

**SUPPORTING STATEMENT FOR
FERC-919 Electric Rate Schedule Filings: Market Based Rates for
Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public
Utilities, In Docket No. RM010-20-000 (Notice of Proposed Rulemaking)**

The Federal Energy Regulatory Commission (FERC, Commission), is submitting this Notice of Proposed rulemaking to the Office of Management and Budget (OMB) with no changes to the reporting burden. The Commission proposes to revise its regulations governing market-based rates for public utilities in accordance section 205 of the Federal Power Act (FPA). The Commission proposes to clarify that employees that determine the timing of scheduled outages, or that engage in economic dispatch¹, fuel procurement, or resource planning may not be shared under the market-based rate affiliate restrictions codified in Order No. 697. The Commission issued Order No. 697 (see below) on June 21, 2007. OMB assigned OMB control No. 1902-0234 to the requirements in Order No. 697.

At the time of submission of the final rule, the intention was to merge the hours associated with Order No. 697 with FERC-516 (1902-0096) which was the subject of a separate OMB review. However, in a subsequent decision, the hours associated with the final rule were kept as a separate information collection requirement under the OMB Control No. noted above. FERC-919 is currently approved through 11/30/2010.

Background

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

The courts have reviewed the Commission's market-based rate program and found that it satisfies the FPA. The FPA requires that all rates demanded by public utilities for the sale of electric energy at wholesale be found "just and reasonable."² The United States Supreme Court has explained that the just and reasonable standard "does not

1 **Economic Dispatch** - Using the most cost-effective mix of resources to meet electric demand. Economic dispatch minimizes the cost of electric generation by operating available units at the same incremental cost. Under economic dispatch, generating units are dispatched at the same incremental cost, or system lambda, which is expressed in dollars per kilowatt-hour.

2 Louisiana Energy and Power v. FERC, 141 F.3d 364, 365 (D.C. Cir. 1998) (citing 16 U.S.C. § 824d(a)) (Louisiana Energy).

compel the Commission to use any single pricing formula.”³ The United States Court of Appeals for the D.C. Circuit has long held that “when there is a competitive market the [Commission] may rely upon market-based prices in lieu of cost-of-service regulation to assure a ‘just and reasonable’ result.”⁴ The Commission’s authorization of market-based rates has been found to satisfy the just and reasonable standard of the FPA.⁵

The Commission initiated the rulemaking proceeding in April 2004 to consider “the adequacy of the current four-prong analysis and whether and how it should be modified to assure that prices for electric power being sold under market-based rates are just and reasonable under the Federal Power Act.”⁶ At that time, the Commission noted that much has changed in the industry since the four-prong analysis was first developed and posed a number of questions that would be explored through a series of technical conferences. The comments from those technical conferences were considered when drafting the Notice of Proposed Rulemaking (NOPR).

On April 14, 2004, the Commission issued an order modifying the then-existing generation market power analysis and its policy governing market power mitigation, on an interim basis.⁷ The April 14th Order adopted a policy that would provide sellers a number of procedural options, including two indicative generation market power screens (an uncommitted pivotal supplier analysis and an uncommitted market share analysis), and the option of proposing mitigation tailored to the particular circumstances of the seller that would eliminate the ability to exercise market power. The order also explained that sellers could choose to adopt cost-based rates.

On July 8, 2004, the Commission acted on requests for rehearing of the April 14 Order, reaffirming the basic analysis, but clarifying and modifying certain instructions for performing the generation market power analysis. The Commission clarified, among other things, the types of data on which sellers and intervenors may rely, and that adjustments may be allowed in certain circumstances. The Commission also clarified that mitigation would be imposed in all markets where a seller is found to have generation market power.

