199 Id. at 998.

200 410 U.S. 366 (1974).

FN201 410 U.S. at 375-76.

FN202 Id. at 374-76.

203 See AGD, 824 F.2d at 998.

204 574 F.2d 610 (D.C. Cir. 1978).

205 Id. at 620.

206 Id. at 623, nn.53 and 57.

207 606 F.2d 1156 (D.C. Cir. 1979).

FN208 While Central Iowa was pending, certain of the functions of the FPC were transferred to the FERC under the DOE Organization Act. Accordingly, the FERC was substituted for the FPC as the respondent in the case.

209 606 F.2d at 1168.

210 Id. at 1169; see also Municipalities of Groton v. FERC, 587 F.2d 1296 (D.C. Cir. 1978).

211 660 F.2d 668 (5th Cir. 1981), cert. denied sub nom. Fort Pierce Utilities Authority v. FERC, 459 U.S. 1156 (1983).

FN212 FP&L provided transmission service when four conditions were met: (1) The specific potential seller and buyer were contractually identified; (2) the magnitude, time and duration of the transaction were specified prior to the commencement of the transmission; (3) it could be determined that the transmission capacity would be available for the term of the contract; and (4) the rate was sufficient to cover FP&L's costs.

FN213 All utilities requesting wheeling services, subject to availability, would be entitled to receive transmission service under the filed terms. Any changes to a filed rate must be filed with the Commission. This is the so-called "filed rate doctrine." See Northwestern Public Service Company v. Montana-Dakota Utilities Company, 181 F.2d 19, 22 (8th Cir. 1980), aff'd, 341 U.S. 246 (1951).

214 Under the filed rate doctrine, a refusal to wheel would be unduly discriminatory under section 206 of the FPA. As the court acknowledged, a customer refused service could petition the Commission to find that FP&L's policy of availability was unduly discriminatory under section 206(a) of the FPA. The court said that in the absence of a tariff on file, a utility refused wheeling services would be unable to claim discrimination under section 206(a) of the FPA. 660 F.2d at 675 (expressing "serious doubts that such a petition would be successful in the absence of a tariff").

FN215 Id. at 676.

FN216 Id. at 678.

217 The AGD court did not address New York State Electric & Gas Corporation v. FERC, 638 F.2d 388 (2d Cir. 1980), cert. denied, 454 U.S. 821 (1981) (NYSEG), presumably because that case did not concern whether the Commission could order wheeling as a remedy for undue discrimination.

218 824 F.2d at 999.

219 Id. at 999.

FN220 Id. at 1006.

221 See, e.g., FPC v. Sierra Pacific Power Company, 350 U.S. 348, 353 (1956); Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571, 577 n.7 (1981); and Kentucky Utilities Company v. FERC, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985). Section 206 of the FPA was recently revised and now differs from section 5 of the NGA, but not in a manner significant to our discussion here. See 16 U.S.C. 824e (b) and (c).

222 NIEP, ELCON, CINergy, UtiliCorp, TAPS, SBA, Entergy, NY Energy Buyers, Sierra.

223 E.g., EEI, Atlantic City, Allegheny, VA Com, PA Com, Ohio Edison, Southern, Utilities For Improved Transition, Dayton P&L, SCE&G, Centerior, BG&E, Central Hudson, NY Com, Salt River, Carolina P&L, Union Electric, VEPCO, Utility Workers Union.

FN224 EEI, VA Com, Union Electric.

FN225 E.g., EEI, VA Com, NY Com, PA Com, Salt River, Southern, Dayton P&L, Detroit Edison, BG&E.

226 See also NY Com (NGA has no parallel provision to section 211 of the FPA), Salt River.

227 NIEP Reply Comments at 8.

228 NIEP explains that

(W)hile much has been made of the Senate report accompanying S.2114, which subsequently became part of PURPA in 1978, that report does not illustrate an intent to limit FERC's authority to remedy undue discrimination under section 206. That report characterizes the Supreme Court's decision in Otter Tail as holding that "the Federal Power Act leaves open a gap in its failure to assign the FPC general authority to order wheeling in this situation * * *." The "situation" to which the Report refers is not discrimination, however. Instead, the statement appears to make reference to circumstances in which general public interest concerns,

such as reliability, efficiency and competition, are at stake. Thus, Senate Report 2114 is simply not a limitation on the Commission's remedial powers under Sections 206.

NIEP Reply Comments at 8-9 (citations omitted).

229 See also Entergy.

230 ELCON Initial Comments at 7 (quoting NYSEG at 403).

231 See, e.g.,- Niagara Mohawk Power Corporation v. FPC, 379 F.2d 153, 159 (D.C. Cir 1967).

232 AGD, 824 F.2d at 997.

FN233 Id. (quoting IBEW, Local No. 474 v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987) (emphasis deleted by court from original)).

234 Id. (emphasis added).

235 Id. at 998-99.

236 Id. at 997. We also note that the contract carriage obligation we are imposing is easily distinguished from the common carrier obligation Congress chose not to adopt. As discussed infra, the common carrier provisions rejected by Congress would have required transmission for "any person" upon reasonable request. This would have included retail purchasers.

237 Otter Tail, 410 U.S. at 374.

238 H.R. 5423, 74th Cong., 1st Sess., 32 (emphasis added).

239 Id. at 44.

FN240 In the debate on the subsequent bill to regulate natural gas, Congressman Cole explained:

Mr. Chairman, the House should realize that the measure we are dealing with today is of extreme importance, more so than the attendance and the time taken in the discussion would seem to indicate. It is the culmination of one of the most far-reaching, intensive studies of the Federal Trade Commission I assume that that Commission ever conducted, and last year found a place in not identical language but very similar in the Rayburn bill, the famous holding-company bill, as part 3 thereof. Our committee eliminated part 3, as members will recall, and saved it for a separate measure reported out as it was last year, which was not considered by the House, but is here today in improved form.

FN81 Cong. Rec. H6724 (daily ed July 1, 1937).

241 AGD, 824 F.2d at 998.

FN242 Id.

243 See FERC Stats. & Regs. at 33,053-56. We further note that the AGD court did not discuss the NYSEG decision at all. Indeed, the NYSEG case did not involve any allegations of undue discrimination and any discussion of section 206 by the court was dictum.

244 See, e.g., NLRB v. Bell Aerospace Company, 416 U.S. 267, 293 (1974) (citing SEC v. Chenery Corporation, 332 U.S. 194, 202-03 (1947). See also Heckler v Campbell, 461 U.S. 458, 467 (1983) (even where enabling statute requires a hearing to be held, agency may rely on its rulemaking authority), Panhandle Eastern Pipeline Company v. FERC, 907 F.2d 185, 187-88 (D.C. Cir. 1990). Under section 403 of the DOE Act, 42 U.S.C. 7173, the Commission is authorized at its discretion to initiate rulemaking proceedings.

FN245 AGD, 824 F.2d at 1008.

246 E.g , EEI, Ohio Edison, PA Com, BG&E, NY Com, Minnesota P&L, Carolina P&L.

FN247 E.g., EEI, BG&E.

248 See also Ohio Edison.

249 See also SCE&G.

250 Salt River Initial Comments at 5-6 (referencing an attached legal memorandum of Donald A. Kaplan).

FN251 Salt River Initial Comments at 6.

252 NY Com Initial Comments at 16-18 (discussing FPL and Cajun).

253 See also Southern.

FN254 See also Southern.

255 We note that CP&L raised legal objections to our authority to implement this rule.

256 Brownsville Reply Comments at 2-3 (emphasis in original).

257 While many public utilities have filed some form of open access tariff (often in response to our proposed rule), we believe that many of the remaining utilities will not voluntarily open their systems absent a final rule. See also note 266.

FN258 AGD, 824 F.2d at 1008.

259 CCEM Initial Comments at 18-19. See also NIEP Reply Comments at 13 n.31.

260 FERC Stats. & Regs. at 33,072.

FN261 See Pacific Gas and Electric Company, 65 FERC 61,312 at 62,428-30 and n.22, remanded on other grounds, Pacific Gas & Electric Company v. FERC, No. 94-70037 (9th Cir. June 23, 1994)(unpublished opinion), order on remand, 69 FERC 61,006 (1994).

262 A list of section 211 applications and the status of each is attached as Appendix A.

FN263 American Municipal Power-Ohio, Inc. v. Ohio Edison Company, 74 FERC 61,086 (1996).

264 See, e.g., Gulf States Utilities Company v. FPC, 411 U.S. 747, 758-60 (1973); FPC v. Conway Corporation, 426 U.S. 271, 279 (1976); Northern Natural Gas Company v. FPC, 399 F.2d 953, 960 (D.C. Cir. 1968).

265 We note that there are now 14 power marketers that are affiliated with public utilities.

FN266 We take note of EEI's comments that, at the time of the comments, 30 utilities had filed open access tariffs. They argue, therefore, that the rule is unnecessary. Since their comment was filed, the number of utilities filing some form of an open access tariff has risen to 106. However, while some of these tariffs are based on the NOPR pro forma tariffs, many of these tariffs fall significantly short of the tariff requirements of both the NOPR and this Rule. Even if the tariffs met these requirements, the Rule is still needed to complete the task of eliminating undue discrimination by all public utilities and assuring, to the extent possible, a nationwide open access transmission grid. Indeed, a number of these tariffs were filed for the purposes of securing authority to market power competitively. This underscores markedly our fundamental conclusion that prior practices of using monopoly power over transmission to preserve market power over electricity sales has no place in today's industry and must be eliminated to get the benefits of competition to the customers we are required to protect under the FPA.

267 E.g., EEI, VA Com, Ohio Edison Southern, Utilities For Improved Transition, BG&E.

FN268 See also NM Com.

269 See also Salt River Moreover, FL Com states that the Commission should modify its hearing process to better accommodate state PUC participation by: (1) Holding hearings in the affected state; (2) teleconferencing; (3) making free transcripts available to states; and (4) substantially deferring to a state when the state commission has held a hearing on an issue in the case.

270 EEI quoted the following language from NYSEG:

Nor do we suggest that the Commission is powerless to review a wheeling agreement under section 206 without following the requirements of sections 211 and 212. If, after a hearing as required by section 206, the Commission determines that a particular rate, charge or condition is unreasonable, it can order a modification. But where, as here, the modification amounts to an order requiring wheeling, it must be preceded also by determination in accordance with sections 211 and 212. Simply put, we will not allow the Commission to do indirectly without compliance with the statutory prerequisites, what it could not do directly without such compliance. (citing Richmond Power & Light).

FN271 See also VA Com.

FN272 See also Carolina P&L.

273 This argument is puzzling. First, section 211 does not control to whom access must be provided under sections 205 and 206. However, even if it did, Associated EC appears to misconstrue eligibility under section 211. An electric utility as defined in the FPA is any person or State agency (including any municipality) which sells electric energy. The definition does not say that electric energy must be re-sold at wholesale. Thus, an electric utility could be a wholesale buyer of transmission used to transmit energy for sale at either wholesale or retail.

274 See also Allegheny.

275 It states that

Section 212(e), however, provides that Sections 211 and 212 limit or impair the Commission's authority under "other provisions of law" (a phrase including, obviously, Sections 205 and 206). On the face of the statute—we say again for emphasis: on the face of the statute—the Commission therefore does not have the authority to order transmission service outside the provisions of Sections 211 and 212.

Utilities For Improved Transition Initial Comments at 51 (emphasis in original).

276 16 U.S.C 824k (emphasis added).

277 In discussing the electricity provisions of the Energy Policy Act, Senator Wallop declared:

It would be a mistake to take the presence of transmission access provisions in the Conference Report as a sign of change in position on my part or that of the Senate. I would have strongly preferred PUHCA reform without any transmission access provisions, as was the Senate position. However, in order to obtain the very significant benefits of PUHCA reform contained in the Senate bill, it was necessary to accept some of the House transmission access provisions.

FN138 Cong. Rec S17615 (daily ed. October 8, 1992).

FN278 See, e.g., Shell Oil Company v. Iowa Department of Revenue, 488 U.S. 19, 29 (1988) (Shell). In Shell, the Court declared:

This Court does not usually accord much weight to the statements of a bill's opponents. "[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 (1981) (quoting Schwegmann Bros. v. Calvert Distillers Corp , 341 U.S. 384, 394 (1951).

See also Sutherland Statutory Construction §48.16 at 366.

279 Hearings on H.R. 1301, H.R. 1543, and H.R. 2224 before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. (May 1,2 and June 26, 1991), Statement of Cynthia A. Marlette, Associate General Counsel,

Federal Energy Regulatory Commission, Report No. 102-60 at 60 and 61-70. See also id. at 106 ("I believe that we have substantial authority under the existing case law to mandate access where necessary to remedy anticompetitive effects.").

FN280 At the time Congress enacted amendments to FPA section 211, it was well aware that the Commission had unexplored authorities under sections 205 and 206 of the FPA to compel wheeling. The only explicit limitations it chose to impose on the Commission's wheeling authorities were those contained in sections 212(g) and (h), which provide that no order "under this Act" may be inconsistent with any State law governing retail marketing areas of electric utilities (section 212(g)), or be conditioned upon or require the transmission of electric energy directly to an ultimate consumer (section 212(h)).

281 FERC Stats. & Regs. 32,514 at 33,083 (footnote omitted).

282 Id. at 33,083 n.195.

283 Section 212(h) (Prohibition on Mandatory Retail Wheeling and Sham Wholesale Transactions).

284 We emphasize that any transmission customer must follow prudent utility practices so as to assure reliability.

285 New Reporting Requirement Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibility Under the Energy Policy Act of 1992, and conforming and Other Changes to Form No. FERC-714, Order No. 558-A, 65 FERC 61,324 at 62,451 n.12 (1993).

FN286 Order No. 558, FERC Stats. & Regs. 30,980 at 30,895-96, reh'g denied, 65 FERC 61,324 (1993) (cooperatives are electric utilities); AES Power, Inc., 69 FERC 61,345 at 62,297 (1995) (power marketer is an electric utility, i.e., a person "which sells electric energy").

287 See, e.g., Citizens Energy Corporation, 35 FERC 61,198 at 61,452-53 (1986).

288 In making this determination, we are not deciding whether these entities are eligible entities under section 211(a) of the FPA.

289 See Section IV.I.

FN290 The Commission has no authority to order retail transmission directly to an ultimate consumer or to order "sham" wholesale transmission. See FPA section 212(h). However, if such access occurs voluntarily or as a result of a state program, the rates, terms, and conditions of the access are within our exclusive jurisdiction if the service is provided by a public utility.

