

(UPDATED 3/2/2010)
SUPPORTING STATEMENT FOR

FERC-717, Standards for Business Practices and Communication Protocols for Public Utilities (formerly Open Access Same-Time Information System and Standards of Conduct) and FERC-516 Electric Rate Schedule Filings,
as proposed in Docket No. RM05-05-013

Standards for Business Practices and Communications Protocols for Public Utilities
(Final Rule issued November 19, 2009)

The Federal Energy Regulatory Commission (Commission) requests the Office of Management and Budget (OMB) review and extend its approval of **FERC-717, Standards for Business Practices and Communication Protocols for Public Utilities (formerly Open Access Same-Time Information System and Standards of Conduct) and FERC-516 Electric Rate Schedule Filings**, both are existing information collections, regarding revisions to requirements contained in parts 35, 37 and 38 of the Commission's regulations. FERC-516 (**OMB Control No. 1902-0096**) approved through January 31, 2013.¹ FERC-717 (**OMB Control No. 1902-0173**) is currently approved through October 31, 2011.

The subject data collections will be affected because the Commission is adopting in a Final Rule, RM05-5-013 “**Standards of Business Practices and Communication Protocols for Public Utilities**”, to incorporate by reference the latest version (Version 002.1) of certain business practice standards adopted by the Wholesale Electric Quadrant (WEQ) of the North American Energy Standards Board (NAESB). These revised standards update earlier versions that the Commission previously incorporated by reference into its regulations at 18 CFR 38.2 in Order Nos. 676, 676-B, 698, and 676-C,² as well as the Version 002.0 standards that NAESB filed with the Commission on September 2, 2008. Most of the changes included in the Version 002.1 standards were made to support the requirements that the Commission established in Order Nos. 890,

1 FERC-516 is currently the subject of another submission pending review and approval at OMB. Because OMB's document management system cannot accept two submissions containing the same control number simultaneously, the submission for this Final Rule will be submitted under 1902-0173 with a latter, subsequent submission under FERC-516.

2 Standards for Business Practices and Communication Protocols for Public Utilities, Order No. 676, 71 FR 26,199 (May 4, 2006), FERC Stats. & Regs., Regulations Preambles ¶ 31,216 (Apr. 25, 2006), reh'g denied, Order No. 676-A, 116 FERC ¶ 61,255 (2006), Order No. 676-B, 72 FR 21,095 (Apr. 30, 2007), FERC Stats. & Regs., Regulations Preambles ¶ 31,246 (Apr. 19, 2007), Order No. 676-C, 73 FR 43,848 (July 29, 2008), FERC Stats. & Regs., Regulations Preambles ¶ 31,274 (July 21, 2008), Order No. 676-D, granting clarification and denying reh'g, 124 FERC ¶ 61,317 (2008); Standards for Business Practices for Interstate Natural Gas Pipelines, Order No. 698, 72 FR 38,757 (July 16, 2007), FERC Stats. & Regs., Regulations Preambles ¶ 31,251 (June 25, 2007), order on clarification and reh'g, Order No. 698-A, 121 FERC ¶ 61,264 (2007).

890-A, and 890-B, in which the Commission took action to prevent undue discrimination under the pro forma open access transmission tariff (OATT).

The new and revised standards that NAESB adopted in its Version 002.0 and 002.1 standards implement requirements of Order Nos. 890, 890-A, and 890-B.³ In addition, NAESB developed standards to support the Commission's eTariff program, modify the Commercial Timing Table (WEQ-004 Appendix D) and Transmission Loading Relief Standards (WEQ-008) to provide clarity and align NAESB's business practice standards with the reliability standards adopted by the North American Electric Reliability Corporation (NERC) and amend certain ancillary services definitions appearing in the Open Access Same-Time Information Systems (OASIS) Standards (WEQ-001) relating to the inclusion of demand resources as part of ancillary services.

Incorporating these standards by reference into the Commission's regulations is intended to benefit wholesale electric customers by streamlining utility business practices and transactional processes and OASIS procedures and by adopting a formal ongoing process for reviewing and upgrading the Commission's OASIS standards and other electric business industry business practices. These practices and procedures would benefit from the implementation of generic industry standards.

We estimate that the one-time annual reporting burden related to the subject Final Rule will be 6,336 total hours (an average of 6 hours per respondent under FERC-516 and 30 hours per respondent under FERC-717) for adopting the proposed changes. (This is a slight increase from the estimate proposed in the NOPR. Although, the Commission did not receive any comments on its initial estimates, the Commission took into consideration, the numerous software modifications that will have to take place and revised the estimate for implementation of the standards.) [After the issuance of a final rule and the affected parties have instituted these changes to reflect compliance with the proposed standards, the total burden for FERC-516 and 717 in this rule will be reduced in a separate submittal to OMB by 6,336 hours, to reflect completion of this one-time burden.]

Background

NAESB's standards include business practices that streamline the transactional processes of the natural gas and electric industries, as well as communication protocols

³ Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 FR 12,266 (March 15 2007), FERC Stats. & Regs., Regulations Preambles ¶ 31,241 (2007) (Order No. 890); order on reh'g, Order No. 890-A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs., Regulations Preambles ¶ 31,261 (2007) (Order No. 890-A); order on reh'g and clarification, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

within each industry. NAESB supports all four quadrants of the gas and electric industries – wholesale gas, wholesale electric, retail gas, and retail electric. All participants in the gas and electric industries are eligible to join NAESB and participate in standards development.

In a series of Commission Orders,⁴ the Commission has incorporated certain NAESB standards into its regulations. These standards include standards for business practices as well as standards and protocols for electronic communication, and business practice standards related to reliability standards issued by the North American Electric Reliability Corporation (NERC) and approved by the Commission. In Order No. 698 (as discussed below), the Commission also incorporated by reference into its regulations the NAESB Gas/Electric Coordination Standards. These standards established communication protocols between interstate natural gas pipelines and electric power plant operators designed to enhance reliability by improving communication between gas and electric industries relating to the scheduling of gas-fired generators.

The Commission believes that adoption of the consensus standards is appropriate because the consensus process assists the Commission in determining the reasonableness of the standards by requiring that the standards draw support from a broad spectrum of the industry. The Commission's regulations should reflect those standards that have the widest possible support.

ORDER No. 676

The Commission amended its regulations under the Federal Power Act (FPA) in Order No. 676 (April 25, 2006) (71 FR 26199) to incorporate by reference standards issued by NAESB's WEQ. These reference standards established a set of business practice standards and communication protocols for the electric industry to enable industry members to achieve efficiencies by streamlining utility business and transactional processes and communication procedures. The standards replaced, with modifications, the Commission's existing Business Practice Standards for OASIS Transactions and OASIS Standards and Communication Protocols and Data Dictionary requirements. Adopting these standards established a formal ongoing process for reviewing and upgrading the Commission's OASIS standards as well as adopting other electric industry business practice standards. The Commission's regulations adopted in this rule were necessary to establish a more efficient and integrated wholesale electric

⁴ Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 FR 12,266 (March 15 2007), FERC Stats. & Regs., Regulations Preambles ¶ 31,241 (2007) (Order No. 890); order on reh'g, Order No. 890-A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs., Regulations Preambles ¶ 31,261 (2007) (Order No. 890-A); order on reh'g and clarification, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

power grid. Requiring this information ensures both a common means of communication and common business practices to provide entities engaged in the wholesale transmission of electric power with timely information and uniform business procedures across multiple transmission providers.

Order No. 698

In Order No. 698 (June 25, 2007) (72 FR 38757) the Commission amended parts 38 and 284 of its open access regulations governing standards for business practices and electronic communications with interstate natural gas pipelines and public utilities. The Commission incorporated by reference standards issued by NAESB. These standards established communication protocols between interstate pipelines and power plant operators and transmission owners and operators. The goal of this incorporation is to improve coordination between the gas and electric industries in order to improve communications about scheduling of gas-fired generators. Improved communications will enhance reliability in both industries. The Commission provided greater flexibility to pipeline shippers for procurement of capacity in order to assist gas-fired generators in aligning gas supply and electric generation schedules. The Order 1) references the possibility of modifying the NAESB Gas Nomination Schedule to provide more opportunities for shippers to nominate gas to flow within the same gas day (also known as intraday nominations; the NAESB Gas Day starts at 9:00 a.m. Central and ends the next calendar day at 8:59 a.m. Central); 2) grants shippers the right to price secondary market capacity based on natural gas prices indexes while not exceeding the pipeline's maximum tariff rate; and 3) allows shippers to redirect gas supplies away from pipeline constraint points by choosing alternate receipt and delivery points.

