**18 CFR [4/2019 edition]**

**§ 35.28 Non-discriminatory open access**

**transmission tariff.**

(a) *Applicability.* This section applies

to any public utility that owns, controls

or operates facilities used for the

transmission of electric energy in

interstate commerce and to any nonpublic

utility that seeks voluntary

compliance with jurisdictional transmission

tariff reciprocity conditions.

(b) *Definitions*—(1) *Requirements service*

*agreement* means a contract or rate

schedule under which a public utility

provides any portion of a customer’s

bundled wholesale power requirements.

(2) *Economy energy coordination agreement*

means a contract, or service

schedule thereunder, that provides for

trading of electric energy on an ‘‘if, as

and when available’’ basis, but does not

require either the seller or the buyer to

engage in a particular transaction.

(3) *Non-economy energy coordination*

*agreement* means any non-requirements

service agreement, except an economy

energy coordination agreement as defined

in paragraph (b)(2) of this section.

(4) *Demand response* means a reduction

in the consumption of electric energy

by customers from their expected

consumption in response to an increase

in the price of electric energy or to incentive

payments designed to induce

lower consumption of electric energy.

(5) *Demand response resource* means a

resource capable of providing demand

response.

(6) *An operating reserve shortage*

means a period when the amount of

available supply falls short of demand

plus the operating reserve requirement.

(7) *Market Monitoring Unit* means the

person or entity responsible for carrying

out the market monitoring functions

that the Commission has ordered

Commission-approved independent system

operators and regional transmission

organizations to perform.

(8) *Market Violation* means a tariff

violation, violation of a Commissionapproved

order, rule or regulation,

market manipulation, or inappropriate

dispatch that creates substantial concerns

regarding unnecessary market

inefficiencies.

(9) *Electric storage resource* as used in

this section means a resource capable

of receiving electric energy from the

grid and storing it for later injection of

electric energy back to the grid.

(c) *Non-discriminatory open access*

*transmission tariffs.* (1) Every public

utility that owns, controls, or operates

facilities used for the transmission of

electric energy in interstate commerce

must have on file with the Commission

an open access transmission tariff of

general applicability for transmission

services, including ancillary services,

over such facilities. Such tariff must be

the *pro forma* tariff promulgated by the

Commission, as amended from time to

time, or such other tariff as may be approved

by the Commission consistent

with the principles set forth in Commission

rulemaking proceedings promulgating

and amending the *pro forma*

tariff.

(i) Subject to the exceptions in paragraphs

(c)(1)(ii), (c)(1)(iii), (c)(1)(iv),

and (c)(1)(v) of this section, the open

access transmission tariff, which tariff

must be the *pro forma* tariff required by

Commission rulemaking proceedings

promulgating and amending the *pro*

*forma* tariff, and accompanying rates

must be filed no later than 60 days

prior to the date on which a public

utility would engage in a sale of electric

energy at wholesale in interstate

commerce or in the transmission of

electric energy in interstate commerce.

(ii) If a public utility owns, controls,

or operates facilities used for the

transmission of electric energy in

interstate commerce, it must file the

revisions to its open access transmission

tariff required by Commission

rulemaking proceedings promulgating

and amending the *pro forma* tariff, pursuant

to section 206 of the FPA and accompanying

rates pursuant to section

205 of the FPA in accordance with the

procedures set forth in Commission

rulemaking proceedings promulgating

and amending the *pro forma* tariff.

(iii) If a public utility owns, controls,

or operates transmission facilities used

for the transmission of electric energy

in interstate commerce, such facilities

are jointly owned with a non-public

utility, and the joint ownership contract

prohibits transmission service

over the facilities to third parties, the

public utility with respect to access

over the public utility’s share of the

jointly owned facilities must file the

revisions to its open access transmission

tariff required by Commission

rulemaking proceedings promulgating

and amending the *pro forma* tariff pursuant

to section 206 of the FPA and accompanying

rates pursuant to section

205 of the FPA in accordance with the

procedures set forth in Commission

rulemaking proceedings promulgating

and amending the *pro forma* tariff.

(iv) Any public utility whose transmission

facilities are under the independent

control of a Commission-approved

ISO or RTO may satisfy its obligation

under paragraph (c)(1) of this

section, with respect to such facilities,

through the open access transmission

tariff filed by the ISO or RTO.

(v) If a public utility obtains a waiver

of the tariff requirement pursuant to

paragraph (d) of this section, it does

not need to file the open access transmission

tariff required by this section.

(vi) Any public utility that seeks a

deviation from the *pro forma* tariff promulgated

by the Commission, as

amended from time to time, must demonstrate

that the deviation is consistent

with the principles set forth in

Commission rulemaking proceedings

promulgating and amending the *pro*

*forma* tariff.