291 FERC Stats. & Regs. 32,514 at 33,079.

292 Requirements for ancillary services are discussed in Section IV.D.

293 FERC Stats. & Regs. 32,514 at 33,049.

294 E.g., Minnesota P&L, Power Marketing Association.

295 E.g., Springfield.

296 FERC Stats. & Regs. 32,514 at 33,050 and 33,092-93.

FN297 As discussed in the NOPR, sections 211 and 212 require that applicants specify only rates, terms, and conditions of service, not specify transactions. Thus, applicants can file requests for tariffs to accommodate future, currently unspecified transactions, similar to the open access tariffs required by this Rule.

298 FERC Stats. & Regs. 32,514 at 33,089.

299 Id. at 33,095.

300 Id. at 33,090.

301 E.g., Consumers Power, Northern States Power, PacifiCorp, Oklahoma G&E, Allegheny Power, ELCON, Public Service Co of CO.

FN302 E.g., Northern States Power, VEPCO, Utilities For Improved Transition, PacifiCorp, Arizona Public Service, Dairyland, Montaup, Illinois Power, South Carolina E&G, Florida Power Corp, KU.

FN303 See also NRECA.

304 Wisconsin P&L notes, however, that a possible exception exists where a user could block the efficient transfer of power and then market its own power at a premium price.

305 A reservation charge would assure that the utility fully recovers its fixed costs associated with the transmission customer's reserved transmission capacity.

306 See Section IV.C.6.

307 E.g., NYPP, Public Service E&G, Sierra Pacific Power, Ohio Edison. Sierra Pacific Power asserts that a utility should be permitted to retain capacity for native load use over the pertinent planning period. El Paso adds that the Commission should allow utilities the opportunity to reserve capacity for anticipated uses that, although not firm, are necessary to maintain reliability.

308 E.g., NIEP, CCEM, Conservation Law Foundation.

309 See Section IV.A.5.

310 FERC Stats. & Regs. 32,514 at 33,088.

311 E.g., PacifiCorp, DOJ, NIEP, ELCON, United Illuminating, DOD, WP&L, FTC. OK Com and FL Com favor reassignment of capacity, but express concerns that reliability not be affected.

312 E.g., Northern States Power.

313 E.g., NEPCO, Nebraska Public Power District.

314 E.g., NRECA, Montana Power, PacifiCorp, NYSEG, PA Com, Idaho, Public Service Co of CO, FPC, Entergy, TDU Systems, Duke, Cajun, CVPSC, Oglethorpe, Minnesota DPS. FL Com argues that the price of reassignment should be capped at the contract selling price. WP&L argues that the price cap should be raised to the maximum rate allowed in the tariff under which the user purchased the original service.

FN315 See also Minnesota DPS.

316 See also Midwest Commissions, SMUD, CCEM.

317 E.g., IL Com, NEPCO, Consumers, American Wind.

FN318 If the market is not competitive, however, Con Ed maintains that the cap should be retained for all entities.

319 E.g., PacifiCorp, NYSEG, Oglethorpe.

320 E.g., Oglethorpe, NSP.

FN321 E g., NYSEG, Entergy, TDU Systems, Turlock, American Wind.

322 The transmission provider has the same rights as any other potential assignee to obtain capacity that is posted on an OASIS or to negotiate with the assignor for any capacity the assignor seeks to assign.

FN323 The public utility's tariff shall not preclude an assignor from including a right of recall in its agreement with an assignee.

324 The assignor may also request the transmission provider to provide the billing and payment services for the reassignment. The parties would negotiate terms for such an arrangement, including a fee for the transmission provider. If an assignor is a public utility, it will have to have on file with the Commission a rate schedule governing reassigned capacity.

FN325 Any expenses that the public utility incurs in carrying out the capacity assignment program would simply be included in its cost of service.

326 Similar arguments with respect to the information that public utilities must provide to the Commission in standard reports (e.g., Form No 1) are addressed later in this Final Rule.

327 E.g., PacifiCorp, NYSEG, NSP

FN328 See also PA Com.

329 The prices of some ancillary services, which are posted on the OASIS, are based on generation costs, however.

FN330 Because the Commission establishes many generation and all transmission rates on a cost basis, the Commission also will continue to need the information that it collects in Form No. 1 and other standard forms from public utilities to assure that the rates are just and reasonable. As we explain later in this Final Rule, the information provided in those forms is public information that is available to any transmission customer. However, because of the competitive changes occurring in the electric industry, we recognize that there may be a need to reexamine the information we collect from public utilities through the Form No. 1.

331 See also Environmental Action, Missouri Basin MPA, Texaco, EGA, AEC & SMEPA.

332 See also TDU Systems, Public Service Co. of CO.

333 E.g., NARUC, AZ Com, CT DPUC, OK Com, FL Com, NC Com, NM Com.

334 E.g., Com Ed, Citizens Utilities, PacifiCorp.

335 E,g,, Allegheny Power, PacifiCorp, MidAmerican, PECO, Public Service Co. of CO, Com Ed, NARUC, NRRI, MN DPS, ND Com, FL Com.

FN336 E.g., Allegheny Power.

337 E.g., CCEM, ABATE.

338 But see discussion of buy/sell transactions in Section IV.I.

339 FERC Stats. & Regs. 32,514 at 33,080.

340 E.g., Michigan Systems, Cleveland, Municipal Energy Agency Nebraska, Missouri Basin MPA, TAPS, Wisconsin Municipals, LG&E, NIEP, CCEM.

341 With the exception of certain contracts and agreements executed on or before 60 days after publication of the Final Rule in the Federal Register, the regulation we are adopting requires that public utilities take service under their open access tariff for wholesale sales or purchases of electric energy and unbundled retail sales of electric energy, effective on the date the public utility engages in such transactions.

FN342 As discussed in Section IV F., the Commission will not impose this requirement on existing bilateral non-economy coordination agreements, but persons may file complaints that such agreements need to be modified.

343 E.g., EEI, Con Ed, VEPCO.

FN344 See also NEPCO.

345 See also Florida Power Corp.

346 If the utility is not required to file a Form No. 1, PacifiCorp states that it should be required to file similar information annually.

347 E.g., Consumers Power, Northern States Power, PacifiCorp, Allegheny Power.

348 Additional guidance on this subject is in Section IV.G.4.g.(2)(a).

349 Of course, public utilities would have to have a rate schedule on file to provide other jurisdictional interconnected operations services.

350 A control area is part of an interconnected power system with a common generation control system. It may contain one or several utilities. The operator of the control area is responsible for balancing generation and load and for maintaining reliable system operation.

351 E.g., Oak Ridge, Houston L&P, Carolina P&L, NYPP.

352 Oak Ridge originally identified nineteen ancillary services, which included a recommended separation of the six NOPR ancillary services into twelve services and seven additional new services.

353 NERC indicates that the list of services is a work in progress and therefore may not be a complete list. NERC has formed an independent Interconnected Operations Services Working Group (Working Group). The Working Group includes representatives with a broad range of industry interests (transmission-dependent, partial requirements, IPP, transmission-owning, public power). We encourage this effort and will consider future changes to the list of ancillary services or their descriptions to reflect the further development of concepts in this area.

354 See, e.g., APPA.

FN355 E.g., EEI, NERC, NYSEG, FPL, NSP.

356 See also APPA.

357 The ability to reduce reactive power requirements will be affected by the location and operating capabilities of the generator. Any arrangement for the customer to self-supply a portion of reactive supply should be specified in the transmission customer's service agreement with the transmission provider.

358 Transmission providers may propose delivery point power factor standards, including additional (penalty) charges for failure to maintain specified power factors, in service agreements with customers. We will evaluate the reasonableness of any such proposals by public utilities to determine whether they conform to prudent utility practices and are comparable to requirements imposed by the utility on other customers, including the utility's own requirements customers, and are otherwise just and reasonable.

359 Separation of reactive supply and voltage control from basic transmission service also may contribute to the development of a competitive market for such service if technology or industry changes result in improved ability to measure the reactive power needs of individual transmission customers or the ability to supply reactive supply from more distant sources. We recognize that these capabilities may not be fully developed at present and the ability to distinguish the reactive power needs of individual customers may be limited at first to generator control and power factor correction.

360 E.g., NERC, EEI, Florida Power Corp.

361 E.g., NERC, EEI.

362 E.g., EEI, Florida Power Corp, TVA, Wollenberg.

363 In addition, NERC designates "facilities use service" as an interconnected operations service. We note that the facilities use service described by NERC is simply basic transmission service, which must be provided under an open access tariff. We do not consider facilities use service to be an ancillary service.

364 See, e.g., Portland, APPA, PacifiCorp, EEI.

365 If a transmission provider does not charge for transmission used to supply losses for its own wholesale power sales and purchases, it may not charge others. If it charges others, it must charge for its own uses.

366 E.g., Detroit Edison, El Paso, FPL, Minnesota P&L, NIPSCO.

367 E.g., NERC, Carolina P&L, Oak Ridge, Houston L&P.

368 E.g., Atlantic City, Oak Ridge.

369 Some commenters suggest that transmission providers be required to provide, or transmission customers be required to purchase or self-supply, certain services other than the six ancillary services that we will require to be included in an open access transmission tariff. Because we will not require the transmission provider to offer any services other than basic transmission service and the six ancillary services, comments on requirements to provide or take other services are not included in the summary.

370 E.g., NERC, Tallahassee, IL Com.

371 E.g., BG&E, Minnesota P&L, Florida Power Corp.

372 See also Florida Power Corp and Montana Power.

FN373 E.g., Carolina P&L, Texas Utilities, NERC, PSE&G.

FN374 E.g., SCE&G, Montana Power, NIPSCO, EEI, PacifiCorp. EEI and PacifiCorp indicate that dynamic scheduling of load following service is an exception to the general practice of the control area operator providing load following service.

375 E.g., Montana Power, TDU Systems.

376 E.g., Tallahassee, Wisconsin Municipals, IL Com.

377 E.g., OVEC, OG&E, Memphis, Nebraska Public Power, TDU Systems, TANC, San Francisco, Brazos.

378 E.g., PSNM, Atlantic City, Centerior, UWG, Texas Utilities, Entergy, LG&E, Montana Power, FPL, United Illuminating, Large Public Power Council, Christensen

379 E g., NIPSCO, PacifiCorp, Orange & Rockland, Allegheny, NYSEG, EEI.

380 E g., BG&E.

381 E.g., CSW, BG&E, ConEd, United Illuminating, Ohio Edison, Atlantic City, Centerior, SoCal Edison, Duke, EEI.

382 E g., RUS, TDU Systems, DE Muni.

383 See also NYSEG, Ohio Edison.

384 E.g., PSNM, Atlantic City, Centerior, Texas Utilities, Entergy, FPL, Utility Working Group.

385 The requirement to offer to act as agent is in lieu of the requirement for the transmission provider to supply the ancillary service to the transmission customer. Many commenters asked that we not require the transmission provider to acquire the capacity to provide ancillary services that it does not provide for itself but acquires from its control area operator. E.g., EEI, NRECA, BPA, TDU Systems.

386 If the transmission provider is a control area operator but not a public utility, we can order transmission services only upon application, pursuant to section 211 and 212 of the FPA. However, the provision of transmission services by non-public utilities would be necessary to satisfy the reciprocity condition in public utilities' open access transmission tariffs.

387 E.g., Carolina P&L, Texas Utilities, PSE&G.

388 Some of these options (e.g., establishing a separate control area), while technically feasible, may be too costly or otherwise inadvisable.

389 E.g., Carolina P&L, NYSEG, FPL, NSP, WP&L, Orange & Rockland, Arizona, Salt River, SC Public Service Authority, Brazos, NY Com.

FN390 See, e.g., Carolina P&L Initial Comments at 56

FN391 See, e.g., CCEM, Carolina P&L, NYSEG, CINergy.

392 E.g., UT Com, Washington and Oregon Energy Offices, WA Com.

393 E.g., Direct Service Industries, Mt. Hope Hydro.

394 E.g., Direct Service Industries, Mt. Hope Hydro, ELCON, PA Com.

395 EEI Initial Comments at V-4; ELCON Initial Comments at 21.

396 E.g., WP&L, NYSEG.

FN397 E.g., Consumers, PacifiCorp, Carolina P&L, PSNM, Salt River, PA Com, TDU Systems.

398 TDU Systems Initial Comments at 87.

FN399 Mt. Hope Hydro Initial Comments at 17.

400 E.g., Utilities For Improved Transition, Idaho, CINergy, Direct Service Industries, Mt. Hope Hydro, ABATE, TDU Systems, Missouri-Kansas Industrials, Washington and Oregon Energy Offices, IN Com.

401 E.g., PJM, Texas Utilities, Entergy, Carolina P&L.

402 Many commenters were particularly concerned that rates for energy losses, a NOPR ancillary service, should be market-based. We need not address this concern in this Rule, however, because we will not require Real Power Losses to be offered as an ancillary service.

403 See Real-Time Information Networks, Notice of Technical Conference and Request for Comments, 60 FR 17726 (April 7, 1995).

404 In Phase II, we will continue to develop the requirements for fully functional OASIS. We expect to issue a final rule on Phase II OASIS requirements sometime in 1997.

405 E.g., DE Com, DC Com, NJ Com, MD Com.

406 E.g., Central Louisiana, Dayton P&L, LPPC, MEAG, Missouri Basin Group, Montana-Dakota Utilities, Nebraska Public Power District, Ohio Edison, PSNM.

407 E.g., Arizona, Ohio Edison.

FN408 E.g., Soyland, NRECA.

FN409 E.g., APPA.

410 E.g., APPA, CCEM, EGA.

FN411 E.g., APPA, CCEM, LG&E, EGA.

412 E.g., Arizona, CINergy, Consumers Power, EEI, PJM.

413 For example, a 30-year contract to supply 50 MW of power can be considered to be a coordination arrangement because it is not a contract to meet all of the buyer's power requirements.

414 Agreements dealing with joint ownership or operation of transmission facilities are discussed at Section IV.C.3.

415 The Commission did not define what it meant by "power pools" in the NOPR discussion. We use the term power pool in a very broad context here and have generally characterized three broad types of arrangements that represent some form of pooling: "tight pools", "loose" pools and other multilateral coordination arrangements, and holding companies. Even between the categories of tight and loose pools, however, there is no bright dividing line.