Order No. 890

In Order No. 890 et. al. issued February 16, 2007 (72 FR 12266) amended the regulations and *pro forma* open access transmission tariff adopted in Order Nos. 888 and 889 to ensure that transmission services are provided on a basis that is just, reasonable and not unduly preferential. The Order was designed to strengthen the *pro forma* open-access transmission tariff to ensure that it achieves its original purpose of remedying undue discrimination; and to foster greater competition in wholesale power markets by reducing barriers to entry in the provision of transmission service. The Commission acted in Order No. 890 to correct the initial flaws of the *pro forma* OATT by reforming the terms and condition in several areas, including the calculation of available transfer capability (ATC), the planning of transmission facilities, and the conditions of services offered by each transmission provider.

Information Collection Requirements

FERC-516

On April 24, 1996, the Commission issued its Final Rule Order No. 888: "Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities"(Docket No. RM95-8/RM94-7). The Commission intended to remedy undue discrimination in the provision of interstate transmission services by public utilities and to address the stranded costs that may result from the transition to more competitive electricity markets.

Order No. 888 has two central components. The first required that all public utilities that own, operate or control interstate transmission facilities to offer network and point-to-point transmission services (and ancillary services) to all eligible buyers and sellers in wholesale bulk power markets, and to take transmission services for their own uses under the same rates, terms and conditions offered to others. In essence, it requires non-discriminatory (comparable) treatment for all eligible users of the transmission facilities. The non-discriminatory services required by Order No. 888, known as open access services, are reflected in a *pro forma* tariff contained in the rule. The rule also required functional separation of the utilities' transmission and power marketing functions (also referred to as functional unbundling) and the adoption of an electric transmission system information network or OASIS. (See *FERC-717*)

The second central component of Order No. 888 was to address whether and how utilities will be able to recover costs that could be stranded when wholesale customers use the open-access tariffs, or FPA section 211 tariffs to leave their utilities' power supply systems and shop for power elsewhere.

As described more fully below, the Commission is proposing that all public utilities subject to FERC's authority will be required to comply with the incorporated standards, as would non-jurisdictional entities voluntarily following FERC's open access requirements under reciprocity by revising their open access transmission tariffs.

FERC-717

By its Final Rule issued April 24, 1996, in Docket No. RM95-9-000 (Order No. 889), the Commission proposed to adopt certain standards/information requirements for

Open Access Same-Time Information System (OASIS) to be maintained by Public Utilities. OASIS is an Internet-based system for obtaining services related to electric power transmission. It is the primary means by which high-voltage transmission lines are reserved for moving wholesale quantities of electricity. Order 889 went to great lengths to define in detail exactly how all participants in the electricity market should interact with transmission providers. It laid out the structure and function of what would become known as OASIS “nodes”, which are secure, web-based interfaces to each transmission system’s market offerings and transmission availability announcements. Each OASIS node was to be the single point of information dissemination to the market as well as the customer portal for transmission service requests, even for affiliated power marketers wanting access to their own parent company’s transmission.

In addition to the creation of OASIS, the Commission proposed to add Part 37 of Title 18, Code of Federal regulations (CFR). The Standards of Conduct were designed to prevent employees of a public utility (or any of its affiliates) engaged in marketing functions from preferential access to OASIS-related information or from engaging in unduly discriminatory business practices. Companies were required to separate their transmission operations/reliability functions from their marketing/merchant functions and prevent system operators from providing merchant employees and employees of affiliates with transmission-related information not available to all customers at the same time through public posting on the OASIS.

RM05-5-013 NOPR (March 19, 2009)

On September 2, 2008, NAESB reported to the Commission that its WEQ Executive Committee had approved Version 002.0 of its business practice standards. NAESB states that its leadership responded to Order Nos. 890, 890-A, and 890-B, by requesting that its Electronic Scheduling Subcommittee/Information Technology Subcommittee (ESS/ITS) and its Business Practice Subcommittee (BPS) coordinate efforts to address the issues raised by those orders. NAESB stated that the ESS/ITS and BPS worked in close coordination with the pertinent NERC committees to draft business practice standards on Order No. 890 issues that complement the NERC reliability standards related to these issues, so that the standards for both organizations would be consistent.⁵

⁵ FERC is addressing the associated reliability standards adopted by NERC in a companion final rule being issued in Docket No. RM08-19-000. Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System, Final Rule, (ATC Final Rule).

On March 19, 2009, the Commission issued a Notice of Proposed Rulemaking (NOPR). In the NOPR, the Commission proposed to incorporate by reference in its regulations at 18 CFR 38.2 the latest version (Version 002.1) of certain business practice standards adopted by the Wholesale Electric Quadrant (WEQ) of the North American Energy Standards Board (NAESB). NAESB has developed new standards and revised existing standards relating to OASIS to ensure consistency with certain policies articulated by the Commission in Order Nos. 890, 890-A and 890-B. Specifically, NAESB has developed business practice standards to facilitate the implementation of conditional firm service, relying on the Commission's description of the attributes of that service in Order No. 890. These standards address: (1) the limitations and conditions under which the Conditional Curtailment Option is offered; (2) the posting requirements for information concerning a Conditional Curtailment Option reservation and its curtailment criteria; (3) the process for performing the biennial reassessment; (4) the curtailment of a Curtailment Option reservation

While many of the Version 002.0 standards simply revise or update existing standards, some of these standards prescribe new business practices to accommodate the reforms adopted in Order No. 890. For example, NAESB has developed business practice and technical standards to support conditional firm service.⁶ Additionally, NAESB developed standards for the posting of narratives explaining changes in available transfer capability and total transfer capability; underlying load forecast assumptions for available transfer capability calculations and actual peak load, as well as metrics relating to the provision of transmission service and the completion of planning studies. The reason for performing available transfer capability calculations and then posting the information on posting on OASIS is to provide greater transparency of the transmission system by providing notifications of the systems' capability and availability to deliver energy.

The Commission also proposed to require each electric utility to revise its open access transmission tariff (OATT) to include the applicable WEQ standards. For

⁶ A form of long-term firm Point to Point service that is offered when the Transmission Service Provider (TSP) does not have long-term firm available transfer capability ("ATC") to meet the request. Conditional Firm Service includes less-than-firm service defined by a lower curtailment priority in either a defined number of hours in a year or during predefined system conditions (Order No. 890 ¶¶ 911 and 912). Conditional Firm Service does not preclude the TSP's obligation to offer other forms of partial interim service (i.e., partial MW offers, partial duration offers, or a combination of the two). The TSP is obligated to make a partial offer of firm service if possible. The remainder can then be studied to determine whether a CFS offer is possible if the customer desires a Conditional Firm Service System Impact Study.

standards that do not require incorporating tariff provisions, FERC is proposing to permit the utility to incorporate the WEQ standard by reference in its OATT.

RM05-5-013 Final Rule (November 19, 2009)

On November 19, 2009, the Commission issued a Final Rule incorporating by reference in its regulations at 18 CFR 38.2 the latest version (Version 002.1) of certain business practice standards adopted by the Wholesale Electric Quadrant (WEQ) of the North American Energy Standards Board (NAESB). In NAESB's Version 002.1 Standards, NAESB has included business practice and technical standards to support conditional firm service, which will provide additional transmission and flexibility to customers. Additionally, NAESB has developed standards that govern the posting requirements for available transfer capability-related information, including narratives explaining changes in available transfer capability and total transfer capability, and explaining underlying load forecast assumptions for available transfer capability calculations and actual peak load. This will improve transparency for customers and allow them to validate available transfer capability calculations. The Commission will require public utilities to modify their transmission tariffs (OATTs) to include these standards contained in the Final Rule and incorporated by reference in the regulations.

