

**SUPPORTING STATEMENT FOR
FERC-516 Electric Rate Schedule Filings, Interim Rate Treatment Policy
for Smart Grid Investments
In Docket No. PL09-4-000 (Policy Statement)**

The Federal Energy Regulatory Commission (Commission) requests the Office of Management and Budget (OMB) review and approve revisions to requirements as contained in part 35 of the Commission's regulations. Part 35, 18 C.F.R. is identified by **FERC-516 Electric Rate Schedule Filings**. **FERC-516** is an existing information collection. The revisions to the regulations are a result of the issuance of a policy statement, PL09-4-000. In PL09-4-000, the Commission provides guidance concerning the development of a smart grid¹ for the nation's electric transmission system. The Policy Statement focuses on the development of key standards to achieve interoperability and functionality of smart grid systems and devices. Within the Policy Statement, the Commission is also adopting an Interim Rate Policy for rate recovery whose provisions are the subject of this submission, to be used for the period until interoperability standards are adopted by the Commission, which will encourage investment in smart grid systems. **FERC-516 (OMB Control No. 1902-0096)** is approved through July 31, 2012.

While FERC-516 covers the requirements for electric rates schedules and tariffs filed by all public utilities, this Policy Statement focuses on those public utilities who may seek to recover their costs for Smart Grid investments, a subset of the total universe of public utilities who are subject to the FERC-516 requirements.

PL09-4-000 Proposed Policy Statement

On March 19, 2009, the Commission issued a Proposed Policy Statement and Action Plan to guide the development of key standards for smart grid devices and systems.² Many companies in the electricity industry are designing and deploying such devices and systems with the objective of achieving greater

¹ Smart grid” refers to the effort to modernize the electric grid to improve the way we deliver and use power. The smart grid takes the existing electricity delivery system and makes it smarter by linking seamless communications systems to the electrical transmission and distribution system between any point of generation and any point of consumption. It can monitor, protect and automatically optimize the operation of the interconnected elements. The smart grid will provide a two-way flow of electricity and information to create a more automated and efficient energy delivery network.

(Testimony of Commissioner Suedeen G. Kelly, Federal Energy Regulatory Commission Before the Energy and Environment Subcommittee of the Committee on Science and Technology, United States House of Representatives, July 23, 2009.

² Smart Grid Policy, 126 FERC ¶ 61,253 (2009) (Proposed Policy Statement).

interoperability and functionality of the nation's electric transmission grid. In the Proposed Policy Statement, the Commission proposed an Interim Rate Policy to guide rate recovery while interoperability standards are adopted.

The Commission identified several potential challenges to the reliable operation of the Commission-jurisdictional bulk-power system and the smart grid functions and characteristics that could help address those challenges. The major challenges identified included: existing cybersecurity issues;³ issues associated with changes to the nation's generation mix,⁴ including an increasing reliance on variable renewable generation resources;⁵ and issues that could arise with increased and more variable electricity loads associated with transportation technology.⁶ In addition to these challenges, the Commission incorporated the National Institute of Standards and Technology Institute's assessment that there is an overarching need for standardization of communication and coordination across inter-system interfaces.⁷

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On July 16, 2009 the Commission issued a Policy Statement that generally adopts the proposals enumerated in the Proposed Policy Statement and provides additional guidance for standards to help realize a smart grid.

³ Proposed Policy Statement, 126 FERC ¶ 61,253 at P 13.

⁴ On May 13, 2009, the Commission announced that it had commissioned the Lawrence Berkeley National Laboratory to use frequency response to help assess the potential for the reliable integration of wind and other renewable energy resources into the bulk-power system. The frequency study has three main objectives: (1) determining if frequency response is an appropriate metric to assess the reliability effects of integrating renewables, (2) using the resulting metric to assess the reliability impact of various levels of renewables on the grid, and (3) identifying what further work and studies are necessary to quantify and mitigate any negative effects on reliability associated with the integration of renewables.

⁵ Proposed Policy Statement, 126 FERC ¶ 61,253 at P 17-20.

⁶ *Id.* P 21-22.

⁷ National Institute of Standards and Technology, Smart Grid Issues Summary (2009), http://collaborate.nist.gov/twiki-sggrid/pub/SmartGrid/TnD/Draft_NIST_Smart_Grid_Issues_Summary_10March2009.pdf, at 1 and 4-5.

The Policy Statement prioritizes the development of key interoperability standards. This prioritization will facilitate progress on the smart grid technologies that will provide the largest benefits to a broad group of market participants.

The Policy Statement establishes two cross-cutting and four functional priorities for interoperability standards. The cross-cutting priorities are cybersecurity and standardized communication across intersystem interfaces. To insure the integrity and reliability of the underlying bulk-power system, the Commission has required a demonstration of sufficient cybersecurity protections in all proposed smart grid standards to be considered in the FERC rulemaking process directed by the Energy Independence and Security Act (EISA)⁸, including, where appropriate, a proposed smart grid standard applicable to local distribution-related components of smart grid. The Commission has also recognized that development of a common semantic framework and software models to enable effective communication and coordination across the inter-system interfaces is critical to supporting all of the smart grid goals, such as system self-healing, integration of diversified resources and improved system efficiency and reliability.

The four functional priorities are wide-area situational analysis, demand response, electric storage, and electric transportation. First, wide-area situational analysis awareness is imperative for enhancing reliability of the bulk-power system because it allows for greater knowledge of the current state of available resources, load requirements and transmission capabilities. Second, smart grid technologies have considerable potential to promote demand response, which can reduce wholesale prices and wholesale price volatility and reduce potential generator market power. Third, as the technology advances, electricity storage will become a valuable resource providing a variety of services to the bulk-power system, including helping to address large-scale changes in generation mix. Finally, to the extent that new electric transportation options become more widely adopted in the near future, maintaining the reliable operation of the bulk-power system will require some level of control over when and how electric vehicles draw electricity off the electric system. Therefore, the Commission has urged the early development of standards that can permit distribution utilities to facilitate electric vehicle charging during off-peak load periods.

In the Policy Statement, the Commission also adopted an interim rate treatment to encourage the near-term deployment of smart grid systems capable of helping to address challenges to the operation of the bulk-power system, if certain conditions are met. Those conditions include showing that (1) the smart grid facilities will advance the smart grid concept, (2) reliability and cybersecurity of the bulk-power system will not be adversely affected, (3) the applicant has

⁸ Public Law No. 110-140, 121 Stat. 1492 (2007).

minimized the possibility of stranded investment in smart grid equipment, and (4) the applicant must share feedback useful to the interoperability standards development process with the Department of Energy Smart Grid Clearinghouse. The conditions that FERC has put in place in the Interim Rate Policy for FERC-jurisdictional costs may serve as a model for retail regulators

In the Policy Statement, the Commission estimated that the annual burden associated with the information requirements contained in the Policy Statement with respect to rate recovery will be 1,714 hours or 15 hours per respondent for preparing and submitting a tariff filing. This estimate was based on the number of public utilities who file open access transmission tariffs with the Commission and type of information to be filed for a 205 filing. The reporting burden of 1,714 hours will be added to the total hours associated with FERC-516.

A. JUSTIFICATION

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

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The following statutory authorities are relevant to smart grid and found in these statutes: the Energy Independence and Security Act of 2007 (EISA); the Energy Policy Act of 2005⁹; the American Recovery and Reinvestment Act of 2009¹⁰ and the Federal Power Act¹¹ (FPA). These statutory authorities are discussed below.

Energy Independence and Security Act

Section 1301 of the EISA states that “it is the policy of the United States to support the modernization of the Nation’s electricity transmission and distribution system to maintain a reliable and secure electricity infrastructure that can meet future demand growth and to achieve” a number of benefits. Section 1301 specifies benefits such as: increased use of digital technology to improve the grid’s reliability, security, and efficiency; “dynamic optimization of grid operations and resources, with full cyber-security;” facilitation of distributed generation, demand response, and energy efficiency resources; and integration of “smart” appliances and consumer devices, as well as advanced electricity storage and peak-shaving technologies (including plug-in hybrid electric vehicles).

Section 1305(a) of the EISA gives NIST “primary responsibility to coordinate the development of a framework that includes protocols and model standards for information management to achieve interoperability of smart grid devices and systems.” NIST is required to solicit input from a range of others, including the GridWise Architecture Council and the National Electrical Manufacturers Association, as well as two international bodies, the Institute of Electrical and Electronics Engineers and the North American Electric Reliability Corporation (NERC). Many of the organizations working with NIST on this issue are developing industry standards through extensive processes aimed at achieving consensus. Although the EISA does not define interoperability, definitions put forth by others often include many of the same elements. These include: (1) exchange of meaningful, actionable information between two or more systems across organizational boundaries; (2) a shared meaning of the exchanged information; (3) an agreed expectation for the response to the information exchange; and (4) requisite quality of service in information exchange: reliability, accuracy and security. (See GridWise Architecture Council, “Interoperability Path Forward Whitepaper,” www.gridwiseac.org)

⁹ Pub. L. No. 109-58, 119 Stat. 594 (2005).