(vii) Each public utility’s open access

transmission tariff must include the

standards incorporated by reference in

part 38 of this chapter.

(2) Subject to the exceptions in paragraphs

(c)(2)(i) and (c)(3)(iii) of this section,

every public utility that owns,

controls, or operates facilities used for

the transmission of electric energy in

interstate commerce, and that uses

those facilities to engage in wholesale

sales and/or purchases of electric energy,

or unbundled retail sales of electric

energy, must take transmission

service for such sales and/or purchases

under the open access transmission

tariff filed pursuant to this section.

(i) For sales of electric energy pursuant

to a requirements service agreement

executed on or before July 9, 1996,

this requirement will not apply unless

separately ordered by the Commission.

For sales of electric energy pursuant to

a bilateral economy energy coordination

agreement executed on or before

July 9, 1996, this requirement is effective

on December 31, 1996. For sales of

electric energy pursuant to a bilateral

non-economy energy coordination

agreement executed on or before July

9, 1996, this requirement will not apply

unless separately ordered by the Commission.

(ii) [Reserved]

(3) Every public utility that owns,

controls, or operates facilities used for

the transmission of electric energy in

interstate commerce, and that is a

member of a power pool, public utility

holding company, or other multi-lateral

trading arrangement or agreement

that contains transmission rates,

terms or conditions, must have on file

a joint pool-wide or system-wide open

access transmission tariff, which tariff

must be the *pro forma* tariff promulgated

by the Commission, as amended

from time to time, or such other open

access transmission tariff as may be

approved by the Commission consistent

with the principles set forth in Commission

rulemaking proceedings promulgating

and amending the *pro forma*

tariff.

(i) For any power pool, public utility

holding company or other multi-lateral

arrangement or agreement that contains

transmission rates, terms or conditions

and that is executed after October

11, 2011, this requirement is effective

on the date that transactions

begin under the arrangement or agreement.

(ii) For any power pool, public utility

holding company or other multi-lateral

arrangement or agreement that contains

transmission rates, terms or conditions

and that is executed on or before

May 14, 2007, a public utility member

of such power pool, public utility

holding company or other multi-lateral

arrangement or agreement that owns,

controls, or operates facilities used for

the transmission of electric energy in

interstate commerce must file the revisions

to its joint pool-wide or systemwide

open access transmission tariff required

by Commission rulemaking proceedings

promulgating and amending

the *pro forma* tariff pursuant to section

206 of the FPA and accompanying rates

pursuant to section 205 of the FPA in

accordance with the procedures set

forth in Commission rulemaking proceedings

promulgating and amending

the *pro forma* tariff.

(iii) A public utility member of a

power pool, public utility holding company

or other multi-lateral arrangement

or agreement that contains

transmission rates, terms or conditions

and that is executed on or before July

9, 1996 must take transmission service

under a joint pool-wide or system-wide

open access transmission tariff filed

pursuant to this section for wholesale

trades among the pool or system members.

(4) Consistent with paragraph (c)(1) of

this section, every Commission-approved

ISO or RTO must have on file

with the Commission an open access

transmission tariff of general applicability

for transmission services, including

ancillary services, over such facilities.

Such tariff must be the *pro forma*

tariff promulgated by the Commission,

as amended from time to time, or such

other tariff as may be approved by the

Commission consistent with the principles

set forth in Commission rulemaking

proceedings promulgating and

amending the *pro forma* tariff.

(i) Subject to paragraph (c)(4)(ii) of

this section, a Commission-approved

ISO or RTO must file the revisions to

its open access transmission tariff required

by Commission rulemaking proceedings

promulgating and amending

the *pro forma* tariff pursuant to section

206 of the FPA and accompanying rates

pursuant to section 205 of the FPA in

accordance with the procedures set

forth in Commission rulemaking proceedings

promulgating and amending

the *pro forma* tariff.

(ii) If a Commission-approved ISO or

RTO can demonstrate that its existing

open access transmission tariff is consistent

with or superior to the *pro*

*forma* tariff promulgated by the Commission,

as amended from time to

time, the Commission-approved ISO or

RTO may instead set forth such demonstration

in its filing pursuant to section

206 in accordance with the procedures

set forth in Commission rulemaking

proceedings promulgating and

amending the *pro forma* tariff.

(d) *Waivers.* (1) A public utility subject

to the requirements of this section

and 18 CFR parts 37 (Open Access

Same-Time Information System) and

358 (Standards of Conduct for Transmission

Providers) may file a request

for waiver of all or part of such requirements

for good cause shown. Except

as provided in paragraph (f) of this

section, an application for waiver must

be filed no later than 60 days prior to

the time the public utility would have

to comply with the requirement.

