

**SUPPORTING STATEMENT FOR  
FERC-516 Electric Rate Schedule Filings, Proposed Rule for  
Promoting a Competitive Market for Capacity Reassignments  
In Docket No. RM10-22-000 (Final Rule)**

The Federal Energy Regulatory Commission (FERC or Commission) is requesting Office of Management and Budget review and approval of a revision to the information collection requirements contained in FERC-516, “Electric Rate Schedule and Tariff Filings” (1902-0096), as proposed in the following Final Rule, RM10-22-000 “Promoting a Competitive Market for Capacity Reassignments” as published in the Federal Register on 9/24/2010 and included under ‘Supplemental Documents’ in OMB’s ROCIS System.

FERC-516 is an existing information collection requirement, approved by OMB through June 30, 2013. We are requesting approval of the collection for an additional three years, as revised by this final rule. We estimate that, as a result of the program changes in the final rule, the estimated annual reporting burden will be increased 1,320 hours, a one time filing so transmission providers can modify their tariffs. (Details are provided in Questions 12 and 15.) Through the final rule, FERC is: lifting the price cap for all electric transmission customers reassigning transmission capacity based on the Commission’s experience to date and on a two-year study, released April 15, 2010 (attached as part of this submission). The removal of the price cap is intended to help facilitate the development of a market for electric transmission capacity reassignments as a competitive alternative to transmission capacity acquired directly from the transmission owner.

### **Overview**

In Order No. 888, the Commission concluded that a transmission provider’s pro forma Open Access Transmission Tariff (OATT) must explicitly permit the voluntary reassignment of all or part of a holder’s firm point-to-point capacity rights to any eligible customer.<sup>1</sup> The Commission also found that allowing holders of firm transmission

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<sup>1</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at 31,696 (1996), order on reh’g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh’g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh’g, Order No. 888-C, 82 FERC ¶ 61,046 (1998),

capacity rights to reassign capacity would help parties manage the financial risks associated with their long-term commitment, reduce the market power of transmission providers by enabling customers to compete, and foster efficient capacity allocation.

With respect to the appropriate rate for capacity reassignment, the Commission concluded it could not permit reassignments at market-based rates because it was unable to determine that the market for reassigned capacity was sufficiently competitive so that assignors would not be able to exert market power. Instead, the Commission capped the rate at the highest of (1) the original transmission rate charged to the purchaser (assignor), (2) the transmission provider's maximum stated firm transmission rate in effect at the time of the reassignment, or (3) the assignor's own opportunity costs capped at the cost of expansion (price cap). The Commission further explained that opportunity cost pricing had been permitted at "the higher of embedded costs or legitimate and verifiable opportunity costs, but not the sum of the two (i.e., 'or' pricing is permitted; 'and' pricing is not)."<sup>2</sup> In Order No. 888-A, the Commission explained that opportunity costs for capacity reassigned by a customer should be measured in a manner analogous to that used to measure the transmission provider's opportunity cost.<sup>3</sup>

To foster the development of a more robust secondary market for transmission capacity, the Commission, in Order No. 890, concluded that it was appropriate to lift the price cap for all transmission customers reassigning transmission capacity.<sup>4</sup> The Commission stated that this would allow capacity to be allocated to those entities that value it most, thereby sending more accurate price signals to identify the appropriate location for construction of new transmission facilities to reduce congestion.<sup>5</sup> The Commission also found that market forces, combined with the requirements of the

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aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>2</sup> Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,740.

<sup>3</sup> Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,224.

<sup>4</sup> Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 808 (2007), order on reh'g, Order No. 890-A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), order on reh'g, Order No. 890-B, 123 FERC ¶ 61,299 (2008), order on reh'g, Order No. 890-C, 126 FERC ¶ 61,228 (2009), order on reh'g, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

pro forma OATT as modified in Order No. 890, would limit the ability of assignors to exert market power, including affiliates of the transmission provider.

To enhance oversight and monitoring activities, the Commission adopted reforms to the underlying rules governing capacity reassignments. First, the Commission required that all sales or assignments of capacity be conducted through or otherwise posted on the transmission provider's OASIS on or before the date the reassigned service commences. Second, the Commission required that assignees of transmission capacity execute a service agreement prior to the date on which the reassigned service commences. Third, in addition to existing OASIS posting requirements, the Commission required transmission providers to aggregate and summarize in an electric quarterly report the data contained in these service agreements.