¹⁰Pub. L. No. 111-3, February 17, 2009.

¹¹ 16 U.S.C. 824, 824o (2006).

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In accordance with EISA section 1305(d), once the Commission is satisfied that NIST's work has led to "sufficient consensus" on interoperability standards, it must then "institute a rulemaking proceeding to adopt such standards and protocols as may be necessary to insure smart-grid functionality and interoperability in interstate transmission of electric power, and regional and wholesale electricity markets." Section 1305 does not specify any other prerequisites to Commission action, such as a filing by NIST with the Commission or unanimous support for individual standards or a comprehensive set of standards.

Energy Policy Act of 2005

The Commission's role under EISA section 1305 is consistent with its responsibility under section 1223 of the Energy Policy Act of 2005. Section 1223 directs FERC to encourage the deployment of advanced transmission technologies, and expressly includes technologies such as energy storage devices, controllable load, distributed generation, enhanced power device monitoring and direct system state sensors.

American Recovery and Reinvestment Act of 2009

Recently, the American Recovery and Reinvestment Act of 2009 (the "Stimulus Bill") appropriated \$4.5 billion to DOE for "Electricity Delivery and Energy Reliability." The authorized purposes for these funds include, inter alia, implementation of programs authorized under Title XIII of EISA, which addresses smart grid. Smart grid grants would provide funding for up to 50 percent of a project's documented costs. In many cases, state and/or federal regulators could be asked to approve funding for the balance of project costs. The Secretary of Energy is required to develop procedures or criteria under which applicants can receive such grants. The Stimulus Bill also states that \$10 million of the \$4.5 billion is "to implement [EISA] section 1305," the provision gives NIST primary responsibility to coordinate the development of the interoperability framework. 5

The Stimulus Bill also directed the Secretary of Energy to establish a smart grid information clearinghouse. As a condition of receiving smart grid grants, recipients must provide such information to the clearinghouse as the Secretary requires.

Federal Power Act

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The Commission's interest and authority in the area of smart grid comes also from its authority under the Federal Power Act (FPA) over the rates, terms and conditions of transmission and wholesale sales in interstate commerce and its responsibility for reliability standards for the bulk-power system. Specifically, the Commission has jurisdiction over transmission and sales for resale of electric energy in interstate commerce by public utilities pursuant to FPA section 201 and over the approval and enforcement of reliability standards for the bulk-power system under FPA section 215.

The Commission has a statutory obligation under Section 205 and 206 of the (FPA) to prevent unduly discriminatory practices in transmission access. FPA section 205 specifies that all rates and charges, and related contracts and service conditions, for wholesale sales and transmission of energy in interstate commerce be filed with the Commission and must be "just and reasonable". In addition, FPA section 206 requires the Commission, upon complaint or its own motion, to modify existing rates or services that are found to be unjust, unreasonable, unduly discriminatory or preferential. FPA section 207 further requires the Commission, upon complaint by a state commission and a finding of insufficient interstate service, to order the rendering of adequate interstate service by public utilities, the rates for which would be filed in accordance with FPA sections 205 and 206.

Because "just and reasonable" is not defined by the FPA, the Commission and the courts historically have interpreted this standard in the context of public utilities possessing market power. The courts generally have held that electric rates should be limited to rate levels sufficient to compensate the utility for the cost of rendering service to its customers, including a fair return on the utility's investment devoted to the service at issue.

In summary, the Commission is working to ensure the modernization of the nation's transmission system, competitiveness of organized wholesale markets which are important parts of the Commission's mandate to ensure adequate and reliable service at just and reasonable rates.

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

As noted above, the Commission's jurisdiction over the transmission system derives from provisions of the Federal Power Act (FPA) relating to the transmission of

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electric energy in interstate commerce by public utilities, and to the reliable operation of the bulk-power system. An additional responsibility was assigned by EISA directing the Commission to initiate a rulemaking proceeding to adopt standards and protocols related to smart grid functionality and interoperability.¹²

The major portion of data requested in the Part 35 regulations specifies the rates, terms and conditions of service to support the wholesale customers in a service the utility is proposing to provide. Submission of the information is necessary because of the complexity of the utility conditions and terms to provide service. Sufficient detail must be obtained for the Commission to make informed and equitable decisions concerning the appropriate levels of rates and service, and to aid customers and other parties who may wish to challenge the rate proposed by the utility. Through this data collection process, the Commission is able to regulate public utilities and licensees by exercising oversight and review of the reported rate schedules and tariffs.

In addition, the Commission has a statutory obligation under section 205 and 206 of the FPA to prevent unduly discriminatory practices in transmission access. To accomplish this, the Commission added section 35.27 to its regulations concerning the standards a public utility must satisfy regarding nondiscriminatory open access transmission services on the utility's facilities that transmit electric energy in interstate commerce. The regulations require all public utilities owning or controlling facilities for the transmission of electric energy in interstate commerce to file tariffs of general applicability that offer transmission services, including ancillary services, on a network and point-to-point basis. The regulations require the public utility to take transmission service for itself under the rates, terms and conditions of these tariffs. In essence these tariffs as approved by the Commission list the terms and conditions, including a schedule or prices, under which utility services will be provided.

In Order No. 890, the Commission reformed the open access transmission tariff (OATT) to ensure that it continues to provide nondiscriminatory access to transmission service. The Commission is now focusing on the compliance phase of OATT reform to ensure that it is implemented properly.

In the Interim Rate Policy, the Commission proposed to require applicants seeking the recovery of costs associated with smart grid investments made during the period in which interoperability standards are being developed to make several showings, beyond the normal filing requirements, before being considered “used and useful” and therefore eligible to recover such costs. First, the Commission proposed that an applicant must

¹² EISA sec. 1305(d), to be codified at 15 U.S.C. 17385(d).

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demonstrate that the reliability and security of the bulk-power system will not be adversely affected by the deployment of smart grid facilities at issue. Second, the Commission proposed that the filing be required to show that the applicant has minimized the possibility of stranded costs for smart grid equipment, in light of the fact that such filings will predate adoption of interoperability standards through Commission rulemakings. Finally, because it would be important for early smart grid deployments, particularly pilot and demonstration projects, to provide feedback useful to the interoperability standards development process, the Commission proposed to direct the applicant to share certain information with the Department of Energy Smart Grid Clearinghouse, provided for in the American Recovery and Reinvestment Act (ARRA).¹³

The Commission proposed the Interim Rate Policy to encourage investment in smart grid technologies intended to address potential challenges to the bulk-power system through the advancement of efficiency, security, reliability, and interoperability. The Interim Rate Policy provides that smart grid investments that demonstrate system security and compliance with Commission-approved Reliability Standards,¹⁴ the ability to be upgraded, and other specified criteria will be eligible for timely rate recovery and other rate treatments.

Without this information, the Commission would be unable to discharge its responsibility to approve or modify electric utility tariff filings and would delay the effective implementation of nationwide open access to transmission by wholesale electric customers. Failure to issue these requirements would prevent timely Commission determination and approval of just and reasonable rates, which in turn, would prevent public utilities and licensees from being fairly compensated for services rendered.

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

There is an ongoing effort to determine the potential and value of improved information technology to reduce the burden. The Commission adopted user friendly electronic formats and software in order to facilitate the required electronic formats for rate filings and will develop formats for any subsequent filings. In Order No. 614 (65 FR

¹³ American Recovery and Reinvestment Act, Pub. L. No. 111-5, sec. 405(3) (2009).

¹⁴ Adopted under FPA sec. 215, 16 U.S.C. 824o.

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18221, April 7, 2000) the Commission amended its regulations to streamline rate schedules sheet designation procedures for electric industry schedules.

In Order No. 2001, (67 FR 31043, May 8, 2002) the Commission revised the format through which traditional public utilities and power marketers must satisfy their obligation, in accordance with section 205 of the FPA and Part 35 of the Commission's regulations, to file agreements with the Commission. Public utilities that have standard forms of agreement in their transmission tariffs, cost-based power sales tariffs, or tariffs for other generally applicable services no longer have to file conforming service agreements with the Commission. The filing requirement for conforming agreements is now satisfied by filing the standard form of agreement and an electronic Electric Quarterly Report. Order No. 2001 also lifted the requirement that parties to an expiring conforming agreement file a notice of cancellation or a cancellation tariff sheet with the Commission. The public utility can simply remove the agreement from its Electric Quarterly Report.