416 A technical conference on pro forma tariffs was held on October 27, 1995. A technical conference on power pools was held on December 5 and 6, 1995 and a follow-up technical conference on ISOs and power pools was held on January 24, 1996.

417 The DOJ and DOE suggested that the Commission examine operational unbundling as a way of enforcing comparability in transmission service. DOJ and DOE believe that functional unbundling may not be adequate to ensure comparability and so have recommended that some form of operational unbundling be required. While we believe that requiring this is premature, we note that an ISO is one way to achieve operational unbundling and we encourage the voluntary development of ISOs.

418 The North and East Interconnections were ordered by the Commission pursuant to sections 210, 211 and 212 of the Federal Power Act. See Central Power and Light Company, et al., 17 FERC 61,078 (1981), order on reh'g, 18 FERC 61,100 (1982); 40 FERC 61,077 (1987).

419 Houston Lighting and Power Company (HL&P) and Texas Utilities Electric Company (TU) also have on file "to or from and over tariffs" pursuant to the Commission orders.

FN420 See, e.g., CP&L and West Texas Interpool Transmission Service Tariff, § 4.1.

FN421 Compare 21 TEX REG 1397, LEXIS, mimeo at 18 (adopting hybrid pricing scheme with 70% of transmission rate based on regional postage stamp method and 30% based on the vector-absolute megawatt-mile method) with Id. at Article III.

We note that the Texas Commission concluded that the ERCOT portion of the costs of the North and East Interconnections "should be included in the cost of service, when the owners of the (Interconnections) amend the FERC tariffs for the use of the (Interconnections) to provide equal access to other utilities. 21 TEX REG, LEXIS, mimeo at 24.

422 It may be appropriate to have different rates for transmission service wholly within ERCOT or the SPP, and for service between the reliability councils. However, the same rates, terms, and conditions applicable for third parties should also be applicable to the CSW System's wholesale transmission requirements.

FN423 We recognize that this action may require amendment to the Commission's orders under FPA sections 210, 211, and 212, ordering the North and East Interconnections. In this regard, it should be clearly understood that the Commission's action in requiring comparable service by the CSW System is not in any way intended to result in public utility status to any ERCOT participants that are not public utilities—e.g., HL&P and TU. See 16 U.S.C. 824(b)(2).

424 All discounts must be posted on the transmission provider's OASIS.

425 A public utility is any person that owns or operates facilities used for the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce. An ISO will operate facilities used for the transmission of electric energy in interstate commerce and thus will be subject to the Open Access and OASIS rules.

426 FERC Stats. & Regs. 32,514 at 33,079.

427 Id. at 33,092.

FN428 On October 27, 1995, the Commission's staff sponsored a technical conference on the pro forma tariffs.

429 American Electric Power Service Corporation, et al., 71 FERC 61,393, modified, 72 FERC 61,287 (1995).

430 The Final Rule pro forma tariff is attached as Appendix D.

431 Additional comments concerning transition to flow-based pricing are summarized in Section IV.A.6.

432 E.g., BPA, Utilities For Improved Transition, PG&E, Duke.

433 We further clarify that, contrary to some commenters' interpretation, the Final Rule pro forma tariff is in no way a rejection of opportunity or incremental cost pricing.

434 As noted in Section IV.H., public utilities may propose variations that are consistent with or superior to the terms and conditions in the Final Rule pro forma tariff.

435 E.g., PSNM, WP&L.

436 Florida Power Corp's contract demand proposal would allow a network customer to nominate less than its full load for transmission service.

FN437 E.g., Cajun, NRECA.

438 Additional comments concerning the Pacific Northwest are summarized in Section IV.K.

439 E.g., OH Coops, Municipal Energy Agency Nebraska, UT Com.

440 Florida Municipal Power Agency v. Florida Power & Light Company, 74 FERC 61,006 (1996), reh'g pending.

441 Under the annual system peak method, system costs are allocated on the basis of each customer's contribution to the utility's annual system peak. Under the 12 CP method, system costs are allocated based on the average of the customer's usage at the time of the utility's 12 monthly system peaks.

442 A ratchet is a billing provision that imposes minimum payment obligations on utility customers.

FN443 See also Centerior, SCE&G, Detroit Edison.

444 In this context, diversity occurs when a customer's peak demand is not coincident with the transmission provider's system peak demand.

FN445 The use of this rate design is particularly applicable where customers who were taking bundled service convert to transmission-only service under the point-to-point tariff and ensures that transmission costs are allocated to point-to-point customers and network customers in a consistent manner.

446 FERC Stats. & Regs. 31,005 (1994).

447 Northeast Utilities Service Company (Northeast Utilities), 56 FERC 61,269 (1991), order on reh'g, 58 FERC 61,070, reh'g denied, 59 FERC 61,042 (1992), order granting motion to vacate and dismissing request for rehearing, 59 FERC 61,089 (1992), aff'd in relevant part and remanded in part, Northeast Utilities Service Company v. FERC, 993 F.2d 937 (1st Cir. 1993); Pennsylvania Electric Company (Penelec), 58 FERC 61,278 at 62,871-75, reh'g denied, 60 FERC 61,034 (1992), affd, Pennsylvania Electric Company v. FERC, 11 F.3d 207 (D.C. Cir. 1993).

FN448 Penelec, 58 FERC at 61,872; 60 FERC 61.034 at 61,126 (1992).

FN449 FERC Stats. & Regs. 31,005 at 31,138.

450 E.g., EEI, Consumers Power.

451 74 FERC 61,006 at 61,010 (1996), reh'g pending.

452 We caution all transmission providers that while our discussion here addresses the requirements necessary for a customer's transmission facilities to become eligible for a credit, the principles of comparability compel us to apply the same standard to the transmission provider's facilities for rate determination purposes.

453 E.g., Duke, SCE&G, AEP, FPL

454 The same requirements will apply to discounts from firm transmission service. Similarly, if a transmission provider offers an affiliate a discount for ancillary services, or attributes a discounted ancillary service rate to its own transactions, it must offer at the same time the same discounted rate to all eligible customers. Discounted ancillary services rates must be posted on the OASIS pursuant to new Part 37 of the Commission's regulations.

455 See also American Forest & Paper, AMP-Ohio.

456 See discussion in Section IV A.5.

457 The service itself, as opposed to reservations, is subject to the curtailment provisions discussed below.

458 E.g , Duke, Orange & Rockland.

459 E.g., TANC, Turlock, SMUD.

460 E.g., PSNM and Nebraska Public Power District.

461 Proposed Pro Forma Network tariff section 9 7—System Reliability.

462 The Final Rule pro forma tariff contains language allowing the transmission provider the discretion to interrupt firm transmission service in an emergency or other unforeseen condition in a manner suggested by these commenters. Section 11.6, Curtailment of Firm Service, of the Final Rule pro forma tariff provides:

However, the Transmission Provider reserves the right to interrupt, in whole or in part, firm Transmission Service provided under this Tariff when, in the Transmission Provider's sole discretion, an emergency or other unforeseen condition impairs or degrades the reliability of its transmission system.

The reference to curtailments being allocated on a proportional (pro rata) basis addresses situations where multiple transactions could be curtailed to relieve a constraint.

463 E.g., Florida Power & Light Company, Southern California Edison Company.

464 69 FERC 61,145 at 62,300 (1994) (proposed order), 74 FERC 61,220 (1996) (final order).

465 E.g , EEI, Utility Working Group, SoCal Edison

466 E.g., Arkansas Cities, NRECA.

467 E.g., Public Power Council, Washington Water Power, NWRTA.

468 See Florida Municipal Power Agency v. Florida Power & Light Company, 74 FERC 61,006 at 61,013 and n.70 (1996).

469 See also VEPCO, CSW, NYSEG, WP&L.

470 E.g., El Paso, Southern, NSP.

471 See discussion in Section IV.C.1.

472 E.g., IL Com, KY Com, VT DPS, GA Com.
FN473 E.g., CCEM, CA Energy Co.
474 E.g., Sierra, MidAmerican, Tucson Power
475 E.g., Puget, Sierra, NSP.
476 E.g., NRECA, Omaha Public Power District, Dairyland, AEC & SMEPA, PA Com, IL Com, TDU Systems.
477 E.g., NRECA, SC Public Service Authority, Seminole EC, TDU Systems.
478 E.g., EEI, Consumers Power, Montana-Dakota Utilities, CSW, Duke, BPA.
479 E.g., Blue Ridge, SMUD, LPPC, Salt River, Oglethorpe.
FN480 See also Omaha PPD, Salt River, MEAG, TAPS.
FN481 See also Omaha PPD.
482 See also Heartland.
483 See also Wisconsin Municipals, Omaha PPD, Salt River, MEAG, MMEWC, NE Public Power District.
FN484 See also TAPS.
485 We note that the application in Docket No. TX95-3-000 by Municipal Energy Agency of Nebraska was withdrawn on November 16, 1995.
486 Salt River Reply Comments at 2 See also NCMPA.
487 37 FPC 12, 37 FPC 495 (1967), aff'd sub nom. Salt River Project v. FPC, 391 F.2d 470 (D.C. Cir.), cert. denied, 393 U.S. 857 (1968).
FN488 See also Basin EC, Big Rivers EC (citing Golden Spread, 39 FERC 61,322, reh'g denied, 40 FERC 61,348 (1987)), RUS (asserting that RUS has exclusive authority over rural power cooperatives that have RUS loans).
FN489 See also McKenzie EC, NW Iowa Cooperative, TDU Systems, RUS (asserting that if cooperative voluntarily gives up its tax exempt status, the Commission should allow the related tax expense to be included in the rates charged to the non-member customers only), Brazos, Tri-State G&T, TAPS.
490 Brazos Initial Comments at 6.
491 E.g., NW Iowa Cooperative, TDU Systems, Big Rivers EC, Mor-Gran-Sou EC, San Luis Valley REC, Tri-County EC; see also RUS, MEAG, Brazos.
492 E.g., NRECA, Cajun, AEC & SMEPA, Seminole EC, TDU Systems.
493 FERC Stat. & Regs. at 33,050.
494 Public utilities would also be required to provide service during the pendency of any request for declaratory order. Otherwise, public utilities could continue to delay providing service.
495 See, e.g., Southwest Regional Transmission Association, 73 FERC 61,147 at 61,414 (1995).
496 See 26 U.S.C. 141.
FN497 See 26 U.S.C. 142.
498 Definition of Private Activity Bonds, 59 FR 67658 (December 30, 1994), Proposed Rules (to be codified at 26 CFR pt. 1).
FN499 The same would be true in the case of a G&T cooperative that is a tax-exempt entity under section 501(c)(12) of the Internal Revenue Code (26 U.S.C. 501(c)(12)) that would risk loss of tax-exempt status if more than 15 percent of its revenues are derived from business with non-members. We clarify that reciprocal service will not be required if providing such service would jeopardize the G&T cooperative's tax-exempt status.
FN500 A tariff offered by a non-public utility transmission provider to satisfy the reciprocity requirement may include a provision permitting the transmission provider to refuse service if providing such service would jeopardize its tax-exempt status or the tax-exempt status of its bonds. The non-public utility could file a declaration to this effect in an NJ docket.
501 26 U.S.C. 142(f)(2)(A).
FN502 See San Diego Gas & Electric Company, Docket No. ER96-43-000, Pro-Forma Point-to-Point Transmission Service Tariff, section 4.6(d); Network Transmission Service Tariff, section 4.7(d).
FN503 See Appendix D, Pro Form Open Access Transmission Tariff, Section 5.
504 This discussion applies to vertically integrated transmission providers. It may not apply, for example, to a transmission-only company or an independent system operator.
505 E.g., ABATE, CO Com, DOE, Florida Power Corp, IBM, IL Com, MN DPS, Industrial Energy Applications, Missouri-Kansas Industrials, NIEP, ND Com, PG&E, PSNM, SBA, SC Public Service Authority, TDU Systems.
FN506 E.g , SC Public Service Authority.
507 E g., Dayton, Carolina P&L, Citizens Utilities, Montana Power, Oglethorpe, OK Com, Seattle, Seminole EC, St. Joseph, Turlock, WA Com.
FN508 E g., Christensen, Seminole EC.

509 As described in the Transmission Pricing Policy Statement, a "conforming" proposal is one that meets the traditional revenue requirement and reflects comparability. FERC Stats. & Regs. 31,005 at 31,141.

FN510 Given the brief comment period on the compliance filings, we will require public utilities to serve copies of their compliance filings (via overnight delivery) on: all participants in their current open access rate proceedings (if applicable); all customers that have taken wholesale transmission service from the utility after the date of issuance of the Open Access NOPR; and the state agencies that regulate public utilities in the states of those participants and customers.

FN511 The Commission retains the right to reject such rates or to set them for hearing.

512 Group 2 public utilities must serve a copy of their filings (via overnight delivery) on all customers that have taken wholesale transmission service from them since March 29, 1995 (the date of issuance of the Open Access NOPR) and on the state agencies that regulate public utilities in the states where those customers are located.

FN513 But see note 510, supra.

514 As we stated in our "Further Guidance Order," American Electric Power Service Corp., 71 FERC 61,393, 62,539-40, order on rehearing, 72 FERC 61,287, order on rehearing, 74 FERC 61,013 (1995), all tariffs need not be "cookie-cutter" copies of the Final Rule tariff. Thus, under our new procedure, ultimately a tariff may go beyond the minimum elements in the Final Rule pro forma tariff or may account for regional, local, or system-specific factors. The tariffs that go into effect 60 days after publication of this Rule in the Federal Register will be identical to the Final Rule pro forma tariff; however, public utilities then will be free to file under section 205 to revise the tariffs, and customers will be free to pursue changes under section 206.

515 That determination included the situation in which a former bundled retail customer may need unbundled wheeling services from its previous public utility generation supplier, as well as unbundled wheeling from one or more intervening public utilities, in order to reach a distant generation supplier. In that scenario, the Commission would have jurisdiction over all of the transmission facilities used for the unbundled wheeling provided by the intervening public utilities. The NOPR also noted that the Commission would not have jurisdiction over the rates for the sale of generation by the distant supplier because the transaction would be a retail sale. FERC Stats. & Regs. 32,514 at 33,144.

FN516 The term "wheeling" is intended to cover any delivery of electric energy from a supplier to a purchaser, i.e., transmission, distribution, and/or local distribution. The Commission also has jurisdiction to order wholesale transmission services in either interstate or intrastate commerce by transmitting utilities that are not also public utilities. See Tex-La Electric Cooperative of Texas, Inc., 67 FERC 61,019 (1994), reh'g pending.

