

Supporting Statement
FERC-915, Public Utility Market-Based Rate Authorization Holders –
Records Retention Requirement

Request for a three-year extension of a currently approved collection

The Federal Energy Regulatory Commission (Commission or FERC) requests the Office of Management and Budget (OMB) review and approve **FERC-915, “Public Utility Market-Based Rate Authorization Holders – Records Retention Requirement”** (OMB Control No. 1902-0223). Current OMB approval expires on July 31, 2009.

A. JUSTIFICATION

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

In accordance with the Federal Power Act (FPA), the Department of Energy Organization Act (DOE Act), and the Energy Policy Act of 2005 (EPAAct 2005) (Attachment A), the Commission regulates the transmission and wholesale sales of electricity in interstate commerce, monitors and investigates energy markets, uses civil penalties and other means against energy organizations and individuals who violate Commission rules in the energy markets, and administers accounting and financial reporting regulations and oversees conduct of regulated companies.

In order to carry this out, the Commission, in 18 CFR 35.41(d) (Attachment B), imposes record-retention requirements on all sellers to retain, for a period of five years, all information upon which they bill their prices charged for electric energy or electric energy products sold pursuant to their market-based rate tariff and the prices reported for use in price indices.

The requirement is necessary to ensure consistency with the Commission rule prohibiting market manipulation (regulations adopted in Order No. 697 [Attachment C], implementing the EPAAct 2005 anti-manipulation provisions¹) and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the anti-manipulation rules or other rules, regulations, or orders to which the price information may be relevant.

¹ 18 CFR 1c.1 and 1c.2, 71 FR 4,244 (2006).

The record retention period of five years is necessary due to the importance of records related to any investigation of possible wrongdoing and related to assuring compliance with the codes of conduct and the integrity of the market.

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

Information retained under FERC-915 is used to monitor and enforce civil penalties in wholesale jurisdictional markets, thus maintaining the integrity of the market.

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

Entities are encouraged to retain records in an electronic format thereby reducing the burden of storage costs.

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

There is no requirement to prepare documents. The only requirement is of retention of documents generated by and through the sale of wholesale power.

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

In most cases, the burden is proportional to the size of the entity. The number of records requiring storage is small for smaller entities and large for larger ones. The Commission encourages entities to store records in electronic format thereby reducing physical space needed for storage.

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

If entities did not retain these records, the Commission would not be able to fulfill its enforcement duties set out under EPCRA 2005.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

There is one special circumstance related to this information collection. OMB's guidelines at 5 CFR 1320.5(d)(2)(iv) direct that agencies should not require respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years. The Commission is requiring that respondents retain records for a period of five years. This is necessary as noted above to ensure consistency with the Commission's rule prohibiting market manipulation that implements the EAct 2005 anti-manipulation provisions and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the anti-manipulation rules or other rules, regulations, or orders to which the price information may be relevant. (There is no explicit statute of limitations set forth in Natural Gas Act (NGA) section 4A or in Federal Power Act (FPA) section 222, and no statute of limitations of general applicability appears in the NGA or FPA. The Commission declined in Order No. 670 to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under NGA section 4A and FPA section 222. The Commission noted, however, that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations, the general statute of limitations for collection of civil penalties, 28 U.S.C. 2462, applies.² Section 2462 in 28 U.S.C. imposes a five-year limitations period on any "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."³)

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

In accordance with OMB requirements in 5 CFR 1320.8(d), a notice was submitted to the Federal Register on March 30, 2009⁴ (Attachment D) for the

² See, e.g., United States v. Godbout-Bandal, 232 F.3d 637, 639 (8th Cir. 2000).

³ 28 U.S.C. 2462 (2000). The five-year limitation runs "from the date the claim first accrued."

⁴ The notice appeared in the *Federal Register* Vol. 74, No. 64 issued on April 6, 2009.

renewal of FERC-915. No comments were received during the 60-day comment period.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to record holders.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

Not applicable. There is no information filed at the Commission under the FERC-915.

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

Not applicable. There are no questions in the FERC-915.

12. ESTIMATED BURDEN OF COLLECTION OF INFORMATION

Number of Respondents Annually		Average Burden Hours Per Respondent		Total Annual Burden Hours
1,150	x	1	=	1,150

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

Respondent Burden Hours		Cost per Staff Employee Hour		Labor Cost		Storage Cost ⁵		Total Annualized Cost
1,150	x	\$17	=	\$19,550	+	\$419,858	=	\$439,408

The estimated cost burden to respondents is \$439,408. The estimated cost per respondent is \$382.09.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT

The estimated burden on government for analysis is *de minimus*, as the information collection merely requires entities to retain documents, not file them. Any burden on the government would be caused by Commission compliance audits of entities with the requirement.

The estimated annual federal cost for Forms Clearance review is \$1,480.00.

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

There has been a decrease in the burden due to electronic recordkeeping. However, there has been no change to the record retention requirements. However, the estimates provided for industry burden and cost have been improved.

16. TIME SCHEDULE FOR PUBLICATION OF DATA

The FERC-915 concerns only the retention of information for applicable entities; no information is collected or published by the Commission.

17. DISPLAY OF EXPIRATION DATE

There is no information filed under FERC-915.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

⁵ Calculated using an estimated 65,000 ft³ of storage space.

There is one exception to the Paperwork Reduction Act statement. The Commission will not use statistical survey methodology for FERC-915.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Statistical methods are not employed for this data collection.

ATTACHMENT A

Energy Policy Act of 2005

SEC. 315. MARKET MANIPULATION.

The Natural Gas Act is amended by inserting after section 4 (15 U.S.C. 717c) the following:

“PROHIBITION ON MARKET MANIPULATION

“SEC. 4A. It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.”

SEC. 1283. MARKET MANIPULATION.

Part II of the Federal Power Act (16 U.S.C. 824 et seq.) is amended by adding at the end the following:

“SEC. 222. PROHIBITION OF ENERGY MARKET MANIPULATION.

