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. RM07-21-001
(Final Rule on Rehearing Issued July 17, 2008)

The Federal Energy Regulatory Commission (Commission) (FERC) is submitting for informational purposes a Final Rule that clarifies 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 in the rule on rehearing.)* However, in a supplemental order to be issued simultaneously with the final rule on rehearing, the Commission proposes a new information collection and seeks comment in response to the notice. (*Both the supplemental order and the accompanying notice are being submitted with the rule on rehearing.)* **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 Final Rule on Rehearing will not change from what was previously submitted to OMB and therefore will not have an impact on the reporting burden. The regulations proposed by the Commission in the rule on rehearing do not substantially change the filing requirements with which section 203 applicants must currently apply. For the accompanying notice, if the proposed information collection is adopted, this will add an additional 20 hours to the reporting 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;
- 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 FERC 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,[1] 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, 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

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

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.[2]

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.[3].

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 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.

Final Rule (Docket No. RM07-21-000)

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

On February 21, 2008, the Commission issued in Docket No. RM07-21-000, a Final Rule in accordance with section 203 of the Federal Power Act (FPA) that amended Part 33 of its regulations to add five blanket authorizations under section 203(a)(1).

The Final Rule adopted the proposal in the Blanket Authorization NOPR to pre-authorize a public utility to dispose of less than 10 percent of its voting securities to a public utility holding company if, after the disposition, the holding company and any associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of that public utility. Based on comments to the Blanket Authorization NOPR , the Final Rule also provided four additional blanket authorizations under section 203(a)(1).

- First, a public utility is granted a blanket authorization under section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization in § 33.1(c)(8) if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility.

- Second, a public utility is granted a blanket authorization under section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization in § 33.1(c)(9).

- Third, a public utility is granted a blanket authorization under section 203(a)(1) to transfer its outstanding voting securities to any holding company granted blanket authorization in § 33.1(c)(10).

- Fourth, a public utility is granted a 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 or owns or provides transmission service over jurisdictional transmission facilities, the contract does not convey control over the operation of a generation or transmission facility, the parties to the transaction are neither affiliates nor associate companies, and the acquirer is a public utility.

In addition, the Final Rule provided for certain clarifications regarding the existing blanket authorizations under section 203. Finally, this Final Rule clarified the definitions of the terms “affiliate” and “captive customers.”

Final Rule on Rehearing (Docket No. RM07-21-001)

On July 17, 2008 the Commission issued a Final Rule on Rehearing addressing requests for rehearing and clarification of Order No. 708.[4] This order on rehearing affirms the five categories of blanket authorizations established in Order No. 708 with certain modifications, and, as discussed in item no. 8, grants, in part, and denies, in part, the requests for rehearing.

The entities sought rehearing and/or clarification with respect to: (1) extending the blanket authorization under 18 CFR 33.1(c)(12) to cover public utility dispositions, not just to certain holding companies but also to non-holding companies; (2) the blanket authorization in 18 CFR 33.1(c)(16) pertaining to the transfer of jurisdictional contracts; (3) the definition and/or scope of hedging activities permitted under 18 CFR 33.1(c)(10); (4) the determination in Order No. 708 not to impose additional reporting requirements related to the new blanket authorizations; and (5) clarification of the existing blanket authorization under 18 CFR 33.1(6) (authorization of internal reorganization not affecting a traditional public utility) identified in the Supplemental Policy Statement.[5]

Supplemental Order (Docket No. RM07-21-002)

On July 17, 2008, the Commission issued simultaneously with the Final Rule on Rehearing (Order No. 708-A), a Supplemental Order complete with a Notice seeking public comment on a proposed information collection. As noted above, in Order No. 708–A, the Commission granted, in part, and denied, in part, the requests for rehearing of Order No. 708. Among other things, the Commission expanded the blanket authorization under section 33.1(c)(12) to authorize a public utility to transfer its outstanding voting securities to ‘‘any person’’ other than a holding company if, after the transfer, “such person and any of its associate or affiliate companies will own less than 10 percent of the outstanding voting interests of such public utility”. The Commission stated that it would also adopt a reporting requirement for entities transacting under that blanket authorization. In order to properly tailor additional reporting requirements, the Commission also stated that it would issue a request for