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 proceedings.

This Final Rule amended the Commission's regulations¹⁵ to provide that all documents filed with the Commission may be submitted through the eFiling interface except for documents specified by the Secretary. The changes implemented in the eFiling 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; and documents that are subject to protective orders.

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>.

¹⁵ Rule 2003(c) of the Commission's Rules of Practice and Procedure, 18 CFR 385.2003(c).

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On September 18, 2008, the Commission issued a Final Rule, RM01-5-000, Order No. 714, “Electronic Tariff Filings” 73 Fed. Reg. 57515 (October 23, 2008) revising its regulations to require that all tariffs, tariff revisions and rate change applications for the public utility, natural gas pipeline and oil pipeline industries be filed according to a set of standards developed in conjunction with the North American Standards Board. The standards will assist in FERC’s goal of establishing a robust electronic filing environment for tariffs and tariff related material and will make it possible for FERC staff and the public to retrieve this material from a data base. Adoption of these standards and protocols will provide each company with enhanced flexibility to develop software to better integrate tariff filings with their individual tariff maintenance and business needs. These standards and protocols will also provide an open platform permitting third-party software developers to create more efficient tariff filing and maintenance applications, which will spread the development costs over larger numbers of companies.

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.¹⁶ At this time, however, the Commission will not accept tariff filings through the eFiling system. The eTariff rulemaking (see RM01-5-000 above) will remain the forum for addressing the electronic submission of tariff filings with tariff material.

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.

Electric Rate schedules and tariff filings containing transmission information that are not available from other sources and therefore, no use or other modification of the information can be made to perform oversight and review responsibilities under applicable legislation (e.g. Federal Power Act, Energy Policy Act of 1992, Energy Policy Act of 2005). All of the Commission’s public information collections are subject to analysis and review by Commission staff and are examined for redundancy. Further, Commission staff conducted an internal review of this collection of information to determine the necessity of the Commission’s strategic objectives.

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

¹⁶ Pub. L. No. 105-277, § 1704, 112 Stat. 2681, 2681-750 (1998).

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The Commission has reviewed those public utilities that constitute “small business concerns” under the Regulatory Flexibility Act for compliance with the Policy Statement. The Commission does not believe that the Policy Statement will have a direct impact on small entities. Most, if not all, of the transmission organizations to which the requirements of this rule would apply do not fall within the definition of small entities.¹⁷

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

It is not possible to collect this data less frequently. Only public utilities owning, operating, and/or controlling facilities used for the transmission of electricity in interstate commerce who at their option, seek to deploy of smart grid systems, are to provide information to ensure certain conditions are met for the reliable operation of the bulk-power system. They will only need to file when they seek to recover their costs for smart grid investments. The prescribed information should impose the least possible burden for companies to follow the Commission’s Interim Rate Policy.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION COLLECTION

This proposed program meets all of OMB's section 1320.5 requirements with the exception of part "d" thereof. Section 1320.5(d) limits the collection of data to an original and two copies of any document. The data provided under FERC-516 includes tariff sheets and rate schedules that would be filed by the respondents to comply with the provisions as indicated in Item A (1.). Currently an original and five copies are required to be submitted to the Commission. This is the minimum necessary to permit processing within the statutory time frame for Commission action. The original is routed to eLibrary for public viewing over the Commission's web site. One copy is distributed to the Public Reference and Files Maintenance Branch for public inspection in the Commission's

¹⁷ The RFA definition of “small entity” refers to the definition provided in the Small Business Act, which defines a “small business concern” as a business that is independently owned and operated and that is not dominant in its field of operation. See 5 U.S.C. § 601(3), citing to Section 3 of the Small Business Act, 15 U.S.C. § 632 (2000). The Small Business Size Standards component of the North American Industry Classification system defines a small utility as one that, including its affiliates is primarily engaged in the generation, transmission, or distribution of electric energy for sale, and whose total electric output for the preceding fiscal years did not exceed 4MWh. 13 C.F.R. § 121.202 (Sector 22, Utilities, North American Industry Classification System, NAICS) (2004).

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Public Reference Room. An additional copy is distributed to the Office of General Counsel for legal review. Three copies are distributed to the Office of Energy Markets and Regulation for technical review by analysts in rate filings, rate investigations and financial analysis.

However, as the eTariff Final Rule has been adopted and electronic filing is being put into place with implementation in 2010, this will eliminate the need for paper copies entirely for service agreements and transactional reports. During this transitional period, however, the traditional number of hard copies will still be needed for efficient processing of the data.

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

As noted above, the Commission issued a Proposed Policy Statement and Action Plan to guide the development of key standards for smart grid devices and systems. On May 19, 2009, the Commission issued a notice requesting supplemental comments on one additional feature of the Interim Rate Policy.¹⁸ This notice sought additional input regarding potential actions the Commission could take to insure that public utilities may qualify for awards under certain Department of Energy funding programs related to jurisdictional facilities.

The Commission received comments from 70 commenters. In general, commenters supported the Proposed Policy Statement, including the establishment of key priorities¹⁹, and the need for focused leadership over the process going forward. With respect to the Interim Rate Policy, there was a great diversity of comments. Sixteen supplemental comments were also submitted, with opinions split as to whether to offer special procedures for rate recovery filings for utilities seeking funding through certain Department of Energy programs. As the focus of this submission is the collections of information within the Interim Rate Policy, we will address those concerns here. Additionally there were also comments that the Commission exceeded its jurisdiction. Because the Commission's jurisdiction plays a critical role in implementing the Smart Grid policy, we will also address those concerns.

¹⁸ Smart Grid Policy, 127 FERC ¶ 61,139 (2009) (Notice Requesting Supplemental Comments).

¹⁹ An area considered to be a "key priority" is proposed as the first level of work to be accomplished in the interoperability standards-setting process. Proposed Policy Statement, 126 FERC ¶ 61,253 at P 27.

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Jurisdiction

In the Proposed Policy Statement, the Commission noted that its interest and authority in the area of smart grid derive from its authority over the rates, terms and conditions of transmission and wholesale sales in interstate commerce and its responsibility for Reliability Standards for the bulk-power system, as well as from EISA.

Many commenters noted a tension is raised by the Proposed Policy Statement between federal jurisdiction and state jurisdiction and urged the Commission to clarify jurisdictional boundaries. Questions centered on both standards adoption and applicability and whether deployed technology will be subject to state or federal rate authority.

A number of commenters maintained that EISA does not alter the fundamental parameters of the Commission's authority.²⁰ State commissions, other state authorities, and several utilities remarked that the Commission should not encroach on traditional state jurisdiction.²¹ The Michigan Commission maintains that implementing smart grid functionality and interoperability at the distribution level or in retail sales should be left to the states. Several entities were concerned by statements in the Proposed Policy Statement that, to those parties, indicated that the Commission may be extending its jurisdictional scope. In particular, commenters took issue with the suggestions that the potential reliability impacts of electric vehicles may afford the Commission some authority over distribution facilities, and certain devices related to the distribution system are eligible for cost recovery in wholesale rates because of some tangential impact on bulk-power operations due to interoperability issues.²²

The Ohio Commission commented that, since interoperability standards encompass areas that are outside of the Commission's jurisdiction, the Commission should support the development of model standards through the Institute's process, resolving any impasses through the NARUC/FERC Smart Grid Collaborative, and that the Commission and states should adopt model standards to be applied within areas

²⁰ See, e.g., Michigan Commission Comments at 6-7, Maryland Counsel Comments at 7-8, Ohio Commission Comments at 4, and Ohio Partners Comments at 2-3.

²¹ See, e.g., California Commission Comments at 6, Ohio Commission Comments at 5-7, Massachusetts Attorney General Comments at 4-5, and SDG&E Comments at 22-23.

²² Michigan Commission Comments at 8 and Maryland Counsel Comments at 5.

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subject to their respective jurisdictions. In addition, states should be responsible for ensuring compliance with Commission-imposed guidelines and standards.²³

The Ohio Commission and North Carolina Agencies noted that not all states will want the same smart grid functionality deployed in the same manner, and commented that standards should accommodate different rate structures and policies. In contrast, NEMA and CURRENT appreciate national standardization, noting that the lack of a consistent national standard for interconnection has inhibited the development of distributed generation. NEMA and CURRENT urged the Commission to pursue nationwide standardization and encourage state commissions to develop policies akin to those in the Proposed Policy Statement. The Kansas Commission asked whether the Commission is suggesting that the federal government should implement guidelines governing the procedures for charging electric vehicles at night as one method for storing electricity.²⁴

Various commenters requested clarification or guidance in certain areas, notably (1) whether the Commission intends to implement mandatory protocols “in areas that are traditionally under state jurisdiction, such as the distribution network and behind-the-meter installations,”²⁵ (2) how the Commission intends to determine which portions of a smart grid are part of the bulk-power system and those which are part of the distribution system,²⁶ (3) whether the Commission has the authority to specify physical layer standards²⁷ while preserving state ratemaking authority,²⁸ and (4) whether the Commission has the authority to mandate a nationwide meter communications protocol.²⁹

²³ Ohio Commission Comments at 5-7.

