c) is required only once a year and is necessary to compute annual charges the Commission will assess later to the applicable regulated entities.

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

The guidelines of 5 C.F.R. 1320.5(d) are not being exceeded in the number of copies forwarded to the Commission. Because FERC-582 data is now submitted electronically, there is no longer a need for paper submission of this information.

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

Prior to adopting regulations that require the collection of data, the Commission's procedures require that rulemaking notices be published in the Federal Register, thereby allowing all applicants, 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.

In Docket No. AD08-7-000 issued on April 21, 2008, "Annual Charge Assessments for Public Utilities" the Commission is seeking comments on its current methodology for the assessment of electric annual charges to public utilities, in particular, whether that methodology remains fair and equitable, and on alternative methodologies.<sup>29</sup>

This methodology reflects that regulation of transmission providers, transmission facilities and transmission service is central to Commission regulation, and that the transmission grid is the interstate highway system for wholesale power sales. This Notice will enable the Commission to determine whether its current methodology remains fair and equitable, and to review alternative methodologies. In response to continued expressions of concern the Commission is issuing this Notice of Inquiry to seek comment on whether the existing methodology remains an appropriate means to

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<sup>29</sup> This Notice of Inquiry is limited to the assessment of annual charges to public utilities regulated under Parts II and III of the Federal Power Act (FPA). It does not, therefore, address the assessment of charges for the Commission's hydroelectric, natural gas or oil pipeline regulatory programs. It also does not address recovery of Federal power marketing agency (PMA)-related costs or electric filing fees (the latter are separately charged for, among other things, petitions for declaratory orders, Commission staff interpretations and certain qualifying facility-related filings).

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recover the costs of the Commission's electric regulatory program or whether there is another more appropriate alternative.

In response to Order No. 641, certain public utilities and members of RTOs and independent system operators (ISO), including municipal utility and cooperative members, expressed concern that this annual charges methodology may be unfair and they alleged that the resulting annual charges fall more heavily on RTO and ISO members than on public utilities that are not RTO or ISO members. These concerns were initially raised in proceedings where RTO and ISO members objected to bills reflecting the charges determined under Order No. 641 and the underlying methodology. Although they did not seek timely rehearing of Order No. 641 itself, they sought rehearing of annual charges bills determined using the Order No. 641 methodology.<sup>30</sup> In a second proceeding, three RTOs and ISOs filed a petition requesting that the Commission initiate a rulemaking proceeding to revise the Order No. 641 methodology, seeking lower annual charges and questioning the assumptions that the Commission made in issuing Order No. 641.<sup>31</sup>

Those proceedings raised arguments that charges should be assessed to power sales as well as transmission,<sup>32</sup> challenges to the Commission's finding that its work was primarily focused on transmission regulation,<sup>33</sup> assertions that annual charge allocations should reflect the transmission component of bundled retail sales,<sup>34</sup> and claims that the Commission's annual charge assessments do not reflect the level of transmission service in various regions and unduly disadvantage RTOs. The proceedings also addressed the

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30 See Revision of Annual Charges to Public Utilities (California Independent System Operator), 101 FERC ¶ 61,043 (California ISO Order), order dismissing reh'g, 101 FERC ¶ 61,326 (2002) (California ISO Rehearing Order) (denying requests for rehearing filed by California Independent System Operator, Inc., New York Independent System Operator (New York ISO), Arizona Public Service Company, American Transmission Company, LLC and American Transmission Services, Inc.).

31 See Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,048 (Midwest ISO Order), order denying reh'g, 104 FERC ¶ 61,060 (2003) (Midwest ISO Rehearing Order) (denying petition for rulemaking filed by Midwest ISO, New York ISO and PJM Interconnection, L.L.C.), aff'd, 388 F.3d 903 (D.C. Cir. 2004) (Midwest ISO Court Order).

32 Midwest ISO Rehearing Order, 104 FERC ¶ 61,060 at P 7.

33 Id. P 9.

34 Id. P 7 n.13.

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assertion that the Commission had erred in assessing charges to RTOs and ISOs based on services provided for non-jurisdictional members.<sup>35</sup>

After noting that those arguments represented an untimely attempt to seek rehearing of Order No. 641, the Commission responded to the specifics of each issue. The Commission rejected the arguments that annual charges should be allocated to power sales and arguments questioning whether transmission was the Commission's primary regulatory focus by noting that, in contrast to the timeframe in which the Commission established its previous methodology, the Commission was then focused increasingly on transmission through efforts related to open access transmission service, interconnection policy, and RTO and ISO regulation.<sup>36</sup> The Commission also noted that then-current market regulation efforts such as reforming western markets and promoting standard market design (SMD), while nominally related to power sales, were primarily focused on transmission issues.<sup>37</sup> The Commission reported that its reform of western markets was concerned with transmission scheduling and constraints used to manipulate prices, and its SMD proposal incorporated a new open access transmission tariff and focused on congestion management procedures.<sup>38</sup>