4 Blanket Authorization Under FPA Section 203, Order No. 708, 73 FR 11003 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,265 (2008).
5 FPA Section 203 Supplemental Policy Statement, 72 FR 42277 (August 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007), order on clarification and reconsideration, 122 FERC ¶ 61,157 (2008) (Supplemental Policy Statement).

supplemental comments on the narrow issue of the scope and form of the reporting requirements under the expanded blanket authorizations under section 33.1(c)(12).

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 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.

The Final Rule and Final Rule on Rehearing implement a codification of limited blanket authorizations 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.

Supplemental Order (RM07-21-002)

The Commission stated in Order No. 708, that in order to extend the blanket authorization under section 33.1(c)(12) to include ‘‘any person,’’ the Commission would need to establish
appropriate reporting requirements so that it could monitor transfers to nonholding companies. The Commission explained that, although there is a presumption that less than 10 percent of a utility’s shares will not result in a change of control, this presumption is

rebuttable. In some instances, the transfer of less than 10 percent of voting shares may constitute a transfer of control.5 The Commission stated that it recognized that it could reduce regulatory burdens and encourage investment to allow transfers of securities not only to holding companies but to other ‘‘persons,’’ and that such transfers would not harm competition or customers as long as there was a sufficient ability to monitor possible changes in control of public utilities.

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 and rising energy costs now 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.

On November 15, 2007, the Commission issued a Final Rule, RM07-16-000, Order No. 703, "Filing via the Internet" 73 Fed. Reg. 65659 (November 23, 2007) revising its regulations for implementing the next version of its system for filing documents via the Internet, eFiling 7.0. The Final Rule allows the option of filing all documents in Commission proceedings through the eFiling interface except for specified exceptions, and of utilizing online forms to allow "documentless" interventions in all filings and quick comments in P (Hydropower Project), PF (Pre-Filing NEPA activities for proposed gas pipelines), and CP (Certificates for Interstate Natural Gas Pipelines) proceedings.

This Final Rule amended the Commission's regulations[6] to provide that all documents

6 Rule 2003(c) of the Commission's Rules of Practice and Procedure, 18 CFR 385.2003(c).

filed with the Commission may be submitted through the eFiling interface except for documents specified by the Secretary. The changes implemented in the Final Rule means that categories such as oversized documents and most confidential documents will be accepted via eFiling. However, at this time, there are principal exceptions, and they are tariffs, tariff revisions and rate change applications; some forms;[7] and documents that are subject to protective orders.

The Final Rulemaking became effective 30 days after publication in the Federal Register or December 24, 20007. However, implementation of eFiling 7.0 is anticipated to occur on March 3, 2008. The Secretary of the Commission will announce the implementation of the upgrade in advance and will also at that time post filing instructions.

The Commission has already issued instructions specifying acceptable file formats for filings submitted on CD-ROM, DVD and other electronic media. These can be found at http://www.ferc.gov/help/submission-guide/electronic-media.asp. In addition, in some cases Commission staff has issued instructions applying to specific types of filings. Where there are no specifications for a particular type of filing, users must follow the Secretary's instructions. At this time, the eFiling system will accept documents in their native formats. This will include both text or word processing documents, and other more specialized documents such as spreadsheets and maps. It will also accept text documents in searchable formats, including scanned documents that have been saved in searchable form. This same list will serve as the list of acceptable formats for eFiling 7.0. Submitters will be able to choose a suitable format from that list unless they are instructed otherwise in specific instances by regulation or by direction from Commission staff. The Commission intends, as far as practicable, to continue decreasing its reliance on paper documents and to continue to upgrade eFiling capabilities in furtherance of the Commission's responsibilities under the Government Paperwork Elimination Act.[8] As we note in item no. 12 of this submission, the information to be provided in response to the information collection request is stored and submitted electronically by the respondents.