3 Mobil Oil Exploration v. United Distribution Co., 498 US 211, 224 (1991).

4 Elizabethtown Gas Company v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993) (Elizabethtown Gas), (citing Tejas Power Corp. v. FERC, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

5 See Louisiana Energy; Elizabethtown Gas; Consumers Energy Company v. FERC, 367 F.3d 915, 923 (D.C. Cir. 2004).

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

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

NOPR (Docket No. RM04-7-000)

On May 19, 2006, in Docket No. RM04-7-0000, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to adopt in most respects the Commission's current standards for granting market-based rates. The Commission believed that these standards allowed the Commission to distinguish between applicants that have market power and those that do not. For example, the existing interim horizontal (generation) market power screens have allowed the Commission to identify a number of smaller applicants that do not have generation market power. The Commission authorized these applicants to obtain or retain market-based rate authority, which benefits customers by encouraging new entry and by providing them with the greater flexibility in product offerings that market-based rate approval conveys. The existing screens also have allowed the Commission to more accurately identify instances where certain larger sellers may possess market power. If an applicant fails the Commission's screens, this does not, however, constitute a definitive finding of market power. Rather, the Commission's existing standards allow any applicant that fails these screens to demonstrate that it lacks market power in generation using the delivered price test (DPT).⁸ The DPT has provided appropriate flexibility in allowing the Commission to consider the differing factual situations of particular sellers, such as those that have a responsibility for serving native load customers. The Commission proposed to continue to apply the DPT in such a flexible manner.

Final Rule (Docket No. RM04-7-000) Order No. 697.

On June 21, 2007, the Commission issued Order No. 697,⁹ codifying and, in certain respects, revising its standards for obtaining and retaining market-based rates for public utilities. In order to accomplish this, as well as streamline the administration of the market-based rate program, the Commission modified its regulations at 18 CFR part 35, subpart H, governing market-based rate authorization. The Commission explained that there are three major aspects of its market-based regulatory regime: (1) market power analyses of sellers and associated conditions and filing requirements; (2) market rules imposed on sellers that participate in Regional Transmission Organization (RTO) and Independent System Operator (ISO) organized markets; and (3) ongoing oversight and enforcement activities. The Final Rule focused on the first of the three features to

⁸ See April 14 Order at P 106 ("The [DPT] defined the relevant market by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each suppliers' economic capacity and available economic capacity for each season/load condition. The results of the [DPT] can be used for pivotal supplier, market share and market concentration analyses.").

⁹ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904 (Jul. 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007) (Final Rule).

ensure that market-based rates charged by public utilities are just and reasonable. Order No. 697 became effective on September 18, 2007.

Specifically in the Final Rule, FERC codified and, in certain respects, revised its existing standards for market-based rates for sales of electric energy, capacity, and ancillary services. The Commission retained several of the core elements of its existing standards for granting market-based rates and revising them in certain respects. FERC also proposed to streamline aspects of its filing requirements to reduce the administrative burdens on applicants, customers and on FERC.

(Docket No. RM04-7-003) Order Clarifying Final Rule

On December 14, 2007, the Commission issued an order clarifying four aspects of Order No. 697.¹⁰ Specifically, that order addressed: (1) the effective date for compliance with the requirements of Order No. 697; (2) which entities are required to file updated market power analyses for the Commission's regional review; (3) the data required for the horizontal market power analyses; and (4) what constitutes "seller-specific terms and conditions" that sellers may list in their market-based rate tariffs in addition to the standard provisions listed in Appendix C to Order No. 697. The Commission also extended the deadline for sellers to file the first set of regional triennial studies that were directed in Order No. 697 from December 2007 to 30 days after the date of issuance of the Clarification Order.

(Docket No. RM04-7-001) Order No. 697-A, Order on Rehearing

In an order on rehearing issued April 21, 2008, the Commission affirmed its basic determinations in Order No. 697, and granted rehearing and clarification regarding certain revisions to its regulations and to the standards for obtaining and retaining market-based rate authority for sales of energy, capacity and ancillary services to ensure that such sales are just and reasonable. The Commission also clarified several aspects of the implementation process adopted in Order No. 697.

Specifically, FERC responded to a number of requests for rehearing and clarification of Order No. 697. In most respects, the Commission reaffirmed its determinations made in Order No. 697 and denied rehearing of these issues. With respect to several issues, however, the Commission granted rehearing or provided clarification.

¹⁰ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 121 FERC ¶ 61,260 (2007) (Clarification Order).