The Commission rejected the suggestion that it should impose annual charges based on the transmission component of bundled retail sales, noting that such transactions formed no part of the Commission's work load at that time.<sup>39</sup> The Commission also refuted the suggestion that the transaction volumes that it relied on were inaccurate and understated transmission service provided by certain utilities, by pointing out that the reported transaction volumes were subject to audit and correction and annual charge assessments would be updated to reflect any correction.<sup>40</sup> Finally, the Commission justified assessing annual charges on public utilities based on transmission services that they provided to non-jurisdictional entities, noting that such charges were properly

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<sup>35</sup> Midwest ISO Order, 103 FERC ¶ 61,048 at P 15 n.25; Midwest ISO Rehearing Order, 104 FERC ¶ 61,060 at P 7.

<sup>36</sup> Midwest ISO Order, 103 FERC ¶ 61,048 at P 11-12; Midwest ISO Rehearing Order, 104 FERC ¶ 61,060 at P 10.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> California ISO Order, 101 FERC ¶ 61,043 at P 15; see also Order No. 641-A, 94 FERC ¶ 61,290 at 62,038.

<sup>40</sup> Midwest ISO Order, 103 FERC ¶ 61,048 at P 13.

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recoverable in rates from the non-jurisdictional utility and should be treated like any other cost of providing service.<sup>41</sup>

The Midwest ISO petitioned the United States Court of Appeals for the District of Columbia for review of the Commission's orders denying the petition for rulemaking. The court denied the petition, but noted the Commission's statement in the Midwest ISO Rehearing Order that "the issues may merit further consideration at a later time."<sup>42</sup>

### **Commission Response**

When the Commission issued Order No. 641, it determined that its regulatory focus was turning increasingly towards regulation of transmission service and away from a case-by-case review of wholesale power sales rates. In recognition of this focus on regulating transmission service, Order No. 641 provided for the Commission to recover the costs of its electric regulatory program (not otherwise recovered by, for example, filing fees) through annual charges assessed to public utilities that provide transmission service, based on the volume of electricity transmitted. Regulation of transmission providers, transmission facilities and transmission service remains at the heart of Commission regulation.

Although the state of the industry in 2002 and 2003 did not justify a change to the Commission's methodology, the Commission stated that it would reconsider its methodology when the issue merited further consideration. The Commission is now seeking through this Notice of Inquiry to determine whether subsequent developments make it appropriate to revisit Order No. 641 or otherwise suggest the need for changes to its methodology for assessing annual charges to recover its electric regulatory program costs.

The Commission continues to devote substantial resources to oversight of transmission service. In February 2007, for example, the Commission issued Order No. 890, amending its regulations and reforming the pro forma open access transmission tariff to ensure that transmission services are provided on a just, reasonable and not

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41 Id. P 15 & n.25. In fact, since that order, the Commission's authority over such traditionally non-jurisdictional utilities has expanded with the passage of the Energy Policy Act of 2005 (EPAAct 2005). Compare 16 U.S.C. 824(f) with 16 U.S.C. 824j-1(a)-(b), 824o(b), 824u, 824v (2000 & Supp. V 2005).

42 Midwest ISO Court Order, 388 F.3d at 923, citing Midwest ISO Rehearing Order, 104 FERC ¶ 61,060 at P 16.

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unduly discriminatory or preferential basis.<sup>43</sup> In addition, the Commission also continues to commit substantial resources to regulation of the development and operation of RTOs and ISOs. These transmission service providers, moreover, administer complex and comprehensive energy markets and transmission tariffs that serve broad regions — New England, New York, California, the mid-Atlantic and the Midwest, among others. These RTO/ISO markets are based on regional, security-constrained economic dispatch transmission service and locational-based marginal pricing, including transmission congestion charges. Therefore, although the Commission devotes some resources to power sales regulation through its regulation of these markets, the markets are fundamentally linked to transmission service. As a result, assessing annual charges based on transmission has been a fair and equitable means to allocate the costs of regulating these markets (with such costs, in turn, being incorporated into the RTO/ISO transmission rates). Moreover, the Commission devotes extensive resources to resolving hundreds of tariff filings by these entities and their members each year – and these filings are among the most complex that the Commission faces.

The Commission thus continues to focus very significant resources on transmission,<sup>44</sup> including implementation of new authority under EPAct 2005 to, among other things, approve and enforce mandatory reliability standards for the bulk-power system, which has as its center the interstate electric transmission grid.<sup>45</sup> Order No. 890, for example, established comprehensive requirements for coordinated, open and transparent transmission planning to facilitate the expansion of the transmission system and to address transmission congestion, which can result in higher energy prices, and other customer concerns.