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

7 The following continue to be submitted through eForms: FERC Form No.1, FERC Form No. 2, FERC Form No. 2-A, FERC Form No. 3-Q, FERC Form No. 6, FERC Form No. 6-Q, Form 60, Form 714, and Electric Quarterly Reports. FERC Form 1-F is currently not included in eForms, so it may be efiled. Open Access Transmission Tariff (OATT) filings may also be efiled.

8 Pub. L. No. 105-277, § 1704, 112 Stat. 2681, 2681-750 (1998).

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 Final Rule on Rehearing and Supplemental Order apply do not fall within the Regulatory Flexibility Act's definition of a small entity.[9] In particular, the rule implements 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 Final Rule on Rehearing 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.

9 5 U.S.C. § 601(3) (2000).

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 Energy Market Regulation 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.

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 Energy Market Regulation. With the 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

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.

RM07-21-001 (Order No. 708-A) Order on Rehearing

Order No. 708 was published in the Federal Register on February 29, 2008.[10] Timely requests for rehearing were filed by the American Public Power Association and the National Rural Electric Cooperative Association (APPA/NRECA), the Financial Institutions Energy Group (Financial Group), and the Electric Power Supply Association (EPSA). The Edison Electric Institute (EEI) filed a timely request for rehearing and clarification.

Whether to Extend the Blanket Authorization in 18 CFR 33.1(c)(12) to Non-Holding Companies

In Order No. 708, the Commission adopted the proposed blanket authorization from the Blanket Authorization NOPR without modification.[11] In order to prevent public utilities from transferring less than 10 percent of their voting securities in successive transfers, the Commission retained the "in aggregate" limitation contained in 18 CFR 33.1(c)(12). In addition, the Commission rejected requests to extend the blanket authorization to "any person." The Commission stated that these requests would expand the blanket authorization proposed in the Blanket Authorization NOPR beyond its original intent. The Commission also noted that if it were to expand the blanket authorization to "any person," it would need to establish appropriate reporting requirements so that the Commission could monitor transfers to non-holding companies.[12]

Financial Group requested rehearing of the Commission's decision declining to extend the blanket certificate to cover public utility dispositions to non-holding companies under 18 CFR 33.1(c)(12), subject to the same "in aggregate" limitations imposed on transfers to holding companies. Financial Group argued that the distinction between holding companies and non-holding companies is immaterial since the same benefits of reducing regulatory burdens and encouraging investment that accrue when applying this blanket to distributions to a holding

10 Supra note 1.
11 Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 19. 18 CFR 33.1(c)(12) states that a public utility will be granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to any holding company granted blanket authorizations in 18 CFR 33.1(c)(2)(ii) of this section if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of the public utility.
12 Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 20.

company also will occur if the blanket is applied to distributions to a non-holding company. Financial Group reasons that it is the nature of the interest being disposed -- less than 10 percent of the voting securities being held in the aggregate -- and not whether the acquirer is a holding company that determines whether the disposition conveys control.

Financial Group argued that the concern underlying the Commission's refusal to extend the blanket certificate to cover public utility dispositions to non-holding companies could be addressed without the need for issuing such blanket authorizations on a case-by-case basis. Financial Group proposed reporting requirements for transactions involving non-holding companies that it says should be at least as helpful to the Commission as the preexisting reporting requirements applicable to holding companies.[13] In addition, Financial Group argued that this expansion of the blanket certificate is not beyond the scope of the Blanket Authorization NOPR.