For example, the Commission affirmed in large part the determinations made in Order No. 697 concerning the horizontal market power analysis, including the use of the 20 percent threshold for the indicative wholesale market share screen and the Delivered Price Test (DPT), the use of a 2,500 Hirschman-Herfindahl Index (HHI) threshold for the DPT analysis, and the use of the average peak native load as the native load proxy for the indicative wholesale market share screen and DPT analysis. The Commission also affirmed its decision to use a balancing authority area or the RTO/ISO region as the default relevant geographic market. Similarly, the Commission affirmed the decision that, where the Commission has made a specific finding that there is a submarket within an RTO/ISO, that submarket should be considered the default relevant geographic market. However, the Commission granted rehearing concerning the finding that Northern PSEG is a submarket within PJM. On reconsideration, the Commission concluded that it erred in relying on a finding of a submarket in a particular proceeding that was subsequently vacated on procedural grounds.

In other provisions of Order No. 697, the Commission clarified:

- that the new affiliate restriction regulations promulgated in Order No. 697 supersede codes of conduct approved by the Commission prior to the effective date of Order No. 697. The Commission also provided a number of clarifications concerning employees who are not subject to the independent functioning requirement. Further, the Commission granted rehearing regarding the adoption of a two-way information sharing restriction in 18 CFR 35.39(d), finding, among other things, that a one-way information sharing restriction adequately protects captive customers.

The Commission codified in the regulations at 18 CFR 35.36 a definition of “affiliate” for purposes of Order No. 697 based on the definition adopted in the Affiliate Transactions Final Rule.¹¹ In addition, the Commission reiterated in the rehearing order a number of clarifications that it made in the Affiliate Transactions Final Rule regarding the term “captive customers,” the purpose of the definition, and its focus on “cost-based regulation.” Among other things, the Commission noted that if a state regulatory authority in a retail choice state does not believe that retail customers are sufficiently protected and that the Commission’s affiliate restrictions should apply to the local franchised public utility, it may ask the Commission to deem its retail customers to be captive customers for purposes of applying the affiliate restrictions.

¹¹ Cross-Subsidization Restrictions on Affiliate Transaction, Order No. 707, 73 FR 11013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 (Feb. 21, 2008) (Affiliate Transactions Final Rule).

Finally, the Commission rejected as without merit arguments raised by petitioners challenging the Commission's authority to adopt market-based rates and alleging that the market-based rate program fails to comply with the requirements of the FPA.

While the rehearing order clarified aspects of the existing information collection requirements for the market-based rate program, it did not add to the requirements.

Docket No. RM04-7-007) Order on Rehearing/Request for Clarification

On April 15, 2010, in Docket No. RM04-7-007, the Commission issued an Order on Rehearing denying a request by the Compliance Working Group (CWG)¹² that the Commission interpret the market-based rate affiliate restrictions adopted in Order No. 697 to permit the sharing of employees who are neither transmission function employees nor marketing function employees under the Standards of Conduct Final Rule (Order No. 717). The Commission found that it would be inappropriate to interpret the market-based rate affiliate restrictions to permit the sharing of employees who are neither transmission function employees nor marketing function employees under the Standards of Conduct. However, the Commission granted clarification to the extent that it addresses the CWG's concerns regarding compliance with the market-based rate affiliate restrictions given that the Commission's rules regarding which employees may be shared under the Standards of Conduct have changed. In order to provide guidance to the industry, and to address the concerns raised by TAPS concerning the potential for affiliate abuse under the CWG's requested interpretation, the order clarifies which employees may not be shared under the market-based rate affiliate restrictions absent explicit waiver from the Commission.

While the rehearing order clarified aspects of the existing information collection requirements for the market-based rate program, it did not add to the requirements.

Docket No. RM10-20-000) Notice of Proposed Rulemaking

Concurrently with the issuance of the Clarification Order, the Commission on April 15, 2010 issued a Notice of Proposed Rulemaking (NOPR). In this NOPR, the Commission is proposing to revise §35.39 of its regulations as initially issued in Order No. 697 in order to reflect the clarification provided in RM04-7-007 (*see above*) in response to the CWG's concerns regarding compliance with the market-based rate affiliate restrictions codified in Order No. 697. Specifically, the Commission is proposing to revise the separation of functions and information sharing provisions of

¹² Industry group of 27 energy companies whose mission is to develop a model FERC compliance program guide.

those affiliate restrictions to explicitly state that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not be shared under the Commission's market-based rate affiliate restrictions adopted in Order No. 697.