The Commission also directed staff to closely monitor the reassignment-related data submitted by transmission providers in their quarterly reports to identify any problems in the development of the secondary market for transmission capacity and, in particular, the potential exercise of market power. As a result, the Commission directed staff to prepare, within six months of receipt of two years of quarterly reports, a report summarizing its findings. In addition, the Commission encouraged market participants to provide feedback regarding the development of the secondary capacity market and, in particular, to contact the Commission's Enforcement Hotline if concerns arise.

In Order No. 890-A, the Commission affirmed its decision to remove the price cap on reassignments of transmission capacity but granted rehearing to limit the period during which reassignments may occur above the cap.<sup>6</sup> The Commission concluded that it would be most appropriate to lift the price cap on reassignments of capacity only to accommodate the Commission staff study period. Accordingly, the Commission amended section 23.1 of the pro forma OATT to reinstate the price cap as of October 1, 2010.<sup>7</sup> The Commission stated that, upon review of the staff report and any feedback from the industry, the Commission would determine whether it would be appropriate to continue to allow reassignments of capacity above the price cap beyond that date.

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<sup>5</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 808.

<sup>6</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 388, 390.

<sup>7</sup> Id. P 390.

In Order No. 890-B, the Commission clarified that the pro forma OATT does not, and will not, permit the withholding of transmission capacity by the transmission provider and that it effectively establishes a price ceiling for long-term reassignments at the transmission provider's cost of expanding its system.<sup>8</sup> The Commission further found the fact that a transmission provider's affiliate may profit from congestion on the system does not relieve the transmission provider of its obligation to offer all available transmission capacity and expand its system as necessary to accommodate requests for service.<sup>9</sup> The Commission pointed out that customers that do not wish to participate in the secondary market may continue to take service from the transmission provider directly, just as if the price cap had not been lifted.<sup>10</sup>

With regard to the report to be prepared by Commission staff, the Commission clarified that staff should focus on the competitive effects of removing the price cap for reassigned capacity.<sup>11</sup> The Commission stated that staff should consider the number of reassignments occurring over the study period, the magnitude and variability of resale prices, the term of the reassignments, and any relationship between resale prices and price differentials in related energy markets. In addition, the Commission directed staff to examine the nature and scope of reassignments undertaken by the transmission provider's affiliates and include in its report any evidence of abuse in the secondary market for transmission capacity, whether by those affiliates or other customers.

## **JUSTIFICATION**

### **1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY**

The Commission has a statutory obligation under Section 205 and 206 of the Federal Power Act (FPA) to prevent unduly discriminatory practices in transmission access. FPA section 205 specifies that all rates and charges, and related contracts and

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<sup>8</sup> Order No. 890-B, 123 FERC ¶ 61,299 at P 78.

<sup>9</sup> Id.

<sup>10</sup> Id. P 79.

<sup>11</sup> Id. P 83.

service conditions, for wholesale sales and transmission of energy in interstate commerce be filed with the Commission and must be “just and reasonable”.<sup>12</sup> In addition, FPA section 206 requires the Commission, upon complaint or its own motion, to modify existing rates or services that are found to be unjust, unreasonable, unduly discriminatory or preferential. FPA section 207 further requires the Commission, upon complaint by a state commission and a finding of insufficient interstate service, to order the rendering of adequate interstate service by public utilities, the rates for which would be filed in accordance with FPA sections 205 and 206.

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

In Order No. 888, the Commission issued a final rule to remedy undue discrimination or preference in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce. On February 17, 2007, the Commission issued a final rule Order No. 890, to revise the pro forma Open Access Transmission Tariff (OATT).<sup>13</sup> The final rule addressed and remedied opportunities for undue discrimination under the OATT adopted in 1996 by Order No. 888. Order No. 888 fostered greater competition in wholesale power markets by reducing barriers to entry in the provision of transmission service. In the ten years since

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<sup>12</sup> 16 U.S.C. §§ 824d - 824e (2000). Section 205(b) states that “[n]o public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue preference or disadvantage. . . .” In addition, section 206(a) states that “[w]henver the Commission . . . shall find that any rate, charge, or classification demanded, observed, charged or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order.”