²⁴ Kansas Commission Comments at 5-6.

²⁵ California Commission Comments at 6-7.

²⁶ *Id.* at 11.

²⁷ NEMA made several references to physical connections and standards in its comments, including interconnection for distributed generation, and applications for intelligent customer energy management equipment. It was not clear from NEMA’s comments whether this reference also applies to meters.

²⁸ NEMA Comments at 6.

²⁹ *Id.* at 7.

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Many commenters asked the Commission to clarify the boundaries between federal and state jurisdiction for rate recovery purposes. NARUC suggested that the approach should be to examine the location of the deployed technology. If such a technology resides on a Commission-jurisdictional line, then it should be regulated by this Commission. If it resides on a line regulated by states, then it should be subject to state oversight.³⁰ EEI highlighted the need for this clarification, noting that specific smart grid equipment might be installed on either or both transmission and distribution facilities.³¹ Indianapolis P&L asserted that the Commission should apply the seven factor test, set forth in Order No. 888,³² to delineate between federal and state activities.³³

NARUC was also concerned that the Commission's policies not allow double cost recovery, or allow Commission-jurisdictional entities to "bootstrap cost recovery for projects implemented within state jurisdiction."³⁴ The California Commission asserted that the Commission should acknowledge that state commissions are in the best position to address concerns as they pertain to retail customers and ratepayers.³⁵

On the other hand, Ohio Commission stated that cost recovery for the initial deployment of a demand response program should be at the state level. However, if such programs require later upgrading or replacement in order to meet model demand response standards approved by this Commission, then Ohio Commission argued that the

³⁰ NARUC Comments at 16, Maryland Counsel Comments at 5, and Springfield Comments at 10-11.

³¹ EEI Comments at 14-15.

³² Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,771 and 31,981 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

³³ Indianapolis P&L Comments at 5-6.

³⁴ NARUC Comments at 13.

³⁵ California Commission Comments at 4, 12.

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associated costs should be recovered on a socialized, national level in Commission-jurisdictional rates.³⁶

Finally, a number of entities encouraged the Commission to work together with the states and in particular with the NARUC/FERC Smart Grid Collaborative, to sort out jurisdictional boundaries. Maryland Counsel and Ohio Partners commented that ongoing dialogues should include consumer advocacy organizations.

Commission's Response

Specifically, the Commission has jurisdiction over the transmission of electric energy in interstate commerce by public utilities pursuant to FPA section 201, and over the reliable operation of the bulk-power system in most of the nation under FPA section 215.³⁷ Section 1305(d) of EISA directs the Commission to initiate rulemaking proceedings to adopt such standards and protocols as may be necessary to insure smart grid functionality and interoperability in interstate transmission of electric power, and in regional and wholesale electricity markets.³⁸

The Commission agrees with commenters who stated that EISA does not alter the FPA's jurisdictional boundaries between federal and state regulation over the rates, terms, and conditions of transmission service and sales of electricity. EISA does not modify any of the provisions of the FPA. Nevertheless, EISA does give the Commission new responsibilities for the adoption of standards needed to insure smart grid functionality and interoperability. The legislation specifically directs the Commission to institute rulemaking proceedings to adopt standards necessary to insure "functionality and interoperability in interstate transmission of electric power, and regional and wholesale electricity markets."³⁹ The Commission understands this mandate to mean that it has the authority to adopt a standard that will be applicable to all electric power facilities and devices with smart grid features, including those at the local distribution level and those used directly by retail customers so long as the standard is necessary for the purpose just

³⁶ Ohio Commission Comments at 1, 10.

³⁷ 16 U.S.C. 824, 824o.

³⁸ EISA sec. 1305(d), to be codified at 15 U.S.C. 17385(d).

³⁹ EISA sec. 1301 and sec. 1305(d).

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stated.⁴⁰ The Commission reached this conclusion because Congress does not exclude from the scope of EISA 1305(d) facilities used in local distribution, or otherwise limit Commission authority to approve standards. Further, other provisions in EISA indicate that the smart grid interoperability framework is intended to include all elements of the grid, including communications with the ultimate consumer.⁴¹ EISA does not identify any segment of the interoperability framework that is not within the scope of standards to be promulgated. Accordingly, the Commission finds that EISA grants the Commission the authority to adopt smart grid standards—such as meter communications protocols or standards—that affect all facilities, including those that relate to distribution facilities and devices deployed at the distribution level, if the Commission finds that such standards are necessary for smart grid functionality and interoperability in interstate transmission of electric power, and in regional and wholesale electricity markets.

EISA, however, does not make any standards mandatory and does not give the Commission authority to make or enforce any such standards. Under current law, the Commission’s authority, if any, to make smart grid standards mandatory must derive from the FPA. Similarly, its authority to allow rate recovery of smart grid costs must derive from the FPA. The authority to adopt standards under EISA does not change the scope of the Commission’s ratemaking or reliability jurisdiction, as many commenters note.

In order to determine whether particular facilities are subject to state or federal jurisdiction for purposes of rate recovery, interested parties should refer to Commission precedent for guidance.⁴² The Commission will evaluate particular facilities and projects

⁴⁰ For example, two-way communications are a distinguishing characteristic of smart grid devices on both the transmission and distribution systems. This two-way communications capability is essential to the smart grid vision of interoperability, allowing the transmission and distribution systems to communicate with each other. They also affect the security and functionality of each other.

⁴¹ See, e.g., EISA sec. 1301 and sec. 1305(a) (stating that the framework should “enable all electric resources, including demand-side resources, to contribute to an efficient, reliable electricity network”) and sec. 1305(b).

⁴² See, e.g., Detroit Edison Co., 95 FERC ¶ 61,415 (2001), order on reh’g, 96 FERC ¶ 61,309 (2001). “[T]o the extent that any facilities, regardless of their original nominal classification, in fact, prove to be used by public utilities to provide transmission service in interstate commerce in order to deliver power and energy to wholesale purchasers, such facilities is subject to this Commission’s jurisdiction and review.” Id., 95 FERC ¶ 61,415, at 62,535. Accord, Northeast Utilities Service Co., 107 FERC ¶ 61,246, at P 22 (2004).

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on a case-by-case basis. In response to commenters' concerns, the Commission recognizes that it would be inappropriate for a utility to recover the same costs for a smart grid project twice, through state-approved retail rates and again in a proceeding before this Commission.

As the EISA mandate to adopt interoperability standards does not afford the Commission new economic regulatory authority over local distribution facilities themselves,⁴³ and does not provide any authority or directive to mandate standards, the Commission does not interpret EISA to allow it to direct states to implement any particular retail customer policies or programs. To the extent the Commission does adopt smart grid standards related to facilities outside the Commission's jurisdiction under the FPA, the Commission agrees with the Ohio Commission that states can insure compliance with any standards they deem applicable to their jurisdictions.

In response to the question posed by the Kansas Commission regarding whether the federal government should have guidelines governing the procedures for charging electric vehicles at night as one method for storing electricity, the Commission does not intend to issue policy guidelines for storing electric power by charging electric vehicles during off-peak load periods. Nevertheless, if the Institute's process results in a smart grid interoperability standard related to storing electric power by charging electric vehicles, the Commission would consider adoption of such a standard pursuant to EISA section 1305(d).

The Commission recognizes that states have an interest in the functionalities of smart grid technologies, as suggested by North Carolina Agencies and the Ohio Commission, and the Commission encourages states to actively participate in the ongoing discussions being organized and facilitated by the Institute to insure that their perspectives are represented. The Commission does not believe that its adoption of national standards for smart grid technologies should interfere with a state's ability to adopt whatever advanced metering or demand response program it chooses. Nor will Commission adoption of national standards affect the existing statutory framework for wholesale and retail pricing. Interoperability standards should be designed flexibly enough to support alternative programs and pricing policies being considered by a

⁴³ Similarly, the Commission's previous actions approving proposed North American Electric Reliability Corporation (NERC) reliability standards applicable to distribution providers and load serving entities to maintain the reliability and integrity of the bulk-power system did not, in and of themselves, confer Commission rate jurisdiction over those entities' local distribution facilities.