As stated above, in Order No. 697, the Commission adopted market-based rate affiliate restrictions that govern the relationship between franchised public utilities with captive customers and their "market-regulated" power sales affiliates, i.e., affiliates whose power sales are regulated in whole or in part on a market-based rate basis. These restrictions govern the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering, and are based on a corporate separation approach to ensure separation of functions between a franchised public utility with captive customers and its market-regulated power sales affiliates. The Commission requires that, as a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless otherwise permitted by Commission rule or order. Failure to satisfy the conditions identified in the market-based rate affiliate restrictions constitutes a violation of the market-based rate tariff.¹³

In response to the CWG's request, the Commission is providing clarification regarding which employees may not be shared under these affiliate restrictions.¹⁴ In this Notice of Proposed Rulemaking (NOPR), the Commission proposes to revise the text of the separation of functions and information sharing provisions of the affiliate restrictions in order to reflect the clarification provided in RM04-7-007.

A. JUSTIFICATION

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

Section 205(c) of the Federal Power Act (FPA) requires that every public utility have all of its jurisdictional rates and tariffs on file with the Commission and make them available for public inspection, within such time and in such form as the Commission may designate. Section 205(d) of the FPA requires that every public utility must provide notice to FERC/Commission and the public of any changes to its jurisdictional rates and tariffs, file such changes with FERC, and make them available for public inspection, in such manner as directed by the Commission. In addition, FPA section 206 requires FERC, 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

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549-550.

¹⁴ April 15 Clarification Order, 131 FERC ¶61,021.

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.

The FPA requires that all rates charged by public utilities for the transmission or sale for resale of electric energy be just and reasonable.¹⁵ Thus, where a market-based rate seller is found to have market power in generation (e.g., after reviewing a seller's DPT), it is incumbent upon the Commission to either reject such rates or to ensure that adequate mitigation measures are in place to ensure that the rates are just and reasonable. The Commission provides default cost-based rates to ensure that wholesale rates are just and reasonable. If a seller does not pass the generation market power screens, or foregoes the screens entirely, the Commission sets the just and reasonable rate at the default cost-based rate unless it approves different mitigation based on case-specific circumstances.

For sellers that have a presumption of market power in generation (e.g. those failing one or both of the indicative screens), the Commission will institute a section 206 proceeding and the seller's rates will prospectively be made subject to refund.¹⁶ For sellers already charging market-based rates, market-based rates will not be revoked and cost-based rates will not be imposed until the Commission issues an order making a definitive finding that the seller has market power in generation (typically, after the Commission has ruled on a DPT analysis) or, where the seller accepts a presumption of market power, an order is issued addressing whether default cost-based rates or case-specific cost-based rates are to be applied. The Commission will revoke the market-based rate authority in all geographic markets where a seller is found to have market power in generation.¹⁷

In Order No. 697, the Commission believed it was the appropriate time to revise and codify the standards for market-based rates for wholesale sales of electric energy, capacity and ancillary services. Refining and codifying effective standards for market-based rates assists customers by ensuring that they are protected from the exercise of market power. It also provides greater certainty to sellers seeking market-based rate

¹⁵ 16 U.S.C. 824d(a) (2000).

¹⁶ The refund floor would be the default cost-based rates or, if applicable, any case-specific cost-based rates proposed by the seller and accepted by the Commission. Accordingly, the seller has certainty as to its potential refund obligation, if any. April 14 Order, 107 FERC ¶ 61,018 at n. 143.

¹⁷ The seller has the option of withdrawing its market-based rate request in whole or in part.

authority.

The Commission had previously required utilities seeking market-based rate authority to file market power analysis and in Order No. 697 the Commission codified that requirement in its regulations. Section 35.27(a) of the Commission's regulations provides that any public utility seeking market-based rate authority is not required to submit a generation market power analysis with respect to sales from capacity for which construction commenced on or after July 9, 1996. Under existing procedures, if all of the generation owned or controlled by an applicant for market-based rate authority and its affiliates in the relevant control area is post-July 9, 1996 generation, the applicant is not required to submit generation market power analysis. In Order No. 697, the Commission eliminated the express exemption provided in section 35.27(a). This modification requires that all new applicants seeking market-based rate authority on or after the effective date of the final rule, whether or not all of their and their affiliates' generation was built or acquired after July 9, 1996, must provide a market power analysis of their generation to support their application for market-based rate authority.