The RTOs and ISOs and their members in their earlier pleadings pointed out that all transmission service in RTOs and ISOs is regulated by the Commission and therefore annual charges are assessed on both wholesale and retail transmission service. This stands in contrast to annual charges paid by a public utility that is not an RTO or ISO member, which may provide both unbundled wholesale transmission service and bundled

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43 Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, FERC Stats. & Regs. ¶ 31,241, Order No. 890-A, FERC Stats. & Reg. ¶ 31,261 (2007).

44 The current electric annual charges methodology also has the advantages of being comparatively simple and easy to administer – a not insignificant concern. It is a methodology that, as well, has been challenged and upheld by the D.C. Circuit. See supra notes 18, 29.

45 Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat. 594 (2005) (EPAct 2005) (amending the FPA, 16 U.S.C. 824, et seq.).

## **FERC-582 ELECTRIC FEES AND ANNUAL CHARGES**

retail transmission service; for such public utilities, only the former transmission service is considered in allocating the Commission's electric regulatory program costs. This results in a comparatively high percentage of the Commission's annual charges being assessed to RTOs and ISOs.

While the nature of Commission regulation of wholesale power sales has certainly changed since adoption of Order No. 641, the Commission continues to regulate wholesale power sales. Comprehensive wholesale power sales rate review proceedings are now comparatively rare. Instead of individual rate proceedings, the Commission reviews new market-based rate power sales applications, electric quarterly reports, and triennial filings and notices of changes in status for market-based rate power sellers. In 2004, the Commission revised the market-power analysis that is used to grant market-

based rate authority, and, in 2007, clarified its market-based rate policies.<sup>46</sup> Further, the Commission establishes market rules and mitigation rules for wholesale power sales. Finally, the Commission dedicates enforcement resources to investigating compliance with rules governing wholesale power sales.

These facts, in combination with new programs intended to implement new EPCRA 2005 authority over certain mergers and other corporate transactions and to sanction market manipulation, warrant the Commission inquiring whether the current system remains fair and equitable, or whether the concerns previously raised by RTOs and ISOs, and their members, or other changes in the industry justify a change to the current electric annual charges methodology.

### **9. EXPLAIN AND PAYMENT OR GIFTS TO RESPONDENTS\_**

No payments or gifts have been made to respondents.

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

The information submitted to the Commission is public information and therefore is not considered confidential.

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<sup>46</sup> Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 FR 39904 (Jul. 20, 1007), FERC Stats. & Regs. ¶ 31,252, clarified, 121 FERC ¶ 61,260 (2007), order on rehearing, 123 FERC 61,055 (2008).

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

No data of a sensitive nature is requested.

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

Based on the Commission's recent experience with the burden of FERC-582, it is estimated that the average burden will be as follows:

<b>FERC-582 burden hours of annual reporting</b>				
FERC-582	Respondents	Estimated no. of responses per year	Average annual hours per response	Total hours
	125	1	4	500

Total estimated burden (hours per year) : 500  
 FERC 582 burden hours currently in OMB's inventory : 500  
 Program change in industry burden hours : 0  
 Adjustment change in industry burden hours : 0

**13. The estimated annualized cost to the respondents for FERC-582 Electric Fees and Annual Charges averaged over the next three years is as follows:**

Total Hours Respondent Burden	□	Person Hours/Year	x	Estimated Average Salary/Year <sup>47</sup>	=	Total Cost
500		2080	x	\$126,384	=	\$30,381

**14. The estimated annualized cost to the Federal Government for FERC-582 Application for Preliminary Permit is shown below:**

<sup>47</sup>The estimated annual cost per staff/employee (\$126,384) based on the number of employees or Full Time Equivalents (FTEs) in the Office of Executive Director and the FY 2008 appropriation for that Office as reported in the Commission's FY 2007 OMB Budget Request. The estimated "salary" per employee with industries regulated by the Commission is assumed to be the same as that per Commission staff members, including related overhead and contracted services.



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<u>Operation</u>	<u>FERC-582</u>
a) Data clearance (FERC FY 2007)	\$ 587.00
b) Analysis of data	\$ <u>63,192.00</u>
Total cost in one year of operation	\$ 63,779.00

**15. CHANGE IN BURDEN**

There are no changes to the burden from the Commission's last submission to OMB. The only changes are to the cost figures which have been adjusted for inflation.

**16. TIME SCHEDULE FOR INFORMATION COLLECTION AND PUBLICATION**

There are no tabulations, statistical analysis or publication plans for the information collection. The data are used for regulatory purposes.

**17. APPROVAL NOT TO DISPLAY EXPIRATION DATE**

It is not appropriate to display the expiration date for OMB approval of the information collected. The information is not collected on a standard printed form. Applicants prepare and submit a format that is filed electronically. The format is usually in the form of a spreadsheet identifying their annual transactions.

**18. EXCEPTIONS TO ITEM NO. 19,**

Not applicable. Item no. 19(g) (vi-See item no. 17 above and item no. 19(i), see Section B below.

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

The FERC-582 is designed for regulatory purposes and therefore, does not employ statistical methods for analysis or publication.