A. JUSTIFICATION

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

FERC-516

The collection of information for electric rate filings is mandated by Sections 15, 19, 20, 205, 206 and 207 of the Federal Power Act as amended by the Energy Policy Act of 1992 (EPA) and section 402(a) of the Department of Energy Organization Act (DOE Act). EPA expands the Commission's authority in section 211 of the Federal Power Act (FPA) to order transmission services upon application and created a new category of power producers called exempt wholesale generators. EPA and other industry developments increased competition in wholesale electric markets. The Commission's goal has been to encourage lower electricity prices by structuring an orderly transition to competitive bulk power markets.

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 35.28 to its regulations concerning the standards a public utility must satisfy regarding non-discriminatory open access transmission services on the utility's facilities that are used to transmit electric energy in interstate commerce. The regulations require that all public utilities owning or controlling facilities for the transmission of electric energy in interstate commerce are 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.

FERC-717

As noted above, the Commission required public utilities to establish OASIS sites to provide transmission customers with equal and timely access to information about transmission and ancillary services provided in the tariffs. The Commission does not believe that open-access nondiscriminatory transmission services can be completely realized until it removes real-world obstacles that prevent transmission customers from competing effectively with the Transmission Provider. One of the obstacles is unequal access to transmission information. The Commission believes that transmission customers must have simultaneous access to the same information available to the Transmission Provider if truly nondiscriminatory transmission services are to be a reality.

The FERC-717 data and communications standards on OASIS are required to carry out the Commission's policies in accordance with the general authority in Sections 309 and 311, of the Federal Power Act of 1935 (FPA) (16 U.S.C. 825h) and 16 U.S.C. 825j)

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

FERC-516 The information from FERC-516 enables the Commission to exercise its wholesale electric rate and electric power transmission oversight and enforcement responsibilities in accordance with the Federal Power Act and the DOE Act as referenced above. Sufficient detail must be obtained for the Commission to make an informed and equitable decision concerning the appropriate level of rates, and to aid customers and other parties who may wish to challenge the rate proposed by the utility. Other more abbreviated data requirements are required where utility filings involve (1) non-rate increase applications, such as changes in the points where electricity is delivered

to a customer, (2) formula rates, (3) settlement rates, and (4) qualifying small power producer rates.

The Commission will require public utilities to modify their open access transmission tariffs (OATTs) to include the standards that are being incorporated by reference in this Final Rule. In the past, to reduce the filing burden, the Commission allowed public utilities to postpone making a separate tariff filing when making this tariff modification and allowed them to include this revision as part of an unrelated subsequent tariff filing.⁷ In this case, however, as compliance with the standards will not be required for more than a year from the issuance of this rule, the Commission will require the tariff filing to be made at least 90 days before the compliance date (*i.e.*, the first day of the first quarter of the first year after the publication of the Final Rule in the Federal Register). Public utilities may still, at their option, combine this tariff filing with an unrelated separate tariff filing, so long as the tariff filing is made at least 90 days before the compliance date.

FERC-717 These requirements apply to all Public Utilities owning and/or controlling facilities used for the transmission of electricity in interstate commerce. These procedures enable the Commission to ensure compliance with the functional unbundling established in the Commission's Open Access rulemaking.

The Commission's Office of Energy Market Regulation uses the information in rate schedules and proceedings to review rate and tariff changes by public utilities, for general industry oversight, and to supplement the documentation used during the Commission's audit process. The collection of this information is necessary to meet the legal requirements, namely the statutory obligations under section 205 and 206 of the FPA, to prevent unduly discriminatory practices.

This final rule, as implemented would supplement the changes the Commission required in Order Nos. 890, 890-A, and 890-B to require that transmission services are provided on a basis that is just, reasonable and not unduly discriminatory. In addition this final rule upgrades the Commission's current business practice and communication standards. Specifically, these standards include several modifications to the existing business practice standards as well as creating new standards to provide additional

⁷ See Order No. 676, FERC Stats. & Regs. ¶ 31,216, P 100. In order to align the implementation date for the NAESB WEQ Version 002.1 standards with that of the related NERC reliability standards being addressed in the proceeding in Docket No. RM08-19-000, the Commission is not requiring compliance with the standards incorporated by reference in this final rule until the first day of the first quarter of the first year after the publication of this rule in the Federal Register. In making its required tariff filing, each filing utility is to use the language specified in this Final Rule, *see infra* P 130.

functionality for OASIS transactions. These practices will ensure that potential customers of open access transmission service receive access to information that will enable them to obtain transmission service on a non-discriminatory basis and will assist the Commission in maintaining a safe and reliable infrastructure. The implementation of these standards and regulations is necessary to increase the efficiency of the wholesale electric power grid.

Failure to issue these requirements would mean the Commission is not meeting its statutory obligations and permitting discrimination in interstate transmission services provided by the public utilities. The Commission believes the implementation of these data requirements will help the Commission carry out its responsibilities under the Federal Power Act of promoting the efficiency of the electric industry's operations.

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

In both FERC-516 and FERC-717, the Commission has shown a commitment to the use of information technology.

In Order No. 714 (RM01-5-000, 73 FR 57515) the Commission revised its regulations to require that all tariffs and tariff revisions and rate change applications for public utilities, natural gas pipelines, oil pipelines and power administrations are to be filed electronically according to a set of standards developed in conjunction with NAESB. By developing the capability to file electronically with the Commission via the Internet, this reduces the physical storage space needs and document processing times, potentially reduces mailing and courier fees, allows access to the tariff filing by multiple parties as well as the ability to download and print tariff filings and provides automatic e-mail notification to an applicant of receipt of the filing and whether or not it has been accepted.

Electronically filed tariffs and rate change applications should improve the efficiency and administrative convenience and improve the overall management of the tariff and tariff change filing process, facilitate public access to tariff information, and reduce the burden and expense associated with paper tariffs and tariff changes. In addition, electronically filed tariffs should improve access and research capabilities with and among applicant's tariffs. This feature should help facilitate the Commission's monitoring of the energy markets, to the benefit of the customers and all involved. It should also enhance competition within industries by providing the customers with an

electronic means of comparing the rates, terms and conditions, and other provisions applicable to the regulated entities.

Further, the Commission's requirement for the use of OASIS to provide transmission service information to the public, demonstrates the use of information technology to reduce the burden. With a single Internet connection, transmission customers are able to access information from any utility as well as be able to display information.

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.

Commission filings and data requirements are periodically reviewed in conjunction with OMB clearance expiration dates. This includes a review of the Commission's regulations and data requirements to identify any duplication. Electric transmission information is 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 (FPA), Energy Policy Act of 1992 (EPAAct)).

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

No small businesses are impacted under FERC-516 reporting data requirements. The proposed additions and revisions to the Commission's regulations will impact the day-to-day operations of public utilities whose operational status would exceed the SIC standards for a "small business concern" as implemented under the Regulatory Fairness Act (RFA). Likewise for FERC-717, the Commission has reviewed the provisions of the RFA and found they would not be applicable to the public utilities that will be subject to the requirements of this Final Rule.

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

It is not possible to collect the data less frequently. Only public utilities owning, operating, and/or controlling facilities used for the transmission of electricity in interstate commerce are required to comply with the Commission's proposed requirements. The

required information will impose the least possible burden for companies while collecting the information that will be used for promoting the efficiency of the electric industry's operations. The Commission believes the adoption of these standards will permit industry to use the NAESB consensus process to suggest further modifications and enhancements to business practices and the OASIS standards as industry considers necessary, subject to the Commission's approval.

If the data were not updated regularly, the Commission and Industry would be placed at a disadvantage by not having the most current data for competitive and regulatory purposes available.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

There are special circumstances requiring the collection of information to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5, as provided below:

Section 1320.5(d) limits the collection of data to an original and two copies of any document.

FERC-516 calls for the submission of six copies of all tariffs, rate schedules, contracts and material related to these filings. (See section 35.7) The current distribution of multiple hard copies of a filing has been essential so that the required technical reviews and analyses can proceed simultaneously and efficiently. As noted in item no. 3 of this submission, the Commission has issued Order No. 714 calling for the electronic filing of all tariff filings, tariff revisions and rate change applications for public utilities, natural gas pipelines, oil pipelines and power administrations. Implementation of Order 714 begins April 1, 2010 with a six-month staggered schedule. With the final rule's implementation, the Commission will eliminate the submission of paper filings.