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, in Order No. 697, the Commission adopted affiliate restrictions that govern the relationship between franchised public utilities with captive customers and their "market-regulated" affiliates, i.e., affiliates whose power sales are regulated in whole or in part on a market-based rate basis. These market-based rate affiliate restrictions govern the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering. The Commission requires that, as a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless explicitly permitted by Commission rule or order. Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of the market-based rate tariff.¹⁸

Under the separation of functions requirement in the market-based rate affiliate restrictions, employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised utilities with captive customers.¹⁹ Order No. 697 exempts certain categories of

¹⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549-550.

¹⁹ 18 CFR 35.39(c)(2)(i).

employees from this separation of functions requirement. Employees in these categories are permitted to be shared, and Order No. 697 gives examples of permissibly “shared employees” that are drawn from Order No. 2004, which established the Standards of Conduct rules that were in effect at the time that Order No. 697 was issued.²⁰ In particular, the market-based rate affiliate restrictions provide that “Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.”²¹ Moreover, under the information sharing restriction, “[a] franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public.” However, “permissibly shared support employees, field and maintenance employees and senior officers and board of directors under § 35.39(c)(2)(ii) may have access to information covered by the prohibition of § 35.39(d)(1), subject to the no-conduit provision in § 35.39(g).”²²

In its request for clarification, the Compliance Working Group (CWG) asked the Commission to clarify which employees are permissibly “shared employees” for purposes of the Commission’s market-based rate affiliate restrictions. Specifically, CWG suggested that the Commission should interpret these affiliate restrictions to permit sharing of employees who are neither “transmission function employees” nor “marketing function employees” under the Standards of Conduct.²³ The CWG stated that the issue arose because shared employees under the market-based rate affiliate restrictions are defined by reference to shared employees under the Order No. 2004-era Standards of Conduct, but as of the effective date of the Standards of Conduct Final Rule, on November 26, 2008, the Standards of Conduct no longer use the concept of shared

20 Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 561-566 (citing Standards of Conduct for Transmission Providers, Order No. 2004, FERC Stats. & Regs. ¶ 31,155, at P 96, 99-101, 145-146 (2003), order on reh’g, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, at P 134, order on reh’g, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, order on reh’g, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), order on reh’g, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006); see id. P 562 (citing 18 CFR 358.4(a)(5) (Order 2004-era Standards of Conduct)).

21 18 CFR 35.39(c)(2)(ii); see also Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 562.

22 18 CFR 35.39(d).

23 Standards of Conduct for Transmission Providers, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008) (Standards of Conduct Final Rule), order on reh’g, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, order on reh’g, Order No. 717-B, 129 FERC ¶ 61,123 (2009). As discussed below, “transmission function employees” and “marketing function employees” are defined terms under the Standards of Conduct. See 18 CFR 358.3(d); 358.3(i).

employees. The CWG therefore claimed that this inconsistency poses a compliance conundrum that needs to be addressed in order to enable companies and their employees to understand, and comply with, the market-based rate affiliate restrictions.

In RM04-7-007 as noted above, the Commission explained in the Clarification Order that “marketing function employee” is not a defined term in the market-based rate regulations adopted in Order No. 697, and explained that the restrictions on which employees may be shared under the market-based rate affiliate restrictions are not limited to those employees who are engaged in sales. The Commission stated that as clarified in Order No. 697-A, under the market-based rate affiliate restrictions, “shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities.”²⁴ In this regard, the RM04-7-007 Clarification Order explained that responsibility for economic dispatch or the timing of scheduled outages, for example, is not a “marketing function” under the Standards of Conduct and, therefore, engaging in these activities would not cause an employee to be a marketing function employee subject to the Independent Functioning Rule under the Standards of Conduct (and therefore, those employees could be shared). Therefore, consistent with the Commission’s determinations in Order No. 697-A, RM04-7-007 Clarification Order clarifies that, for purposes of compliance with the market-based rate affiliate restrictions, a franchised public utility with captive customers and its market-regulated power sales affiliates may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.²⁵

Likewise, because the Commission’s Final Rule on Standards of Conduct does not specifically address in the definition of “marketing function employee” those employees who determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning, the RM04-7-007 Clarification Order clarifies that employees engaging in these activities²⁶ are prohibited from being shared under the market-based rate affiliate restrictions, absent an explicit waiver from the Commission.