(2) The requirements of this section,

18 CFR parts 37 (Open Access Same-

Time Information System) and 358

(Standards of Conduct for Transmission

Providers) are waived for any

public utility that is or becomes subject

to such requirements solely because

it owns, controls, or operates

Interconnection Customer’s Interconnection

Facilities, in whole or in

part, as that term is defined in the

standard generator interconnection

procedures and agreements referenced

in paragraph (f) of this section, or comparable

jurisdictional interconnection

facilities that are the subject of interconnection

agreements other than the

standard generator interconnection

procedures and agreements referenced

in paragraph (f) of this section, if the

entity that owns, operates, or controls

such facilities either sells electric energy,

or files a statement with the

Commission that it commits to comply

with and be bound by the obligations

and procedures applicable to electric

utilities under section 210 of the Federal

Power Act.

(i) The waivers referenced in this

paragraph (d)(2) shall be deemed to be

revoked as of the date the public utility

ceases to satisfy the qualifications

of this paragraph (d)(2), and may be revoked

by the Commission if the Commission

determines that it is in the

public interest to do so. After revocation

of its waivers, the public utility

must comply with the requirements

that had been waived within 60 days of

revocation.

(ii) Any eligible entity that seeks

interconnection or transmission services

with respect to the interconnection

facilities for which a waiver is in

effect pursuant to this paragraph (d)(2)

may follow the procedures in sections

210, 211, and 212 of the Federal Power

Act, 18 CFR 2.20, and 18 CFR part 36. In

any proceeding pursuant to this paragraph

(d)(2)(ii):

(A) The Commission will consider it

to be in the public interest to grant

priority rights to the owner and/or operator

of interconnection facilities

specified in this paragraph (d)(2) to use

capacity thereon when such owner and/

or operator can demonstrate that it

has specific plans with milestones to

use such capacity to interconnect its

or its affiliate’s future generation

projects.

(B) For the first five years after the

commercial operation date of the

interconnection facilities specified in

this paragraph (d)(2), the Commission

will apply the rebuttable presumption

that the owner and/or operator of such

facilities has definitive plans to use the

capacity thereon, and it is thus in the

public interest to grant priority rights

to the owner and/or operator of such facilities

to use capacity thereon.

(e) *Non-public utility procedures for*

*tariff reciprocity compliance.* (1) A nonpublic

utility may submit an open access

transmission tariff and a request

for declaratory order that its voluntary

transmission tariff meets the

requirements of Commission rulemaking

proceedings promulgating and

amending the *pro forma* tariff.

(i) Any submittal and request for declaratory

order submitted by a nonpublic

utility will be provided an NJ

(non-jurisdictional) docket designation.

(ii) If the submittal is found to be an

acceptable open access transmission

tariff, an applicant in a Federal Power

Act (FPA) section 211 or 211A proceeding

against the non-public utility

shall have the burden of proof to show

why service under the open access

transmission tariff is not sufficient and

why a section 211 or 211A order should

be granted.

(2) A non-public utility may file a request

for waiver of all or part of the

reciprocity conditions contained in a

public utility open access transmission

tariff, for good cause shown. An application

for waiver may be filed at any

time.

(f) *Standard generator interconnection*

*procedures and agreements.* (1) Every

public utility that is required to have

on file a non-discriminatory open access

transmission tariff under this section

must amend such tariff by adding

the standard interconnection procedures

and agreement and the standard

small generator interconnection procedures

and agreement required by Commission

rulemaking proceedings promulgating

and amending such interconnection

procedures and agreements,

or such other interconnection procedures

and agreements as may be required

by Commission rulemaking proceedings

promulgating and amending

the standard interconnection procedures

and agreement and the standard

small generator interconnection procedures

and agreement.

(i) Any public utility that seeks a deviation

from the standard interconnection

procedures and agreement or the

standard small generator interconnection

procedures and agreement required

by Commission rulemaking proceedings

promulgating and amending

such interconnection procedures and

agreements, must demonstrate that

the deviation is consistent with the

principles set forth in Commission

rulemaking proceedings promulgating

and amending such interconnection

procedures and agreements.

(ii)–(iv) [Reserved]

(2) The non-public utility procedures

for tariff reciprocity compliance described

in paragraph (e) of this section

are applicable to the standard interconnection

procedures and agreements.

(3) A public utility subject to the requirements

of this paragraph (f) may

file a request for waiver of all or part

of the requirements of this paragraph

(f), for good cause shown.