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particular state. Indeed, national standards adopted by the Commission should enhance, not limit, the policy choices available to each state.

The Commission believes that it is appropriate for it to have a role in determining key priorities in the interoperability standards development process. The Commission's leadership in this arena will help to expedite the development of functionalities that are important to federal energy policy (e.g., wide-area situational awareness to improve the reliability of the transmission grid) as well as to support programs that have emerged in many states (e.g., integrating renewable generation to permit utilities to meet state-mandated renewable portfolio requirements). The Commission sees a great benefit from collaborating closely with states regarding flexibility in smart grid standards and adapting to new technologies and the Commission expects to work with the states to pursue these topics through the NARUC/FERC Smart Grid Collaborative.

Interim Rate Policy

In the Proposed Policy Statement, the Commission stated that certain upcoming challenges to the operation of the bulk-power system justified enacting policies to encourage the near-term deployment of smart grid systems capable of helping to address those challenges. Accordingly, the Commission proposed certain rate policies meant to encourage such near-term deployment while appropriately protecting customers from stranded costs and the electric system from potential cybersecurity threats. Consistent with FPA section 205, which requires that all rates for the transmission or sale of electric energy subject to the Commission's jurisdiction be just and reasonable, the Commission proposed to consider smart grid devices and equipment—including those used in a smart grid pilot program or demonstration project—to be “used and useful”⁴⁴ for purposes of cost recovery if the applicant makes certain showings.

Midwest ISO Transmission Owners fully supports the Commission's proposals regarding the used and useful determination for smart grid costs.⁴⁵ Ice Energy supports the proposed eligibility requirements and discussed how its own thermal-storage air conditioning technology meets those requirements and could aid utility compliance with those requirements as well.⁴⁶ Public Interest Organizations supports the criteria already included in the Interim Rate Policy, and also proposed two additional criteria: first, a

⁴⁴ The general rate-making principle is that expenditures for an item may be included in a public utility's rate base only when the item is “used and useful” in providing service. See NEPCO Municipal Rate Committee v. FERC, 668 F.2d 1327, 1333 (D.C. Cir. 1981).

⁴⁵ Midwest ISO Transmission Owners Comments at 7.

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requirement that the smart grid cost in question be vetted through a regional planning process and that such planning process demonstrates the value of such investments for meeting reliability, security, dispatchable demand response, or renewable energy integration needs, and second, a requirement to perform a cost/benefit analysis.⁴⁷ Ohio Counsel stated that it fully supports the comments made by Public Interest Organizations but would add further emphasis to the need for a comprehensive plan based upon appropriate criteria to insure prudence in project scope, implementation, and cost recovery. It views this as necessary to insure that the cost/benefit analysis of the deployment will be favorable and that the guidelines for cost recovery are prudent and net of operation and asset management benefits.⁴⁸

NRECA stated that smart grid deployments should not exceed “the pace of value” with new elements entering the system only as they are able to demonstrate value.⁴⁹ Ohio Partners and Maryland Counsel similarly argued that the benefits to customers must be shown before cost recovery is granted.⁵⁰ Likewise if any Interim Rate Policy is finalized, ELCON believes that it must incorporate a cost/benefit requirement.⁵¹

Several commenters⁵² also supported the addition of a cost-effectiveness requirement. In this regard, North Carolina Agencies stressed the need for coordination with the affected state commissions, and Wal-Mart pointed to item number six in the document “Proposed Funding Criteria for the ARRA Smart Grid Matching Grant Program” recently proposed by the NARUC/FERC Smart Grid Collaborative to the Department of Energy, which proposes a variety of information requirements that could be used to help determine cost-effectiveness. Springfield argued that utilities should be required to demonstrate that they are following best utility practices, and should be

⁴⁶ Ice Energy Comments at 19-20.

⁴⁷ Public Interest Organizations Comments at 4.

⁴⁸ Ohio Counsel Comments at 1-3.

⁴⁹ NRECA Comments at 13-14.

⁵⁰ Ohio Partners and Maryland Counsel Comments at 5-6.

⁵¹ ELCON Comments at 10.

⁵² CPower Comments at 2, Alcoa Comments at 9, PSEG Companies Comments at 2, North Carolina Agencies Comments at 3, and Wal-Mart Comments at 6.

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required to demonstrate the incremental benefit of smart grid deployment as if such best practices were in place.⁵³

Illinois Commission argued that the Commission's proposed requirements seem to assume that smart grid proposals are economically justified by their very nature.⁵⁴ Illinois Commission pointed out that under the Department of Energy's grant criteria, a smart grid project could be denied grant funding if it fails to adhere to the Institute-published standards, but under the Interim Rate Policy the same project could receive rate recovery and, in particular, guaranteed recovery of abandonment costs. Illinois Commission sought clarification that this would not be automatically permitted. Instead, Illinois Commission argued that during the period between when the Institute publishes standards and the Commission adopts them through rulemaking, any affected smart grid rate recovery applicants should have the burden to establish that such project remains used and useful.⁵⁵ Illinois Commission and AWEA also urged the Commission to limit application of the Interim Rate Policy to only those smart grid projects that further the Commission's goals associated with the two cross-cutting issues and priority functionalities identified in the Proposed Policy Statement.⁵⁶ Finally, Illinois Commission also argued that the Commission should maintain a traditional cost-causation; beneficiary-pays cost allocation methodology and, in particular, prohibit broad socialization of such costs within RTOs.⁵⁷

Michigan Commission argued that the Interim Rate Policy should be applied carefully and conservatively to avoid inefficient spending on equipment that does not promote real progress toward true smart grid functionality. Michigan Commission is particularly concerned about permitting cost recovery for smart grid deployments that cannot be upgraded to final interoperability standards. Accordingly, Michigan Commission argued that if the Commission proceeds with an Interim Rate Policy, it should clarify that its eligibility criteria will be strictly applied and only available to

⁵³ Springfield Comments at 10.

⁵⁴ Illinois Commission Comments at 4.

⁵⁵ *Id.* at 6. Maryland Counsel Comments at 5, n.4.

⁵⁶ Illinois Commission Comments at 6-7 and AWEA Comments at 11-12.

⁵⁷ Illinois Commission Comments at 7.

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investments that create significant new smart grid functionality or serve as the basis for upgrading or expanding such functionality in the future.⁵⁸

Indianapolis P&L also supports the proposed criteria but requested that the Commission apply these criteria with some degree of flexibility given that national smart grid development is a work-in-progress. Specifically, Indianapolis P&L suggested that the need to demonstrate good faith adherence to the smart grid vision articulated in EISA may be complicated by the early stage of the interoperability process generally. In this regard, Indianapolis P&L suggested that any evaluation of applicant good faith decisions take into account the state of affairs at the time any decisions were made.⁵⁹ Regarding the requirement to share information with the Department of Energy Smart Grid Clearinghouse, Indianapolis P&L requested that confidential and commercially-sensitive information not be demanded or that appropriate protections be permitted to apply.⁶⁰

FirstEnergy urged the Commission not to require applicants to make showings that would be unreasonable, overly burdensome, or inflexible such that any proposed cost recovery would discourage investment. It did not, however, specify whether any of the Commission's proposed eligibility criteria would fall into this category.⁶¹ DRSG Coalition, on the other hand, argued that some of the Commission's proposed security criteria for cost recovery may be overly burdensome.⁶²

SDG&E proposed that, where an application for rate recovery or incentives involves the utility's share of the cost of a project receiving partial Department of Energy funding, the Commission could deem the utility's share of the investment per se prudent as used and useful plant so that rate recovery of such costs would be deemed per se just and reasonable. If this proposal is not adopted outright, then SDG&E argued that the Commission should at least apply a rebuttable presumption that such costs are per se prudent and their rate recovery would be per se just and reasonable.

⁵⁸ Michigan Commission Comments at 10-12.

⁵⁹ Indianapolis P&L Comments at 4.

⁶⁰ Id. at 4-5.

⁶¹ First Energy Comments at 10.

⁶² DRSG Coalition Comments at 9-10.