In order to reflect this clarification, the Commission proposes in this NOPR to revise § 35.39 of its regulations in order to clarify that employees that determine the

24 April 15 Clarification Order 131 FERC ¶ 61,021 at P 37 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253).

25 Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

26 The prohibition on sharing employees that engage in resource planning applies only to the sharing of employees between a franchised public utility and its market-regulated power sales affiliate, and is not intended to alter resource planning activities by transmission providers that are permitted under the Standards of Conduct Final Rule.

timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not be shared under the market-based rate affiliate restrictions. The proposed revision of the separation of functions provision contained in § 35.39(c)(2)(ii) of the regulations is to include the provision that franchised public utilities with captive customers are prohibited from sharing employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning with their market-regulated power sales affiliates.

Without this information, the Commission would be unable to discharge its responsibilities under the Federal Power Act to approve or modify electric utility rate and tariff filings. Failure to issue these requirements would permit discrimination in interstate transmission services by public utilities and the potential for the exercise of market power.

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 has 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 RM01-5-000, Order No. 714 issued September 19, 2008 (73 FR 57515, October 8, 2008), FERC revised 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 have assisted 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 provides 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 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. These regulations went into effect April 1, 2010.

As the Commission increases its use of electronic media for filing, storage, retrieval, and tracking of information and documents, greater uniformity in filing procedures, wherever practical, will greatly expedite and simplify the conversion to electronic media.

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 tariffs contain rate information that 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, Energy Policy Act of 1992 and the 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

This proposed rule revises the regulations for the market-based rate program in order to provide clarification of an existing requirement that affected entities, including small entities, are currently required to comply with. Because the proposed revisions clarify an existing requirement, and do not add to the existing information collection or filing requirements, the Commission has concluded that the proposed rule will not have a significant economic impact on a substantial number of small entities.

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

It is not possible to collect this data less frequently. If the collection were conducted less frequently, the Commission would be unable to perform its mandated oversight and review responsibilities with respect to electric rates. Furthermore, Section

205 of the FPA mandates that the information be filed every time a licensee or public utility proposes to change its rates.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION COLLECTION

Public Utilities and licensees make electric rate schedule filing applications only when they have developed new electric rate schedules or revisions to existing rate schedules. Section 205 of the Federal Power Act requires the Commission to take action on these applications within 60 days of the filing. 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-919 includes service agreements and transaction reports and 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 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 Market Regulation for technical review by analysts in rate filings, rate investigations and financial analysis. As noted above, on April 1, 2010 the Commission implemented its eTariff program on a six month staggered schedule. After the schedule has been completed, the Commission will eliminate all paper copies.

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

The Commission's procedures require that the rulemaking notice be published in the Federal Register, thereby allowing all public utilities and licensees, pipeline companies, state commissions, federal agencies, and other interested parties an opportunity to submit comments, or suggestions concerning the proposal. The rulemaking procedures also allow for public conferences to be held as required.

This NOPR and the accompanying Clarification Order are in response to Compliance Working Group's request for clarification, as to which employees are permissibly "shared employees" for purposes of the Commission's market-based rate affiliate restrictions. Specifically, CWG suggested that the Commission should interpret these affiliate restrictions to permit sharing of employees who are neither "transmission function employees" nor "marketing function employees" under the Standards of

Conduct.²⁷ The CWG indicated that the issue arose because shared employees under the market-based rate affiliate restrictions are defined by reference to shared employees under the Order No. 2004-era Standards of Conduct, but as of the effective date of the Standards of Conduct Final Rule, November 26, 2008, the Standards of Conduct no longer use the concept of shared employees. The CWG therefore claimed that this inconsistency poses a compliance conundrum that needs to be addressed in order to enable companies and their employees to understand, and comply with, the market-based rate affiliate restrictions.