It should be noted that NAESB approved the Version 002.1 standards under its consensus procedures. The adoption of standards is appropriate because the consensus process assists the Commission in determining the reasonableness of the standards by requiring that the standards draw support from a broad spectrum of all segments of industry. Since the industry itself has to conduct business under these standards, the Commission's regulations should reflect those standards that have the widest possible support.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995, requires federal agencies to use technical standards developed by voluntary consensus standards organizations, like NAESB's WEQ, as a means to carry out policy objectives or activities. The Commission believes that incorporation by reference is appropriate, and indeed the required, method for adopting copyrighted standards material.⁸

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

Commission procedures require that rulemaking notices be published in the Federal Register, thereby allowing all electric utilities, natural gas pipeline companies, state commissions, Federal agencies, and other interested parties an opportunity to submit views, comments or suggestions concerning the proposal. These rulemaking procedures allow for public conferences to be held as required. Comments were due 30 days after publication in the Federal Register. In response to the NOPR, thirteen entities filed timely comments, and one entity filed a late-reply comment.⁹

Standard 001-13.1.5 (ATC Information Link)

Standard 001-13.1.5 replaces NERC MOD-003, which NERC and NAESB determined were better classified as business practice standards than reliability standards.

In the NOPR, the Commission proposed to incorporate by reference Standard 001-13.1.5, which provides for an ATC Information Link on OASIS and requires Transmission Providers to post links to their Available Transfer Capability Implementation Document, Capacity Benefit Margin Implementation Document, and Transmission Reserve Margin Implementation Document (as specified in NERC

⁸ See 5 U.S.C. 552 (a)(1)(2000); 1 C.F.R. 51.7(4) (requirements established for incorporation by reference); Federal Participation in the Development and Use of Voluntary Standards, OMB Circular A-119, at 6 (a)(1) (Feb. 10, 1998), <http://www.whitehouse.gov/omb/circulars/a119/a119.html> (incorporation by reference appropriate means of adopting private sector standards under the National Technology Transfer and Advancement Act). The Commission cannot reproduce the WEQ standards in violation of the NAESB copyright. See 28 U.S.C. 1498 (government not exempt from patent and copyright infringement).

⁹ The Commission received comments from the following entities: American Wind Energy Association (AWEA); Arizona Public Service Company (APS); Bonneville Power Administration (Bonneville); Duke Energy Corporation (Duke); Electric Power Supply Association (EPSA); Entergy Services, Inc. (Entergy); ISO/RTO Council (IRC); National Rural Electric Cooperative Association (NRECA) and American Public Power Association (APPA) (collectively, NRECA/APPA); New York Independent System Operator, Inc. (NYISO); North Carolina Electric Membership Corporation (NCEMC); Open Access Technology International, Inc. (OATI); TranServ International, Inc. (TranServ); and Transmission Access Policy Study Group (TAPS; APS filed a late-reply comment.

reliability standards MOD-001-1, MOD-004-1, and MOD-008-1, respectively). Under NERC Standard MOD-001-1 R3.2, the Available Transfer Capability Implementation Document must include a “description of the manner in which the Transmission Service Provider will account for counterflows.”¹⁰

Several commenters requested that the implementation date for posting the Available Transfer Capability Information Link required by Standard 001-13.1.5 coincide with the effective implementation date for implementing the NERC reliability standards relating to available transfer capability currently before the Commission in RM08-19-000, as the documents to which links must be provided under Standard 001-13.1.5 are described in these NERC standards.

TAPS supported the Commission’s interpretation of the proposed business practices, particularly Standard 001-13.1.5.¹¹ TAPS stated that it is essential for customers to have timely access to available transfer capability-and service request-related information. This will allow customers to verify the amount of transmission that appears to be available for purchase, thereby enhancing the Commission’s goals of transparency, reliability, and competition.

EPSA was critical of Standard 001-13.1.5. EPSA commented that the standard affords transmission providers the ability to redact certain information due to market, security or reliability sensitivity concerns, but provides no definition or guidance as to what constitutes such concerns, thereby allowing transmission providers the flexibility to post whatever information they so choose.¹² EPSA requested that the Commission make explicit that nothing in these standards limits customers’ ability to specifically request available transfer capability-related information subject to appropriate confidentiality protections and CEII requirements, as specified in Order No. 890-A.

EPSA also argued that Standard 001-13.1.5 results in a “fill-in-the-blank” standard governing the treatment of counterflows. EPSA claims that the standard will result in different calculation methodologies by different transmission providers. Because Standard 001-13.1.5 permits transmission providers to redact information due to market, security, or reliability sensitivity concerns, EPSA also contends that transmission providers will have unfettered discretion with respect to their obligations to post the methodology that they use to account for counterflows.¹³

10 The creation of power flows in the direction opposite of prevailing flows of energy that has the net result of decreasing the prevailing flow.

11 TAPS at 3-4.

12 EPSA at 16.

13 EPSA at 17.

Commission's Response

NAESB's Standard 001-13.1.5 represents a consensus approach agreeable to all six segments of the industry, and is not inconsistent with Commission policies. Therefore, the Commission is incorporating the standard by reference as proposed in the NOPR.

In response to EPSA's concerns relating to the redaction of information under Standard 001-13.1.5, the Commission reiterates the statement it made in the WEQ NOPR, that the Commission expects the provision for a transmission provider to redact sensitive information from postings to be implemented by a transmission provider subject to the OATT in a manner consistent with its obligation to make that information available to those with a legitimate need to access the information, subject to appropriate confidentiality restrictions.¹⁴ The Commission also clarifies that these standards do not limit transmission customers' ability to request nor relieve transmission providers of their obligation to provide, subject to appropriate confidentiality protections and CEII requirements, data relating to the calculation of available transfer capability, as required by the Commission in Order Nos. 890 and 890-A.¹⁵ With these clarifications, the Commission will incorporate Standard 001-13.1.5 into its regulations as it proposed in the WEQ Version 002.1 NOPR.

As to EPSA's argument that Standard 001-13.1.5 allows transmission providers unfettered discretion with respect to their obligations to post the methodology that they use to account for counterflows, the Commission emphasizes that it expects transmission providers subject to the OATT to implement this standard in a manner consistent with their obligation to make any redacted information available to those with a legitimate need to access it, subject to appropriate confidentiality restrictions.

As to EPSA's argument that Standard 001-13.1.5 results in a fill in the blank standard for the treatment of counterflows, while the NAESB standards address the posting requirements for the document in which a description of how the transmission provider accounts for counterflows must be included, Order No. 890 did not prescribe the exact methodology to account for counterflows, nor did it find that there could only be a single acceptable methodology for determining this available transfer capability component. Moreover, we note that responsibility for developing the methodology to account for counterflows rests with NERC, and not NAESB.

¹⁴ See Order No. 890, P 403-04 (requiring the development of standard disclosure for timely disclosure of CEII information to those with a legitimate need for it).

¹⁵ See Order No. 890, P 348 and Order No. 890-A, P 148.

Standards 001-14 and 001-15 (Available Transfer Capability Narratives)

In the WEQ Version 002.1 NOPR, the Commission proposed to incorporate by reference Standard 001-14, which was developed by NAESB to meet the requirement in Order No. 890 for transmission providers to post a narrative in instances when available transfer capability remains unchanged at a value of zero for six months or longer. In addition, the Commission also proposed to incorporate by reference Standard 001-15, which requires transmission providers to post a brief narrative that explains the reason for a change in monthly or yearly available transfer capability values on a constrained path when a monthly or yearly available transfer capability value changes as a result of a 10 percent change in total transfer capability.