Commission Determination

After further review, the Commission does not consider Financial Group's request to be beyond the scope of the Blanket Authorization NOPR. In general, the Commission is permitted to learn from comments submitted during its rulemaking process.[14] In the Blanket Authorization NOPR, the Commission sought comments on proposals to reduce regulatory burdens and encourage investment under FPA section 203 while simultaneously protecting the public interest. Financial Group's proposal to extend the proposed blanket authorization under 18 CFR 33.1(c)(12) to cover "any person" rather than just certain holding companies is a variation of the originally proposed regulation, and therefore, is a logical outgrowth of the Blanket Authorization NOPR.[15] Interested parties have had sufficient notice of the type of regulation that the Commission might adopt, and reasonably could have anticipated that other commenters might seek to expand the proposal. Moreover, commenters will have the opportunity for rehearing with respect to any modifications to the originally proposed section

13 Financial Group proposed that within a specified time following consummation of the transaction (e.g., 30 days), the following information be reported: (1) names of all parties to the transaction; (2) identification of both the pre-transaction and post-transaction voting security holdings (and the percentage ownership) in the public utility held by the acquirer and its associates or affiliate companies; (3) the date the transaction was consummated; (4) identification of any public utility or holding company affiliates of the parties to the transaction; and (5) (if the Commission has particular concerns as to whether such a transaction would result in cross-subsidization) the same type of statement currently required under 18 CFR 33.2(j)(1), which describes Exhibit M to an FPA section 203 filing.

14 Daniel Int'l Corp. v. OSHA, 656 F.2d 925, 932 (4th Cir. 1981) (The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated differs from the rule proposed, partly at least in response to submission).

15 See Owner-Operator Independent Drivers Assoc., Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188, 209 (D.C. Cir. 2007) (the object of the logical outgrowth test is one of fair notice).

33.1(c)(12).

Substantively, the distinction in 18 CFR 33.1(c)(12) between holding companies and non-holding companies is not determinative as to whether a particular transaction is consistent with the public interest, particularly if the "in aggregate" 10 percent limitation is in place to ensure that there is no likely opportunity for a transfer of control of a public utility. Moreover, expanding the 18 CFR 33.1(c)(12) blanket authorization to include non-holding companies would reduce regulatory burdens and encourage investment without causing harm to competition or captive customers. With such an expansion, however, it is important for the Commission and the public to monitor these activities. As the Commission stated in Order No. 708, although there is a presumption that less than 10 percent of a utility's shares will not result in a change of control, this presumption is rebuttable.[16] In some instances, the transfer of less than 10 percent of voting shares may constitute a transfer of control. Accordingly, the Commission will extend the blanket authorization to "any person," but the Commission will require additional reporting for non-holding companies such as the requirements proposed by Financial Group. *(See RM07-21-002).*

Specifically, the Commission will amend its regulations in 18 CFR 33.1(c)(12) to also authorize a public utility to transfer its outstanding voting securities to any person other than a holding company if, after the transfer, such person and any of its associate or affiliate companies will own less than 10 percent of the outstanding voting interests of such public utility. In addition, the Commission will adopt a reporting requirement for entities that transact under this blanket authorization. In order to properly tailor additional reporting requirements, however, we will issue concurrently with this order a request for supplemental comments that will seek comments on the narrow issue of the scope and form of the reporting requirements under the expanded blanket authorization. The expanded blanket authorization under 18 CFR 33.1(c)(12) will not become effective until a Commission decision on reporting requirements becomes effective. The Commission retains its jurisdiction under section 203(b) of the FPA to issue further orders as appropriate with respect to transactions authorized under blanket authority.[17]

Reporting Requirements

In Order No. 708, the Commission declined to impose additional reporting requirements in connection with the new blanket authorizations.[18] Although the Commission agreed with APPA/NRECA's argument in its comments on the Blanket Authorization NOPR that additional reporting requirements could provide greater efficiency, on balance, the Commission determined

16 Order No. 708, FERC Stats. & Regs. ¶ 31,265 at P 20.
17 16 U.S.C. 824b(b).
18 Order No. 708, FERC Stats & Regs. ¶ 31,265 at P 33.

that the potential burdens would outweigh any efficiency gains.[19] In its comments on rehearing, APPA/NRECA reasserted its request that the Commission require public utilities to report all dispositions of securities undertaken pursuant to a blanket authorization on the ground that the Commission failed to explain why it dismissed its request in Order No. 708.