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

The Commission generally does not consider the data filed in rate filings to be confidential. There are no confidentiality provisions associated with the data requirements that were proposed in Order No. 697. Specific requests for confidential treatment to the extent permitted by law will be entertained pursuant to 18 C.F.R. Section 388.110. Section 205(c) of the FPA requires that every public utility have all of its jurisdictional rates and tariffs on file with the Commission and make them available for public inspection, within such time and in such form as the Commission may designate. Section 205(d) of the FPA requires that every public utility must provide notice to the Commission and the public of any changes to its jurisdictional rates and tariffs, file such changes with the Commission, and make them available for public inspection, in such manner as directed by the Commission.^{28/}

²⁷ Standards of Conduct for Transmission Providers, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008) (Standards of Conduct Final Rule), order on reh'g, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, order on reh'g, Order No. 717-B, 129 FERC ¶ 61,123 (2009). As discussed below, “transmission function employees” and “marketing function employees” are defined terms under the Standards of Conduct. See 18 CFR 358.3(d); 358.3(i).

²⁸ See *The Power Company of America, L.P. v. FERC*, 245 F.3d 839 (D.C. Cir. 2001) (*PCA*). In *PCA*, the court found, 245 F.3d at 846, that the Commission may alter its view of what information is required to be on file under section 205(c) of the FPA and ¶ 35.15 of the Commission's regulations.

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

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

12. ESTIMATED BURDEN ON COLLECTION OF INFORMATION

The Commission’s regulations in 18 CFR Part 35 specifies those reporting requirements that must be followed in conjunction with the filing of rate schedules under the FPA. The information provided to the Commission under 18 CFR Part 35 is identified for information collection and records retention purposes as FERC-516. However, for those requirements concerned with market-based rate analysis and reporting requirements for changes in status for public utilities with market-based rate authority, the Commission has designated this subsection as FERC-919.

In Order No. 697, for the number of respondents expected to file, the Commission estimated the total number to be filed to be approximately 1230.

As Proposed in the NOPR

This NOPR does not add to the existing information existing information collection requirements. Therefore the burden established in Order No. 697 remains as shown below.

Total Annual hours for Collection: (Reporting + record retention, (if appropriate))
 = 71,200hours.

Current OMB inventory for FERC-919

Data Collection	No. of Respondents	No. of Responses	Hours Per Responses	Total Annual Hours
FERC-919	1230	940	75.745	71,200

13. ESTIMATED OF THE TOTAL COST BURDEN TO RESPONDENTS

In Order No. 697, the Commission estimated the total annual costs to industry as follows:

- a) Initial Market Power Analyses: \$2,340,000;
- b) market-based rate tariffs: \$ 369,000 (first year);

c) Category 1 Qualification Filings	\$ 472,500. ²⁹
d) Updated Market Power Analyses Category 2	\$7,500,000.

Totals:

Commission's assumptions: The hourly rate of \$150 includes attorney fees, engineering consultation fees and administrative support. There are 2080 total work hours in a year. There are no filing fees associated with applications for market-based rate authority. As noted above, as the Commission is not making any changes to the information collection requirements nor will the clarification result in any changes to industry in terms of new procedures or training, the Commission is retaining its original estimate. Industry should already have in place the separation functions for employees as identified in this proposed rule.

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

The costs to the Commission are estimated to be \$896,181 (6.5 FTE (full time equivalent employees x \$137, 874). This is an increase of \$102,229 over the Commission's initial estimate of \$793,891, and reflects the Commission's most recent appropriation submission for 2010.

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

While this order proposes to revise the regulations for the market-based rate program in order to provide clarification, it does not add to the existing information collection requirements.

16. TIME SCHEDULE FOR THE PUBLICATION OF DATA

Schedule for Data Collection and Analysis

Tariff Amendment Filed	60 days after publication in Federal Register
Initial Commission Order	60 days
(Not applicable for this NOPR)	

17. DISPLAY OF EXPIRATION DATE

It is not appropriate to display the expiration date for OMB approval of the Information collected. Currently, the information on the tariff filings is not collected on a

²⁹ The Commission notes that Category 1 sellers will only be required to file on a single occasion Category 1 qualification filings whereas Category 2 sellers will file updated market power analyses every three years.

standard, preprinted form which would avail itself to this display. Rather, public utilities and licensees prepare and submit filings that reflect the unique or specific circumstances related to rates and services involved in the filing. In addition, the information contains a mixture of narrative descriptions and empirical support that varies depending on the nature of the services to be provided.

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.