Entergy requested that the Commission clarify that, where a transmission provider is not required to convert available flowgate capability values to available transfer capability values for posting, the values to be used to fulfill the posting requirements set forth in Standard 001-14 and 001-15 are the values calculated and posted by the transmission provider, *i.e.*, in Entergy's circumstance, available flowgate capability values. Entergy submits that this interpretation is supported not only by the Commission's statement in Order No. 890-B, but also by the NERC reliability standards, the inclusion of "Other" as reasons for zero available transfer capability in Standard 001-14, and the specific inclusion of total flowgate capacity as an underlying assumption in Standard 001-15.¹⁶

EPSA contends that Standard 001-15, while consistent with the requirements of Order No. 890, does not reflect the underlying goals of the Commission in Order No. 890.¹⁷ EPSA argued that the standard allows transmission providers five business days to post a narrative, provides no linkage between the duration of the contingency that has caused the reduction in total transfer capability and the resulting changes in available transfer capability/available flowgate¹⁸ capability, and does not require a narrative posting by a transmission provider when an outage on an adjacent system affects the original transmission provider's available transfer capability. EPSA stated that these current requirements are insufficient to promote market transparency.

¹⁶ Entergy at 7-8.

¹⁷ EPSA at 13.

¹⁸ A physical transmission interface on which limit is enforced. The interface could be a single element such as a line or transformer or a set of elements. The limit is typically a specification of the maximum power flow allocated on the element and may be derived from thermal, stability or other reliability considerations.

Commission Determination

In this final rule, the Commission is incorporating by reference Standards 001-14 and 001-15, with the exception of Standards 001-14.1.3 and 001-15.1.2. The Commission declines to incorporate Standards 001-14.1.3 and 001-15.1.2 by reference, as they permit transmission providers to post an available transfer capability change narrative within five business days of meeting the criteria under which a narrative is required to be posted, which is inconsistent with the Commission's rejection in Order No. 890 of delays in posting data.¹⁹

In regards to Entergy's question of whether the transmission provider's calculated and posted available flowgate capability values should be used to fulfill the posting requirements set forth in Standard 001-14 and 001-15 in instances where there is no requirement to convert this calculation to available transfer capability values, the Commission agrees with Entergy that this requirement can be met by the transmission provider posting its available flowgate capability values.

As to EPSA's argument that Standard 001-15 falls short of the goals of Order No. 890, the Commission finds that, with the exception of Standard 001-15.1.2, compliance with Standard 001-15 provides all of the information required by Order No. 890. However, while Standards 001-14.1.3 and 001-15.1.2 permit transmission providers to post an available transfer capability change narrative within five business days of meeting the criteria under which a narrative is required to be posted, the Commission rejected calls for delays prior to posting data in Order No. 890.²⁰ Thus, the Commission declines to incorporate Standards 001-14.1.3 and 001-15.1.2 by reference.

Standard 001-16.1 (Available Transfer Capability or Available Flowgate Capability Methodology Questions)

In the WEQ Version 002.1 NOPR, the Commission proposed to incorporate by reference Standard 001-16.1, which requires Transmission Providers to respond to questions about the methodology for calculating available transfer capability and available flowgate capability. In the NOPR, the Commission interpreted this standard as requiring the Transmission Provider to provide data when necessary to respond to the methodology questions in order to be consistent with the requirement in Order No. 890 that transmission providers must, upon request, "make available all data used to calculate [available transfer capability] and [total transfer capability] for any constrained paths and

¹⁹ Order No. 890, P 370.

²⁰ *Id.*

any system planning studies or specific network impact studies performed for customers.”²¹

TAPS²² supports the Commission’s interpretation of the proposed business practices for the disclosure of available transfer capability and transmission service related data. It also supports the Commission’s pro-transparency interpretation of NAESB Standard 001-16.1 which requires transmission providers to provide data used to calculate available transfer capability and total transfer capability for any constrained path upon request. TAPS stated that timely access to available transfer capability and service request information and a transparent and accurate available transfer capability calculation process will encourage competition.

Commission’s Response

Standard 001-16.1 represents a consensus approach agreeable to all six segments of the industry, and is not inconsistent with Commission policies. Therefore, as proposed in the WEQ Version 002.1 NOPR, the Commission will incorporate Standard 001-16.1 by reference into its regulations. The Commission reiterates its interpretation of this standard, as described in the WEQ Version 002.1 NOPR. The Commission expects that transmission providers will implement this standard in a manner consistent with the requirement in Order No. 890 that transmission providers must, upon request, “make available all data used to calculate [available transfer capability] and [total transfer capability] for any constrained paths and any system planning studies or specific network impact studies performed for customers”²³ by providing data when necessary to respond to methodology questions.

Posting System Conditions

As part of the overall Version 002.1 Standards, the Commission proposed to incorporate by reference Standard 001-21.4.2.1, which is part of a set of standards detailing the business practices for managing and curtailing transmission service with a conditional curtailment option. Standard 001-21.4.2.1 requires transmission providers to post on OASIS the reduction in each impacted conditional firm reservation prior to or coincident with any curtailments of conditional firm service at the conditional curtailment priority level. The conditional curtailment priority level is equal to that of secondary network transmission service, and is applied when conditional firm service is not firm in accordance with the terms of the transmission service agreement. For a conditional firm

21 Order No. 890, P 348.

22 TAPS is an association of transmission-dependent utilities in more than 30 states.

23 Order No. 890, P 348.

service reservation subject to the system conditions criteria, the conditional curtailment priority level is applied to a conditional firm service reservation under system conditions specified in the transmission service agreement. For a conditional firm service reservation subject to the number of hours criteria, it is applied due to reliability concerns when the maximum number of hours that service can be curtailed under the transmission service agreement has not yet been reached.

Entergy sought Commission clarification on whether this standard requires the posting of any curtailment of conditional firm service actually be made “prior to or coincident with” the implementation of the curtailment, in light of the difficulty of making such postings while managing the reliability of the transmission system in a congested situation. Entergy urged the Commission to clarify that the same posting requirements currently in the regulations at 18 C.F.R. 37.6(e)(3) are appropriate for posting curtailments of conditional firm service.²⁴

Both AWEA and EPSA contend that the standards governing the provision of conditional firm service lack adequate transparency due to a deficiency of posting requirements regarding system conditions. Under a conditional curtailment option subject to the systems-condition criteria, conditional firm service can be curtailed based on pre-identified system conditions. To inform their business decisions and to evaluate the firmness of their reservation at any given time, AWEA and EPSA argued that transmission customers taking conditional firm service require the maximum amount of information practical as to the risk that their service will be curtailed. Therefore, AWEA and EPSA claim that transmission providers should be required to post information pertaining to the system conditions in effect at any given time, even if the event of a single condition alone will not reduce the priority of the service to non-firm.²⁵

Commission’s Response

Standard 001-21.4.2.1 represents a consensus approach agreeable to all six segments of the industry, and is not inconsistent with Commission policies. Therefore, as proposed in the WEQ Version 002.1 NOPR, the Commission will incorporate Standard 001-21.4.2.1 by reference into its regulations. As to Entergy’s contention that Standard 001-21.4.2.1 should allow postings consistent with 18 C.F.R. 37.6(e)(3), the Commission notes that 18 C.F.R. 37.6(e)(3) does not include any specific time requirements for the

²⁴ Entergy at 5-6. Entergy’s comments refer to 18 CFR 33.6, which is the regulation covering form of notice. The Commission presumes that Entergy intends to refer to 18 CFR 37.6(e)(3). To the extent Entergy’s comments are aimed at 18 CFR 33.6, the Commission sees no merit in its argument, because this regulation governs form of notice.

²⁵ AWEA at 4-5, EPSA at 18-19.

posting. Therefore, the Commission will require the posting to be made “prior to or coincident with” as provided in the standard.

As to the concern raised by AWEA and EPSA about the lack of transparency regarding the conditions leading to curtailments, these commenters failed to persuade a majority of NAESB members to adopt their requests to impose posting obligations that exceed the requirements of Order No. 890. Given that the current NAESB standard satisfies all Commission requirements, it will incorporate the standard by reference.

Order No. 717 Issues (Standards of Conduct)

In the WEQ Version 002.1 NOPR, the Commission recognized that a specific standard, Standard 001-13.1.2, contained references to Commission regulations regarding the posting of Standards of Conduct-related information. These regulations were revised by Order No. 717.²⁶ The Commission went on to acknowledge that the references in the standard were no longer accurate and did not conform to the Commission’s current requirements, and therefore did not propose to require public utilities to comply with any portion of the standard that was inconsistent with Order No. 717.