It also asked the Commission to impose a requirement that public utilities certify their continued compliance with any "in aggregate" limitation in light of each new transaction. APPA/NRECA argued that, since the only reporting requirement is under 18 CFR 33.1(c)(2), a transfer of control in a public utility could occur over a series of transactions without the Commission's knowledge. Accordingly, APPA/NRECA asserted that the Commission cannot be sure that it is being provided with all the information necessary to ensure that a transfer of control does not occur.

Commission Determination

APPA/NRECA did not present any convincing reason to impose additional reporting requirements at this time and therefore its request for rehearing is denied. The Commission first points out that APPA/NRECA is incorrect that there are no reporting requirements under 18 CFR 33.1(c)(9) (authorization of certain activities by a company regulated by the Board of Governors of the Federal Reserve Bank or by the Comptroller of the Currency) and 18 CFR 33.1(c)(10) (authorization for a holding company to engage in certain underwriting and hedging activities).[20] Further, the Commission does not believe that reports by a company regulated by the Board of Governors of the Federal Reserve Bank or by the Comptroller of the Currency are necessary when securities are held as a fiduciary or as principal for derivatives hedging purposes, since such activities by the holding company are overseen and closely monitored by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency as described in 18 CFR 33.1(c)(9). In addition, holding of shares as collateral for a loan does not change control of a public utility. Although 18 CFR 33.1(c)(10)(ii) does not have an explicit reporting requirement when securities are held for purposes of engaging in hedging transactions, this authorization does limit voting ability of the company acquiring the securities, eliminating the concern over transfer of control over a public utility. The transfer of wholesale contracts under 18 CFR 33.1(c)(16) is subject to section 205 filing requirements, which include,

19 Id.

20 The reporting requirements under 18 CFR 33.1(c)(9)(iv) and 18 CFR 33.1(c)(10)(i) require the parent holding company to file within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding share, irrespective of the capacity in which they were held.

among other things, designation of the jurisdictional entity that will be the supplier under the contract.[21]

APPA/NRECA was correct in stating that 18 CFR 33.1(c)(8) (authorization for a person being a holding company solely with respect to EWGs, FUCOs, or QFs to acquire the securities of additional EWGs, FUCOs, or QFs) does not include a reporting requirement. The parallel authorization to public utilities under 18 CFR 33.1(c)(13), however, limits the acquiring holding company and its affiliates to less than 10 percent of the outstanding voting securities of the public utility. As the Commission stated in Order No. 708, it believes this protection ensures that this blanket authorization is in the public interest.

The Commission does not, however, foreclose the possibility of imposing additional reporting requirements in the future, should circumstances change and it become apparent that additional reporting requirements would help the Commission better monitor industry transactions that could adversely affect public utilities or their captive customers or transmission customers. The Commission also notes that, it is concurrently issuing a supplemental request for comments on the narrow issue of reporting requirements for the extension of 18 CFR 33.1(c)(12) to cover public utility dispositions to non-holding companies.

Hedging

Order No. 708

In Order No. 708, the Commission extended to public utilities a blanket authorization to transfer securities to holding companies that have blanket authorizations to acquire public utility securities under FPA section 203(a)(2) for certain underwriting or hedging purposes.[22] In doing

21 Order No. 669-A at P 83.

22 18 CFR 33.1(c)(15) states that a public utility is granted a blanket authorization under section 203(a)(1) of the FPA to transfer its outstanding voting securities to any holding company granted blanket authorization in 18 CFR 33.1(c)(10). 18 CFR 33.1(c)(10) states that any holding company, or a subsidiary of that company, is granted a blanket authorization under section 203(a)(2) of the FPA to acquire any security of a public utility or a holding company that includes a public utility: (i) for purposes of conducting underwriting activities, subject to the condition that holdings that the holding company or its subsidiary are unable to sell or otherwise dispose of within 45 days are to be treated as holdings as principal and thus subject to a limitation of 10 percent of the stock of any class unless the holding company or its subsidiary has within that period filed an application under section 203 of the FPA to retain the securities and has undertaken not to vote the securities during the pendency of such application; and the parent holding company files with the Commission on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by

so, the Commission observed that the condition for the parallel blanket authorization under FPA section 203(a)(2), limiting the acquiring entity to a voting right of less than 10 percent of the relevant class of securities, should ensure that any disposing entity facilitating such transactions does not affect a disposition or change in control of the issuer of the public utility securities.[23]