517 FERC Stats. & Regs. 32,514 at 33,145.

518 Id. at 33, 144-45.

519 As discussed infra, there also would be a component of local distribution in such a transaction that would be subject to state jurisdiction.

520 E.g., PG&E, Wisconsin Coalition, Com Ed.

521 E.g., NM Com, NC Com, AZ Com.

522 Oklahoma G&E Initial Comments at 16.

523 See also OH Com.

524 E.g., DOD, NM Com, KY Com, ABATE

525 See Public Utilities Commission v. Attleboro Steam & Electric Company, 273 U.S. 83 (1927).

526 IA Com Initial Comments at 4.

527 Natural Resources Defense Initial Comments at 3.

528 NV Com Reply Comments at 3

529 Sections 212(g) and 212(h) of the FPA.

FN530 We note that since OH Com filed its comments, it approved an interruptible buy-through plan. See Interruptible Electric Service Guidelines, Case No. 95-866-EL-UNC, _ PUR 4th _ (Ohio PUC Feb 15, 1996). See also Central Illinois Light Company, Docket No. ER96-1075-000, 75 FERC ___ (1996) (accepting amendment to open access transmission tariffs that expands service eligibility to accommodate participation in experimental retail wheeling pilot program approved by the Illinois Commerce Commission); Illinois Power Company, Docket No ER96-1285-000, 75 FERC ___ (1996); cf. Illinois Power Company, _ PUR4th _, No. 95-0494 (Illinois Commerce Commission Mar. 13, 1996) (offering retail direct access service providing transmission and ancillary services using the rates, terms, and conditions of Illinois Power's open access tariff on file with the Commission); recently introduced legislation in Rhode Island, H.B. 8124, the Utility Restructuring Act of 1996.

531 SBA Initial Comments at 36.

532 NC Com Initial Comments at 7.

533 NARUC Reply Comments at 15-16.

534 FERC Stats. & Regs. 32,514 at 33,080-83.

535 See id. at 33,082.

536 UT Com Initial Comments at 4-5.

537 NYSEG Initial Comments at 48 (footnote omitted).

538 NYSEG Initial Comments at 50.

539 Not only do we conclude that our determinations are legally supportable under the case law, but we believe it is imperative to provide guidance to public utilities and state regulators as to our position on where the jurisdictional boundaries lie.

540 The Commission's complete legal analysis on this issue, and on the related issue of what facilities are Commission-jurisdictional transmission facilities, and what are state jurisdictional local distribution facilities, are contained in Appendix G to this Rule.

FN541 Section 201(b)(1) specifically exempts from Commission jurisdiction facilities used for transmission in intrastate commerce and transmission of electric energy consumed wholly by the transmitter. As a result, we have no jurisdiction over retail wheeling that occurs in Alaska, Hawaii and the Electric Reliability Council (ERCOT) portion of Texas since transactions in those areas are intrastate.

542 The legislative history of FPA section 212(g) and its predecessor, former section 211(c)(3), indicates that the provision was focused on not interfering with state laws governing retail service territories and not permitting Commission wheeling orders "for purposes of sale by a utility to an ultimate consumer who is within the service territory of another utility (other than the applicant) where such territory is established by or under State law, rule, or decision." See H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 92 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 7797, 7826. Nothing on the face of section 212(g) or the legislative history of either the Energy Policy Act or PURPA indicates that the provision in any way affects the Commission's authority over rates, terms, and conditions of transmission in interstate commerce by public utilities.

543 Among other things, Congress left to the States authority to regulate generation and transmission siting. See FPA sections 201(b) and 211(d)(1); section 731 of the Energy Policy Act.

544 This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges.

545 Section 35.27 of the proposed rules provided that any public utility seeking authorization to engage in sales for resale at market-based rates shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity first placed in service on or after 30 days from the date of publication of the Final Rule in the Federal Register. FERC Stats. & Regs. 32,514 at 33,154.

546 As noted, the Commission's detailed legal analysis is contained in Appendix G. We are particularly persuaded by the Supreme Court's statement that whether facilities are used in local distribution is a question of fact to be decided by the Commission as an original matter. See CL&P, 515 U.S. at 534-35.

547 As noted above, states retain authority over state integrated resource planning, utility resource portfolios, and utility buy-side and demand-side decisions.

548 In order to give such deference, we expect state regulators to specifically evaluate the seven indicators and any other relevant facts and to make recommendations consistent with the essential elements of the Rule.

549 This should also alleviate some concerns about the potential for costs not being accounted for if the Commission and a state commission use different methods of allocating costs.

550 As discussed above, even if there were instances where no local distribution facilities are used, we believe states have authority over the service of delivering electric energy to end users.

FN551 I.e., the tariff would be different from the tariff that applies to wholesale customers. Such tariff would still be filed with the Commission under FPA section 205.

FN552 In applying the principles of the Final Rule to retail transmission tariffs, the Commission clearly cannot order retail wheeling directly to an ultimate consumer. See FPA section 212(h).

553 FERC Stats. & Regs. 32,514 at 33,095.

FN554 The Supplemental Stranded Cost NOPR described such an obligation as explicit at retail and arguably implicit at wholesale. FERC Stats. & Regs. 32,514 at 33,101.

FN555 Id. at 33,095-96, 33,101.

556 See, e.g., EEI, Atlantic City, Arizona, Carolina P&L, Centerior, Central Hudson, Detroit Edison, Duke, Duquesne, Entergy, Florida Power Corp, El Paso, Houston, NIPSCO, NU, Oklahoma G&E, Otter Tail, PG&E, Puget, Southern, San Diego G&E, SCE&G, SoCal Edison, Montana, Montana-Dakota Utilities, NSP, Utilities For Improved Transition, NC Com, PA Com, Electric Consumers Alliance, American National Power, NE Public Power District, MEAG, OH Coops, Seattle, NY Energy Buyers, SBA, TVA, Utility Workers Union, Big Rivers EC, Central EC, Citizens Lehman, NGSA, AGA, Montaup, NIEP.

FN557 See, e.g., EEI, Coalition for Economic Competition, EGA, CINergy, Electric Consumers Alliance, Atlantic City, Com Ed, Consumers Power, Dayton P&L, Dominion, Duke, El Paso, NEPCO, NIMO, NIPSCO, Ohio Edison, Florida Power Corp, PECO, Pennsylvania P&L, PSNM, Public Service Co of CO, Southern, SCE&G, VEPCO, Texas Utilities, DOE, CA Energy Com, CO Com, PA Com, NE Public Power District, SMUD, Brazos, Sunflower, PJM, Utility Workers Union, Utility Investors Analysts, Nuclear Energy Institute, SoCal Gas, AGA, Utility Shareholders, LPPC. Although DOD agrees that addressing stranded costs is a critical part of the transition to a more competitive industry, it submits that there is nothing in the Open Access NOPR that should affect the treatment of stranded costs because the Open Access NOPR would not change the contracts that govern existing wholesale transactions. It argues that the Commission will have ample opportunity to decide these matters before the present wholesale long-term contracts expire.

FN558 E.g., Utilities For Improved Transition, PECO, Utility Workers Union, Dayton P&L.

559 Utility Investors Analysts, Utility Shareholders.

FN560 See, e.g., EEI, SCE&G, Montana, Com Ed.

561 E.g., TAPS, IN Industrials, Air Liquide, Texas Industrials, Detroit Edison Customers, AMP-Ohio.

FN562 E.g., TDU Systems, Competitive Enterprise.

563 See, e.g., Missouri Joint Commission, Omaha PPD, American Forest & Paper, TAPS, AMP-Ohio, Kansas Commission, VA Com, Nucor, Torco, IPALCO, DE Muni, Municipal Energy Agency Nebraska, Air Liquide, Arkansas Cities, Detroit Edison Customers, Cleveland, Texas-New Mexico, Blue Ridge, Suffolk County, NM Industrials, PA Munis, Caparo, ABATE, NRRI, Building Owners, Alma, WEPCO, Total Petroleum. SC Public Service Authority asserts that the Commission has not adequately addressed the anticompetitive potential of exit fees and the potential shifting of losses from high-cost to low-cost producers. It says that the Commission should renotice any further proposal that it develops to permit a reasoned analysis of anticompetitive concerns.

FN564 E.g., TAPS, AMP-Ohio, IPALCO, Suffolk County, Competitive Enterprise, NY Energy Buyers, Supervised Housing, Central Illinois Light, WP&L, SC Public Service Authority, KS Com.

565 E.g., Alma, IPALCO, Suffolk County, CO Consumers Counsel, Arkansas Cities, Central Illinois Light, NY AG, NASUCA, VA Com, NY Energy Buyers, UT Industrials, NM Industrials, NJ Ratepayer Advocate, WEPCO, IN Industrials, ABATE, AZ Com.

566 E.g., ELCON, TDU Systems, Texas-New Mexico, Central Illinois Light.

FN567 However, Utilities for Improved Transition refers to a report by Moody's Investor Service estimating that the stranded costs of the Nation's 114 largest electric utilities under open access transmission will be $135 billion in the next ten years (13 to 14 times greater than the costs stranded by the introduction of open access transportation of natural gas). It notes that this estimate covers costs stranded by transmission in interstate commerce of both wholesale and retail power, and submits that both types of costs are relevant to this proceeding because of the Commission's jurisdiction over the transmission rates for wheeling to both wholesale and retail customers.

FN568 E.g., Central Illinois Light, Utility Workers Union, Alcoa.

FN569 See FERC Stats. & Regs. 32,514 at 33,105.

570 According to NRRI, the Commission did not "berate" electric utility management to sign uneconomic contracts in the manner that NRRI contends the Commission and Congress "berated" pipeline management. NRRI Initial Comments at 6. NRRI also objects that the proposed rule is a departure from what occurred in other deregulated industries (where no stranded cost recovery was allowed) and that the Commission should provide a fuller explanation as to why it believes allowing utilities full recovery of legitimate and verifiable stranded costs is the correct course of action.

571 E.g., Legal Environmental Assistance, Conservation Law Foundation.

FN572 E.g., TDU Systems.

FN573 E.g., EGA, LG&E. EGA and LG&E further argue that if a utility is able to abrogate a QF contract, a QF should be entitled to recover its costs based upon the same equities of reliance upon governmental approvals, changed regulatory regimes, and reasonable expectation.

574 VT DPS argues that under Order No. 636, the Commission allowed recovery of costs that would be rendered "unrecoverable" because the costs would not be incurred to provide transportation service and because there would be no wholesale load from which to recover the costs. It suggests that when a utility loses wholesale load or a municipality establishes a new distribution system, the utility's costs are not necessarily rendered unrecoverable.

575 E.g., PA Munis, Missouri Joint Commission, TAPS, Municipal Energy Agency Nebraska.

FN576 But see FPA section 212(a), 16 U.S.C. 824k(a).

FN577 RUS objects that, at the same time, an RUS-financed cooperative that is a transmitting utility would be required to provide reciprocal open access to its public utility supplier, which is also its customer and its competitor.

578 761 F.2d 768 (D.C. Cir. 1985).

579 E.g., VA Com, DE Muni, LG&E, Mountain States Petroleum Assoc.

FN580 ELCON July 25, 1995 Comments at 6.

581 Hereafter referred to collectively as the "new open access" or "open access transmission."

FN582 FERC Stats. & Regs. 32,514 at 33,101-02.

FN583 Contrary to NRRI's claim, and as explained in the NOPR (see, e.g., FERC Stats. & Regs. 32,514 at 33,063-68), the electric industry's transition to a more competitive market is driven in large part by statutory and regulatory changes beyond the utilities' control

FN584 As a result, the opportunity for wholesale stranded cost recovery under this Rule is limited to utilities that provided sales of generation and transmission under wholesale requirements contracts, and to utilities that provided service to retail customers that convert to wholesale customer status, and that face the potential inability to recover costs when their customers are able to reach new suppliers through open access transmission.

585 15 U.S.C. 3301 et seq.

FN586 AGD, 824 F 2d at 1021.

FN587 Id. at 1027.

588 Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol. Order No. 636, 57 FR 13267 (April 16, 1992), FERC Stats. & Regs. 30,939 (1992), order on reh'g, Order No. 636-A, 57 FR 36128 (August 12, 1992), FERC Stats. & Regs. 30,950 (1992); order on reh'g, Order No. 636-B, 57 FR 57911 (December 8, 1992), 61 FERC P61,272 (1993), reh'g denied, 62 FERC 61,007 (1993), appeal pending United Distribution Companies, et al., v FERC, No. 92-1485, et al., (D.C. Cir. Oral Argument Held Feb. 21, 1996).

FN589 See, e.g., Public Utilities Commission of the State of California v. FERC, 988 F.2d 154, 166 (D.C. Cir. 1993) ("FERC, with the backing of this court, has been at pains to permit pipelines to recover these (take-or-pay) costs, which have accumulated less through mismanagement or miscalculation by the pipelines than through an otherwise beneficial transition to competitive gas markets."); Western Resources, Inc. v. FERC, 72 F.3d 147 (D.C. Cir. 1995).

590 28 F.3d 173 (D.C. Cir. 1994) (Cajun).

591 FERC Stats. & Regs. P32,514 at 33,105-06.

592 E.g., APPA, ABATE, ELCON, Central Illinois Light, IL Com, VT DPS.

FN593 See, e.g., ELCON, American Forest & Paper, MMWEC, Cajun, IL Com, PA Com, VT DPS, Education, DE Muni, IN Industrials, Texas-New Mexico, Las Cruces, Blue Ridge, Suffolk County, Total Petroleum, NM Industrials, PA Munis.

594 E.g., Arkansas Cities, PA Munis, NM Industrials.

FN595 See Cajun, 28 F.3d at 179.

596 See, e.g., Suffolk County, Arkansas Cities, Education.

597 E.g., PA Com, NY Com, RUS

FN598 Cajun, 28 F.3d at 179 (emphasis in original).

599 SC Public Service Authority notes this distinction as well (Initial Comments at 78): "In Cajun, the court was not criticizing the recovery of stranded assets as an abstract matter, but specifically as an integral part of a set of tariffs designed to justify market-based rates on the basis that the open access tariff adequately mitigated market power despite the provision permitting recovery of stranded assets." It suggests that if the Commission decides to allow utilities to recover stranded costs from departing customers, any utility recovering such costs should not be allowed to charge market-based rates.