<sup>13</sup> Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, order on reh’g, Order No. 890-A, 112 FERC ¶ 61,297 (2007)).

Order No. 888, however, the Commission has found that the OATT contained flaws that undermine realizing its core objective of remedying undue discrimination, thus the issuance of Order No. 890.

Removal of the price cap will help foster the development of a more robust secondary market for transmission capacity because point-to-point transmission service customers will have increased incentives to resell their service whenever others place a higher value on it. Existing transmission, therefore, may be put to better, more efficient use.

Moreover, removal of the price cap will promote the efficient construction of new capacity. High prices serve as price signals indicating where capacity shortages exist and where potentially profitable construction can take place. The Commission has previously addressed the need for new transmission and established incentives for its construction.<sup>14</sup> Removing the price cap on sales of secondary electric transmission capacity is one way to create the proper incentives for new transmission investment in this industry, because the areas with the highest prices will be the most congested and thus in need of the most investment.<sup>15</sup> If prices for reassigned capacity exceed the cost of construction of new transmission, the customer could support investment in new transmission by requesting service from the transmission provider, which would lower costs prospectively by relieving constrained transmission capacity. Thus, the price of reassigned capacity will remain effectively capped at the cost of new transmission. In this final rule, the Commission reaffirms its finding in Order No. 890-A that removal of the price cap for reassigned capacity will help establish a competitive market for secondary transmission capacity that will send more accurate signals and that such price signals will promote more efficient use of the electric transmission system.<sup>16</sup>

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<sup>14</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 FR 43294 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, 72 FR 1152 (Jan. 10, 2007), FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

<sup>15</sup> See *Interstate Nat'l Gas Ass'n of America v. FERC*, 285 F.3d 18, 32-34 (D.C. Cir. 2002) (INGAA) (“[B]rief spikes in moments of extreme exigency are completely consistent with competition, reflecting scarcity rather than monopoly.”).

<sup>16</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 388.

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

The information from FERC-516 enables the Commission to exercise its wholesale electric power and transmission oversight responsibilities in accordance with the Federal Power Act. The Commission needs sufficient detail to make an informed and reasonable decision concerning the appropriate level of rates, and the appropriateness of non-rate terms and conditions, and to aid customers and other parties who may wish to challenge the rates, terms, and conditions proposed by the utility.

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

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

FERC's continued regulatory oversight will limit the potential for the exercise of market power. FERC is not deregulating or otherwise adopting market-based rates for the provision of transmission service under the *pro forma* OATT. Transmission providers will continue to be obligated to offer available transfer capability to customers, including available transfer capability associated with purchased but unused capacity.

Transmission providers also will continue to be obligated to construct new facilities to satisfy requests for service if those requests cannot be satisfied using existing capacity. Furthermore, the rates for transmission service provided under the *pro forma* OATT will continue to be determined on a cost-of-service basis unless the transmission provider can demonstrate, on a case-specific basis, that it lacks market power. Nothing in this Final Rule affects the obligations of transmission providers to offer service under the *pro forma* OATT at cost-based rates. The availability of firm and non-firm service from transmission providers, therefore, will limit the ability of reassignors to exercise market power. In *INGAA*, the Court of Appeals for the District of Columbia Circuit recognized that the maintenance of regulated rates for primary service would protect against the potential for the exercise of market power in the capacity release market.<sup>17</sup>

On April 15, 2010, FERC staff published its report on the two-year study period.<sup>18</sup> The Staff Report took a comprehensive look at electric point-to-point transmission capacity reassignment that occurred over the period from the second quarter of 2007 through the fourth quarter of 2009. Staff examined all reported electric transmission reassignments during this period on both a national and a regional basis. These almost 35,000 transactions encompassed 65TWh of total volume transferred. Staff looked at the data in a number of ways, in order to better understand the market and to look for evidence of abuse. In doing so, staff looked at the magnitude and variability of resale prices, and focused on trends in those numbers over time and by region. Staff compared resale prices to the maximum tariff rates that would have otherwise been in effect for those transactions. Further, staff looked at reassignments by term – hourly, daily, monthly, and yearly and looked at differences in term by transmission provider and by volume. Where the receipt and delivery points of transactions had reported price indices with sufficient data, staff compared the prices of reassignments to the energy market spread (differential in prices between the two locations) over the same time periods.