APPA/NRECA argued that this blanket authorization is contrary to the law and that the Commission should only allow such transactions on a case-by-case basis, with full disclosure of the specific business arrangements being contemplated. Because the Commission did not define "hedging transaction(s)," APPA/NRECA contends that the Commission cannot reasonably determine that the authorization is consistent with the public interest. It further argued that this blanket authorization, like the parallel blanket authorization under FPA section 203(a)(2), does not assure that the hedging transaction is only incidental to the acquirer's main business, since the blanket authorization does not require that the hedging transaction relate to the utility, power or energy business. APPA/NRECA believes that ratepayers should not be exposed to the complex and risky transactions sometimes undertaken by financial market participants to the harm of innocent third parties.

Commission Determination

While the Commission agrees with APPA/NRECA's general proposition that electric ratepayers should not be exposed to unnecessary harm caused by risky transactions of financial market participants, it disagrees that the blanket authorizations previously granted to holding companies in Order No. 669-A (18 CFR 33.1(c)(10)), or the parallel authorization granted to public utilities in Order No. 708 (18 CFR 33.1(c)(15)), will cause such harm.

Nor does the Commission believe that the authorization in Order No. 708 is contrary to law. These authorizations are limited, and any hedging in public utility securities that is within the scope of section 203 is allowed only to the extent that it falls under one of the Commission's blanket authorizations or a specific authorization granted by the Commission on a case-by-case basis. Specifically, an existing condition in 18 CFR 33.1(c)(10)(ii) limits the voting ability of the entity acquiring securities for hedging purposes, so transactions under the new blanket

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class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held; (ii) for purposes of engaging in hedging transactions, subject to the condition that if such holdings are 10 percent or more of the voting securities of a given class, the holding company or its subsidiary shall not vote such holdings to the extent that they are 10 percent or more.

23 Order No. 708, FERC Stats & Regs. ¶ 31,265 at P 45 (citing Order No. 669 at P 132).

authorizations should not result in a change in control of a public utility. Furthermore, the first part of the blanket authorization, 18 CFR 33.1(c)(10)(i), concerns underwriting and is directed at financial entities such as a bank, investment bank, or broker/dealer that engages in underwriting activities that may involve public utilities, but this authorization also has a 10 percent limitation and is subject to a reporting requirement. It is unlikely that the acquirers in the hedging transactions authorized would be public utilities because most holding companies are not also public utilities as most do not operate jurisdictional facilities. In fact, the Commission is unaware of any public utility with captive customers that engages in hedging transactions involving the securities of other public utilities.[24] Therefore, the Commission believes that the potential for harm to ratepayers of public utilities as a result of the blanket authorization is minimal.

In addition, it should be noted that states oversee cost recovery associated with their franchised public utilities' hedging activities involving purchases of power or fuel as part of an overall purchasing strategy in the interests of ratepayers. The Commission thinks it would be unlikely that a state regulatory body would authorize the recovery from ratepayers of the costs incurred by one public utility to engage in hedging activities concerning the securities of another public utility. The Commission further notes that the Commission is not making any finding as to whether the costs associated with such hedging are appropriately recovered in rates.

The Commission rejects APPA/NRECA's request to deny any blanket authority for hedging transactions. APPA/NRECA's arguments, in large part, are a collateral attack of Order No. 669-A. Order No. 669-A determined that a blanket authorization under FPA section 203(a)(2), involving hedging for holding companies was in the public interest because such a blanket authorization would not give the acquiring entity additional market power or enable it to undermine competition or disadvantage captive customers. The Commission agreed that the blanket authority would promote the public interest by bringing more capital investment to the utility industry. The Commission also found that the condition removing the holder's power to vote the securities held for hedging purposes to the extent they are 10 percent or more of the securities in the class outstanding, even though the amount held for hedging is not limited, would address its concerns regarding control.[25] Subject to certain limitations, Order No. 708 merely granted the mirror image of this blanket for public utilities under FPA section 203(a)(1), in part, because the Commission had already determined in Order No. 669-A that there were adequate controls on these transactions.