Duke requested that the Commission not adopt NAESB standards that conflict with Order No. 717, and instead adopt the revised NAESB standards whenever they are filed with the Commission.²⁷ Or, in the alternative, Duke stated the Commission should provide greater clarity that transmission service providers do not have to comply with any posting or other requirements in the approved NAESB standards that have been revised by Order No. 717.²⁸ Similarly, APS requested that the Commission decline to incorporate by reference Standard 001-21.3.1.2.2 (which states that waivers of the Biennial Reassessment be posted on OASIS as a discretionary action) because such posting of discretionary actions is no longer required under Order No. 717.²⁹

26 Standards of Conduct for Transmission Providers, Order No. 717, 73 FR 63796, FERC Stats. & Regs ¶ 31,280 (2008).

27 Duke stated that NAESB’s Executive Committee approved modifications to the business practices to make them consistent with Order No. 717 on May 12, 2009, and they believe NAESB will “file these standards with the Commission soon.”

28 For instance, Duke referenced standards WEQ 001-13.1.2, WEQ 001-21.3.1.2.2, WEQ 001-13.1, and WEQ 002-3.4 b (ii) as examples of standards containing posting requirements that are no longer required by Order No. 717.

29 APS at 4.

Commission Determination

The Commission addressed this concern in the WEQ Version 002.1 NOPR, in which it stated that “we do not propose to require public utilities to comply with any portion of the standard that requires information to be posted in a manner inconsistent with Order No. 717.” While this statement related directly to Standard 001-13.1.2, the Commission clarified in the Final Rule that it will not require public utilities to comply with any portion of the Version 002.1 standards that requires information to be posted in a manner inconsistent with Order No. 717.

Incorporation by Reference

While NRECA and APPA³⁰ did not object to the substance of the NAESB standards, they oppose the Commission’s proposal to incorporate by reference non-public standards into its regulations and the OATTs of public utilities. NRECA and APPA claim that by incorporating standards by reference, the Commission is depriving those industry participants that are unable to participate in the time- and resource-intensive NAESB standards development process of adequate notice or a reasonable opportunity to comment on the standards before they are enacted. They argued that the Commission’s ordinary notice and comment rulemaking process is more cost-effective for smaller stakeholders, as they are provided with the opportunity to submit comments before a neutral arbiter without incurring the costs involved in the time-and resource-intensive private standards development process. In addition, NRECA and APPA contend that, because these standards are incorporated by reference, industry participants without knowledge of, or practical access to, these rules may have to defend themselves against enforcement action by the Commission based on alleged noncompliance with the standards. Specifically, NRECA and APPA cite the enhancement of the Commission’s civil penalty authority in EPAct 2005 and the possibility that such penalties could be enforced against transmission customers for violations of the OATT.

Additionally, NRECA and APPA claimed that the Commission has taken the National Technology Transfer and Advancement Act of 1995 (NTT&AA) out of context, as it applies to practices regarding federal procurement contracts and places no affirmative obligations on agencies outside of that context.

Therefore, they contend that the Commission can and should reproduce the content of the standards in order to provide for greater transparency and compliance.

³⁰ NCEMC supports the comments filed by NRECA and APPA.

To address these issues, NRECA and APPA recommended that the Commission “(1) cease incorporating NAESB standards by reference into the pro forma OATT and instead promulgate its standards by ordinary notice and comment rulemaking; (2) provide substantially greater access to those materials that are promulgated in regulations; (3) or, at a minimum, clarify that FERC will not attempt to assess civil penalties on transmission customers for violations of standards that have merely been incorporated by reference into regulations and OATTs of public utilities.”³¹ To support their position for Commission publication of the standards, NRECA and APPA claim that the United States Court of Appeals for the Fifth Circuit clarified that the contents of privately developed standards are not subject to copyright protections once incorporated.³²

Commission’s Response

When the Commission first began to establish technical standards for communication protocols and business practices for the gas and electric industries, the Commission sponsored technical conferences and meetings at which all industry participants were entitled to participate. For example, when the Commission sponsored the process leading up to the OASIS standards adopted in Order No. 889, it relied on two *ad hoc* committees comprised of volunteers who offered to host and conduct their own meetings, open to participants from various industry sectors and attended by staff observers, to seek consensus on proposed OASIS standards. These committees had no formal structure or voting rules.

The NAESB process for both the gas and electric industries resulted in streamlining the standards development process and making it more efficient by creating regularized procedures and voting rules. Under the NAESB approved ANSI consensus procedures, each industry segment is represented and it is no longer necessary for all participants to attend conferences at the Commission in order to ensure their votes are heard. They can now participate either directly or indirectly through their industry representatives at NAESB. From the Commission’s experience, the NAESB process is far more efficient and cost effective method of developing technical standards for the industries involved than the use of a notice and comment rulemaking process involving numerous technical conferences in Washington that all believe they have to attend.

31 NRECA and APPA at 7.

32 NRECA and APPA at 9. These commenters cite Veeck v. Southern Building Code Congress International, Inc., 293 F.3d 791 (5th Cir. 2002), cert. denied, 539 U.S. 969 (2003) (Veeck) for the proposition that a model code incorporated into the law becomes part of the “public domain” and, therefore, is not copyrightable. They also cite John G. Danielson, Inc. v. Winchester-Conant Properties, Inc., 322 F.3d 26, 39 (1st Cir. 2003) (Danielson) as supporting this proposition.

While the NAESB process includes numerous volunteers from the industries, NAESB incurs administrative expenses which it must cover. Membership dues and fees for obtaining standards provide a reasonable means of obtaining the necessary revenue stream.³³ When the Commission weighed the advantages achieved by the NAESB standards development process against the cost to the Commission and the industry of developing these standards through notice and comment rulemaking, it found, and continues to find, that the benefits of having a well-established, consensus process outweigh whatever costs non-members may incur in having to obtain copies of the standards.

In choosing to take advantage of the efficiency of the NAESB process, the Commission has followed the government regulations that require the use of incorporation by reference. These rules appropriately balance the interest of the standards organization and the expediency of governmental use of privately developed standards. Under section 552(a) of title 5, material may be incorporated by reference when such material is reasonably available to the public. Under the regulations adopted by the Federal Register, material incorporated by reference is maintained at the Office of the Federal Register for public viewing.³⁴ As part of the incorporation process, the material also must be available and obtainable by the user.³⁵ As the Commission has pointed out in past orders, the NAESB standards are easily and readily available from NAESB, as well as being available at the Commission and the Office of the Federal Register. For example, for those who want to view the standards in order to make comments with the Commission, NAESB makes the standards available for free for a three day period.³⁶ Even for those non-members seeking to purchase a copy, the standards are available for \$900, which the Commission does not find prohibitive, given the costs of otherwise participating in a notice and comment rulemaking proceeding, including the hiring of legal counsel.³⁷

33 American National Standards Institute, Why Charge for Standards, http://www.ansi.org/help/charge_standards.aspx?menuid=help. Without such a revenue source, the Commission would have to consider imposing mandatory charges, similar to the mandatory charges to support NERC. 18 CFR 39.4(e).

34 1 CFR 51.3

35 1 CFR 51.9.

36 http://www.naesb.org/misc/NAESB_Nonmember_Evaluation_LockLizard.pdf.

37 The cost of obtaining the standards likely would be no higher than the legal cost to prepare the pleading at issue. http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_3.html. (\$180-\$380/hour depending on experience under the Laffey Matrix estimation procedure); http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/87716caa-56df-4ad9-b375-9e9366ba6d60/resource/New_Survey_Provides_Snapshot_of_Law_Firm_Economics_Across_US.cfm. (2007 median Washington DC legal rates of at \$455/hour for partners and \$295/hour for associates).