600 See, e.g., EEI, NEPCO, Centerior, Electric Consumers Alliance, Southern.

601 E.g., Omaha PPD, Com Ed, Florida Power Corp. Com Ed also submits that the argument by the petitioners in Cajun that "there really is no such thing as stranded investment, only a failure to compete" ignored the circumstances under which the investments were made. It states that electric utilities did not incur the costs of generation facilities (and long-term fuel and power supply contracts) because they were less efficient competitors, but to satisfy their obligation in a fully-regulated market to provide service to all who request it

602 See, e.g., Com Ed, Coalition for Economic Competition, NYSEG, Entergy.

FN603 See, e.g., K N Energy, Inc., 968 F.2d 1295 at 1301 (D.C. Cir. 1992), Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 874 (D.C. Cir. 1993).

604 E.g., EEI, Com Ed, Consumers Power, SoCal Edison, Salt River, Entergy.

FN605 See State of Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1483 (7th Cir. 1991), cert. denied, 502 U.S. 1094 (1992) (pipeline's refusal to transport gas that an LDC customer purchased from another supplier was "genuinely and reasonably motivated by the need to limit its potential take-or-pay liability, not by a desire to maintain its monopoly position by excluding competition in the sale of natural gas"); City of Chanute v. Williams Natural Gas Company, 743 F. Supp. 1437 (D. Kan.), aff'd, 955 F.2d 641 (7th Cir. 1990) (pipeline's refusal to transport third-party gas was motivated by legitimate business concerns, including desire to prevent take-or-pay liability, not by an anticompetitive motive).

606 72 F.3d 147 (D.C. Cir. 1995).

FN607 Id. at 152.

FN608 As we noted in the Supplemental NOPR, the same court had earlier instructed the Commission in the AGD case that the Commission must consider the transition costs borne by regulated utilities when the Commission changes the regulatory rules of the game. FERC Stats. & Regs. 32,514 at 33,106.

609 Id. at 33,065-67.

610 In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff provides that available transmission capability (ATC) must be calculated and posted on the transmission provider's Open Access Same-time Information System (OASIS) pursuant to new Part 37—OPEN ACCESS SAME-TIME INFORMATION SYSTEM AND STANDARDS OF CONDUCT FOR PUBLIC UTILITIES of the Commission's regulations. Section 37.6 provides in pertinent part that along with posting its ATC on its OASIS node, a public utility must make all data used in the calculation publicly available, on request. Section 37.4 provides that employees of the public utility and any affiliate that are engaged in merchant functions are prohibited from having preferential access to any transmission-related information. Additionally, the regulations provide auditing and monitoring procedures to safeguard against discriminatory practices.

FN611 In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff requires the provision of point-to-point and network service.

FN612 In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff requires reasonable time limits for responses to transmission requests. Specifically, Section 17.5 provides that a transmission provider must respond to a request for firm service as soon as practicable, but not later than thirty days after the date of receipt of a completed application.

FN613 In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff does not allow firm transmission service to be cancelled after the service has been commenced. However, Section 7.3 of the Final Rule pro forma tariff does provide that in the event of a customer default, the transmission provider may, in accordance with Commission policy, file and initiate a proceeding with the Commission to terminate service.

FN614 Cajun, 28 F 3d at 179-80.

615 Notably, the court stated: "This is, in essence, a tying arrangement, (citation omitted), and it might be fine if the purpose of the arrangement were not to cabin Entergy's market power." Id. at 177-78 (emphasis added).

616 FERC Stats. & Regs. 32,514 at 33,108.

617 See, e.g., EEI, Atlantic City, Arizona, Carolina P&L, Centerior, Com Ed, Duke, HP&L, Duquesne, Florida Power Corp, Omaha PPD, Alcoa, AEC & SMEPA, BG&E, Central Electric, Detroit Edison, El Paso, Montana-Dakota Utilities, Ohio Edison, PECO, PSNM, Southern, Sierra, SoCal Edison, Tucson Power, Utilities For Improved Transition, Cajun, NRECA, EGA, Electric Consumers Alliance, FL Com, PA Com, Knoxville, Salt River, KY Com, ND Com, California DWR, LA DWP, TVA, Utility Investors Analysts, Texas Utilities, LG&E, Utility Shareholders.

FN618 E.g., NC Com, UT Com, NJ Ratepayer Advocate.

619 E.g., SCE&G, Com Ed, Ky Com, NC Com. SCE&G states that the Commission misinterpreted its previous comments by suggesting in the Supplemental NOPR that SCE&G believed shareholders should bear part of the costs.

620 E.g., Texas Utilities, DOJ.

FN621 In its reply comments, Utility Working Group disputes DOJ's arguments that a transmission adder is analogous to an excise tax and would distort competition. It argues that DOJ's claim of price distortion ignores the fact that the costs that would be associated with a transmission adder consist of a portion of the previous wholesale power price—the markup above the utility's marginal cost that had regulatory approval. Utility Working Group says that because the utility's price and its competitor's price will contain this same charge for the utility's sunk and regulatory costs (the difference between the utility's regulated rate and its incremental cost), they will compete on the basis of their respective incremental costs. It also suggests that transmission adders can be designed on a lump-sum basis so that they are not tied to the amount of electricity purchased.

622 E.g., ELCON, NYMEX, IL Industrials, Missouri-Kansas Industrials, Philip Morris, Fertilizer Institute, Coalition on Federal-State Issues.

FN623 Some commenters also oppose the Commission's proposal to allow the recovery of generation-related costs through transmission rates as being in contravention of cost-causation principles (e.g., VT DPS) or in violation of section 212(a) of the FPA, which they contend limits cost recovery to transmission-related costs (e.g., IL Industrials, Las Cruces).

FN624 E.g., ELCON, IL Industrials, NY Energy Buyers, TX Industrials, Missouri-Kansas Industrials, Caparo, IBM, PA Munis, Education. For example, Caparo submits that business decisions by incumbent utilities are the cause of stranded costs.

FN625 In support of this proposition, the VT DPS cites Transwestern Pipeline Co., 44 FERC 61,164 at 61,536 (1988); El Paso Natural Gas Co., 47 FERC 61,108 at 61,314 (1989); El Paso Natural Gas Co., 72 FERC 61,083 (1995). It also contends that the Commission recently treated a notice provision in an El Paso contract as a conclusive, rather than a rebuttable, presumption. VT DPS cites other

differences between the Commission's treatment of the natural gas and the electric utility industries. It notes that the Commission has not proposed to allow existing wholesale electric customers to get out of their contracts early, as it did in the gas area.

626 E.g., ELCON, IN Industrials, Reynolds, Philip Morris, ABATE, Missouri-Kansas Industrials, Aluminum.

627 See, e.g., American National Power, NIEP, NSP, SBA, Coalition on Federal-State Issues, Pennsylvania P&L, Consolidated Natural Gas, Nordhaus, PA Munis. Consumers Power states that it does not oppose direct assignment, but asks that the final rule not preclude utilities from proposing alternative recovery mechanisms, including those that assess stranded costs on all transmission customers as part of the transmission rate. It suggests that utilities should not be precluded from showing that there may be countervailing reasons to assess stranded costs broadly among all transmission customers (e.g., where the costs assignable to a particular customer or group of customers may be so high as to create a dispute as to the propriety of direct assignment)

628 See, e.g., American Forest & Paper, Torco, Philip Morris, DE Muni, MT Com, IL Com, KS Com, Fertilizer Institute, Caparo, Las Cruces, IN Com, PA Munis, San Francisco, NRRI, Competitive Enterprise, ELCON, IN Industrials, UT Industrials, NY Energy Buyers, ABATE, CA Energy Co, Caparo, Education, Reynolds.

FN629 See, e.g., Fertilizer Institute, Caparo, DE Muni, PA Munis, MT Com, San Francisco, ELCON, IN Industrials, NY Energy Buyers.

630 As used in this Rule, "exit fee" refers to the charge that will be payable by a departing generation customer upon the termination of its requirements contract with a utility (if the utility is able to demonstrate that it reasonably expected to continue serving the customer beyond the term of the contract), whether payable in a lump-sum payment or an amortization of a lump-sum payment. (The same charge also can be paid as a surcharge on the customer's transmission rate.)

631 To counteract this potential disadvantage, we have provided procedures in this Rule, including a formula that the utility is to use to calculate a departing generation customer's stranded cost obligation, that allow a customer considering switching power suppliers to request a stranded cost determination from the utility at any time before the expiration of the customer's wholesale requirements contract. See Section IV.J.9.

632 In addition, because the customer would already know its stranded cost transmission surcharge, it presumably would have some certainty as to the costs of shopping for power. However, the stranded cost surcharge in its transmission rates subsequently may be adjusted upward if the utility providing transmission becomes eligible to recover retail-turned-wholesale stranded costs. Also, if the broad-based stranded cost surcharge is adjusted on an as-realized basis, the potential departing generation customer's surcharge may increase as a result of other customers leaving the utility's system.

633 As discussed in Section IV.A.5, we are not providing for a similar conversion right in this Rule.

634 FERC Stats. & Regs. 32,514 at 33,108.

635 968 F.2d 1295, 1300-01 (D.C. Cir. 1992) (quoting Alabama Electric Cooperative, Inc. v FERC, 684 F.2d 20, 27 (D.C. Cir. 1982) (emphasis in original).

FN636 Id. at 1301. See also Public Utilities Commission of State of California v. FERC, 988 F.2d 154, 169 (D.C. Cir. 1993).

637 Moreover, as we explained in the Supplemental Stranded Cost NOPR, the shifting of generation costs to transmission rates does not violate Commission policy where, as here, the customer that caused the costs to be incurred and stranded will continue to pay those costs. As we indicated, the only difference is that in some instances the customer will pay the costs through an adder to its transmission rate instead of through a generation rate. See FERC Stats. & Regs. 32,514 at 33,108 n.269.

638 See, e.g., Transwestern Pipeline Company, 43 FERC 61,240 at 61,654, order on rehearing, 44 FERC 61,164 at 61,536 (1988), relevant petitions for review dismissed as moot, Transwestern Pipeline Company v. FERC, 897 F.2d 570, 575-76 (D.C. Cir. 1990); El Paso Natural Gas Company, 47 FERC 61,108 at 61,314 (1989).

FN639 72 FERC 61,083 (1995). Further, VT DPS misinterprets the Commission's reference to the NOPR in that case. The Commission did not treat a notice of termination provision in El Paso's contract as a conclusive presumption that El Paso had no reasonable expectation of continuing to serve certain customers, as VT DPS contends. The Commission merely stated that "[e]ven if the rules proposed in [the Supplemental Stranded Cost] NOPR were applied here, El Paso would have difficulty justifying the exit fee proposed in light of the existence of the notice of termination provision in the contract." 72 FERC at 61,441.

640 See, e.g., Maryland v Louisiana, 451 U.S. 725, 748 (1981); Office of Consumers' Counsel v. FERC, 914 F.2d 292 (D.C 1990); National Fuel Gas Supply Corporation v. FERC, 900 F.2d 340, 342, 347-51 (D.C. Cir. 1990).

FN641 In Order No. 500, the Commission provided that if pipelines absorbed from 25 to 50 percent of their take-or-pay settlement costs, they could recover an equal amount from their firm sales customers in the form of fixed charges. Any balance could be recovered in the form of a commodity rate surcharge or a volumetric surcharge on total pipeline throughput. Order No. 500, FERC Stats. & Regs. 30,761 at 30,787 (1987). See also Order No. 528, 53 FERC 61,163 at 61,597 (1990). Moreover, we offered pipelines an important quid pro quo for absorbing take-or-pay costs under Order Nos. 500 and 528—a special presumption that they had been prudent in incurring their take-or-pay liabilities.

FN642 Order No. 636, FERC Stats. & Regs. 30,939 at 30,461.

643 FERC Stats. & Regs. 32,514 at 33,110.
FN644 Id. at 33,118.

645 Id. and nn. 273, 274.

646 E.g , PA Com, FL Com, PSNM, Southern, NC Com, Duke, Public Service Co of CO, SoCal Edison, PacifiCorp, Carolina P&L, NYSEG.

647 E.g., Sunflower, Sierra, Public Service Co of CO, Duke.

648 E.g., EEI, NYSEG, Southern, PA Com, SoCal Edison, Pacificorp, El Paso.

649 E.g., EEI, Public Service Co of CO, PA Com, Entergy, Florida Power Corp.

650 E.g., TDU Systems, NRECA, TAPS, Redding, Southwest TDU Group. VT DPS sees no urgent need for elimination of the §35.15 requirement or for automatic termination of sales service under a wholesale contract of more than three years duration. However, it supports pregranted authorization of service termination upon expiration of sales contracts with terms of less than three years. Among other things, it submits that the pregranted authority to terminate short-term service would relieve the utility of a planning uncertainty and allow it to maximize use of uncommitted transmission capacity.

651 TAPS, TDU Systems, FL Com, MMWEC

652 Although several commenters have asked the Commission to retain the prior notice of termination filing requirement due to concern that a utility nevertheless may be able to exercise generation market power with regard to a "new" wholesale requirements contract, we do not believe that retention of that provision is necessary to address these commenters' concerns. Instead, any party claiming to be aggrieved by a utility's alleged abuse of generation market power under a wholesale requirements contract can file a complaint with the Commission under section 206 of the FPA.

653 FERC Stats. & Regs. 32,514 at 33,113.
FN654 We invited comments on this proposal. Id. at 33,115.

655 See United Gas Pipeline Company v Mobile Gas Service Corporation, 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Company, 350 U.S. 348 (1956).
FN656 FERC Stats. & Regs. 32,514 at 33,113-14. We noted that under the Mobile-Sierra doctrine, a customer may waive its right to challenge the contract and/or the utility may waive its right to make unilateral rate changes. However, the parties may not waive the indefeasible right of the Commission to alter rates that are contrary to the public interest. Id. at 33,111.

657 Id. at 33,114-15.

658 E.g., ELCON, TAPS, Alcoa, Utilicorp.

659 E.g., Utilities For Improved Transition, Atlantic City.

660 E.g., Basin, Tri-County EC, NW Iowa Cooperative, Baker EC, Big Horn EC, Black Hills EC, Bon Homme Yankton EC, Carbon Power, Central EC, Douglas EC, East River EC, Ida County REC, James Valley EC, Lincoln-Union EC, McKenzie EC, North Dakota RECs, Oahe EC, Oliver-Mercer EC, Panhandle Coop, Rushmore EC, San Luis Valley EC, Slope EC, Spink EC, Turner-Hutchinson EC, Traverse EC, Union County EC, West River EC, Whetstone Valley EC, Woodbury County REC, Yellowstone Valley EC.
FN661 Basin indicates that all such contracts for the sale of more than 1,000 kW and any amendments thereto must be specifically approved by the RUS.