Staff also compared resale prices for transactions involving affiliates versus non-affiliates. Staff compared the rate of transactions above the cap for both affiliates and non-affiliates. Staff looked for additional forms of affiliate abuse such as a transmission

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<sup>17</sup> *Interstate Natural Gas Association v. FERC*, 285 F.3d 18, 32 (D.C. Cir. 2002) (“[i]f holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate - which is still applicable to the pipelines”); *see also*, Order No. 712, FERC Stats. & Regs. ¶ 31,271 at P 48-49.

<sup>18</sup> FERC Staff, *Staff Finding on Capacity Reassignment* (2010), available at <http://www.ferc.gov> (Staff Report).



provider providing preferential treatment in the allocation of reassigned capacity to an affiliate. Staff also checked for complaints of the abuse in affiliate transactions, as well as for capacity reassignment in general. Based on the Commission's experience in the natural gas transportation market and the Staff Report's conclusion that the secondary market had grown substantially and that resale prices reflected market fundamentals rather than the exercise of market power, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to lift the price cap for all electric transmission customers reassigning transmission capacity beyond October 1, 2010.

Without this information, the Commission would be unable to discharge its responsibility to approve or modify electric utility tariff filings in order to improve the competitiveness of organized wholesale energy markets and thus ensure just and reasonable wholesale rates. Failure to issue these requirements would prevent timely Commission determination and approval of just and reasonable rates, which in turn, would prevent public utilities and licensees from being fairly compensated for services rendered.

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

There is an ongoing effort to determine the potential and value of improved information technology to reduce the burden. The Commission adopted user friendly electronic formats and software in order to facilitate the required electronic formats for rate filings and will develop formats for any subsequent filings.

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

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

This Final Rule amended the Commission’s regulations<sup>19</sup> to provide that all documents filed with the Commission may be submitted through the eFiling interface except for documents specified by the Secretary. The changes implemented in the eFiling Final Rule means that categories such as oversized documents and most confidential documents will be accepted via eFiling. However, at that time, there were principal exceptions, and they are tariffs, tariff revisions and rate change applications; some forms; and documents that are subject to protective orders.

In RM01-5-000<sup>20</sup>, Order No. 714 issued September 19, 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 will assist in FERC’s goal of establishing a robust electronic filing environment for tariffs and tariff related material and will make it possible for FERC staff and the public to retrieve this material from a data base. Adoption of these standards and protocols 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.

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

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<sup>19</sup> Rule 2003(c) of the Commission’s Rules of Practice and Procedure, 18 CFR 385.2003(c).

<sup>20</sup> Electronic Tariff Filings, Order No. 714, 73 FR 57515 (Oct. 3, 2008), FERC Stats. & Regs ¶ 31,276 (2008).

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. While Order No. 714 became effective November 3, 2008, the Commission delayed required implementation of the electronic filing requirements until April 1, 2010 to provide sufficient time for filers to develop tariff filing software based on the standards adopted in Order No. 714. Filers must submit their filings by September 30, 2010.

The Commission intends, as far as practicable, to continue decreasing its reliance on paper documents and to continue to upgrade eFiling capabilities in furtherance of the Commission's responsibilities under the Government Paperwork Elimination Act.<sup>21</sup>

**4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2.**

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

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

The Commission has reviewed those public utilities that constitute "small business concerns" under the Regulatory Flexibility Act for compliance with the proposed rule. FERC does not believe that the Final Rule will have a direct impact on small entities. Out of the total universe of respondents, only six public utilities, or less than five percent, dispose of four million MWh or less per year. Therefore most of the transmission

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<sup>21</sup> Pub. L. No. 105-277, § 1704, 112 Stat. 2681, 2681-750 (1998).

organizations to which the requirements of this rule would apply do not fall within the definition of small entities.<sup>22</sup>

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

It is not possible to collect this data less frequently. Only public utilities owning, operating, and/or controlling facilities used for the transmission of electricity in interstate commerce are required to comply with the Final Rule. They will only be required to file once to amend their OATTs to include these reforms. The Commission proposes to require that transmission providers make certain filings to amend their tariffs, in order to comply with the lifting of the capacity price ceiling requirements as specified in the Final Rule.