“(a) IN GENERAL.—It shall be unlawful for any entity (including an entity described in section 201(f)), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

“(b) NO PRIVATE RIGHT OF ACTION.—Nothing in this section shall be construed to create a private right of action.”

ATTACHMENT B

FED-REGS, FERCSR, [¶13,997], **FPA, Regulations 18 CFR Sec. 35.41 Market behavior rules.**

FPA, Regulations 18 CFR Sec. 35.41 Market behavior rules.

(a) *Unit operation.*

[11,359]

Where a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market. A Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to Seller through Seller's participation in a Commission-approved organized market.

(b) *Communications.* A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

(c) *Price reporting.* To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Unless Seller has previously provided the Commission with a notification of its price reporting status, Seller must notify the Commission within 15 days of the effective date of this regulation or within 15 days of the date it begins making wholesale sales, whichever is earlier, whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status. In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) *Records retention.* A Seller must retain, for a period of five years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to Seller's market-based rate tariff, and the prices it reported for use in price indices.

ATTACHMENT C

Note: This Commission Order is 655 pages long. The Order in its entirety is available (in Word) from the Commission’s eLibrary at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11383252> .

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities Docket No. RM04-7-000

ORDER NO. 697

FINAL RULE

TABLE OF CONTENTS

	<u>Paragraph Numbers</u>
I. Introduction.....	<u>1.</u>
II. Background.....	<u>7.</u>
III. Overview of Final Rule	<u>12.</u>
IV. Discussion.....	<u>33.</u>
A. Horizontal Market Power.....	<u>33.</u>
1. Whether to Retain the Indicative Screens.....	<u>33.</u>
2. Indicative Market Share Screen Threshold Levels and Pivotal Supplier Application Period.....	<u>80.</u>
a. Market Share Threshold.....	<u>82.</u>
b. Pivotal Supplier Application Period.....	<u>94.</u>
3. DPT Criteria.....	<u>96.</u>
4. Other Products and Models.....	<u>118.</u>
5. Native Load Deduction.....	<u>125.</u>
a. Market Share Indicative Screen.....	<u>125.</u>
b. Pivotal Supplier Indicative Screen.....	<u>143.</u>
c. Clarification of Definition of Native Load.....	<u>150.</u>
d. Other Native Load Concerns.....	<u>153.</u>
6. Control and Commitment.....	<u>156.</u>
a. Presumption of Control.....	<u>164.</u>
b. Requirement for Sellers to have a Rate on File.....	<u>212.</u>

7. Relevant Geographic Market.....	215.
a. Default Relevant Geographic Market.....	215.
b. NERC’s Balancing Authority Area and Default Geographic Area.....	247.
c. Additional Guidelines for Alternative Geographic Market and Flexibility .	253.
d. Specific Issues Related to Power Pools and SPP.....	279.
e. RTO/ISO Exemption.....	285.
8. Use of Historical Data.....	292.
9. Reporting Format.....	302.
10. Exemption for New Generation (Formerly Section 35.27(a) of the Commission’s Regulations).....	307.
a. Elimination of Exemption in Section 35.27(a).....	307.
b. Grandfathering.....	327.
c. Creation of a Safe Harbor.....	335.
11. Nameplate Capacity.....	339.
12. Transmission Imports.....	346.
a. Use of Historical Conditions and OASIS Practices	348.
b. Use of Total Transfer Capability (TTC).....	363.
c. Accounting for Transmission Reservations.....	365.
d. Allocation of Transmission Imports based on Pro Rata Shares of Seller's Uncommitted Generation Capacity.....	370.
e. Miscellaneous Comments	376.
f. Required SIL Study for DPT Analysis.....	382.
13. Procedural Issues.....	387.
B. Vertical Market Power.....	397.
1. Transmission Market Power.....	400.
a. OATT Requirement	403.
b. OATT Violations and MBR Revocation	411.
c. Revocation of Affiliates’ MBR Authority.....	422.
2. Other Barriers to Entry.....	428.
3. Barriers Erected or Controlled by Other Than The Seller.....	452.
4. Planning and Expansion Efforts.....	454.
5. Monopsony Power.....	459.
C. Affiliate Abuse	464.
1. General Affiliate Terms and Conditions.....	464.
a. Codifying Affiliate Restrictions in Commission Regulations.....	464.
b. Definition of “Captive Customers”	469.
c. Definition of “Non-Regulated Power Sales Affiliate”	484.
d. Other Definitions.....	496.
e. Treating Merging Companies as Affiliates	499.
f. Treating Energy/Asset Managers as Affiliates.....	503.
g. Cooperatives.....	518.

2. Power Sales Restrictions.....	529.
3. Market-Based Rate Affiliate Restrictions (formerly Code of Conduct) for Affiliate Transactions Involving Power Sales and Brokering, Non-Power Goods and Services and Information Sharing.....	544.
a. Uniform Code of Conduct/Affiliate Restrictions - Generally.....	546.
b. Exceptions to the Independent Functioning Requirement.....	553.
c. Information Sharing Restrictions.....	570.
d. Definition of “Market Information”.....	590.
e. Sales of Non-Power Goods or Services.....	595.
f. Service Companies or Parent Companies Acting on Behalf of and for the Benefit of a Franchised Public Utility.....	599.
D. Mitigation.....	604.
1. Cost-Based Rate Methodology.....	606.
a. Sales of One Week or Less.....	606.
b. Sales of more than one week but less than one year	632.
c. Sales of one year or greater.....	658.
d. Alternative methods of mitigation.....	660.
2. Discounting.....	699.
3. Protecting Mitigated Markets.....	720.
a. Must Offer	720.
b. First-Tier Markets.....	776.
c. Sales that Sink in Unmitigated Markets.....	794.
d. Proposed Tariff Language.....	825.
E. Implementation Process.....	832.
1. Category 1 and 2 Sellers.....	836.
a. Establishment of Category 1 and 2 Sellers.....	836.
b. Threshold for Category 1 Sellers and Other Proposed Modifications.....	845.
2. Regional Review and Schedule.....	869.
F. MBR Tariff.....	897.
1. Tariff of General Applicability.....	901.
2. Placement of Terms and Conditions.....	925.
3. Single Corporate Tariff.....	928.
G. Legal Authority.....	938.
1. Whether Market-Based Rates Can Satisfy the Just and Reasonable Standard Under the FPA.....	938.
Consistency of Market-based Rate Program with FPA Filing Requirements	956.
2. Whether Existing Tariffs Must Be Found to Be Unjust and Unreasonable, and Whether the Commission Must Establish a Refund Effective Date.....	973.
H. Miscellaneous.....	976.
1. Waivers.....	976.