(g) *Tariffs and operations of Commission-*

*approved independent system operators*

*and regional transmission organizations—*(

1) *Demand response and pricing—*

(i) *Ancillary services provided by demand*

*response resources.* (A) Every Commission-

approved independent system operator

or regional transmission organization

that operates organized markets

based on competitive bidding for energy

imbalance, spinning reserves,

supplemental reserves, reactive

power and voltage control, or regulation

and frequency response ancillary

services (or its functional equivalent in

the Commission-approved independent

system operator’s or regional transmission

organization’s tariff) must accept

bids from demand response resources

in these markets for that product

on a basis comparable to any other

resources, if the demand response resource

meets the necessary technical

requirements under the tariff, and submits

a bid under the Commission-approved

independent system operator’s

or regional transmission organization’s

bidding rules at or below the marketclearing

price, unless not permitted by

the laws or regulations of the relevant

electric retail regulatory authority.

(B) Each Commission-approved independent

system operator or regional

transmission organization must allow

providers of a demand response resource

to specify the following in their

bids:

(*1*) A maximum duration in hours

that the demand response resource

may be dispatched;

(*2*) A maximum number of times that

the demand response resource may be

dispatched during a day; and

(*3*) A maximum amount of electric

energy reduction that the demand response

resource may be required to

provide either daily or weekly.

(ii) *Removal of deviation charges.* A

Commission-approved independent system

operator or regional transmission

organization with a tariff that contains

a day-ahead and a real-time market

may not assess charge to a purchaser

of electric energy in its day-ahead market

for purchasing less power in the

real-time market during a real-time

market period for which the Commission-

approved independent system operator

or regional transmission organization

declares an operating reserve

shortage or makes a generic request to

reduce load to avoid an operating reserve

shortage.

(iii) *Aggregation of retail customers.*

Each Commission-approved independent

system operator and regional

transmission organization must accept

bids from an aggregator of retail customers

that aggregates the demand response

of the customers of utilities

that distributed more than 4 million

megawatt-hours in the previous fiscal

year, and the customers of utilities

that distributed 4 million megawatthours

or less in the previous fiscal

year, where the relevant electric retail

regulatory authority permits such customers’

demand response to be bid into

organized markets by an aggregator of

retail customers. An independent system

operator or regional transmission

organization must not accept bids from

an aggregator of retail customers that

aggregates the demand response of the

customers of utilities that distributed

more than 4 million megawatt-hours in

the previous fiscal year, where the relevant

electric retail regulatory authority

prohibits such customers’ demand

response to be bid into organized markets

by an aggregator of retail customers,

or the customers of utilities

that distributed 4 million megawatthours

or less in the previous fiscal

year, unless the relevant electric retail

regulatory authority permits such customers’

demand response to be bid into

organized markets by an aggregator of

retail customers.

(iv) *Price formation during periods of*

*operating reserve shortage.* (A) Each

Commission-approved independent system

operator and regional transmission

organization must modify its

market rules to allow the marketclearing

price during periods of operating

reserve shortage to reach a level

that rebalances supply and demand so

as to maintain reliability while providing

sufficient provisions for mitigating

market power. Each Commission-

approved independent system operator

and regional transmission organization

must trigger shortage pricing

for any interval in which a shortage of

energy or operating reserves is indicated

during the pricing of resources

for that interval.

(B) A Commission-approved independent

system operator or regional

transmission organization may phase

in this modification of its market

rules.

(v) *Demand response compensation in*

*energy markets.* Each Commission-approved

independent system operator or

regional transmission organization

that has a tariff provision permitting

demand response resources to participate

as a resource in the energy market

by reducing consumption of electric

energy from their expected levels

in response to price signals must:

(A) Pay to those demand response resources

the market price for energy for

these reductions when these demand

response resources have the capability

to balance supply and demand and

when payment of the market price for

energy to these resources is cost-effective

as determined by a net benefits

test accepted by the Commission;

(B) Allocate the costs associated with

demand response compensation proportionally

to all entities that purchase

from the relevant energy market in the

area(s) where the demand response reduces

the market price for energy at

the time when the demand response resource

is committed or dispatched.

(vi) *Settlement intervals.* Each Commission-

approved independent system

operator and regional transmission organization

must settle energy transactions

in its real-time markets at the

same time interval it dispatches energy,

must settle operating reserves

transactions in its real-time markets

at the same time interval it prices operating

reserves, and must settle

intertie transactions at the same time

interval it schedules intertie transactions.

(2) *Long-term power contracting in organized*

*markets.* Each Commission-approved

independent system operator or

regional transmission organization

must provide a portion of its Web site

for market participants to post offers

to buy or sell power on a long-term

basis.

(3) *Market monitoring policies.* (i) Each

Commission-approved independent system

operator or regional transmission

organization must modify its tariff

provisions governing its Market Monitoring

Unit to reflect the directives

provided in OrderNo. 719, including the

following:

(A) Each Commission-approved independent

system operator or regional

transmission organization must include

in its tariff a provision to provide

its Market Monitoring Unit access to

Commission-approved independent system

operator and regional transmission

organization market data, resources

and personnel to enable the

MarketMonitoring Unit to carry out

its functions.