The required information should impose the least possible burden for companies to comply with the Commission's open access policies.

**7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION COLLECTION**

This proposed program meets all of OMB's section 1320.5 requirements. As noted above with the implementation of the eTariff Final Rule, Order No. 714, electronic filing was put into place on a phased in approach beginning April 1, 2010 with full implementation by September 30, 2010. This eliminates the need for paper copies entirely for service agreements and transactional reports.

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

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

On April 29, 2010 or two weeks after the release of the Staff Report, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to lift the price cap for all electric transmission customers reassigning transmission capacity beyond October 1, 2010. In addition, the Commission proposed to direct transmission providers to submit corresponding revisions to their OATTs within 30 days of publication of the Final Rule in the *Federal Register*. The Commission also sought comment as to whether there are any other reforms that it should undertake to create a more efficient and vibrant secondary market for electric transmission capacity. In response to these NOPR proposals, the Commission received comments from 13 parties.

Several commenters supported the Commission's proposal to remove the price cap on transmission reassignments permanently.<sup>23</sup> They contend that removal of the cap will encourage the development of a more robust secondary market, resulting in appropriate price signals and an efficient allocation of transmission capacity. Cargill commented that the resale of transmission capacity at negotiated rates is consistent with other Commission reforms in favor of market-based pricing.

Despite their general support for the Commission's proposal, EPSA and PG&E raised concerns about the staff study and the need for transparency. EPSA stated that the Staff Report shows some gaps that will require further analysis; such as limited numbers of transmission providers reported and the majority of transactions being from Bonneville. PG&E expressed a lingering concern about the potential for transmission service providers to raise power prices in locations where there is insufficient competition. EPSA and PG&E urged the Commission to continue to monitor the capacity reassignment market as it matures so that the Commission will be informed and therefore able to direct necessary reforms to the market, as the needed reforms reveal themselves. EPSA further urged the Commission to look at ways of increasing transparency for transmission capacity available for reassignments as a way of promoting the secondary market for reassignment. Powerex commented that there are already a number of safeguards including requirements that transmission providers report reassignments on their systems on OASIS and in the electronic quarterly reports (EQR) that should help limit abuses. Similarly, Seattle commented that reconciliation of EQRs, audits, and OASIS transactions would go a long way to ensure that resale markets are functioning without affiliate abuse.

Bonneville agreed that lifting the price cap on transmission capacity reassignments appears to support the goal of a more robust secondary market for that capacity but asked

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<sup>23</sup> *E.g.* Bonneville, Cargill, EPSA, FIEG, PG&E, PGE, Powerex, Seattle.

the Commission to recognize the position of non-jurisdictional entities, such as itself. Bonneville contends that non-jurisdictional entities may have to place conditions upon the removal of the cap in order to obtain reciprocity and comply with their applicable statutory requirements. Bonneville contends that if its administrator determines that behavior associated with transmission capacity reassignments is occurring on its system in a manner that frustrates or is otherwise inconsistent with the administrator's statutory requirements to make all excess capacity available to utilities on a fair and nondiscriminatory basis, the administrator must be able to act promptly to stop that behavior. Thus, Bonneville suggested that any revision to section 23 of Bonneville's OATT permanently lifting the price cap must be conditioned upon the administrator's express authority to carry out this mandate including the right to reinstate the cap expeditiously if necessary.

Other commenters argued against removal of the price cap, contending that staff's two-year study provides insufficient evidence to support a finding that the secondary market is sufficiently competitive to lift the price caps or that market forces or other factors will be effective to adequately protect consumers.<sup>24</sup> These commenters point out that, although the Final Rule would apply to an estimated 132 public utilities, the Staff Report included data from only 26 with 79 percent of the reported transactions coming from Bonneville. These commenters also point out that the study was performed during a recession with concomitant reductions in the demand for electricity, and that Bonneville is atypical, given that it is dependent on large hydroelectric projects. APPA further commented that because there were so few sales made during the study period by affiliates above the rate cap, it would appear that reinstatement of the cap would not significantly dampen resales of capacity by affiliates of transmission providers.