a. Accounting Waivers.....	980.
b. Timing.....	989.
c. Part 34 Waivers Blanket Authorizations.....	995.
2. Sellers Affiliated with a Foreign Utility.....	1001.
3. Change in Status.....	1009.
a. Fuel Supplies.....	1012.
b. Transmission Outages.....	1020.
c. Control	1028.
d. Triggering Events.....	1034.
e. Timing of Reporting.....	1036.
f. Sellers Affiliated with a Foreign Utility.....	1041.
4. Third-Party Providers of Ancillary Services.....	1047.
a. Internet Postings and Reporting Requirements.....	1053.
b. Pricing for Ancillary Services in RTOs/ISOs	1063.
5. Reactive Power and Real Power Losses.....	1073.
a. Reactive Power.....	1074.
b. Real Power Losses.....	1076.
V. Section-by-Section Analysis of Regulations	1078.
VI. Information Collection Statement.....	1106.
VII. Environmental Analysis.....	1125.
VIII. Regulatory Flexibility Act.....	1126.
IX. Document Availability.....	1130.
X. Effective Date and Congressional Notification.....	1133.
Appendix A: Standard Screen Format	
Appendix B: Corporate Entities and Assets sample appendix	
Appendix C: Required Provisions of the Market-Based Rate Tariff	
Appendix D: Regions and Schedule for Regional Market power Update Process	
Appendix E: List of Commenters and Acronyms	

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Market-Based Rates For Wholesale Sales Of Electric
Energy, Capacity And Ancillary Services By Public Utilities

Docket No. RM04-7-000

FINAL RULE

ORDER NO. 697

(Issued June 21, 2007)

I. Introduction

1. On May 19, 2006, the Commission issued a Notice of Proposed Rulemaking (NOPR), pursuant to sections 205 and 206 of the Federal Power Act (FPA),⁶ in which the Commission proposed to amend its regulations governing market-based rate authorizations for wholesale sales of electric energy, capacity and ancillary services by public utilities. In the NOPR, the Commission proposed to modify all existing market-based authorizations and tariffs so they would reflect any new requirements ultimately adopted in the Final Rule. After considering the comments received in response to the NOPR, the Commission adopts in many respects the proposals contained in the NOPR, but with a number of modifications.

2. This Final Rule represents a major step in the Commission's efforts to clarify and codify its market-based rate policy by providing a rigorous up-front analysis of whether market-based rates should be granted, including protective conditions and ongoing filing requirements in all market-based rate authorizations, and reinforcing its ongoing oversight of market-based rates. The specific components of this rule, in conjunction with other regulatory activities, are designed to ensure that market-based rates charged by public utilities are just and reasonable. There are three major aspects of the Commission's market-based rate regulatory regime.

3. First is the analysis that is the subject of this rule: whether a market-based rate seller or any of its affiliates has market power in generation or transmission and, if so, whether such market power has been mitigated.⁷ If the seller is granted market-based rates, the authorization is conditioned on: affiliate restrictions governing transactions and conduct between power sales affiliates where one or more of

⁶ 16 U.S.C. 824d, 824e.

those affiliates has captive customers; a requirement to file post-transaction electric quarterly reports (EQRs)

containing specific information about contracts and transactions; a requirement to file any change of status; and a requirement for all large sellers to file triennial updates.⁸

4. Second, for wholesale sellers that have market-based rate authority and sell into day ahead or real-time organized markets administered by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), they do so subject to specific RTO/ISO market rules approved by the Commission and applicable to all market participants. These rules` are designed to help ensure that market power cannot be exercised in those organized markets and include additional protections (e.g., mitigation measures) where appropriate to ensure that prices in those markets are just and reasonable. Thus, a seller in such markets not only must have an authorization based on an analysis of that individual seller's market power, but it must also abide by additional rules contained in the RTO/ISO tariffs.

5. Third, the Commission, through its ongoing oversight of market-based rate authorizations and market conditions, may take steps to address seller market power or modify rates. For example, based on its review of triennial market power updates required of market-based rate sellers, its review of EQR filings made by market-based rate sellers, and its review of required notices of change in status, the Commission may institute a section 206 proceeding to revoke a seller's market-based rate authorization if it determines that the seller may have gained market power since its original market-based rate authorization. The Commission may also, based on its review of EQR filings or daily market price information, investigate a specific utility or anomalous market circumstances to determine whether there has been any conduct in violation of RTO/ISO market rules or Commission orders or tariffs, or any prohibited market manipulation, and take steps to remedy any violations. These steps could include, among other things, disgorgement of profits and refunds to customers if a seller is found to have violated Commission orders, tariffs or rules, or a civil penalty paid to the United States Treasury if a seller is found to have engaged in prohibited market manipulation or to have violated Commission orders, tariffs or rules.