662 E.g., EEI, PSNM, AEP, Consumers Power. Consumers Power suggests that the language of proposed §35.26(c)(1)(iv) be modified to recite the Commission's public interest finding.
FN663 E g., Concord, Chugach, ME Consumer-Owned Utilities.

664 E.g., Utilicorp, AMP-Ohio, Environmental Action, DE Muni, Arkansas Cities, Direct Service Industries, PA Munis, ABATE, APPA.

665 See, e.g., American Forest & Paper, VT DPS, PA Munis, ABATE, ELCON, APPA, Environmental Action.

666 55 F.3d 686 (1st Cir. 1995) (Northeast Utilities).
667 PA Munis argues that Northeast Utilities provides no support for the Commission's proposed Mobile-Sierra finding because Northeast Utilities involved the effect of disputed contractual terms on third parties, not the alleged financial effect on the utility. It argues that the court found that the Commission had adequately explained how the disputed contractual terms may harm third parties to the contract (which PA Munis says the Commission has failed to do here). PA Munis also submits that the court went out of its way to emphasize the narrow scope of its order affirming the Commission.

668 E.g., ELCON, CCEM, VT DPS, OK Com, TDU Systems, LG&E, ABATE, Portland, Utilicorp, TAPS.

669 E.g., Knoxville, Memphis.

670 E.g., EEI, Florida Power Corp, PA Com, WP&L, Consumers Power, FL Com, TVA, SoCal Edison, Texas Utilities.

671 E.g., TAPS, TDU Systems, DOD, ELCON, APPA.

672 E.g., Sierra, Central Illinois Light, NY Energy Buyers, American Forest & Paper, WEPCO, EGA. Education proposes either a transition period that ends five years after the effective date of the final rule or a phase-out of the utility's authority to recover

stranded costs from departing customers by gradually reducing (for instance, over a ten year period from the date of the final rule) the percentage of stranded costs that the utility could recover.

FN673 E.g., TAPS, Missouri Joint Commission.

FN674 E.g., TDU Systems.

FN675 E.g., DOD, ABATE.

676 See UFIT Initial Comments at 34. Moreover, the cases that UFIT cites, in which the Commission rejected parties' efforts to devise rates based on methods or formulas contained in proposed rules, are inapposite. By establishing the July 11, 1994 cutoff date, the Commission is not "fix(ing) rates under section 206" or otherwise making "a Section 206 'determination,'" as UFIT suggests. Id. at 35, 36. The Commission has not proposed a change in the way that utilities compute their rates; it has simply put all parties on notice of the limited nature and opportunity for extra-contractual stranded cost recovery.

FN677 In response to the commenters representing electric cooperatives that object to the July 11, 1994 cut-off date, we do not believe that the requirement that RUS borrowers obtain RUS approval of their contracts necessarily prevents such borrowers from addressing stranded cost recovery in contracts executed after July 11, 1994.

678 We confirm that a notice of termination provision by itself (that is, one that does not also provide for or preclude recovery of stranded costs by the seller upon termination of the contract) is not an "explicit" stranded cost provision; however, as discussed in Section IV.J.8, the presence of a notice provision creates a rebuttable presumption that the utility had no reasonable expectation of continuing to serve the customer.

FN679 In the case of an existing wholesale requirements contract that does not contain an exit fee or other explicit stranded cost provision but does contain a notice provision, once a customer gives notice according to the terms of the contract that it will no longer purchase all or a part of its requirements from the selling utility, we would not allow the utility to amend the contract to add a stranded cost provision. However, in such a case, the utility could seek to recover stranded costs through its rates for transmission services to the customer. As discussed in Section IV.J.8, the utility would have to rebut the presumption that, based on the presence of the notice provision, it had no reasonable expectation of continuing to serve the customer.

680 FERC Stats. & Regs. 32,507 at 32,870.

681 See Utility Investors Analysts, Initial Comments at 2-3; Utility Shareholders, Initial Comments at 2-4.

682 The court concluded that the Commission "gave thoughtful consideration to the public interest." 55 F.3d at 693.

FN683 Id. at 689

FN684 Id. at 690.

685 Id. at 691, citing Northeast Utilities Service Company v. FERC, 993 F.2d 937, 961 (1st Cir. 1993).

FN686 Northeast Utilities, 55 F.3d at 691. The court distinguished the facts of that case from other Mobile-Sierra cases. It noted that "[t]he issue here is not whether one party to a rate contract filed with FERC can effect a rate change unilaterally, but the standard to be used by FERC in examining electric power contracts filed with it." Id. at 690-91. It also noted that the contract provisions under review were not low-rate issues in the context of Mobile and Sierra. We recognize that whether a contract should be modified to add a stranded cost provision could be viewed as one party to a contract seeking to effect a unilateral rate change, or as a low-rate issue (i.e., whether the utility's rates would be insufficient without stranded cost recovery). However, parties are being permitted to make such unilateral filings only after a generic finding by the Commission that the public interest likely would be jeopardized if utilities are not permitted to make a case-specific showing that recovery should be allowed. We believe that Northeast Utilities provides valuable guidance concerning application of the public interest standard where, as here, a failure to allow limited contract modification may harm the public interest by harming third parties.

FN687 The court found that the Commission had met the public interest standard "by explaining how the disputed contractual terms may harm third parties to the contract. * * * For example, the Commission found the automatic rate-of-return-on-equity adjustment provision unacceptable because third parties may ultimately bear the burden of a rate component that does not reflect actual capital market conditions. Likewise, the 'blank check' given owners of the power plant to determine the decommissioning costs for themselves under New Hampshire law is impermissible because it may be cashed at the expense of non-parties to the contract." Id. at 692 (emphasis in original). The court rejected the argument that the public interest standard is "practically insurmountable" in all circumstances. It noted, among other things, "that neither Mobile nor Sierra stated or intimated that the 'public interest' doctrine was 'practically insurmountable.'" Id. at 691.

688 Id. at 692 (emphasis in original).

689 FERC Stats. & Regs. 32,507 at 32,871.

690 This is consistent with the definition of existing requirements contracts we have used for purposes of stranded cost recovery.

691 The value of its assets could vary over time as new technologies emerge, fuel costs fluctuate, or environmental requirements change.

692 FERC Stats. & Regs. 32,514 at 33,127.

693 Id. at 33,128.

694 Id.

695 E.g., NARUC, ELCON, TAPS, NASUCA, N.Y. Mayors, NY Industrials, American Iron & Steel, Missouri Joint Commission, Omaha PPD, MI Com, NY Com, NJ BPU, VT DPS, OK Com, IN Com, UT Com, WA Com, Environmental Action, IN Industrials, LA DWP, Seattle, CAMU, Las Cruces, UT Industrials, Suffolk County, NM Industrials, CO Consumers Counsel.
FN696 ELCON Comments, dated July 25, 1995, at 41.

697 E.g., MD Com, MI Com, LA DWP, Las Cruces. For example, MD Com states that while open access transmission may make municipalization more attractive, it ultimately is MD Com's approval that makes municipalization possible in Maryland.
FN698 E.g., MD Com, Las Cruces, Caparo, Coalition on Federal-State Issues, IN Com, MI Com, Iowa Board.

699 E.g., IL Com, CA Com, Midwest Commissions, CO Consumers Counsel.

700 E.g., LA DWP, Ohio Manufacturers, MMWEC, American Iron & Steel, UT Industrials, MI Com, NY Industrials, WA Com, Caparo.
FN701 E.g., American Iron & Steel, MD Com, LA DWP, Suffolk County, MI Com, NJ BPU, N.Y. Mayors. NASUCA cites practical problems posed by the Commission's proposal to assume jurisdiction over stranded costs resulting from municipalization, such as how the Commission would transfer the revenues extracted from the retail-turned-wholesale customer to a non-wholesale, locally-franchised entity.

702 NARUC Initial Comments at 18-19.

703 E.g., N.Y. Mayors, NIEP, Wing Group, VT DPS, NY Industrials, American Iron & Steel, Environmental Action, IN Industrials, Las Cruces, Caparo, UT Industrials.
FN704 E.g., IN Com.

705 E.g., VT DPS, American Iron & Steel. American Forest & Paper states that allowing stranded cost recovery in the event of municipalization would be inconsistent with the Commission's actions in the natural gas industry, where the Commission has encouraged competition at the retail level (through competitive bypass rather than franchise competition) and has not imposed transition charges or exit fees on converting customers.
706 VT DPS Initial Comments at 49; see also American Iron & Steel, NY Industrials, Caparo.

707 63 FERC 61,212 (1993), reh'g denied, 64 FERC 61,087 (1993).
FN708 See Massachusetts Electric Company, 68 FERC 61,101 (1994); Letter Order dated March 3, 1995, Docket No. ER94-129-000 (approving settlement).

709 E.g., EEI, PSE&G, Centerior, Com Ed, Consumers Power, Detroit Edison, Duke, El Paso, Entergy, LILCO, Minnesota Power, Montana-Dakota Utilities, NYSEG, PECO, PG&E, PSNM, Southern, Utilities For Improved Transition, Allegheny, OH Com, Utilicorp, PA Com, WI Com, Coalition for Economic Competition, Central Louisiana, United Illuminating, Utility Investors Analysts, Nuclear Energy Institute, Utility Shareholders.
FN710 E.g., Consumers Power, Coalition for Economic Competition, Utilities For Improved Transition.

711 E.g., Detroit Edison, Minnesota Power, El Paso, LILCO, Centerior, PG&E. PG&E urges a clarification in the rule so that the Commission would address retail-turned-wholesale stranded costs only if the state commission either lacks jurisdiction over municipal utilities, or, if it has jurisdiction, declines to address stranded costs. Where a state commission possesses jurisdiction over municipal entities and provides a utility with stranded cost recovery from former retail customers that have municipalized, PG&E proposes that such action should be final and not subject to Commission review. Other commenters, such as El Paso, ask the Commission to establish itself as the forum of last resort when states do not provide for full recovery of stranded costs.

712 E.g., Coalition for Economic Competition, El Paso.

713 E.g., EEI, Minnesota Power, Centerior, Public Service Co of CO, SoCal Edison, Coalition for Economic Competition. PG&E asks that we allow utilities to seek recovery at the Commission for stranded costs attributable to former retail customers that have become customers of existing public agencies or municipal utilities where such costs cannot be collected at the state level.
FN714 E.g., Centerior, Coalition for Economic Competition, PG&E. Coalition for Economic Competition proposes that the Commission accept just and reasonable regional stranded cost recovery mechanisms in such situations to enable regional transmission associations (whether through pool and interpool arrangements or regional transmission groups) to collect through Commission-filed rate schedules from interconnected utilities charges equal to the costs otherwise stranded as a result of Commission-jurisdictional service realignments.

715 E.g., SoCal Edison, OH Com, NY Com, MI Com, Coalition on Federal-State Issues.
FN716 E.g., MI Com, NY Com, Ohio Com.
FN717 PG&E proposes a similar approach, noting that if there are differences in the stranded cost method used by the Commission and the states, an incentive may remain for retail customers to municipalize merely to take advantage of more favorable stranded cost treatment at the Commission.

718 Costs that are exposed to nonrecovery when a retail customer or a newly-created wholesale power sales customer ceases to purchase power from the utility and does not use the utility's transmission system to reach a new generation supplier (e.g., through self-

generation or use of another utility's transmission system) do not meet the definition of "wholesale stranded costs" for which this rule provides an opportunity for recovery. Such costs are outside the scope of this rule because such costs would not be stranded as a result of the new open access. See Section IV.J.12.

FN719 We recognize that we took a different approach to retail-turned-wholesale stranded cost recovery in United Illuminating, where we suggested that state and local regulatory authorities or the courts should be able to provide an adequate forum to address retail franchise matters, including recovery of stranded costs caused by municipalization, but said we would consider revisiting the question if United Illuminating could demonstrate the lack of a forum. 63 FERC at 62,583-84 Since the issuance of that decision, however, we have had an opportunity to re-analyze the nature of the stranded cost problem in cases where a retail customer becomes a wholesale customer, including the potential that there might not be a state regulatory forum for recovery of such costs. In these circumstances, we have determined that where such costs are stranded as a result of wholesale open access transmission, these costs should be viewed as wholesale stranded costs and this Commission should be the primary forum for addressing their recovery.

720 The CA Com has asked that, "(t)o the extent of FERC's authority, it should assume jurisdiction to fulfill a backstop role in case retail customers evade a state-determined transition charge by becoming retail customers of an entity not subject to the state regulatory commission's jurisdiction. In assuming jurisdiction, the Commission should defer to the state commission's determination and allocation of stranded costs for the departing retail customer." CA Com March 18, 1996 Response to Supplemental Comments of PG&E.

721 As discussed in Section IV.I, the Commission's authority to address retail stranded costs derives from its jurisdiction over the rates, terms and conditions of unbundled transmission in interstate commerce used by retail customers that obtain retail wheeling. The states' authority derives from state jurisdiction over local distribution facilities and over the service of delivering electric energy to end users, and from the authority to impose, among other things, retail exit fees and surcharges on local distribution rates.

FN722 We proposed to require the same evidentiary demonstration for recovery of stranded costs from a retail customer that obtains retail wheeling as that required in the case of a wholesale requirements customer. We also reaffirmed our proposal in the initial Stranded Cost NOPR that a utility will have to show that the stranded costs are not more than the net revenues that the retail customer would have contributed to the utility had it remained a retail customer of the utility, and that the utility has taken and will take reasonable steps to mitigate stranded costs. FERC Stats. & Regs. 32,514 at 33,128.

723 As we noted in the Supplemental NOPR, a state may require payment of an exit fee before a franchise customer is permitted to obtain unbundled retail wheeling. If local distribution facilities are used by a retail wheeling customer, the state may allow recovery of stranded costs through rates for use of such local distribution facilities. In addition, as discussed in Section IV.I, because we believe that states have authority over the service of delivering electric energy to end users, not merely the local distribution facilities themselves, state authorities can assign stranded costs and benefits through a local distribution service charge, and may do so based on usage (kWh), demand (kW), or any combination or method they find appropriate. If a state decides not to take any of these routes, it may consider whether to allow recovery of stranded costs from remaining retail customers or whether shareholders should bear all or part of those costs. Id. at 33,129.