TAPS stated that the staff study did not examine both prices offered and accepted such that the Commission could determine the level of market interest in reassigned capacity, whether prices increased, the cause of price changes, and whether those prices remained in the zone of reasonableness. It noted that the staff study compared resale prices during the study period to the tariff rate, but not to the opportunity cost cap, which is likely higher. It argued that accordingly, the study does not show that the price cap constrained any prices, and thus it prevents a finding that the price cap is unjust and unreasonable. SCE requested that the Commission reconcile its proposal with findings in the Staff Report that removal of the price cap does not appear to be primarily responsible for the observed growth in the secondary market. It also stated that the Staff Report did not definitively conclude that there was not abuse by resellers, even in a period with very

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<sup>24</sup> *E.g.* APPA, NRECA, SCE, TAPS, Outland, and TDU Systems.

low demand and no supply scarcity. SCE stated that this is not sufficient evidence to lift the price cap. APPA, SCE and TAPS suggested that, if the Commission wishes to lift the price cap, it should only do so as a continuation of the experiment.

NRECA, TAPS, and TDU Systems urged the Commission, at a minimum, to retain the price cap on transmission capacity reassignments for transmission provider affiliates and retail/merchant functions. TAPS stated that the pattern of affiliate pricing reveals more about corporate strategy selected by a few corporate entities and general conditions during an atypical period, than confirming the Commission's assumption that the rates for primary capacity or competition in the reassignment market will restrain prices. It stated that assuming that the customer may always take service from the transmission provider directly is cold comfort if the available capacity has been assigned to the transmission provider's affiliate. NRECA stated that a larger portion of affiliate than non-affiliate transactions occurred over the cap, and pointed to the PSNH system where all reported transactions originated with an affiliate and occurred over the price cap.

In its supplemental comments, Powerex expressed concern that Bonneville might reinstate the price cap as of October 1, 2010, regardless of Commission action in this proceeding. Powerex asked the Commission to address the possible adverse consequences of non-jurisdictional transmission providers reinstating price caps on transmission reassignments and to provide guidance to customers seeking to reassign transmission on the systems of non-jurisdictional transmission providers that elect not to adopt any reforms the Commission directs. To address this issue, Powerex requested the Commission clarify that its seller-specific market-based rate schedule for transmission reassignment remains operative. Alternatively, Powerex sought guidance on how to price capacity reassignments based on the customer's opportunity cost capped at the transmission provider's cost of expansion.

### **Commission's Response**

The Commission is adopting its NOPR proposal to lift the price cap for all reassignments of electric transmission capacity to become effective October 1, 2010. Removal of the price cap will help foster the development of a more robust secondary market for transmission capacity because point-to-point transmission service customers will have increased incentives to resell their service whenever others place a higher value on it. Existing transmission, therefore, may be put to better, more efficient use.

Moreover, removal of the price cap will promote the efficient construction of new capacity. Prices serve as signals indicating where capacity shortages exist and where potentially profitable construction can take place. The Commission has previously addressed the need for new transmission and established incentives for its construction.<sup>25</sup> Removing the price cap on sales of secondary electric transmission capacity is one way to create the proper incentives for new transmission investment in this industry. Areas with congestion tend to have higher prices and thus signal the need for investment.<sup>26</sup>

However, if prices for reassigned capacity exceed the cost of construction of new transmission, the customer could request service from the transmission provider which would support investment in new transmission and lower costs prospectively by relieving constrained transmission capacity. Thus, the price of reassigned capacity will remain effectively capped at the cost of new transmission. The Commission therefore reaffirms its finding in Order No. 890-A that removal of the price cap for reassigned capacity will help establish a competitive market for secondary transmission capacity that will send more accurate signals and that such price signals will promote more efficient use of the electric transmission system.<sup>27</sup>

The Commission disagrees with suggestions that affiliates of the transmission provider be treated differently than non-affiliated customers with respect to reassignments of transmission capacity. The Commission's Standards of Conduct are designed to prevent the transmission provider and its affiliate from acting in concert to

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<sup>25</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 FR 43294 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, 72 FR 1152 (January 10, 2007), FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

<sup>26</sup> See *Interstate Nat'l Gas Ass'n of America v. FERC*, 285 F.3d 18, 32-34 (D.C. Cir. 2002) (*INGAA*) (“[B]rief spikes in moments of extreme exigency are completely consistent with competition, reflecting scarcity rather than monopoly.”).