6. The Commission recognizes that several recent court decisions by the United States Court of Appeals for the Ninth Circuit⁹ have created some uncertainty for sellers transacting pursuant to our market-based rate program. The cases raise issues with respect to the circumstances under which sellers' pre-authorized market-based rate sales may be subject to retroactive refunds and the circumstances under which buyers might be able to invalidate or modify contracts based on the

⁸ During the past three years, the Commission has initiated over 20 investigations under section 206 of the FPA because of concerns of possible market power. Several of those investigations led to the revocation or voluntary relinquishing of market-based rate authority and the ordering of refunds by sellers.

⁹ See State of California, ex rel. Bill Lockyer v. FERC, 383 F.3d 1006 (9th Cir. 2004), cert. denied (S. Ct. Nos. 06-888 and 06-1100, June 18, 2007) (Lockyer); Public Utility District No. 1 of Snohomish County, Washington v. FERC, 471 F.3d 1053 (9th Cir. 2006) (Snohomish); Public Utilities Commission of the State of California and California Electric Oversight Board v. FERC, 474 F.3d 587 (9th Cir. 2007) (California Commission).

argument that the contracts were entered into at a time when markets were dysfunctional. The Commission's first and foremost duty is to protect customers from unjust and unreasonable rates; however, we recognize that uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller's willingness to enter into long-term contracts and this, in turn, can harm customers in the long run. The Commission recently provided guidance in this regard, noting that these Ninth Circuit decisions addressed a unique set of facts and a market-based rate program that has undergone substantial improvement since 2001, and reiterating that an ex ante finding of the absence of market power, coupled with the EQR filing and effective regulatory oversight qualifies as sufficient prior review for market-based rate contracts to satisfy the notice and filing requirements of FPA section 205.¹⁰ Through this Final Rule, the Commission is clarifying and further improving its market-based rate program. Moreover, the Commission will explore ways to continue to improve its market-based rate program and processes to assure appropriate customer protections but at the same time provide greater regulatory and market certainty for sellers in light of the above court opinions

II. Background

7. In 1988, the Commission began considering proposals for market-based pricing of wholesale power sales. The Commission acted on market-based rate proposals filed by various wholesale suppliers on a case-by-case basis. Over the years, the Commission developed a four-prong analysis used to assess whether a seller should be granted market-based rate authority: (1) whether the seller and its affiliates lack, or have adequately mitigated, market power in generation; (2) whether the seller and its affiliates lack, or have adequately mitigated, market power in transmission; (3) whether the seller or its affiliates can erect other barriers to entry; and (4) whether there is evidence involving the seller or its affiliates that relates to affiliate abuse or reciprocal dealing.

8. The Commission initiated the instant rulemaking proceeding in April 2004 to consider "the adequacy of the current analysis and whether and how it should be modified to assure that prices for electric power being sold under market-based rates are just and reasonable under the Federal Power Act."¹¹ At that time, the Commission noted that much has changed in the industry since the four-prong analysis was first developed and posed a number of questions that would be explored through a series of technical conferences.

9. On April 14, 2004, the Commission issued an order modifying the then-existing generation market power analysis and its policy governing market power mitigation, on an interim basis.¹² The April 14 Order adopted a policy that provided sellers a number of procedural options, including two indicative generation market power screens (an uncommitted pivotal supplier analysis and an uncommitted market share analysis), and the option of proposing mitigation tailored to the particular circumstances of the seller that would eliminate the ability to exercise market power. The order also

¹⁰ CALifornians for Renewable Energy, Inc. v. Cal. Pub. Util. Com'n, 119 FERC ¶ 61,058 (2007).

¹¹ Market-Based Rates for Public Utilities, 107 FERC ¶ 61,019 at P 1 (2004) (initiating rulemaking proceeding).

¹² AEP Power Marketing, Inc., 107 FERC ¶ 61,018 (April 14 Order), order on reh'g, 108 FERC ¶ 61,026 (2004) (July 8 Order).

explained that sellers could choose to adopt cost-based rates. On July 8, 2004, the Commission addressed requests for rehearing of the April 14 Order, reaffirming the basic analysis, but clarifying and modifying certain instructions for performing the generation market power analysis. Over the next year, the Commission convened four technical conferences, seeking input regarding all four prongs of the analysis.

10. On May 19, 2006, the Commission issued a NOPR in this proceeding.¹³ The Commission explained that refining and codifying effective standards for market-based rates would help customers by ensuring that they are protected from the exercise of market power and would also provide greater certainty to sellers seeking market-based rate authority.

11. The regulations proposed in the NOPR adopted in most respects the Commission's existing standards for granting market-based rates, and proposed to streamline certain aspects of its filing requirements to reduce the administrative burdens on sellers, customers and the Commission. The Commission received over 100 comments and reply comments in response to the NOPR. A list of commenters is attached as Appendix E.

III. Overview of Final Rule

12. In this Final Rule, the Commission revises and codifies in the Commission's regulations the standards for market-based rates for wholesale sales of electric energy, capacity and ancillary services. The Commission also adopts a number of reforms to streamline the administration of the market-based rate program. As set forth below, the Final Rule adopts in many respects the proposals contained in the NOPR, but with a number of modifications.

Horizontal Market Power

13. In this Final Rule, the Commission adopts, with certain modifications, two indicative market power screens (the uncommitted market share screen (with a 20 percent threshold) and the uncommitted pivotal supplier screen), each of which will serve as a cross check on the other to determine whether sellers may have market power and should be further examined. Sellers that fail either screen will be rebuttably presumed to have market power. However, such sellers will have full opportunity to present evidence (through the submission of a Delivered Price Test (DPT) analysis) demonstrating that, despite a screen failure, they do not have market power, and the Commission will continue to weigh both available economic capacity and economic capacity when analyzing market shares and Hirschman-Herfindahl Indices (HHIs).

14. With regard to control over generation capacity, the Commission finds that the determination of control is appropriately based on a review of the totality of circumstances on a fact-specific basis. No single factor or factors necessarily results in control. The Commission will require a seller to make an affirmative statement as to whether a contractual arrangement (energy management agreement, tolling agreement, specific contractual terms, etc.) transfers control and to identify the party or parties it believes controls the generation facility. Regarding a presumption of control, the Commission will continue its practice of attributing control to the owner absent a contractual agreement transferring such control, and we provide guidance as to how we will consider jointly-owned facilities.