(B) The tariff provision must provide

the Market Monitoring Unit complete

access to the Commission-approved

independent system operator’s and regional

transmission organization’s

databases of market information.

(C) The tariff provision must provide

that any data created by the Market

Monitoring Unit, including, but not

limited to, reconfiguring of the Commission-

approved independent system

operator’s and regional transmission

organization’s data, will be kept within

the exclusive control of the Market

Monitoring Unit.

(D) The Market Monitoring Unit

must report to the Commission-approved

independent system operator’s

or regional transmission organization’s

board of directors, with its management

members removed, or to an independent

committee of the Commissionapproved

independent system operator’s

or regional transmission organization’s

board of directors. A Commission-

approved independent system operator

or regional transmission organization

that has both an internal Market

Monitoring Unit and an external

Market Monitoring Unit may permit

the internal Market Monitoring Unit

to report to management and the external

Market Monitoring Unit to report

to the Commission-approved independent

system operator’s or regional

transmission organization’s board of

directors with its management members

removed, or to an independent

committee of the Commission-approved

independent system operator or

regional transmission organization

board of directors. If the internal market

monitor is responsible for carrying

out any or all of the core Market Monitoring

Unit functions identified in

paragraph (g)(3)(ii) of this section, the

internal market monitor must report

to the independent system operator’s

or regional transmission organization’s

board of directors.

(E) A Commission-approved independent

system operator or regional

transmission organization may not

alter the reports generated by the Market

Monitoring Unit, or dictate the

conclusions reached by the Market

Monitoring Unit.

(F) Each Commission-approved independent

system operator or regional

transmission organization must consolidate

the core Market Monitoring

Unit provisions into one section of its

tariff. Each independent system operator

or regional transmission organization

must include a mission statement

in the introduction to the Market Monitoring

Unit provisions that identifies

the Market Monitoring Unit’s goals,

including the protection of consumers

and market participants by the identification

and reporting of market design

flaws and market power abuses.

(ii) *Core Functions of Market Monitoring*

*Unit.* The Market Monitoring

Unit must perform the following core

functions:

(A) Evaluate existing and proposed

market rules, tariff provisions and

market design elements and recommend

proposed rule and tariff

changes to the Commission-approved

independent system operator or regional

transmission organization, to

the Commission’s Office of Energy

Market Regulation staff and to other

interested entities such as state commissions

and market participants, provided

that:

(*1*) The Market Monitoring Unit is

not to effectuate its proposed market

design itself, and

(*2*) The Market Monitoring Unit must

limit distribution of its identifications

and recommendations to the independent

system operator or regional

transmission organization and to Commission

staff in the event it believes

broader dissemination could lead to exploitation,

with an explanation of why

further dissemination should be avoided

at that time.

(B) Review and report on the performance

of the wholesale markets to

the Commission-approved independent

system operator or regional transmission

organization, the Commission,

and other interested entities such as

state commissions and market participants,

on at least a quarterly basis and

submit a more comprehensive annual

state of the market report. The Market

Monitoring Unit may issue additional

reports as necessary.

(C) Identify and notify the Commission’s

Office of Enforcement staff of instances

in which a market participant’s

or the Commission-approved

independent system operator’s or regional

transmission organization’s behavior

may require investigation, including,

but not limited to, suspected

Market Violations.

(iii) *Tariff administration and mitigation*

(A) A Commission-approved independent

system operator or regional

transmission organization may not

permit its Market Monitoring Unit,

whether internal or external, to participate

in the administration of the

Commission-approved independent system

operator’s or regional transmission

organization’s tariff or, except

as provided in paragraph (g)(3)(iii)(D)

of this section, to conduct prospective

mitigation.

(B) A Commission-approved independent

system operator or regional

transmission organization may permit

its Market Monitoring Unit to provide

the inputs required for the Commission-

approved independent system operator

or regional transmission organization

to conduct prospective mitigation,

including, but not limited to, reference

levels, identification of system

constraints, and cost calculations.

(C) A Commission-approved independent

system operator or regional

transmission organization may allow

its Market Monitoring Unit to conduct

retrospective mitigation.

(D) A Commission-approved independent

system operator or regional

transmission organization with a hybrid

Market Monitoring Unit structure

may permit its internal market monitor

to conduct prospective and/or retrospective

mitigation, in which case it

must assign to its external market

monitor the responsibility and the

tools to monitor the quality and appropriateness

of the mitigation.

(E) Each Commission-approved independent

system operator or regional

transmission organization must identify

in its tariff the functions the Market

Monitoring Unit will perform and

the functions the Commission-approved

independent system operator or

regional transmission organization will

perform.