FN724 Id. at 33,129-30.

FN725 Id. at 33,098 n 230.

726 E g., Utilicorp, Houston L&P, PG&E, Freedom Energy Co, WI Com.

727 E.g., EEI, EGA, Coalition for Economic Competition, Utilities for Improved Transition, Atlantic City, Arizona, Centerior, Com Ed, Detroit Edison, El Paso, LILCO, NU, NSP, NYSEG, United Illuminating, BG&E, Sierra, Southern, UT Industrials, NRECA NRECA argues that unless the Commission addresses stranded costs caused by retail wheeling where a state commission lacks authority, or has authority but decides not to exercise it, there could be a jurisdictional gap into which many rural electric cooperatives could fall.

FN728 E.g., CSW.

729 E.g., EEI, Illinois Power, PSNM, Entergy, Nuclear Energy Institute, Coalition for Economic Competition.

FN730 E.g., Coalition for Economic Competition, Illinois Power, Utilities for Improved Transition, EEI.

FN731 EEI notes, for example, that as use of electrical facilities shifts between retail and wholesale, jurisdiction over the rates to recover the allocated cost of service shifts between state commissions and this Commission, and that the regulatory authority is determined by the nature of the transactions and the classification of the customer, not the jurisdiction under which the costs originally arose.

732 E.g., Illinois Power, Utilities For Improved Transition, EEI, Coalition for Economic Competition.

FN733 EEI Initial Comments at IV-13; see also Coalition for Economic Competition Initial Comments at 23-31.

734 See also SoCal Edison.

735 Opinion 234, 31 FERC 61,305, on reh'g, 32 FERC 61,425 (1985).

FN736 875 F.2d 903 (D.C. Cir. 1989), cert. denied sub nom. Mississippi v FERC, 494 U.S. 1078 (1990).

737 E.g., NU, Coalition for Economic Competition, Illinois Power, EEI.

FN738 E.g., NEPCO, EEI, Coalition for Economic Competition, Entergy.

739 E.g., LILCO, Coalition for Economic Competition.

740 E.g., NU, NSP, Illinois Power, Coalition for Economic competition, PSE&G, Utilities For Improved Transition, Philip Morris, EEI.
FN741 Freedom Energy Co. rejects this argument on the basis that state regulation has never been wholly consistent and yet utilities have not asked for federal unification of state ratemaking policies or resolution of differences.
FN742 E.g., PSNM, GA Com, Omaha PPD, Illinois Power.

743 E g., CA Com, MD Com, VA Com, IN Com, NH Com, NV Com, NY Com, OH Com, FL Com, AZ Com, TX Com, ELCON, NY Industrials, NY AG, NY Consumer Protection, MA DPU, Iowa Board, IN Industrials, Texas Industrials, NM Industrials, Reynolds, NYMEX, Legal Environmental Assistance, CO Consumers Counsel, NJ Ratepayer Advocate, IBM, ME Industrials, Jay, WEPCO, NH General Court.

744 E.g., NARUC, ELCON, NY Industrials, NM Industrials, NV Com.
FN745 16 U.S.C. 824(a).
FN746 See also Freedom Energy Co. Reply Comments.

747 E.g., ELCON, PA Com, NY Industrials, ND Com, VA Com, NM Com.
FN748 E.g., OH Com, NY Industrials, NM Com, IN Com, WA Com, NV Com, NY Com, Suffolk County, NY AG, Tonko, PA Industrials, NH General Court.

749 E.g., OH Com, PA Com, NM Com, CA Com, Blue Ridge.

750 E.g., Nucor, AEC & SMEPA.

751 E.g., NY Industrials, EGA, NJ BPU, Coalition on Federal-State Issues.
FN752 E.g., Iowa Board, Nevada Commission, CCEM; see also NE Public Power District.

753 E.g., IL Com, PG&E, Public Service Co of CO.

754 E.g., NRECA, Wisconsin EC, EEI, PECO, Missouri Basin Group.

755 E.g., MT Com, Entergy.

756 E.g., NARUC, Entergy Retail Regulators, MS Com, Al Com.
FN757 E.g., NARUC, MS Com

758 E.g., Homelessness Alliance, Black Mayors, National Women's Caucus, Vann, La Raza.
FN759 NARUC and OH Com assert that, in determining whether a wholesale transmission transaction is a "sham," the Commission should consider a retail customer's intent to bypass responsibility for supporting social programs

760 E.g., Natural Resources Defense, NW Conservation Act Coalition, Seattle, FTC, Northeast States for Coordinated Air Use Management, NARUC, OH Com. CO Com agrees that states should have the option to fund such programs through the imposition of surcharges on any form of electric service used to benefit retail customers, including surcharges on retail transmission rates. Seattle proposes either a simple fee on kWhs or a differential fee based on the type of resource and its environmental affects. DOE urges the Commission to work with state regulators to ensure that states have the ability to recover stranded retail costs and benefits in a way that prevents cost-shifting, forum-shopping, and uneconomic bypass (including bypass of stranded benefits).
FN761 CO Com notes that the NOPR proposes to limit states to funding mechanisms that can be implemented solely at the local distribution level, presumably through the use of a surcharge on distribution facilities or so-called "fee at the meter" or the use of a local distribution system revenue decoupling mechanism. It suggests that neither of these options may be legally or practically feasible in many states for a wide variety of reasons (but does not expand on these reasons).
FN762 Natural Resources Defense proposes that the Commission adopt the following language: "The FPA does not affect state regulators' jurisdiction to apply distribution charges—either volume-based or fixed—to electricity that is used by any utility customer to provide end-use services (as distinguished from electricity that is purchased for resale to end-use customers)." Natural Resources Defense Initial Comments at 3.

763 "State regulatory authority" has the same meaning as provided in section 3(21) of the FPA.

764 We reject the arguments of EEI and Coalition for Economic Competition that the Commission made findings in the initial stranded cost NOPR that "inexorably" lead to the conclusion that Commission action providing full recovery of retail stranded costs is required. Their reliance on Williams Natural Gas Company v. FERC, 872 F.2d 438 (D.C. Cir. 1989), appeal after remand, 943 F.2d 1320 (D.C. Cir. 1991) (Williams), is simply misplaced. Williams involved a rulemaking that was terminated by the Commission. The court stated that the Commission, "having expressed these tentative views (that the incentive price for tight formation gas would disserve the public interest) and having solicited comments on the issue, was not free to terminate the rulemaking" without providing a satisfactory explanation. 872 F.2d at 446, 450. Here, in contrast, we are issuing a Final Rule that reaffirms in many respects preliminary findings proposed in both the initial and Supplemental Stranded Cost NOPRs. Although the conclusion we reach based on those findings may be different than that which some commenters advocate, we have fully explained the basis for our decision.

FN765 In these circumstances, the cases cited by commenters to support the proposition that an agency is not authorized to abdicate its statutory responsibilities or to delegate to parties and intervenors regulatory responsibilities (such as preparation of an environmental impact statement) are factually distinguishable and inapposite. See, e g., FPC v. Texaco, 417 U.S. 380, 394 (1974) (Commission cannot exempt small-producer rates from compliance with just and reasonable standard); United States v. City of Detroit, 720 F.2d 443, 451 (6th Cir. 1983) (district court inappropriately implied waiver of EPA statutory duty under Title II of the Federal Water Pollution Prevention and Control Act); State of Idaho v. ICC, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (an agency cannot abdicate its NEPA responsibilities in favor of the regulated party).

766 As discussed in the Supplemental NOPR (FERC Stats. & Regs. 32,514 at 33,129-30), these mechanisms include requiring an exit fee before a franchise customer is permitted to obtain unbundled retail wheeling and imposing a surcharge on local distribution rates. Commenters identified several other possible mechanisms in response to the initial Stranded Cost NOPR.

767 As we stated in the Supplemental NOPR, we do not address whether states have the lawful authority to order retail wheeling in interstate commerce. Id. at 33,098 at n.228. In addition, we are neither endorsing nor discouraging retail wheeling.

FN768 See id. at 33,098, 33,127-28.

769 See Public Utilities Commission of the State of California v. FERC, 988 F.2d 154, 163-66 (D.C. Cir. 1993).

770 FERC Stats. & Regs. 32,514 at 33,117.

771 Id. at 33,118.

772 Id. at 33,128

773 E.g., Carolina P&L, CSW, Duke, Utilities for Improved Transition, Montaup, TVA, MidAmerican. MidAmerican states that, for years, utilities have entered into wholesale contracts containing termination notice provisions and, for years, customers have renewed and renegotiated those contracts. Duke agrees that more important indications of the utility's reasonable expectation of continuing to serve the customer can be found where the service has been included in the IRP process or the contract has been repeatedly renewed. Orange & Rockland proposes that there be a rebuttable presumption of recovery for long-standing (at least 10 years) contracts between utility affiliates on the basis that the existence of a long-standing relationship is of greater significance than a notice provision.

774 E.g., CSW, IN Com.

775 E.g., El Paso, Utilities For Improved Transition.

776 See, e.g., ELCON, NRECA, APPA, American Forest & Paper, Central Montana EC, Municipal Energy Agency Nebraska, Arkansas Cities, Direct Service Industries, Atlantic City, TDU Systems, Fertilizer Institute, LG&E, ABATE, Oglethorpe.

FN777 E.g., TAPS, Missouri Joint Commission, Detroit Edison Customers, LEPA, APPA, Cleveland.

FN778 According to LEPA, the normal set of NRC license conditions included an explicit wheeling commitment and many of the license conditions clearly referenced the possibility that the wheeling commitment would lead to the loss of customers to whom the utility had been selling bulk power supply as well as retail power. LEPA submits that acceptance of such license conditions should have ended any reasonable expectation that a utility might have had of continuing to serve a full requirements customer, wholesale or retail, after the termination of its contract.

779 See FERC Stats. & Regs. 32,514 at 33,117.

FN780 E.g., TAPS, Phelps Dodge. Phelps Dodge suggests that evidence of past contract renewals, by itself, should not serve to rebut the presumption that the utility has no reasonable expectation of contract renewal in the future.

FN781 In contrast, EEI believes that lack of access to alternative suppliers can be evidence that a utility reasonably expected to continue to serve a customer.

782 If the investment now alleged to be stranded was incurred after the most recent amendment or extension to the contract, TAPS would focus the reasonable expectation review on such later date.

783 E.g., IL Com, Utilicorp, PSG&E, NM Industrials.

FN784 453 U.S. 571 (1981).

785 E.g., Florida Power Corp, Consumers Power, FL Com, TDU Systems.

786 E.g., PA Com, Com Ed, CSW, United Illuminating, UFIT, PSNM, TDU Systems.

787 E.g., Com Ed, Central and Southwest, United Illuminating, Utilities For Improved Transition, Utility Investors Analysts, Utility Shareholders.

FN788 E.g., EEI, Minnesota Power, PECO, Puget, Centerior, Florida Power Corp, FL Com, Southern, SoCal Edison, NEPCO, Consumers Power, Coalition for Economic Competition. NEPCO asserts that the Supplemental Stranded Cost NOPR does not cite any comments or evidence casting doubt on the Commission's initial proposal (in the initial Stranded Cost NOPR) not to apply the reasonable expectation test to retail-turned-wholesale or retail customers that obtain retail wheeling on the basis that utilities operating under an obligation to serve at retail necessarily have an entitlement to recover the costs prudently incurred in fulfillment of that obligation.

FN789 E.g., EEI, Detroit Edison, Centerior, Consumers Power, Ohio Edison.

790 E.g., Wing Group, Alma, Total Petroleum, Cleveland, ABATE, N.Y. Mayors, CAMU, Suffolk County.

FN791 E.g., Wing Group, Total Petroleum, ABATE, CAMU, NY Mayors. Proposals advanced by commenters to address non-exclusive franchises include suggestions that the Commission: summarily reject claims to recover retail stranded costs where the utility has a non-exclusive franchise and historically has been subject to retail competition (e.g , Cleveland), apply a rebuttable presumption that a utility had no reasonable expectation of continued service where a municipal franchise is expiring and the municipality has put the retail supplier on notice that the municipality may seek an alternative source of power supply (e.g., Las Cruces); or provide that no stranded cost claim will be entertained absent a showing, by reference to applicable state law, that the utility had an exclusive service franchise obligation or was otherwise subject to an obligation to serve the customer that is departing its system (e.g., Phelps Dodge).

792 E.g., Utility Working Group, SoCal Edison, Florida Power Corp, PG&E. Referring to the Commission's statement that it expects the reasonable expectation test to be easily met in those instances in which state law awards exclusive territories and imposes a mandatory obligation to serve, Utility Working Group asks the Commission to make clear in the final rule that it did not intend by that example that utilities with non-exclusive service territories would be presumed to fail the reasonable expectation test. According to Utility Working Group, the focus of the test must be on the utility's obligation to serve, which may be separate from any franchise arrangements.

793 The examples that the Commission provided in the Supplemental NOPR of possible ways to establish reasonable expectation were not intended to be dispositive of the issue. As we make clear in this Rule, whether a particular utility had a reasonable expectation that a contract would be extended will depend on all of the facts and circumstances

794 However, if the remote customer does not use the former supplying utility's open access tariff to reach the new supplier, there would be no "wholesale stranded costs" as that term is defined in this Rule In this situation, we would not allow extra-contractual recovery of stranded costs. Thus, there would be no need to address reasonable expectation. See Section IV.J.12.

795 The same procedures would apply to retail customers that obtain retail wheeling.

796 FERC Stats. & Regs. 32,507 at 32,872.

797 Id. at 33,121.

798 Id.

799 Id. at 33,123. We also asked how revenues received as a result of mitigation measures should be reflected in the determination of the amount of recoverable stranded costs; what special accounts, if any, should be created to track revenue liability for specific customers, revenues from mitigation measures, and other revenues received by the utility that offset the stranded cost liability; whether any adjustment should be permitted to the revenues that the utility claims will be realized in a competitive market for its stranded assets, and if so, how often and under what circumstances. Further, we sought comments on whether there are special costs that warrant some special consideration in the determination of stranded cost liability under a revenues lost approach, and if so, how they should be treated. Id. at 33,121-22.

800 Id. at 33,122.

801 Id. at 33,114-15.

FN802 Id. at 33,115.