¹³ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Notice of Proposed Rulemaking, 71 FR 33102 (Jun. 7, 2006), FERC Stats. & Regs. ¶ 32,602 (2006) (NOPR).

15. The Commission adopts its current approach with regard to the default relevant geographic market, with some modifications. In particular, the Commission will continue to use a seller's control area (balancing authority area)¹⁴ or the RTO/ISO market, as applicable, as the default relevant geographic market. However, where the Commission has made a specific finding that there is a submarket within an RTO, that submarket becomes the default relevant geographic market for sellers located within the submarket for purposes of the market-based rate analysis. The Commission also provides guidance as to the factors the Commission will consider in evaluating whether, in a particular case, to adopt an alternative geographic market instead of relying on the default geographic market.

16. The Commission modifies the native load proxy for the market share screens from the minimum peak day in the season to the average peak native load, averaged across all days in the season, and clarifies that native load can only include load attributable to native load customers based on the definition of native load commitment in § 33.3(d)(4)(i) of the Commission's regulations. In addition, sellers are given the option of using seasonal capacity instead of nameplate capacity.

17. The Commission retains the snapshot in time approach based on historical data for both the indicative screens and the DPT analysis and disallows projections to that data. A standard reporting format is adopted for sellers to follow when summarizing their analysis.

18. The Commission modifies the treatment of newly-constructed generation and adopts an approach that requires all sellers to perform a horizontal analysis for the grant of market-based rate authority.

19. With regard to simultaneous transmission import limit studies (SILs), the Commission adopts the requirement that the SIL study be used as a basis for transmission access for both the indicative screens and the DPT analysis. Further, the Commission clarifies that the SIL study as shown in Appendix E of the April 14 Order is the only study that meets our requirements. The Commission provides guidance regarding how to perform the SIL study, including accounting for specific OASIS practices.

20. Finally, the Commission adopts procedures under which intervenors in section 205 proceedings may obtain expedited access to Critical Energy Infrastructure Information (CEII) or other information for which privileged treatment is sought.

Vertical Market Power

21. With regard to vertical market power and, in particular, transmission market power, the Commission continues the current policy under which an open access transmission tariff (OATT) is deemed to mitigate a seller's transmission market power. However, in recognition of the fact that OATT violations may nonetheless occur, the Commission states that a finding of a nexus between the specific facts relating to the OATT violation and the entity's market-based rate authority may subject the seller to revocation of its market-based rate authority or other remedies the Commission may deem appropriate, such as disgorgement of profits or civil penalties. In addition, the Commission creates a rebuttable presumption that all affiliates of a transmission provider should lose their market-based rate authority in each market in which their affiliated transmission provider loses its market-based rate authority as a result of an OATT violation.

22. With regard to other barriers to entry, the Commission adopts the NOPR proposal to consider a seller's ability to erect other barriers to entry as part of the vertical market power analysis, but modifies the requirements when addressing other barriers to entry. The Commission also provides clarification

¹⁴ As discussed below in the Horizontal Market Power section, the Commission adopts the use of balancing authority area instead of control area.

regarding the information that a seller must provide with respect to other barriers to entry (including which inputs to electric power production the Commission will consider as other barriers to entry). The Commission adopts a rebuttable presumption that ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and the transportation of coal supplies such as barges and rail cars do not allow a seller to raise entry barriers, but intervenors are allowed to demonstrate otherwise. The Final Rule also requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and the transportation of coal supplies such as barges and rail cars. The Commission will require sellers to provide this description and to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market. The Final Rule clarifies that the obligation in this regard applies both to the seller and its affiliates, but is limited to the geographic market(s) in which the seller is located.

Affiliate Abuse

23. With regard to affiliate abuse, the Commission adopts the NOPR proposal to discontinue considering affiliate abuse as a separate “prong” of the market-based rate analysis and instead to codify affiliate restrictions in the Commission’s regulations and address affiliate abuse by requiring that the provisions provided in the affiliate restrictions be satisfied on an ongoing basis as a condition of obtaining and retaining market-based rate authority. As codified in this Final Rule, the affiliate restrictions include a provision prohibiting power sales between a franchised public utility with captive customers and any market-regulated power sales affiliates¹⁵ without first receiving Commission authorization for the transaction under section 205 of the FPA. The Commission also codifies as part of the affiliate restrictions the requirements that previously have been known as the market-based rate “code of conduct” (governing the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering), as clarified and modified in this Final Rule. The Commission modifies certain of these provisions, including separation of functions and information sharing, consistent with certain requirements and exceptions contained in the Commission’s standards of conduct.¹⁶ In the Final Rule the Commission defines “captive customers” as “any wholesale or retail electric energy customers served under cost-based regulation” and provides clarification that the definition of “captive customers” does not include those customers who have retail choice, *i.e.*, the ability to select a retail supplier based on the rates, terms and conditions of service offered. In addition, among other clarifications, the Commission clarifies and modifies the definition of “non-regulated power sales affiliate,” and changes the term to “market-regulated power sales affiliate.”

24. The Commission also provides clarification as to what types of affiliate transactions are permissible and the criteria used to make those decisions, and how the Commission will treat merging partners. In addition, the Commission codifies in the regulations a prohibition on the use of third-party

¹⁵ In the NOPR, the Commission proposed to define the term “non-regulated power sales affiliate.” As discussed below, this Final Rule uses the term “market-regulated power sales affiliate” instead.

¹⁶ 18 CFR part 358.

entities, including energy/asset managers, to circumvent the affiliate restrictions, but does not adopt the NOPR proposal to treat energy/asset managers as affiliates. The Commission also provides clarification regarding the Commission’s market-based rate policies as they relate to cooperatives.