The Veeck case cited by the commenters dealt only with a third-party reprinting of local law derived from incorporation of a model building code. The case did not invalidate the copyrights held by the organization over their standards, nor did it require, nor authorize the government to provide copies of private sector standards either prior to or after incorporation by reference.³⁸

Indeed, OMB Circular A-119 requires government agencies incorporating privately developed standards to “observe and protect the rights of the copyright holder and any other similar obligations.”³⁹ In addition to copyright, the Commission also is barred contractually from reproducing the standards for distribution to third parties.⁴⁰

Nor does the Commission find that the need for public utilities to obtain standards to comply with Commission regulations is a sufficient reason to reconsider the Commission’s reliance on the NAESB process. Public utilities must incur numerous fees as a cost of doing business, including the payment of Commission’s annual charges, the filing of mandated reports and forms, and the costs incurred in having to maintain those records. As to commenters’ argument that the Commission has misinterpreted section 12d of the National Technology Transfer and Advancement Act of 1995 (NTT&AA), the Commission finds that the Act and the accompanying regulations are not limited to procurement specifications, as suggested in the comments, but include adoption of

38 Veeck, 293 F.3d at 803 (case deals only with the “relationship between non-federal government entities and copyright holders”). The court also emphasized that it was not dealing with extrinsic standards that government agencies incorporate by reference as part of the technical requirements of a government regulation, similar to our use of the NAESB standards as technical implementation of the Commission’s OASIS regulations. Veeck, 293 F.3d at 84; see CCC Info. Services v. Maclean Hunter Market Reports, Inc., 44 F.3d 61 (2nd Cir. 1994); and Practice Management Info. Corp. v. American Medical Ass’n, 121 F.3d 516 (9th Cir. 1997), opinion amended by 133 F.3d 1140 (9th Cir. 1998). Unlike Veeck, NAESB does not solicit incorporation by reference. Veeck, 293 F.3d at 805. Likewise, in Danielson, the court found that architectural drawings were not made into judicial decisions and statutes in the public domain merely because they were referenced in a recorded deed.

39 OMB Circular No. A-119 (Revised February 10, 1998), at 6J, <http://www.whitehouse.gov/omb/rewrite/circulars/a119/a119.html>. See 28 U.S.C. §1498 (federal government may be liable for copyright infringement). Other government agencies similarly have denied requests to publish copies of privately developed standards. See Updating OSHA Standards Based on National Consensus Standards, 74 FR 46350-46361 (September 9, 2009) (“OSHA notes that copyright laws protect national consensus standards”); Airworthiness Directives: Airbus Model A300 Airplanes, 72 FR 6923 (Feb. 14, 2007) (finding that incorporated by reference materials “do not lose their copyright protection”). Taken to its logical extreme, NRECA and APPA’s argument would require that a school system’s decision to require children to acquire and read the novel “Fahrenheit 451” over summer vacation operates to vitiate the copyright and obligates the system to reprint the text of the novel. See Veeck, 293 F.3d at 804-805 (copyrighted works do not “become law” merely because a statute refers to them); CCC Info. Servs. 44 F.3d at 74 (“It scarcely extends CCC’s argument to require that all such assigned books lose their copyright -- as one cannot comply with the legal requirements without using the copyrighted works”).

40 Agreement Granting Permission to Copy Standards (August 9, 1996), http://www.naesb.org/pdf4/gisb_copy_permission_to_ferc_080996.pdf.

standards “as a means to carry out policy objectives or activities”⁴¹ In any event, as discussed above, the Commission sees benefits to the continued role of NAESB in developing electronic communication and business practice standards for public utilities, whether required by NTT&AA or not.

Implementation Dates and Procedures

OATI⁴² supports the Commission’s proposed actions and has no immediate concerns with any of the proposed standards. Both OATI and TranServ suggest that the Commission should defer implementation of WEQ-002, WEQ-003, and WEQ-013 for a minimum of six to nine months to allow transmission providers sufficient time to modify their existing OASIS systems and make necessary changes to their processes, procedures, and other supporting software systems. Both also suggested avoiding implementation during the summer or winter peak seasons.

APS argued that because the postings for the ATC Information Link and Postback Requirements relate to the Implementation Documents required by the NERC standards, there should not be an effective requirement to post items related to these documents prior to the date on which the underlying NERC rules take effect. Therefore, APS requested that the requirements of Standards 001-18 through 001-18.2 have the same effective date as the NERC available transfer capability related standards.

Entergy argued that because Standards 001-13.1.5, 001-14.1, and 001-15.1 relate to, and potentially depend on, the NERC reliability standards, the Commission should consider the need to coordinate the effective dates of these two sets of standards.⁴³

While Entergy acknowledges the difficulty of developing a single industry methodology for implementing Standard 001-21.1.6, because Entergy believes that it does not provide significant guidance as to how transmission providers should implement this standard, Entergy argued that its implementation will require significant software development. To address this issue, Entergy asks that the Commission set the effective date of this provision to coincide with the date at which the OASIS vendors will have developed the appropriate software modifications necessary to implement this standard.⁴⁴

41 Pub L. No. 104-113, 12(d), 110 Stat. 775 (1996), 15 U.S.C. 272 note (1997). OMB Circular A-119 (agency “must use voluntary consensus standards, both domestic and international, in its regulatory” as well as procurement activities).

42 Open Access Technology International, Inc. (OATI) is a supplier of software for the electric industry, including OASIS and back-office supporting systems.

43 Entergy at 6-7.

44 *Id.* at 4-5.

Commission's Response

In light of the time needed to plan and complete the complex tasks involved in implementing the standards the Commission is adopting in this Final Rule, as well as the desirability of aligning the implementation of the requirements in these standards that relate to the NERC standards being adopted in Docket No. RM008-19-000, the Commission will make the implementation date for compliance with the NAESB standards it is incorporating by reference in this final rule coincident with the implementation date applicable to the NERC reliability standards that the Commission approved in an order being issued concurrently with this order. Accordingly, public utilities subject to these requirements will not be required to comply with these standards until the first day of the first quarter of the first year after the publication of this rule in the Federal Register.

However, as the Commission indicated in this final rule, a revised Attachment C to the OATT must be filed within 60 days of the effective date of this final rule.

Consistent with the Commission's regulation at 18 CFR 35.28(c)(vi), each electric utility must revise its OATT to include the Version 002.1 WEQ standards that are being incorporated by reference in this final rule. For standards that do not require implementing tariff provisions, the Commission will allow the utility to incorporate the WEQ standard by reference in its OATT. Moreover, as the Commission proposed in the WEQ NOPR, to lighten the burden associated with a stand-alone filing of a revised tariff reflecting the standards incorporated by reference in this final rule, the Commission is giving public utilities the option of including these changes as part of an unrelated tariff filing, provided that the revised tariff is filed with the Commission at least ninety days before the prescribed date for compliance with the revised standards (the first day of the first quarter of the first year after the publication of this rule in the Federal Register). In addition, consistent with the Commission's prior practice, if a public utility fails to file the required tariff revisions prior to the compliance date, it nonetheless must abide by these standards even before it has updated its tariff to incorporate these changes.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to respondents under any circumstance.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

All data filed is public information and, therefore, are not confidential. However, a company may request confidential treatment of some or all parts of the FERC-717 information requirement under the FOIA and FERC regulations at 18 CFR 388.112.

Standard 001-13.1.5 provides that the posting of information on Available Transfer Capability Information Link would be “subject to the Transmission Provider’s ability to redact certain provisions due to market, security or reliability sensitivity concerns”. In Order No. 890, the Commission acknowledged that a transmission provider may require someone seeking access to CEII materials or proprietary customer information to sign a confidentiality agreement. The Commission expects the provision in NAESB Standard 001-13.1.5 for a transmission provider to redact sensitive information from postings to be implemented by a transmission provider subject to the OATT in a manner consistent with its obligation to make that information available to those with a legitimate need to access the information, subject to appropriate confidentiality restrictions.

Each request for confidential treatment will be reviewed by the Commission on a case-by-case basis.

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

There are no questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs and other matters that are commonly considered private in the reporting requirements.

12. ESTIMATED BURDEN COLLECTION OF INFORMATION

The information collection requirements of this final rule are based on the transition from transactions being made under the existing business practice standards to conducting such transactions under the proposed revisions to these standards and to account for the burden associated with the new standards the Commission proposes to incorporate in its regulations. The Commission estimates there are approximately 176 public utilities who own or control facilities used for the transmission of electric energy in interstate commerce and would be subject to the filing requirements of this final rule.