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AARP argued that the Commission’s proposed eligibility criteria are equivalent to “near automatic rate recovery” for new investments labeled “smart grid.”⁶³ AARP does not believe that the Commission’s statutory responsibility to insure just and reasonable rates can be fulfilled with such criteria. First, it asserted that the Commission has failed to identify the specific investments, devices, or other systems that would or could be subject to the proposed Interim Rate Policy. It also asserted that the Commission should require applicants to affirmatively demonstrate benefits, such as enhanced reliability, as a condition for rate recovery. It also argued that rate recovery should not be granted unless the applicant can demonstrate that the smart grid equipment in question can be upgraded.⁶⁴ Finally, AARP proposed that the Commission require applicants to demonstrate that their investments have been reviewed and approved by state regulators when those investments are intimately related to, and coordinated with, investments that are subject to state regulatory authorities.⁶⁵

APPA had two concerns in this area.⁶⁶ First, it is concerned that only smart grid costs associated with wholesale rates and transmission functions be recovered through filings under this proposal. It argued that the cost of smart grid installations that support retail service should be recovered in retail rates. Second, APPA opposed the Commission’s proposal to consider smart grid devices and equipment to be used and useful for cost recovery purposes if the applicant meets the criteria set out in the Proposed Policy Statement. APPA believes that such treatment shifts the burden of proof from the applicant to customers opposing such a finding. Third, APPA believes that applicants for smart grid-related rate recovery or incentives should be required to show that their suppliers have attested to the integrity of the components used in the smart grid installation in question.

Kansas Commission concurs with the need to provide certainty and guidance regarding cost recovery issues but expressed concerns regarding the three criteria proposed by the Commission. Specifically, it prefers that more traditional demonstrations of the used and useful requirement be preserved and also supports a

⁶³ AARP Comments at 10.

⁶⁴ The Proposed Policy Statement encouraged upgradeability but stopped short of requiring it because it may not always be technically or economically feasible. Proposed Policy Statement, 126 FERC ¶ 61,253 at P 49.

⁶⁵ AARP Comments at 10-12.

⁶⁶ APPA Comments at 16-17, 19.

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cost/benefit requirement.⁶⁷ The Massachusetts Attorney General believes that no smart grid costs should be eligible for rate recovery until after the Institute provides guidance on which technologies are most cost effective and where device deployment will be most valuable.⁶⁸ The Massachusetts Attorney General also recommended that the Commission require applicants to demonstrate that they maximized all opportunities to secure federal funding to offset the costs associated with smart grid deployment.

Citizens Coalition opposed the proposal to find smart grid equipment used and useful if three conditions are met on the basis that such changes are “simply dishonest manipulation of traditional utility principles.”⁶⁹ It also expressed concern with the proposal to require good faith efforts to adhere to the vision of a smart grid described in Title XIII of EISA. Specifically, it opposes a “good faith” standard and instead urged that applicants be required to show that they acted reasonably and prudently, which it characterizes as a standard of reasonableness.

Commission’s Response

To help inform the Commission’s review for rate approval of smart grid costs, an applicant seeking the recovery of smart grid costs must make four demonstrations. The first, and threshold, demonstration is that an applicant must show that the smart grid facilities will advance the goals of EISA section 1301. Second an applicant must show that the reliability and cybersecurity of the bulk-power system will not be adversely affected by the deployment of the smart grid facilities at issue. Third, the applicant must show that it has minimized the possibility of stranded investment in smart grid equipment, in light of the fact that such filings will predate adoption of interoperability standards. Finally, because it will be important for early smart grid deployments, particularly pilot and demonstration projects, to provide feedback useful to the interoperability standards development process, an applicant must agree to provide feedback useful to the interoperability standards development process, by sharing information with the Department of Energy Smart Grid Clearinghouse.

To make the first and threshold demonstration, an applicant must describe the proposed investment (including the technologies, systems, and applications it entails) and how it is consistent with the policy and one or more of the goals Congress set forth in

⁶⁷ Kansas Commission Comments at 7-8.

⁶⁸ Massachusetts Attorney General Comments at 3-4.

⁶⁹ Citizens Coalition Comments at 10, 12-13.

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section 1301 of EISA. In section 1301 of EISA, Congress made clear that “it is the policy of the United States to support the modernization of the Nation’s electricity transmission and distribution system to maintain reliable and secure electricity infrastructure that can meet future demand growth” and to achieve certain goals, “which together characterize a Smart Grid.”⁷⁰ Those goals include increased use of digital information and controls technology to improve reliability, security, and efficiency of the electric grid, dynamic optimization of grid operations and resources, with full cybersecurity, and deployment and integration of distributed resources and generation, including renewable resources, demand side resources and energy efficiency resources. This threshold showing was implicit in the Proposed Policy Statement, but in light of many comments the Commission received, we now state it explicitly.

In order to make the second showing, an applicant must describe how its proposed deployment of smart grid equipment will maintain compliance with Commission-approved Reliability Standards, such as the CIPS Reliability Standards, during and after the installation and activation of smart grid technologies so the reliability and cyber security of the bulk-power system will not be jeopardized. An applicant must also address: (1) the integrity of data communicated (whether the data is correct), (2) the authentication of the communications (whether the communication is between the intended smart grid device and an authorized device or person), (3) the prevention of unauthorized modifications to smart grid devices and the logging of all modifications made, (4) the physical protection of smart grid devices, and (5) the potential impact of unauthorized use of these smart grid devices on the bulk-power system.

To make the third showing concerning potential stranded smart grid investment, applicants must show how they have relied to the greatest extent practical on existing,

⁷⁰ EISA sec. 1301.

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widely adopted and open⁷¹ interoperability standards; and where feasible, relied on systems and firmware that can be securely upgraded readily and quickly.

Finally, to make the showing concerning the sharing of information, an applicant must agree to share with the Department of Energy Smart Grid Clearinghouse the same information required by the Department of Energy for its grant program. While in the Proposed Policy Statement the Commission initially proposed seven specific categories of information to be shared, modeled on a similar proposal made to the Department of Energy by the NARUC/FERC Smart Grid Collaborative, the Department of Energy has now released its final information sharing requirements and the Commission will rely on those requirements instead.

Some commenters argued that these showings represent a departure from traditional ratemaking practice. The Commission disagrees. These showings do not replace the Commission's existing demonstrations, but supplement them. The supplemental information is needed in this case to assure the Commission that recovery of investments in these new technologies, in some cases still experimental, are serving the interests of consumers while advancing the effort to create a smart grid. Further, although the Commission generally does not allow the recovery of new costs outside a rate case, we will do so for smart grid costs as explained further below, and this fact alone creates a need for additional filing requirements designed for just these costs. Here Commission is allowing cost recovery for jurisdictional smart grid costs based on traditional standards of review with an added showing that the technologies will not adversely affect the security and reliability of the grid, have minimized potential stranded investment related to consistency with interoperability standards as they are fully developed over time, and assist in providing information for future projects. Such considerations are fully consistent with the "used and useful" standard, and are the proper determinations for the Commission to make when considering whether a smart grid cost

⁷¹ An open architecture is publicly known, so any and all vendors can build hardware or software that fits within that architecture, and the architecture stands outside the control of any single individual or group of vendors. In contrast, a closed architecture is vendor-specific and proprietary, and blocks other vendors from adoption. An open architecture encourages multi-vendor competition because every vendor has the opportunity to build interchangeable hardware or software that works with other elements within the system. See Gridwise Architecture Council Decision-Maker's Interoperability Checklist Draft Version 1.0, http://www.gridwiseac.org/pdfs/gwac_decisionmakerchecklist.pdf. The Commission notes that Congress recently made utilization of open protocols and standards, if available and appropriate, a condition of receiving funding from the Department of Energy for demonstration projects and grants pursuant to EISA sec. 1304 and 1306. See ARRA sec. 405(3) and 405(8).

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is just and reasonable in this interim period before a substantial body of relevant interoperability standards are adopted through Commission rulemaking.

These considerations do not constitute automatic rate recovery for smart grid projects, as some commenters have suggested. The Commission has laid out specific showings that must be made, in addition to normal rate filing requirements, for rate recovery for a smart grid project to be approved. The burden is on the applicant to make these showings.

The Commission rejects the arguments that a formal cost/benefit or cost-effectiveness analysis should be required in addition to these three filing requirements. Under section 205 of the FPA, the Commission already considers whether rates are just and reasonable and not unduly discriminatory. Formal quantitative analyses typically contain some areas with highly subjective benefits that could lead to protracted debate between each side's experts and increase the cost of litigation. Further, a cost-benefit analysis would be particularly infeasible in this instance. For example, if the benefits of smart grid deployment were to include enhanced ability to accommodate changes in generation mix, including heavier reliance on renewable generation, then the costs of failure to deploy such technology could potentially include such hard-to-quantify costs as the results of global climate change. Such cost estimates will be highly dependent on a broad range of assumptions and would likely be highly contentious in every case. Accordingly, the value of such a requirement would be questionable. In any event, intervenors in rate proceedings can and do raise the issue of whether utility investments were prudently made in light of their costs and they may continue to do so.