Mitigation

25. With regard to mitigation, in the Final Rule the Commission retains the incremental cost plus 10 percent methodology as the default mitigation for sales of one week or less; the default mitigation rate for mid-term sales (sales of more than one week but less than one year) priced at an embedded cost “up to” rate reflecting the costs of the unit(s) expected to provide the service; and the existing policy for sales of one year or more (long-term) sales.¹⁷ The Commission will continue to allow sellers to propose alternative cost-based methods of mitigation tailored to their particular circumstances. The Final Rule also states that the Commission will make its stacking methodology available for the public.¹⁸ In addition, the Commission will continue the practice of allowing discounting and will permit selective discounting by mitigated sellers provided that the sellers do not use such discounting to unduly discriminate or give undue preference.

26. The Commission concludes that use of the Western Systems Power Pool (WSPP) Agreement may be unjust, unreasonable or unduly discriminatory or preferential for certain sellers. Therefore, in an order being issued concurrently with this Final Rule, the Commission is instituting a proceeding under section 206 of the FPA to investigate whether, for sellers found to have market power or presumed to have market power in a particular market, the WSPP Agreement rate for coordination energy sales is just and reasonable in such market.

27. The Commission does not impose an across-the-board “must offer” requirement for mitigated sellers. While wholesale customer commenters have raised concerns relating to their ability to access needed power, the Commission concludes that there is insufficient record evidence to support instituting a generic “must offer” requirement.

28. The Commission limits mitigation to the market in which the seller has been found to possess, or chosen not to rebut the presumption of, market power and does not place limitations on a mitigated seller’s ability to sell at market-based rates in areas in which the seller has not been found to have market power.

29. Finally, regarding mitigation, the Final Rule allows mitigated sellers to make market-based rate sales at the metered boundary between a mitigated balancing authority area and a balancing authority area in which the seller has market-based rate authority under the conditions set forth herein, including a record retention requirement, and provides a tariff provision to allow for such sales.

[This Commission Order is 655 pages long. The Order in its entirety is available from the

¹⁷ We note here that we expect mitigated sellers adopting the default cost-based rates or proposing new cost-based rates will propose a cost-based rate tariff of general applicability for sales of less than one year, and sales of power for one year or longer will be filed with the Commission on a stand-alone basis.

¹⁸ This is addressed in the Mitigation section discussion concerning the cost-based rate methodology for sales of more than one week but less than one year.

Commission eLibrary web page: www.eLibrary.ferc.gov, set the Date Range to All and enter RM04-7 in the Docket Number space.]

In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18, Code of Federal Regulations, as follows:

1. The authority citation for part 35 continues to read as follows:
Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.
2. In § 35.27, the title and the section are revised to read as follows:

§ 35.27 Authority of State Commissions.

Nothing in this part –

(a) Shall be construed as preempting or affecting any jurisdiction a state commission or other state authority may have under applicable state and federal law, or (b) Limits the authority of a state commission in accordance with state and federal law to establish

(1) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or

(2) Non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with state law.

3. Subpart H is revised to read as follows:

Subpart H – Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates

Sec.

35.36 Generally.

35.37 Market power analysis required.

35.38 Mitigation.

35.39 Affiliate restrictions.

35.40 Ancillary services.

35.41 Market behavior rules.

35.42 Change in status reporting requirement.

Appendix A to Subpart H Standard Screen Format

Appendix B to Subpart H Corporate Entities and Assets

§ 35.36 Generally.

(a) For purposes of this subpart:

(1) Seller means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.

(2) Category 1 Sellers means wholesale power marketers and wholesale power producers that own or

control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶ 31,036); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a

franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.

(3) Category 2 Sellers means any Sellers not in Category 1.

(4) Inputs to electric power production means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; sources of coal supplies and equipment for the transportation of coal supplies such as barges and rail cars.

(5) Franchised public utility means a public utility with a franchised service obligation under state law.

(6) Captive customers means any wholesale or retail electric energy customers served under cost-based regulation.

(7) Market-regulated power sales affiliate means any power seller affiliate other than a franchised public utility, including a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate, whose power sales are regulated in whole or in part on a market-rate basis.

(8) Market information means non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes. Market information includes information from either affiliates or non-affiliates.

(b) The provisions of this subpart apply to all Sellers authorized, or seeking authorization, to make sales for resale of electric energy, capacity or ancillary services at market-based rates unless otherwise ordered by the Commission.

§ 35.37 Market power analysis required.

(a) (1) In addition to other requirements in subparts A and B, a Seller must submit a market power analysis in the following circumstances: when seeking market-based rate authority; for Category 2 Sellers, every three years, according to the schedule contained in Order No. ____, FERC Stats. & Regs. ¶ 31, __; or any other time the Commission directs a Seller to submit one. Failure to timely file an updated market power analysis will constitute a violation of Seller's market-based rate tariff.

(2) When submitting a market power analysis, whether as part of an initial application or an update, a Seller must include an appendix of assets in the form provided in Appendix B of this subpart.

(b) A market power analysis must address whether a Seller has horizontal and vertical market power.

(c) (1) There will be a rebuttable presumption that a Seller lacks horizontal market power if it passes two indicative market power screens: a pivotal supplier analysis based on the annual peak demand of the relevant market, and a market share analysis applied on a seasonal basis. There will be a rebuttable presumption that a Seller possesses horizontal market power if it fails either screen.

(2) Sellers and intervenors may also file alternative evidence to support or rebut the results of the indicative screens. Sellers may file such evidence at the time they file their indicative screens. Intervenors may file such evidence in response to a Seller's submissions.

(3) If a Seller does not pass one or both screens, the Seller may rebut a presumption of

horizontal market power by submitting a Delivered Price Test analysis. A Seller that does not rebut a presumption of horizontal market power or that concedes market power, is subject to mitigation, as described in § 35.38.