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24 The Commission notes that it was the investment firm Morgan Stanley Capital Group, Inc., not a franchised public utility, that requested rehearing of Order No. 669 to request the blanket authorization regarding hedging for a non-bank holding company. See Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 119-120.
25 Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 121, 132.

Further, the Commission will not codify a definition of "hedging" in this proceeding. This decision is based in part on the Commission's observation that hedging activities may be accomplished in a variety of ways and defining hedging may inappropriately limit it or may create situations that are inconsistent with usage by other government agencies. In general, hedging is an approach to risk management that uses financial instruments to manage identified risk. The Commission notes that various regulators have defined "hedging" and have promulgated rules and policies concerning such activities.[26] The Commission will generally follow those principles with respect to the blanket authorizations granted under its rules.

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 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

26 For example, the Commodities Futures Trading Commission, defines bona fide hedging transactions in its regulations. 17 CFR 1.3(z). The Internal Revenue Service defines a qualified hedging transaction in its regulations. 26 CFR 1.988-5. The Financial Accounting Standards Board, the New York Mercantile Exchange, and the Chicago Mercantile Exchange all have policies concerning and defining hedging.

recordkeeping requirements proposed in the subject Final Rule.

12. ESTIMATED BURDEN COLLECTION OF INFORMATION

The Final Rule's information collections were approved under OMB control no. 1902-0082. While this rule on rehearing clarifies aspects of the existing information collection requirements, it does not add to these requirements.

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.

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The Commission has expanded a blanket authorization to additional entities under section 33.1(c)(12), and now requests supplemental comments on the scope and form of the reporting requirements for entities that transact under the expanded blanket authorization. The anticipated number of respondents who will provide the information under the expanded blanket authorization are a subset of the total respondent universe. The information is readily available to the respondents. The experience of Commission staff' with these types of transactions has indicated an average time of 30 to 45 minutes maximum. However, because the Commission is taking into consideration that there may be potential respondents in additional to respondents who are already performing these transactions and need to become familiarize with the Commission's proposed requirements, the Commission has increased the average time per respondent to 1 hour. However, it should be noted that the information that is generated from the types of activities to occur under the expanded blanket authorization is both stored and submitted electronically.

Data Collection FERC-519	Number of Respondents	Number of Responses	Hours Per Response	Total
Reporting	20	1	1	20
Totals	20	1	1	20

Currently the reporting requirements that are covered by FERC-519 and contained in OMB's

inventory are shown below:

Data Requirement (FERC-519)	Current OMB Inventory	Proposed in Final Rule	Proposed in Final Rule Rehearing
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:	52,930*	52,930	

*OMB inventory as of 7/15/2008

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 Final Rule on rehearing 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. However, if the proposed information collection contained in the supplemental order is adopted, the Commission estimates the following costs:

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The Commission has projected the average annualized cost of all respondents to be the following: 20 hours (reporting) @ $66 per hour = $1,320 for respondents. No capital costs are estimated to be incurred by respondents. This estimate is based on the hourly rate for a senior financial analyst reviewing the transactions and filing the information with the Commission. This estimate is based on both national averages as reflected by the Bureau of Labor Statistics and then on a regional basis. Because of the types of activities being reviewed, the estimate was based on a senior financial analyst compensated at market rates.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT:

(a) Forms Clearance Review	$ 2,562
(b) Analysis of Data (8 FTE)	$1,011,072
Year of Operation	$1,013,634

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 $126,384 "salary" represents the average annual salary of 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 will result in minimal changes to the reporting burden as provided for in the Final Rule on Rehearing. With respect to the Supplemental Order, there will be a program change resulting in a burden increase to reflect transactions that will be permitted under the expanded blanket authorization.

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.