<sup>27</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 388.



exercise market power.<sup>28</sup> Commenters did not identify any affiliate concerns that these obligations, along with the monitoring discussed below, would not address.

The Commission takes seriously the possibility that resellers may attempt to exercise market power in the secondary market for transmission. The Commission continues to find, however, that the regulatory protections in place and its increased oversight of this market will limit the potential for market power abuse. Prices for secondary transmission capacity may rise above prices for primary transmission capacity but this alone does not indicate an abuse of market power. On the contrary, courts have recognized that prices in a competitive market should rise during periods when capacity is truly scarce in order to ensure that transmission capacity is being allocated appropriately.<sup>29</sup> Nevertheless, the Commission will continue to monitor the secondary transmission capacity market to ensure that participants are not exercising market power.<sup>30</sup> The Commission also will monitor for abuse by transmission providers in concert with their affiliates. If a customer has evidence of an exercise of market power or other abuse, it should bring the matter to the Commission's attention through a complaint or other appropriate procedural mechanism. Absent such evidence, the Commission concludes that the continued rate regulation of the primary market for electric transmission capacity and the transmission provider's obligation to expand its system to accommodate service requests adequately mitigates any market power that resellers may have in the long-term secondary market.

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<sup>28</sup> See *Standards of Conduct for Transmission Providers*, Order No. 717, 73 FR 63796 (October 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, 74 FR 54463 (October 22, 2009), FERC Stats. & Regs. ¶ 31,297 (2009), *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010). The Commission's Standards of Conduct establish that a transmission provider must (1) treat all customers, affiliated and non-affiliated, on a not unduly discriminatory basis, (2) not make or grant any undue preference or advantage to any person, and (3) not subject any person to any undue prejudice or disadvantage with respect to transmission of electric energy. This would include avoiding undue prejudice or disadvantage in the initial allocation of capacity to affiliates, thereby allowing those affiliates to gain market power and then to exercise it when reassigning capacity.

<sup>29</sup> *INGAA*, 285 F.3d at 32-34 (“[B]rief spikes in moments of extreme exigency are completely consistent with competition, reflecting scarcity rather than monopoly.”).

<sup>30</sup> See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 815.

The Staff Report did not raise any concerns with removal of the price cap that would warrant its reimposition given the regulatory protections and increased market oversight discussed above. The report included a comprehensive examination of the assignments that took place during the study period which included both the period prior to the economic downturn starting in September 2008 and the period after the downturn. Although the Staff Report did not conclusively demonstrate that the price cap inhibited the growth of the secondary market, the data showed a marked growth in reassignments, with both the number of transactions and the volume increasing during the two and one half year time span. The number of reassignments grew from just over 200 in 2007 to almost 32,000 in 2009. During this same period, the volume reassigned grew from 3 TWh to 36 TWh.

The data do not suggest the exercise of market power. The prices during the test period appear consistent with pricing differentials between locational markets, indicating that the transactions reflect market fundamentals, not the exercise of market power.<sup>31</sup> Moreover, the Staff Report found that 99 percent of reassignments were priced at or below the transmission provider's maximum firm transmission rate, an indication that prices reflect market conditions and competition rather than the exercise of market power.<sup>32</sup> The brief spikes above the price cap are consistent with a competitive market, indicating scarcity rather than market power.<sup>33</sup>

The Commission disagrees with comments suggesting that the Staff Report does not provide enough evidence to support a finding that the market is sufficiently competitive to lift the price cap because it relied on data from a limited number of transmission providers. While capacity reassignments occurred on a limited number of transmission systems, the lack of data for other transmission providers indicates a lack of reassignments on those systems, not an exercise of market power or lack of potential competition for capacity reassignment. Where reassignment is currently non-existent or occurring at a lower level, potential reassignment of transmission in these areas, should it

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<sup>31</sup> See *INGAA*, 285 F.3d at 31 (indicating that differentials in prices between receipt and delivery points are indicative of the value of the transportation between those points).

<sup>32</sup> Because 99 percent of the prices were below the tariff rate, these prices are almost certainly lower than opportunity costs which TAPS suggests are likely higher than the tariff rate.