Several commenters stated that the Commission should identify what devices will be eligible for smart grid rate recovery. The Commission will not attempt to list all the particular facilities, equipment, or devices that are eligible or ineligible. In response to APPA and others, and as noted above, rate recovery will apply only to smart grid costs within the Commission's FPA jurisdiction. EISA does not alter the FPA's jurisdictional boundaries between federal and state regulation over the rates, terms, and conditions of transmission service and sales of electricity.

Incentives

In its Proposed Policy Statement the Commission proposed several incentive rate treatments for smart grid costs. These rate treatments are meant to encourage the adoption of and investment in smart grid technologies. As part of the Interim Rate Policy, the Commission proposed that jurisdictional entities should be able to recover

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costs for used and useful smart grid facilities on a single issue basis. That is, entities would be able to recover the cost of smart grid investments without having to open their entire rate base to Commission review.

Some commenters⁷² support the Commission's proposal to permit single issue rate filings for qualifying smart grid investments. NYISO noted that allowing jurisdictional transmission owners to recover the cost of investment in new controls and communication devices may assist in stimulating needed investment.⁷³ Midwest ISO Transmission Owners stated that such a policy will encourage investment because it allows transmission owners to invest in smart grid equipment without running the risk that other aspects of their system-wide rates will become subject to review and possible alteration.⁷⁴

Several commenters argued against the proposed single issue ratemaking, and stated that the Commission should adhere to traditional ratemaking practices.⁷⁵ ELCON stated that such cost recovery is premature, given unresolved technical issues.⁷⁶ APPA argued that single issue ratemaking for smart grid technology could lead to an over-recovery of costs, and is part of a trend in which the Commission overlooks its duty to insure just and reasonable rates in the name of current policy goals.⁷⁷ Commenters also argued against treating approved smart grid technologies as used and useful.⁷⁸ Citizens

⁷² SDG&E Comments at 24-25, Indianapolis P&L Comments at 3-4, Black Hills Corp. Comments at 4, Midwest ISO Transmission Owners Comments at 3-7, and Allegheny Companies Comments at 8.

⁷³ NYISO Comments at 12.

⁷⁴ Midwest ISO Transmission Owners Comments at 4.

⁷⁵ NRECA Comments at 11-13, Maryland Counsel Comments at 2, 4-5, Ohio Partners Comments at 9-10, ELCON Comments at 9-10, and Citizens Coalition Comments at 12-14.

⁷⁶ ELCON Comments at 9-10.

⁷⁷ APPA Comments at 17-18.

⁷⁸ NRECA Comments at 11-13, Maryland Counsel Comments at 4, and Ohio Partners at 9-10.

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Coalition opposes any special rate treatment for smart grid equipment, as does ELCON for the same reasons that it opposes finalization of the Interim Rate Policy generally.⁷⁹

EEI also argued that for purposes of smart grid-related single issue rate filings, the Commission should consider providing waiver of the full financial data requirements in the Commission's regulations. In particular, EEI argued that Period I data may be adequate for determining whether such rates are just and reasonable and the otherwise required Period II data may not be needed.

Commission's Response

The Commission will allow single issue rate treatment for the recovery of costs associated with smart grid investments as part of its Interim Rate Policy. Although the Commission generally does not allow the recovery of new costs outside a rate case that considers all costs, the Commission has entertained exceptions for special cases. For example, in implementing FPA section 219, as enacted in the Energy Policy Act of 2005, the Commission has stated that it would allow single issue rate treatment for new transmission projects.⁸⁰ Furthermore, such rate treatment is not unheard of in other jurisdictions; retail rates may include surcharges to the base rates in order to recover unusual, or "single issue," costs.⁸¹ Here the Commission will allow single issue rate treatment in response to a pressing need for the development of new and innovative smart grid capabilities that will be needed by the electric system, and in response to a statutory directive to support the modernization of the electric grid. This will in no way affect the ability of customers to file a complaint pursuant to section 206 of the FPA if they believe that the ultimate rate charged by the public utility is no longer just and reasonable.

⁷⁹ Citizens Coalition Comments at 14 and ELCON Comments at 13.

⁸⁰ Promoting Transmission Investment Through Pricing Reform, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 191 (2006), order on reh'g, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), order on reh'g, 119 FERC ¶ 61,062 (2007).

⁸¹ See, e.g., Kan. Stat. Ann. sec. 66-117(f) (2009), Pa. Pub. Util. Code sec. 2804(16)(ii) (2009) and WUTC v. Puget Sound Energy, Inc., Docket Nos. UE-011570 and UG-011571, at P 25 and 27 (2002).

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As to EEI's request for clarification regarding waiver of the full financial data requirements in the Commission's regulations, the Commission already permits applicants to seek such waiver on a case-by-case basis. On the record before us, the Commission sees no need for a blanket waiver. Applicants seeking such a waiver must retain the burden for supporting the waiver.

The Commission also proposed to permit applicants to seek recovery of the otherwise stranded costs of legacy systems that are to be replaced by smart grid equipment. The Commission stated that an appropriate plan for the staged deployment of smart grid equipment, which could include appropriate upgrades to legacy systems where technically feasible and cost-effective, could help minimize the stranding of unamortized costs of legacy systems. The Commission therefore proposed that any request to recover stranded legacy system costs must demonstrate that such a migration plan has been developed.

AARP argued that the proposed stranded cost policies for legacy systems are unreasonable because they may present significant cost risk exposure to consumers. AARP recommended that the Commission transfer at least some portion of the risks of stranded costs from ratepayers to shareholders.⁸² APPA stated that retail costs, including stranded costs, should not be reflected in wholesale rates. APPA also argued that applicants should be required to make every effort to minimize the stranding of legacy costs through phased integration strategies.⁸³ Citizens Coalition opposes any recovery of the stranded legacy costs of legacy systems, stating that past stranded cost proceedings cost consumers billions of dollars.⁸⁴ It argued that smart grid advocates should reimburse utilities and their customers for such costs if they wish to replace such systems prematurely. ELCON also opposes permitting recovery of the stranded cost of legacy systems.⁸⁵ NRECA argued that if the Commission's discussion of permitting applicants to seek stranded cost recovery was meant to change existing ratemaking policies, the Commission must provide more justification for doing so and detailed criteria for

⁸² AARP Comments at 12-13.

⁸³ APPA Comments at 20.

⁸⁴ Citizens Coalition Comments at 9, 14.

⁸⁵ ELCON Comments at 13.

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evaluating such applications.⁸⁶ Additionally, several commenters argued that every effort should be made to minimize the stranding of legacy costs.⁸⁷

Other commenters support the Commission's proposals with respect to recovery of the stranded investment in legacy systems to be replaced by smart grid equipment, including the proposals meant to minimize such stranded costs.⁸⁸ FirstEnergy also proposed that the Commission consider permitting accelerated depreciation or amortization for legacy systems to be replaced with smart grid equipment.⁸⁹

Commission's Response

As part of the Interim Rate Policy, the Commission will allow single issue rate treatment of otherwise stranded costs for jurisdictional legacy systems being replaced by jurisdictional smart grid equipment, provided that proposals to recover these costs are supported by an equipment migration plan that minimizes the stranding of unamortized costs of legacy systems. In the Policy Statement the Commission has discussed several major potential challenges to the operation of the bulk-power system, and the smart grid capabilities that could help address those challenges. The Commission views these challenges as potentially serious enough to justify making the development of these smart grid capabilities a high priority. Accordingly, if developing these capabilities requires the early replacement of some legacy equipment, the Commission would view that as a strong argument for doing so, and would not necessarily render these previously-approved investments as unwise.

Department of Energy Funding Grants

Subsequent to the Commission's issuance of the Proposed Policy Statement, the Department of Energy announced two smart grid funding opportunities for up to fifty percent of the costs of certain smart grid projects. In addition, the Department of Energy

⁸⁶ NRECA Comments at 14-15.

⁸⁷ Ohio Partners Comments at 11, National Grid Comments at 7, and Maryland Counsel Comments at 6.

⁸⁸ SDG&E Comments at 26, FirstEnergy Comments at 10, Midwest ISO Transmission Owners Comments at 9-11, PSEG Companies Comments at 8, and Black Hills Corp. Comments at 4.

⁸⁹ First Energy Comments at 10.

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planned to require applicants to identify the source of non-Department of Energy funds, along with some evidence as to the certainty of these funds.

Given that applicants for these programs might include jurisdictional public utilities that seek rate recovery through Commission-jurisdictional rates for the non-Department of Energy portion of funds for transmission-related projects, the Commission sought supplemental comments on the matter. The Commission received 16 supplemental comments.