The burden estimate includes the time required to implement the standards proposed in this rule, review the standards, search existing data sources, gather and maintain the data needed, and complete and review the information and file as appropriate with the Commission. Details of the burden estimates are shown in the following table:

Data Collection	No. of Respondents	No. of Responses Per Respondent	Hours Per Response	Total No. of Hours
FERC-516	176	1	6	1056
FERC-717	176	1	30	5280
Totals				6336

DATA COLLECTION (FERC-516) CURRENT INVENTORY PROPOSED IN NOPR PROPOSED IN FINAL NEW OMB INV.

Estimated Number of Respondents

1,230
 176
 176

			1,230
Estimated number of responses/respondent/yr	3.52	1	1
Estimated annual number of responses	4,330	176	176
Estimated hours per information requirement	98.5686	6	6
Total estimated annual burden hours	426,802	1,056	1,056
Estimated annual burden in OMB inventory#			
Increase/decrease in FERC-516 burden hours		+1,056	
Program Change:		+1,056	
Adjustment:		0	

#Note: FERC-516 is currently the subject of another rulemaking proceeding under review at OMB. The hours attributable to this information collection are for the proposed requirements of this rule and the inventory below reflects the most recent approval. When the final rule is issued, the Commission will make a correction to reflect the hours under 1902-0096 (FERC-516). Also the 176 respondents subject to the Final Rule are a

FERC-717 & FERC-516

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subset of the total universe of respondents who are subject to the filing requirements of FERC-516.

FERC-717	TOTAL, CURRENT INVENTORY	NEW COLLECTION, PROPOSED IN NOPR⁴⁵	NEW COLLECTION, PROPOSED IN FINAL Reference source not found	TOTAL, NEW OMB INV. Reference source not found
Estimated no. of Respondents	220	176	176	176
Estimated no. of responses/respondent/yr [1 per Information Collection]	2	1	1	3
Estimated annual no. of responses	440	176	176	528
Estimated hours per response [averaged for all IC's]	506.72*	12	30	347.81*
Total estimated annual burden hours Reference source not found	222,955	2,112	5,280	183,643.68*

Increase/decrease in FERC-717 burden hours
 Error: Reference source not found

45 The estimated number of respondents (and responses) for the new Information Collection (IC) (promulgated in this docket for FERC-717) was listed as 176 at the proposed rule and final rule stages. However the two unchanged IC's in FERC-717 retained the estimate of 220 respondents (and responses) in the submittal for the NOPR, rather than the updated estimate of 176. This revised supporting statement updates and reduces the number of respondents (and responses) for the two unchanged IC's to 176.

The first IC in OMB's ROCIS system for FERC-717 now will have 176 responses X 980.43 hrs. per response, for a total of 172,555.68 hours (a decrease in the estimate of 43,138.92 hrs.). The second IC will show 176 responses X 33 hrs. per response, for a total of 5,808 hrs. (a decrease in the estimate of 1,452 hrs.) The third IC (new from this rulemaking) shows 176 responses X 30 hrs. per response, for a total of 5,280 hrs.

The total burden for FERC-717 will now be 183,643.68 hrs. (from the program increase of 5,280 hrs. and the total adjustment (decrease) of -44,590.92 hrs. [43,138.92 + 1,452]). See the spreadsheet in ROCIS under 'Supplementary Documents'.

Program Change, due to new collection: +5,280
 Adjustment (due to adjustment in the no. of respondents and responses, in
 the unchanged IC's): -44,590.92 hrs.
 *rounded off.

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

Annualized Capital/Startup Costs

The Commission's estimate for costs to comply with the Proposed Rule is based on a one-time implementation of the proposed standards for public utilities. The estimated hours needed to comply with this Notice of Proposed Rulemaking include the following activities:

- filing of open access transmission tariff that includes incorporated by reference of the requirements in 18 C.F.R. Part 38 of the Commission's regulations;
- a change to their OASIS or Internet websites to disclose information relevant to posting of narratives explaining changes in available transfer capability and total transfer capability, underlying load forecast assumptions for available transfer calculations and actual peak load, as well as metrics relating to the provision of transmission service and the completion of planning services.

The following burden estimate is based on the projected costs for the industry to implement revisions to the WEQ Standards currently incorporated by reference into the Commission's regulations at 18 CFR 38.2 and to implement the new standards adopted by NAESB that we propose here to incorporate by reference.

Information Collection Costs: The Commission is seeking comments on the costs to comply with these requirements. It has projected the average annualized cost for all respondents to be the following:⁴⁶

	FERC-516	FERC-717
Annualized Capital/Startup Costs	\$130,236.48	\$651,182.40
Annualized Costs (Operations & Maintenance)	N/A	N/A
Total Annualized Costs	\$130,236.48	\$651,182.40

⁴⁶ The total annualized costs for the information collections promulgated by this rulemaking is \$781,418.88 (\$130,236.48 for FERC-516, and \$651,182.40 for FERC-717) . This number is reached by multiplying the total hours to prepare responses (1,056 hrs. for FERC-516, and 5,280 hrs. for FERC-717) by an hourly wage estimate of \$123.33 (an estimate that averages legal (\$250/hr.), technical (\$95/hr.) and support staff rates (\$25/hr.)).

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT:

The estimated annualized cost to the Federal Government for FERC-516 and FERC-717 is as follows:

Data

	Analysis
	Estimated
	FERC
	Data
	Total
Collection	Cost
	of Data
	Salary
	Clearance
	One
<u>Number</u>	Year's
	(FTEs)
	x
	<u>Per</u>
	Year +
	(FY
	'09) =
	<u>Operation</u>
FERC-516	2.5
	\$128,297
	\$
	1,952

	\$322,695
FERC-717	.5
	\$128,297
	\$
	1,952
	\$
	66,101
Total Cost	3.0
	\$128,297
	\$3,804
	\$388,796

The average cost per staff year reflects direct human resource's costs. These costs consist of direct labor and fringe benefit costs. The direct labor cost is that portion of staff salary that is charged to a collection of information activity. The fringe benefits cost consists of allowances and services provided to Government employees in addition to employee salaries. It is expressed as a percentage of the salary costs.

Cumulative Costs to the Federal Government:

Data Collection	Current Costs	Final Rule Costs	Total
FERC-516	\$712,551	\$322,695	\$1,035,246
FERC-717	\$511,589	\$ 66,101	\$ 577,690

15. **REASONS FOR CHANGES IN BURDEN INCLUDING THE NEED FOR ANY INCREASE** Error: Reference source not found

As reported in item #12, there is a program increase in the annual reporting burden (and a adjustment decrease). The Commission's estimates for the annual reporting

burden in the Standards for Business Practices and Communication Protocols for Public Utilities Final Rule are anticipated to be a total of 6,336 hours (1,056 hrs. for FERC-516 and 5,280 hrs. for FERC-717). This program increase is attributable to the implementation of business standards and communication protocols as noted in the preamble to this submission (and the additional background under ‘Supplemental Documents’). This burden increase is partially offset by a decrease in the number of respondents who have to post the information on their OASIS sites.

The Commission is proposing, consistent with its regulations at 18 CFR 35.28(c)(1)(vii), to require each public utility to revise its OATT to include Version 002.1 WEQ standards. For standards that do not require implementing tariff provisions, the Commission is proposing to permit the public utility to incorporate the WEQ standard by reference in its OATT.

In addition, there is an adjustmentError: Reference source not found for the 2 IC’s under FERC-717 (that were unaffected by this rule). This adjustment is a decrease from 220 respondents to 176 for each of the two IC’s, resulting in an adjustment (decrease) of -44,590.92 hrs.

16. TIME SCHEDULE FOR PUBLICATION OF DATA

This is not a collection of information for which results are planned to be published.

17. DISPLAY OF EXPIRATION DATE

It is not appropriate to display the expiration date for OMB approval of the information collected pursuant to Parts 35, 37 and 38 in the Code of Federal Regulations. The information collected is not collected on a standard, preprinted form which would avail itself of this display for either FERC-516 or FERC-717. However, the Commission has printed the OMB Control number and a disclaimer that respondents will not be subject to a penalty if a valid OMB control number is not displayed on the Commission's publication OASIS Standards and Communication Protocols. This publication contains the standards of conduct and communication protocols that industry must follow. The proposed reporting requirements under FERC-717 are not filed on formatted/printed forms but rather based on posting requirements for Internet web sites.

B. Collections of Information Employing Statistical Methods

These are not collections of information employing statistical methods.