(iv) *Protocols on Market Monitoring*

*Unit referrals to the Commission of suspected*

*violations.* (A) A Market Monitoring

Unit is to make a non-public referral

to the Commission in all instances

where the Market Monitoring

Unit has reason to believe that a Market

Violation has occurred. While the

Market Monitoring Unit need not be

able to prove that a Market Violation

has occurred, the Market Monitoring

Unit is to provide sufficient credible

information to warrant further investigation

by the Commission. Once the

Market Monitoring Unit has obtained

sufficient credible information to warrant

referral to the Commission, the

Market Monitoring Unit is to immediately

refer the matter to the Commission

and desist from independent

action related to the alleged Market

Violation. This does not preclude the

Market Monitoring Unit from continuing

to monitor for any repeated instances

of the activity by the same or

other entities, which would constitute

new Market Violations. The Market

Monitoring Unit is to respond to requests

from the Commission for any

additional information in connection

with the alleged Market Violation it

has referred.

(B) All referrals to the Commission

of alleged Market Violations are to be

in writing, whether transmitted electronically,

by fax, mail, or courier. The

Market Monitoring Unit may alert the

Commission orally in advance of the

written referral.

(C) The referral is to be addressed to

the Commission’s Director of the Office

of Enforcement, with a copy also directed

to both the Director of the Office

of Energy Market Regulation and

the General Counsel.

(D) The referral is to include, but

need not be limited to, the following

information.

(*1*) The name[s] of and, if possible,

the contact information for, the

entity[ies] that allegedly took the

action[s] that constituted the alleged

Market Violation[s];

(*2*) The date[s] or time period during

which the alleged Market Violation[s]

occurred and whether the alleged

wrongful conduct is ongoing;

(*3*) The specific rule or regulation,

and/or tariff provision, that was allegedly

violated, or the nature of any inappropriate

dispatch that may have occurred;

(*4*) The specific act[s] or conduct that

allegedly constituted the Market Violation;

(*5*) The consequences to the market

resulting from the acts or conduct, including,

if known, an estimate of economic

impact on the market;

(*6*) If the Market Monitoring Unit believes

that the act[s] or conduct constituted

a violation of the anti-manipulation

rule of Part 1c, a description of

the alleged manipulative effect on market

prices, market conditions, or market

rules;

(*7*) Any other information the Market

Monitoring Unit believes is relevant

and may be helpful to the Commission.

(E) Following a referral to the Commission,

the Market Monitoring Unit is

to continue to notify and inform the

Commission of any information that

the Market Monitoring Unit learns of

that may be related to the referral, but

the Market Monitoring Unit is not to

undertake any investigative steps regarding

the referral except at the express

direction of the Commission or

Commission Staff.

(v) *Protocols on Market Monitoring*

*Unit Referrals to the Commission of Perceived*

*Market Design Flaws and Recommended*

*Tariff Changes.* (A) A Market

Monitoring Unit is to make a referral

to the Commission in all instances

where the Market Monitoring Unit has

reason to believe market design flaws

exist that it believes could effectively

be remedied by rule or tariff changes.

The Market Monitoring Unit must

limit distribution of its identifications

and recommendations to the independent

system operator or regional

transmission organization and to the

Commission in the event it believes

broader dissemination could lead to exploitation,

with an explanation of why

further dissemination should be avoided

at that time.

(B) All referrals to the Commission

relating to perceived market design

flaws and recommended tariff changes

are to be in writing, whether transmitted

electronically, by fax, mail, or

courier. The Market Monitoring Unit

may alert the Commission orally in advance

of the written referral.

(C) The referral should be addressed

to the Commission’s Director of the Office

of Energy Market Regulation, with

copies directed to both the Director of

the Office of Enforcement and the General

Counsel.

(D) The referral is to include, but

need not be limited to, the following

information.

(*1*) A detailed narrative describing

the perceived market design flaw[s];

(*2*) The consequences of the perceived

market design flaw[s], including, if

known, an estimate of economic impact

on the market;

(*3*) The rule or tariff change(s) that

the Market Monitoring Unit believes

could remedy the perceived market design

flaw;

(*4*) Any other information the Market

Monitoring Unit believes is relevant

and may be helpful to the Commission.

(E) Following a referral to the Commission,

the Market Monitoring Unit is

to continue to notify and inform the

Commission of any additional information

regarding the perceived market

design flaw, its effects on the market,

any additional or modified observations

concerning the rule or tariff

changes that could remedy the perceived

design flaw, any recommendations

made by the Market Monitoring

Unit to the regional transmission organization

or independent system operator,

stakeholders, market participants

or state commissions regarding

the perceived design flaw, and any actions

taken by the regional transmission

organization or independent

system operator regarding the perceived

design flaw.