There are two major themes in the supplemental comments. First, the investor-owned electric industry is supportive of the Commission's proposal to conditionally approve rate adjustments on smart grid projects, including those eligible for Department of Energy funding. EEI is fully supportive of the Commission's smart grid Interim Rate Policy proposal, stating that it provides certainty and incentives for utilities to aggressively pursue Department of Energy funding.⁹⁰ Without interim rate policies, utilities may be less willing or unable to pursue Department of Energy funding. EEI encouraged the Commission to issue its Interim Rate Policy before the Department's release of its June 17, 2009 final funding opportunity documents, and certainly prior to the July 29 project submission deadline. EEI supports rate recovery of upgrades to legacy systems and rate recovery of stranded costs resulting from smart grid upgrades.⁹¹ EEI also stated that expedited rate adjustments can be accomplished through formula rates.⁹² SDG&E, PSEG, PG&E, and the New York Transmission Owners all filed comments in support of the Commission's Interim Rate Policy proposals.⁹³ None of the Investor Owned Utility commenters suggested that the Commission adopt a separate rate policy for investments supported by Department of Energy funds.

On the other hand, the public power sector, energy consumer representatives, and state regulatory commissions opposed or have serious reservations about the Commission's policy proposal. NRECA and ELCON continue to oppose the Commission's Interim Rate Policy proposal in general. NRECA stressed that the

⁹⁰ EEI Supplemental Comments at 4-5.

⁹¹ Id. at 6.

⁹² Id.

⁹³ SDGE Supplemental Comments at 1-2, PSEG Supplemental Comments at 1-2, PGE Supplemental Comments at 1, and NYISO Supplemental Comments at 3.

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Commission should strictly adhere to the just and reasonable requirements of the FPA.⁹⁴ NRECA's position is that rate adjustments related to smart grid investments can be processed expeditiously while still following requirements prescribed in the FPA. NRECA also stated that cost recovery assurance for facilities not under construction is beyond the Commission's authority.⁹⁵ NRECA further stated that a careful reading of the Department of Energy draft funding opportunity announcement does not condition grant award upon assurance of recovery of smart grid facilities in rates.⁹⁶ Similarly, ELCON stated the Commission should proceed carefully and focus on its statutory obligation that utility costs are prudently incurred, and used and useful.⁹⁷ ELCON also reaffirmed its opposition to the Commission's proposed Interim Rate Policy and stated that special rate treatment for smart grid investments is contrary to the FPA.⁹⁸

NARUC asserted, as did NRECA, that many if not most of the grant projects will occur on the distribution-retail side of the grid.⁹⁹ In consequence, the Commission should not provide funding guarantees for that portion of smart grid projects not covered by Department of Energy grants; state commissions must have the opportunity to review these projects. The Maryland Commission comments mirror NARUC's and NRECA's, opposing the Interim Rate Proposal generally and specifically opposing conditional rate recovery of projects it considers to be state jurisdictional.¹⁰⁰ The California Commission provided a copy of an order describing how it will review smart grid projects eligible for Department of Energy funds.¹⁰¹

AARP commented, while not explicitly opposing the Commission's Interim Rate Proposal; they believe that additional clarity should be provided to the smart grid cost approval process, including conducting a preliminary review of smart grid grant

⁹⁴ NRECA Supplemental Comments at 4-5.

⁹⁵ *Id.* at 10-11.

⁹⁶ *Id.* at 8-9.

⁹⁷ ELCON Supplemental Comments at 3.

⁹⁸ *Id.* at 3.

⁹⁹ NARUC Supplemental Comments at 1.

¹⁰⁰ Maryland Commission Supplemental Comments at 1-2.

¹⁰¹ CPUC Supplemental Comments at 1.

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applications to determine whether they are complete.¹⁰² Similarly, the Massachusetts Attorney General stressed that the Commission should have a project approval and monitoring process that focuses on cost containment.¹⁰³

Commission's Response

After consideration of the supplemental comments, the Commission sees no need for special procedures for rate recovery filings for projects that also receive Department of Energy grant funding. The Department of Energy does not require an assurance of rate recovery as a condition for grant funding. In fact, the most recent version of the Department of Energy's Smart Grid Grant Program states that applicants that do not yet have regulatory approval are eligible to receive an award.¹⁰⁴ The more general concerns expressed by the commenters regarding the Interim Rate Policy have already been addressed in previous sections here as well as in the Policy Statement.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

Not applicable. The Commission does not provide compensation or remuneration to entities subject to its jurisdiction.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

An entity seeking confidential treatment of the information must ask the Commission to treat this information as confidential and non-public, consistent with Section 388.112 of the Commission's regulations. (18 CFR 388.112) Generally, the Commission does not consider this information to be confidential.

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

¹⁰² AARP Supplemental Comments at 1-3.

¹⁰³ Massachusetts Commission Supplemental Comments at 3-4.

¹⁰⁴ See generally Recovery Act Smart Grid Grant Investment Program, <http://www.grants.gov/search/search.do;jsessionid=fvXjKDLQNQG8kgxwx65nJs4rYhGgThcL9t7KzGZCkqFXSRpGpn9z!1215949849?oppId=46833&flag2006=false&mode=VIEW>.

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There are no questions of a sensitive nature that are considered private.

12. ESTIMATED BURDEN ON COLLECTION OF INFORMATION

Data Collection	No. of Respondents	No. of Responses Per Respondent	Hours Per Response	Total No. of Hours
FERC-516	116	1	15	1740
Totals				1740

Total Annual hours for Collection: (Reporting + recordkeeping, (if appropriate)) =
 Total hours for performing tasks 1 through as identified above = 1,740 hours.

It should be noted that the above table applies only with the number of respondents who must comply with the requirements of the Policy Statement. These requirements are a component of all filing requirements contained under 18 CFR Part 35.

Current OMB Inventory

Data Collection	No. of Respondents	No. of Responses	Hours Per Response	Total Hours
FERC-516	1,230	4,330	105.715	457,749

As Proposed by Policy Statement

Data Collection	No. of Respondents	No. of Responses	Hours Per Response	Total Hours
FERC-516	1,230	4,330	106.117	459,489

The Commission sought comments on the Interim Rate Policy, among other things, in the Proposed Policy Statement. No comments were filed relating to the burden of reporting or complying with the requirements for seeking rate recovery pursuant to the Interim Rate Policy.

13. ESTIMATED OF THE TOTAL COST BURDEN TO RESPONDENTS

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Information Collection Costs: The Commission projects the average annualized cost for all respondents to be the following:¹⁰⁵

	FERC-516
Total Annualized Costs	\$261,000

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

The costs to the Commission are estimated to be \$1,055,889 (8.353 FTEs (full time equivalent employees x \$126,384). This is unchanged from previous Commission submissions with OMB. The filings in response to the Interim Rate Policy will be treated as part of the normal 205 (FPA) filings and therefore not require additional staff to process these filings.

Data Collection	Previous Federal	Policy Statement	Total/New*
FERC-516	\$1,814,193	\$0	\$1,814,193

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

The Commission is issuing this Policy Statement and more specifically, the Interim Rate Policy to encourage the near-term deployment of smart grid systems capable of addressing upcoming challenges to the operation of the bulk-power system. Requiring the information specified in the Interim Rate Policy will encourage this near-term deployment while appropriately protecting customers from stranded costs and the electric system from potential cybersecurity threats.

See [Background](#) section above for further discussion.

16. TIME SCHEDULE FOR THE PUBLICATION OF DATA

Schedule for Data Collection and Analysis

Tariff Amendment Filed

60 days after publication in Federal Register

¹⁰⁵ The total annualized costs for the information collection is \$261,000. This number is reached by multiplying the total hours to prepare responses (1740 hours) by an hourly wage estimate of \$150 (a composite estimate that includes legal, technical and support staff rates, \$90+\$35+\$25). $\$261,000 = \150×1740 .

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Initial Commission Order 60 days

17. DISPLAY OF EXPIRATION DATE

The information collected on Open Access Transmission Tariffs is not collected on standardized filing formats or a preprinted form that would avail itself of displaying the OMB control number. The requirements of RM01-5-000, the electronic filing electric, gas and oil tariffs (see item no. 3 above) as adopted, will have the control numbers for these information collections displayed on the instructional manual to be disseminated to regulated entities and also posted on the Commission's web site.

18. EXCEPTION TO THE CERTIFICATION STATEMENT

There are exceptions to the Paperwork Reduction Act Submission certification. Because the data collected for these reporting and recordkeeping requirements are not used for statistical purposes, the Commission does not use as stated in item 19(I) "effective and efficient statistical survey methodology." In addition, as noted in no. 17, this information collection does not fully meet the standard set in 19 (g) (vi.).

A. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS.

This is not a collection of information employing statistical methods.