(4) When submitting a horizontal market power analysis, a Seller must use the form provided in Appendix A of this subpart and include all supporting materials referenced in the form.

(d) To demonstrate a lack of vertical market power, a Seller that owns, operates or controls transmission facilities, or whose affiliates own, operate or control transmission facilities, must have on file with the Commission an Open Access Transmission Tariff, as described in § 35.28; provided, however, that a Seller whose foreign affiliate(s) own, operate or control transmission facilities outside of the United States that can be used by competitors of the Seller to reach United States markets must demonstrate that such affiliate either has adopted and is implementing an Open Access Transmission Tariff as described in § 35.28, or otherwise offers comparable, non-discriminatory access to such transmission facilities.

(e) To demonstrate a lack of vertical market power in wholesale energy markets through the affiliation, ownership or control of inputs to electric power production, such as the transportation or distribution of the inputs to electric power production, a Seller must provide the following information:

(1) A description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities;

(2) Sites for generation capacity development; and

(3) Sources of coal supplies and the transportation of coal supplies such as barges and rail cars.

(4) A Seller must ensure that this information is included in the record of each new application for market-based rates and each updated market power analysis. In addition, a Seller is required to make an affirmative statement that it has not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

(f) If the seller seeks to protect any portion of the application, or any attachment thereto, from public disclosure pursuant to § 388.112 of this chapter, the seller must include with its request for privileged treatment a proposed protective order under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the seller for which privileged treatment is sought. A seller must grant access to privileged data to any party that signs a protective order within 5 days from the date that the party executes the protective order.

§ 35.38 Mitigation.

(a) A Seller that has been found to have market power in generation or that is presumed to have horizontal market power by virtue of failing or foregoing the horizontal market power screens, as described in § 35.37(c), may adopt the default mitigation detailed in paragraph (b) of this section or may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power. Mitigation will apply only to the market(s) in which the Seller is found, or presumed, to have market power.

(b) Default mitigation consists of three distinct products:

(1) Sales of power of one week or less priced at the Seller's incremental cost plus a 10 percent adder;

(2) Sales of power of more than one week but less than one year priced at no higher than a cost-based ceiling reflecting the costs of the unit(s) expected to provide the service; and

(3) New contracts filed for review under section 205 of the Federal Power Act for sales of power

for one year or more priced at a rate not to exceed embedded cost of service.

§ 35.39 Affiliate restrictions.

(a) General affiliate provisions. As a condition of obtaining and retaining market-based rate authority, the conditions provided in this section, including the restriction on affiliate sales of electric energy and all other affiliate provisions, must be satisfied on an ongoing basis, unless otherwise authorized by Commission rule or order. Failure to satisfy these conditions will constitute a violation of the Seller's market-based rate tariff.

(b) Restriction on affiliate sales of electric energy. As a condition of obtaining and retaining market-based rate authority, no wholesale sale of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the Federal Power Act. All authorizations to engage in affiliate wholesale sales of electric energy must be listed in a Seller's market-based rate tariff.

(c) Separation of functions.

(1) For the purpose of this paragraph, entities acting on behalf of and for the benefit of a franchised public utility with captive customers (such as entities controlling or marketing power from the electrical generation assets of the franchised public utility) are considered part of the franchised public utility. Entities acting on behalf of and for the benefit of the market-regulated power sales affiliates of a franchised public utility with captive customers are considered part of the market-regulated power sales affiliates.

(2) (i) To the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers.

(ii) Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.

(iii) Notwithstanding any other restrictions in this section, in emergency circumstances affecting system reliability, a market-regulated power sales affiliate and a franchised public utility with captive customers may take steps necessary to keep the bulk power system in operation. A franchised public utility with captive customers or the market-regulated power sales affiliate must report to the Commission and disclose to the public on its website, each emergency that resulted in any deviation from the restrictions of section 35.39, within 24 hours of such deviation.

(d) Information sharing.

(1) Unless simultaneously disclosed to the public, market information may not be shared between a franchised public utility with captive customers and a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers.

(2) Permissibly shared support employees, field and maintenance employees and senior officers and board of directors under §§ 35.39(c)(2)(ii) may have access to information covered by the prohibition of § 35.39(d)(1), subject to the no-conduit provision in § 35.39(g).

(e) Non-power goods or services.

(1) Unless otherwise permitted by Commission rule or order, sales of any non-power goods or

services by a franchised public utility with captive customers, to a market-regulated power sales affiliate must be at the higher of cost or market price.

(2) Unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a market-regulated power sales affiliate to an affiliated franchised public utility with captive customers may not be at a price above market.

(f) Brokering of power.

(1) Unless otherwise permitted by Commission rule or order, to the extent a market-regulated power sales affiliate seeks to broker power for an affiliated franchised public utility with captive customers:

(i) The market-regulated power sales affiliate must offer the franchised public utility's power first;

(ii) The arrangement between the market-regulated power sales affiliate and the franchised public utility must be non-exclusive; and

(iii) The market-regulated power sales affiliate may not accept any fees in conjunction with any brokering services it performs for an affiliated franchised public utility.

(2) Unless otherwise permitted by Commission rule or order, to the extent a franchised public utility with captive customers seeks to broker power for a market-regulated power sales affiliate:

(i) The franchised public utility must charge the higher of its costs for the service or the market price for such services;

(ii) The franchised public utility must market its own power first, and simultaneously make public (on the Internet) any market information shared with its affiliate during the brokering; and

(iii) The franchised public utility must post on the Internet the actual brokering charges imposed.

(g) No conduit provision. A franchised public utility with captive customers and a market-regulated power sales affiliate are prohibited from using anyone, including asset managers, as a conduit to circumvent the affiliate restrictions in §§ 35.39(a) through (g).

(h) Franchised utilities without captive customers. If necessary, any affiliate restrictions regarding separation of functions, power sales or non-power goods and services transactions, or brokering involving two or more franchised public utilities, one or more of whom has captive customers and one or more of whom does not have captive customers, will be imposed on a case-by-case basis.