<sup>33</sup> *INGAA*, 285 F.3d 18, 32 (“A surge in the price of candles during a power outage is no evidence of monopoly in the candle market”).

develop, would face competition associated with transmission that can be acquired from other customers. Such reassignment also would compete with capacity available from the transmission provider. Although the data in the Staff Report included extensive data from Bonneville and Central Vermont, the greater number of such assignments may be due to differences in market dynamics (such as the extensive use of hydroelectric power in the Bonneville region) or reporting conventions (in the case of Central Vermont).<sup>34</sup> It also may indicate that capacity reassignment is more developed in those areas. The volume of capacity reassignments on these two systems provides an example of what may be possible in other areas of the country. As for arguments that the time period under review was atypical due to the economic downturn and, thus, not representative, the Commission notes that study began the second quarter of 2007, well before the downturn began.

The Staff Report also did not show evidence of affiliate abuse. Ninety-nine percent of reassignments by affiliates of the transmission provider were at or below the transmission provider's maximum rate. The percentage of such reassignments over the maximum firm transmission rate by affiliates was comparable to that by non-affiliates (0.5 percent versus 0.4 percent).

**9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS**

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

**10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS**

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

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

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

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<sup>34</sup> The Staff Report states that "the large number of [Central Vermont] transactions may be due, in part, to reporting conventions. For EQR reporting purposes, each line of data is counted as one transaction." See Staff Report at 4.

**12. ESTIMATED BURDEN ON COLLECTION OF INFORMATION**

Data Collection	Number of Respondents	No. of Responses	Hours Per Response	Total Annual Hours
FERC-516				
Transmission Organizations with Organized Electricity Markets	132	1	10	1,320

Total Annual hours for Collection: (Reporting + recordkeeping, (if appropriate)) =  
 Total hours for performing tasks 1 through as identified above = 1,320 hours.

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

**Current OMB Inventory**

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

**If adopted:**

Data Collection	No. of Respondents	No. of Responses	Hours Per Response	Total Hours
FERC-516	1,230	4,462	<b>103.2740</b>	<b>460,809</b>

**13. ESTIMATED OF THE TOTAL COST BURDEN TO RESPONDENTS**

The Commission reviewed both the hourly rate figures of the Bureau of Labor Statistics and salary.com. plus applying where possible market rates per occupational series. The hourly rates represent a composite of the respondents who will be responsible for implementing and responding to the Final Rule (Legal and support staff—technical and administrative). It has projected the average annualized cost to be:

Compliance with this final rule is expected to cost 132 transmission providers an estimated \$1,140 each to prepare revisions to their OATTs. Thus, the cost to comply is \$150,480.

The Commission has projected the average annualized cost of all respondents to be the following: 1,320 hours @ \$114 per hour = \$150,480 for respondents. No capital costs are estimated to be incurred by respondents.

#### **14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT**

The costs to the Commission are estimated to be \$34,459 (.25 FTEs (full time equivalent employees) x \$137,834).

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

This proposed rule, as adopted, would amend the Commission's regulations to direct transmission providers to modify their open access transmission tariffs. Because the current OATTs reinstate the price cap as of October 1, 2010, transmission providers will need to revise section 23 of the *pro forma* OATT. The Commission is directing transmission providers to file these changes within 30 days from publication of this Final Rule in the *Federal Register*. As noted above, the removal of the price cap is intended to help facilitate the development of a market for electric transmission capacity reassignments as a competitive alternative to transmission capacity acquired directly from the transmission owner.

See Background section above for further discussion.

#### **16. TIME SCHEDULE FOR THE PUBLICATION OF DATA**

##### Schedule for Data Collection and Analysis

Tariff Amendment Filed	30 days from publication of Final Rule in Federal Register
Initial Commission Order	60 days

**17. DISPLAY OF EXPIRATION DATE**

The information collected on Open Access Transmission Tariffs is not collected on standardized filing formats or a preprinted form that would avail itself of displaying the OMB control number. With the implementation of Order No. 714 (RM01-5-000), the electronic filing electric, gas and oil tariffs (see item no. 3 above), the control numbers for these information collections have been displayed on the instructional manual to be disseminated to regulated entities and also posted on the Commission's web site.

**18. EXCEPTION TO THE CERTIFICATION STATEMENT**

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

**B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS.**

This is not a collection of information employing statistical methods.