(vi) *Market Monitoring Unit ethics*

*standards.* Each Commission-approved

independent system operator or regional

transmission organization must

include in its tariff ethical standards

for its Market Monitoring Unit and the

employees of its Market Monitoring

Unit. At a minimum, the ethics standards

must include the following requirements:

(A) The Market Monitoring Unit and

its employees must have no material

affiliation with any market participant

or affiliate.

(B) The Market Monitoring Unit and

its employees must not serve as an officer,

employee, or partner of a market

participant.

(C) The Market Monitoring Unit and

its employees must have no material

financial interest in any market participant

or affiliate with potential exceptions

for mutual funds and non-directed

investments.

(D) The Market Monitoring Unit and

its employees must not engage in any

market transactions other than the

performance of their duties under the

tariff.

(E) The Market Monitoring Unit and

its employees must not be compensated,

other than by the Commission-

approved independent system operator

or regional transmission organization

that retains or employs it, for

any expert witness testimony or other

commercial services, either to the

Commission-approved independent system

operator or regional transmission

organization or to any other party, in

connection with any legal or regulatory

proceeding or commercial transaction

relating to the Commission-approved

independent system operator or

regional transmission organization or

to the Commission-approved independent

system operator’s or regional

transmission organization’s markets.

(F) The Market Monitoring Unit and

its employees may not accept anything

of value from a market participant in

excess of a *de minimis* amount.

(G) The Market Monitoring Unit and

its employees must advise a supervisor

in the event they seek employment

with a market participant, and must

disqualify themselves from participating

in any matter that would have

an effect on the financial interest of

the market participant.

(4) *Electronic delivery of data.* Each

Commission-approved regional transmission

organization and independent

system operator must electronically

deliver to the Commission, on an ongoing

basis and in a form and manner

consistent with its own collection of

data and in a form and manner acceptable

to the Commission, data related to

the markets that the regional transmission

organization or independent

system operator administers.

(5) *Offer and bid data.* (i) Unless a

Commission-approved independent system

operator or regional transmission

organization obtains Commission approval

for a different period, each Commission-

approved independent system

operator and regional transmission organization

must release its offer and

bid data within three months.

(ii) A Commission-approved independent

system operator or regional

transmission organization must mask

the identity of market participants

when releasing offer and bid data. The

Commission-approved independent system

operators and regional transmission

organization may propose a

time period for eventual unmasking.

(6) *Responsiveness of Commission-approved*

*independent system operators and*

*regional transmission organizations.* Each

Commission-approved independent system

operator or regional transmission

organization must adopt business practices

and procedures that achieve Commission-

approved independent system

operator and regional transmission organization

board of directors’ responsiveness

to customers and other stakeholders

and satisfy the following criteria:

(i) *Inclusiveness.* The business practices

and procedures must ensure that

any customer or other stakeholder affected

by the operation of the Commission-

approved independent system operator

or regional transmission organization,

or its representative, is permitted

to communicate the customer’s

or other stakeholder’s views to the

independent system operator’s or regional

transmission organization’s

board of directors;

(ii) *Fairness in balancing diverse interests.*

The business practices and procedures

must ensure that the interests of

customers or other stakeholders are

equitably considered, and that deliberation

and consideration of Commission-

approved independent system operator’s

and regional transmission organization’s

issues are not dominated

by any single stakeholder category;

(iii) *Representation of minority positions.*

The business practices and procedures

must ensure that, in instances

where stakeholders are not in total

agreement on a particular issue, minority

positions are communicated to

the Commission-approved independent

system operator’s and regional transmission

organization’s board of directors

at the same time as majority positions;

and

(iv) *Ongoing responsiveness.* The business

practices and procedures must

provide for stakeholder input into the

Commission-approved independent system

operator’s or regional transmission

organization’s decisions as

well as mechanisms to provide feedback

to stakeholders to ensure that information

exchange and communication

continue over time.

(7) *Compliance filings.* All Commission-

approved independent system operators

and regional transmission organizations

must make a compliance filing

with the Commission as described

in Order No. 719 under the following

schedule:

(i) The compliance filing addressing

the accepting of bids from demand response

resources in markets for ancillary

services on a basis comparable to

other resources, removal of deviation

charges, aggregation of retail customers,

shortage pricing during periods

of operating reserve shortage, longterm

power contracting in organized

markets, Market Monitoring Units,

Commission-approved independent system

operators’ and regional transmission

organizations’ board of directors’

responsiveness, and reporting on

the study of the need for further reforms

to remove barriers to comparable

treatment of demand response

resources must be submitted on or before

April 28, 2009.

(ii) A public utility that is approved

as a regional transmission organization

under § 35.34, or that is not approved

but begins to operate regional markets

for electric energy or ancillary services

after December 29, 2008, must comply

with Order No. 719 and the provisions of

paragraphs (g)(1) through (g)(5) of this

section before beginning operations.