§ 35.40 Ancillary services.

A Seller may make sales of ancillary services at market-based rates only if it has been authorized by the Commission and only in specific geographic markets as the Commission has authorized.

§ 35.41 Market behavior rules.

(a) Unit operation. Where a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market. A Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to Seller through Seller's participation in a Commission-approved organized market.

(b) Communications. A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission,

Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

(c) Price reporting. To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Unless Seller has previously provided the Commission with a notification of its price reporting status, Seller must notify the Commission within 15 days of the effective date of this regulation or within 15 days of the date it begins making wholesale sales, whichever is earlier, whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status. In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) Records retention. A Seller must retain, for a period of five years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to Seller's market-based rate tariff, and the prices it reported for use in price indices.

§ 35.42 Change in status reporting requirement.

(a) As a condition of obtaining and retaining market-based rate authority, a Seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, the following:

(1) Ownership or control of generation capacity that results in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities, or

(2) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation facilities or inputs to electric power production, affiliation with any entity not disclosed in the application for market-based rate authority that owns, operates or controls transmission facilities, or affiliation with any entity that has a franchised service area.

(b) Any change in status subject to paragraph (a) of this section must be filed no later than 30 days after the change in status occurs. Power sales contracts with future delivery are reportable 30 days after the physical delivery has begun. Failure to timely file a change in status report constitutes a tariff violation.

(c) When submitting a change in status notification regarding a change that impacts the pertinent assets held by a Seller or its affiliates with market-based rate authorization, a Seller must include an appendix of assets in the form provided in Appendix B of this subpart.

ATTACHMENT D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
[Docket No. IC09-915-000]

COMMISSION INFORMATION COLLECTION ACTIVITIES (FERC-915);
COMMENT REQUEST; EXTENSION

(March 30, 2009)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c) (2) (a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments in consideration of the collection of information are due June 1, 2009.

ADDRESSES: Comments may be filed either electronically or in paper format, and should refer to Docket No. IC09-915-000. Documents must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines at <http://www.ferc.gov/help/submission-guide.asp>.

Comments may be eFiled. The eFiling option, under the Documents & Filings tab on the Commission's home web page (www.ferc.gov), directs users to the eFiling web page. First-time users follow the eRegister instructions on the eFiling web page to establish a user name and password before eFiling. Filers will receive an emailed confirmation of their filed comments. Commenters filing electronically should not make a paper filing. If electronic filing is not possible, deliver original and 14 paper copies of the filing to: Federal Energy Regulatory Commission, Secretary of the Commission,

888 First Street, NE, Washington, DC 20426.

Parties interested in receiving automatic notification of activity in this docket may do so through eSubscription. The eSubscription option under the Documents & Filings tab on the Commission's home web page directs users to the eSubscription web page. Users submit the docket numbers of the filings they wish to track and will subsequently receive an email notification each time a filing is made under the submitted docket numbers. First-time users will need to establish a user name and password before eSubscribing.

Filed comments and FERC issuances may be viewed, printed and downloaded remotely from the Commission's website. The eLibrary link found at the top of most of the Commission's web pages directs users to FERC's eLibrary. From the eLibrary web page, choose General Search, and in the Docket Number space provided, enter IC09-915, then click the Submit button at the bottom of the page. For help with any of the Commission's electronic submission or retrieval systems, email FERC Online Support: ferconlinesupport@ferc.gov, or telephone toll-free: (866) 208-3676 (TTY (202) 502-8659).

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by telephone at (202)502-8663, by fax at (202)273-0873, and by e-mail at ellen.brown@ferc.gov .

SUPPLEMENTARY INFORMATION: FERC is requesting comments on the record retention requirement FERC-915¹⁹, "Public Utility Market-Based Rate Authorization Holders – Records Retention Requirement," OMB Control No. 1902-0223.

In accordance with the Federal Power Act, the Department of Energy Organization Act (DOE Act), and the Energy Policy Act of 2005 (EPAAct 2005), the Commission regulates the transmission and wholesale sales of electricity in interstate commerce, monitors and investigates energy markets, uses

¹⁹ The FERC-915 requirements (formerly labeled "FERC-915(516)") are contained in 18 CFR 35.41(d).

civil penalties and other means against energy organizations and individuals who violate FERC rules in the energy markets, and administers accounting and financial reporting regulations and oversees conduct of regulated companies.

The Commission imposes the FERC-915 record retention requirement, in 18 CFR 35.41(d), on applicable sellers to retain, for a period of five years, all data and information upon which they bill the prices charged for “electric energy or electric energy products it sold pursuant to Seller's market-based rate tariff, and the prices it reported for use in price indices.”

The record retention period of five years is necessary due to the importance of records related to any investigation of possible wrongdoing and related to assuring compliance with the codes of conduct and the integrity of the market. The requirement is necessary to ensure consistency with the rule prohibiting market manipulation (adopted in Order No. 670) and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the anti-manipulation rules or other rules, regulations, or orders to which the price data may be relevant.

ACTION: The Commission is requesting a three-year extension of the current expiration date for the FERC-915Error: Reference source not found, with no changes to the requirements.

BURDEN STATEMENT: Public reporting burden for this collection is estimated at:

FERC Requirements	Number of Respondents Annually(1)	Number of Responses Per Respondent (2)	Average Burden Hours Per Response (3)	Total Annual Burden Hours (1)x(2)x(3)
FERC-915	1,150	1	1	1,150

The estimated total annual cost to respondents includes hours for labor (1,150 hrs. at \$17 per hour, for a labor cost of \$19,550) and storage costs (using an estimated 65,000 cu. ft of records in off-site storage, for a total storage cost of \$419,858). The total annual cost (labor plus off-site storage) is \$439,408; the total annual cost per respondent is \$382.00.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

Kimberly D. Bose,
Secretary.