(8) *Frequency regulation compensation*

*in ancillary services markets.* Each Commission-

approved independent system

operator or regional transmission organization

that has a tariff that provides

for the compensation for frequency regulation

service must provide such compensation

based on the actual service

provided, including a capacity payment

that includes the marginal unit’s opportunity

costs and a payment for performance

that reflects the quantity of

frequency regulation service provided

by a resource when the resource is accurately

following the dispatch signal.

(9) *Electric storage resources.* (i) Each

Commission-approved independent system

operator and regional transmission

organization must have tariff

provisions providing a participation

model for electric storage resources

that:

(A) Ensures that a resource using the

participation model for electric storage

resources in an independent system operator

or regional transmission organization

market is eligible to provide all

capacity, energy, and ancillary services

that it is technically capable of

providing;

(B) Ensures that a resource using the

participation model for electric storage

resources can be dispatched and can set

the wholesale market clearing price as

both a wholesale seller and wholesale

buyer consistent with rules that govern

the conditions under which a resource

can set the wholesale price;

(C) Accounts for the physical and

operational characteristics of electric

storage resources through bidding parameters

or other means; and

(D) Establishes a minimum size requirement

for resources using the participation

model for electric storage

resources that does not exceed 100 kW.

(ii) The sale of electric energy from

an independent system operator or regional

transmission organization market

to an electric storage resource that

the resource then resells back to that

market must be at the wholesale locational

marginal price.

(10) *Transparency*—(i) *Uplift reporting.*

Each Commission-approved independent

system operator or regional

transmission organization must post

two reports, at minimum, regarding

uplift on a publicly accessible portion

of its website. First, each Commissionapproved

independent system operator

or regional transmission organization

must post uplift, paid in dollars, and

categorized by transmission zone, day,

and uplift category. Transmission zone

shall be defined as the geographic area

that is used for the local allocation of

charges. Transmission zones with fewer

than four resources may be aggregated

with one or more neighboring transmission

zones, until each aggregated

zone contains at least four resources,

and reported collectively. This report

shall be posted within 20 calendar days

of the end of each month. Second, each

Commission-approved independent system

operator or regional transmission

organization must post the resource

name and the total amount of uplift

paid in dollars aggregated across the

month to each resource that received

uplift payments within the calendar

month. This report shall be posted

within 90 calendar days of the end of

each month.

(ii) *Reporting Operator-Initiated Commitments.*

Each Commission-approved

independent system operator or regional

transmission organization must

post a report of each operator-initiated

commitment listing the size of the

commitment, transmission zone, commitment

reason, and commitment

start time on a publicly accessible portion

of its website within 30 calendar

days of the end of each month. Transmission

zone shall be defined as a geographic

area that is used for the local

allocation of charges. Commitment

reasons shall include, but are not limited

to, system-wide capacity, constraint

management, and voltage support.

(iii) *Transmission constraint penalty*

*factors.* Each Commission-approved

independent system operator or regional

transmission organization must

include, in its tariff, its transmission

constraint penalty factor values; the

circumstances, if any, under which the

transmission constraint penalty factors

can set locational marginal prices;

and the procedure, if any, for temporarily

changing the transmission constraint

penalty factor values. Any procedure

for temporarily changing transmission

constraint penalty factor values

must provide for notice of the

change to market participants.

(11) A resource’s incremental energy

offer must be capped at the higher of

$1,000/MWh or that resource’s costbased

incremental energy offer. For the

purpose of calculating Locational Marginal

Prices, Regional Transmission

Organizations and Independent System

Operators must cap cost-based incremental

energy offers at $2,000/MWh.

The actual or expected costs underlying

a resource’s cost-based incremental

energy offer above $1,000/MWh

must be verified before that offer can

be used for purposes of calculating Locational

Marginal Prices. If a resource

submits an incremental energy offer

above $1,000/MWh and the actual or expected

costs underlying that offer cannot

be verified before the market clearing

process begins, that offer may not

be used to calculate Locational Marginal

Prices and the resource would be

eligible for a make-whole payment if

that resource is dispatched and the resource’s

actual costs are verified afterthe-

fact. A resource would also be eligible

for a make-whole payment if it is

dispatched and its verified cost-based

incremental energy offer exceeds $2,000/

MWh. All resources, regardless of type,

are eligible to submit cost-based incremental

energy offers in excess of $1,000/

MWh.

[Order 888, 61 FR 21693, May 10, 1996]

EDITORIAL NOTE: For FEDERAL REGISTER citations

affecting § 35.28, see the List of CFR

Sections Affected, which appears in the

Finding Aids section of the printed volume

and at *www.govinfo.gov.*