803 E.g., Centerior, NYSEG, Florida Power Corp, Houston L&P, NIMO, Orange & Rockland, Com Ed, PSE&G. EEI, PECO, Texas Utilities, PG&E, SoCal Edison, Dayton P&L, El Paso, IL Com, United Illuminating, Nuclear Energy Institute.

804 E.g., LG&E, TAPS, TDU Systems, ABATE, Blue Ridge, NY Energy Buyers, WP& L, PA Com, KY Com, American National Power, ELCON, Texaco, UT Com, NARUC, NIEP, DE Muni, Reynolds, Knoxville, Alma, APPA, NY Industrials, IL Industrials, SC Public Service Authority, Caparo, American Forest & Paper.

FN805 E.g., NIEP, DE Muni and TDU Systems.

FN806 E.g , SC Public Service Authority, ABATE, NY Energy Buyers, NARUC, ELCON, American Forest and Paper, APPA.

FN807 E.g., NARUC, NYSEG.

FN808 E.g., NRECA, NIEP, TDU Systems.

FN809 E.g., TDU Systems, Blue Ridge, NY Energy Buyers.

FN810 E.g., UT Com.

811 E.g., Utility Investors Analysts, Public Power Council, Atlantic City, EEI, PA Com, NYSEG, Central Montana EC, Nebraska Public Power District, LG&E ABATE.

FN812 nSeveral commenters (Illinois Power, Oklahoma G&E, and Utility Investors Analysts) suggest that the Commission hold a technical conference to discuss how best to define the calculation of the formula components.

FN813 Central Montana EC and NY Energy Buyers.

FN814 See EEI, Electronic Data Systems, Knoxville, NIMO, NYSEG, NY Energy Buyers, Reynolds.

815 E.g., Nuclear Energy Institute, EEI, Consumers Power, PA Com, Oklahoma G&E, Portland, Knoxville, MidAmerican, Seattle, Salt River, Washington and Oregon Energy Offices, SMUD, Caparo.

FN816 Some commenters (e.g., Alma, Freedom Energy) oppose such flexibility. Alma maintains that clarity of rules is needed to provide participants in the competitive market as much certainty as possible about stranded cost charges likely to be recovered before they engage in alternative transactions. Freedom Energy similarly supports across-the-board or generic standards, as opposed to a case-by-case approach.

817 E.g., Centerior, Com Ed, Duke, Entergy, Florida Power Corp, Utility Investors Analysts, CA Energy Co, CSW.

818 E.g., Alma, ABATE, DOD, TDU Systems, ELCON.

FN819 E.g., NRECA, CA Energy Co, ABATE, DOD.

820 E.g., EEI and various investor-owned utilities, Nuclear Energy Institute, NC Com, Legal Environmental Assistance, EPA, Utilities for Improved Transition, PA Com.

821 E.g., TAPS, WP&L, UT Industrials, UtiliCorp, American Forest & Paper.

822 E g., DC Com, Sustainable Energy Policy, Washington and Oregon Energy Offices.

823 E.g., AEC & SMEPA, Electronic Data Systems, Freedom Energy Co, LG&E, American National Power, EGA, Entergy, AMP Ohio, TDU Systems, TAPS, Las Cruces.

FN824 TDU Systems proposes that the Commission allow for the recovery of stranded benefits in one of two ways: (1) Require direct payment of stranded benefits to a wholesale purchaser whose contract is terminated; or (2) allow a party to continue to receive power at cost-based rates for a period sufficient for the purchaser to be "transitioned" into a competitive market.

825 E.g., ELCON, NY Energy Buyers, SMUD, Caparo.

826 E.g., Centerior, Duke, Entergy, Com Ed, Houston L&P, Florida Power Corp, Carolina P&L, NRRI, WP&L, DOE, CSW, UtiliCorp, LG&E, FL Com.

FN827 E.g., WP&L, DOD, Duke, PSNM, ABATE, Houston L&P. The Commission notes that the New York Mercantile Exchange only recently began trading in electricity futures and that such trading was limited to two delivery points located within the Western Interconnection.

828 E.g., MI Com, NSP, NY Energy Buyers, KS Com.

FN829 E.g., KS Com, NY Energy Buyers.

830 Commenters that support a one-time, up-front approach include FL Com, Dayton P&L, Portland, DE Muni.

FN831 Commenters that support true-ups include ELCON, NYSEG, MN DPS, Reynolds, TAPS, NIMO, DOE, Electric Consumers Alliance, Com Ed, United Illuminating, SoCal Edison.

FN832 DE Muni urges rejection of true-ups on the basis that true-ups represent guaranteed recovery of 100 percent of stranded costs.

833 E.g., Electronic Data Systems, Alma, American National Power, CA Energy Co, NARUC, NRECA.

834 E.g., Atlantic City Electric, EGA, Conservation Law Foundation.

835 E.g., Utility Investors Analysts, Duke, PSE&G, Com Ed, United Illuminating, Entergy.

FN836 E.g., NIEP, LG&E, TDU Systems, EGA, NY Energy Buyers, ELCON, American National Power.

837 E.g., LG&E, Allegheny, TDU Systems, EGA, AMP Ohio, CA Energy Co, WP&L, Torco.

FN838 CA Energy Co maintains that an anticompetitive intent could be hidden by the argument that power must be dumped to mitigate stranded costs. It thus submits that, even without intending to do so, a utility could cripple competition by depressing market rates to artificially low levels.

839 E.g., TDU Systems, Arkansas EC.

840 See, e.g., CA Energy Co

FN841 See, e.g., PSNM.

FN842 See WP&L.

FN843 E.g., EEI, PA Com, AMP Ohio, TAPS.

FN844 E.g., ABATE, Fertilizer Institute, IL Com, KS Com, San Francisco, UT Industrials, ELCON, CA Energy Co, MT Com, Caparo, WA Com, Education, NRRI, NY Energy Buyers, Reynolds, DOD, DC Com.

845 See, e.g., Florida Power Corp, Central and South West, Com Ed, EEI, Montana, PECO, Minnesota DPS, NIMO, NSP, SoCal Edison, PA Com, Central Louisiana, Utility Investors Analysts, Salt River, Orange & Rockland.

FN846 E.g., Utility Investors Analysts and Utility Shareholders.

847 E.g., NIEP, TAPS, Allegheny, Central Montana, Municipal Energy Agency Nebraska, PSNM, ABATE, ELCON, PSE&G, UtiliCorp.

FN848 E g., PSE&G, PSNM, ELCON, Oklahoma G&E, Duke. Oklahoma G&E supports use of the utility's planning cycle for retail stranded costs and use of the contract term for wholesale stranded costs. Duke states that the Commission should permit the customer and the transmission provider to establish the compensation period at something less than the maximum period.

FN849 E.g., UtiliCorp, WP&L, Missouri Joint Commission, TAPS, Municipal Energy Agency Nebraska, TDU Systems.

FN850 E.g., Carolina P&L.

FN851 E.g., FL Com.

FN852 E.g., UT Industrials.

853 Central Montana describes as "excessive" the recovery period offered to it by Montana. Central Montana states that it gave notice under a five-year notice provision and that Montana responded with a stranded cost demand extending 14 years after notice of termination (nine years from the date service would terminate).

FN854 Allegheny would exempt three types of stranded costs from such a limit· (1) Those due to PURPA power purchases (it submits that these were federally-mandated rather than profit-motivated business decisions); (2) those due to regulatory assets (such as deferred taxes); and (3) those due to municipalization. In addition, it favors establishing a rebuttable presumption that these special costs are eligible for stranded cost recovery.

855 E.g., EEI, Centerior, PECO, Houston L&P, Salt River.

856 E.g., Entergy.

FN857 E.g., Associated Power.

FN858 E.g., Associated Power.

FN859 E.g., Texaco.

FN860 E.g., Heartland

FN861 E.g., PSNM, ELCON.

FN862 E.g., ELCON.

863 In the case of a retail-turned-wholesale customer, subtraction of distribution system-related costs may also be appropriate.

864 The formula is not to be used for recovering stranded costs associated with retail wheeling. We believe the formula is unworkable in this scenario because one of its key elements—the option for a customer to market or broker the utility's power—may not be practicable for retail customers. Therefore, stranded costs associated with retail wheeling will be determined on a case-by-case basis.

865 The customer may also decide to remain a requirements customer for L. If the customer elects to remain a requirements customer, the utility will be obligated to continue service to the customer for the duration of L.

866 This option also addresses the concerns of commenters that, by failing to require auctions or divestiture of stranded capacity, the Rule would allow a utility recovering stranded costs to sell the freed capacity at subsidized prices, thereby gaining a competitive advantage in other transactions. If the customer avails itself of this option, the utility would no longer control the released capacity.

867 The present rates, whether established by settlement or otherwise, have been found to be just and reasonable. In other words, they are neither confiscatory nor exorbitant.

868 These procedures apply to a potential departing generation customer who is an existing wholesale requirements customer of a public utility, or a retail customer of a public utility who is contemplating becoming a wholesale transmission customer (such as through municipalization). They may be used at the option of the potential departing generation customer. An existing wholesale requirements customer may use the procedures in conjunction with, or in lieu of, a complaint under section 206 to amend its existing requirements contract to add an explicit stranded cost provision, as discussed in Section IV.J.5.

869 FERC Stats. & Regs. 32,514 at 33,114-15; 33,128-29.

870 If the customer is a retail customer contemplating becoming a wholesale transmission customer, it may at any time request the public utility to provide an estimate of its stranded cost obligation.

FN871 Because the formula reduces a customer's stranded cost obligation by the competitive market value of the capacity and associated energy that would be released by the customer's departure, we will not adopt the proposal in the Supplemental Stranded Cost NOPR to allow a potential departing customer to receive an estimate of the customer's "maximum possible stranded cost exposure without mitigation." Requiring the utility to provide an estimate that reflects the competitive market value of the capacity and associated energy to be released will better enable the customer to assess its supply options.

FN872 If the customer is a retail customer contemplating becoming a wholesale transmission customer, it should specify in its request, to the extent possible, the date on which the customer is considering becoming a wholesale transmission customer of the utility and the amount of generation, if any, it will continue to purchase from its existing supplier.

873 If the customer is a retail customer contemplating becoming a wholesale transmission customer, the utility should provide a detailed rationale justifying the basis for its reasonable expectation of continuing to provide the customer bundled retail service.

874 Subsection (i) above also would apply to a retail customer contemplating becoming a wholesale transmission customer if the customer believes that the utility has failed to establish that it had a reasonable expectation of continuing to provide the customer bundled retail service.

875 As discussed above, retail customers contemplating becoming wholesale transmission customers may use the same procedures. As also discussed above, customers under existing requirements contracts with public utilities have the option of making a filing under section 206 seeking to amend the contract to add an explicit stranded cost provision, without having to go through these procedures.

FN876 Although estimates by the utility or the customer may be binding for purposes of litigation, this does not mean that the parties may not settle at any time on another amount.

877 A customer requesting a section 211 order for transmission services from a transmitting utility also may incur a stranded cost obligation. Any estimate of stranded cost obligation resulting from the requested transmission services should be included as part of the utility's good faith response to the customer's request for transmission services. See 18 CFR 2.20. Because the Commission will apply the revenues lost formula to any request for stranded cost recovery as a part of its determination of the appropriate charge for transmission services ordered in a section 211 proceeding, we encourage non-public utilities to use the revenues lost formula to estimate a customer's stranded cost obligation.

878 Because litigation of stranded costs may extend beyond the date of the customer's departure, the customer may also file a petition for a declaratory order requesting expedited resolution of marketing or brokering implementation issues.

879 If the customer can market the released capacity and associated energy for a higher price than the customer paid for it, the customer effectively reduces its stranded cost obligation, i.e., the incremental revenue received offsets a portion of the customer's stranded cost payment to the utility.

880 For example, if the customer brokers any released capacity and associated energy for a higher price than the utility's estimated competitive market value of that capacity and energy, the difference between the utility's estimate and the brokered price will be used to increase the utility's CMVE component of the stranded cost calculation, thereby reducing the customer's stranded cost obligation.

881 FERC Stats. & Regs. 32,514 at 33,132.

882 See, e.g., EEI, NSP, LILCO, Central Hudson, Deloitte & Touche, Centerior.

883 FERC Stats. & Regs. 32,514 at 33,115.

884 EEI asks the Commission to expand the definition of stranded costs to account for the case where the Commission has proposed to address purely retail stranded costs (that is, where a state regulatory authority does not have authority to address stranded costs at the time that retail wheeling is required). However, the regulations will contain a definition of "retail stranded costs" to account for this case. See §35.26(b)(5) of the Final Rule.

FN885 E.g., EGA, Direct Service Industries, Memphis

886 E.g., Atlantic City, Carolina P&L, Consumers Power, Minnesota Power, Knoxville, Alma, Florida Power Corp, El Paso, Central Louisiana, Southern, WP&L, FL Com, Utility Investors Analysts, Florida Power Corp, El Paso, Central Louisiana, TDU Systems, NW Conservation Act Coalition, Puget, NU, EEI.

FN887 Several commenters also ask the Commission to expand the definition of wholesale stranded cost to include the situation where a wholesale supplier loses wholesale load as a result of a requirements customer's loss of retail load because of retail wheeling, municipalization or retail taps from another utility's system. E.g., Utilities For Improved Transition, Montaup, SC Public Service Authority. In addition, a number of commenters ask the Commission to treat the members of a single G&T cooperative system as a single economic unit and to revise the definition of wholesale stranded costs to allow a transmitting G&T cooperative (the arm of the cooperative system that provides the transmission) to recover the costs stranded when a retail customer of one of its member distribution cooperatives takes advantage of the open access environment by becoming a wholesale entity. E.g., Big Rivers EC, NRECA, Tri-County EC, TDU Systems.

888 E.g., Carolina P&L, NU, Florida Power Corp, PSNM, Southern, Mountain States Petroleum Assoc, FL Com.

FN889 In its reply comments, Memphis Light objects to the proposal that the Commission condition approval of all new power contracts for those customers that leave a utility's system without using the transmission services of the original utility upon the inclusion of a provision to recover the stranded cost for the previous power supplier. It argues that this proposal could result in nonrecovery from some customers because wholesale customers faced with such a provision would pursue non-jurisdictional contracts and/or generate within the confines of their own systems.

FN890 E.g., EEI, El Paso, NU, Atlantic City, PG&E, Coalition for Economic Competition, NW Conservation Act Coalition, Puget, NRECA, Cajun, East Kentucky, FL Com, Associated EC, Utilities For Improved Transition, TDU Systems, TVA.

891 E.g., EEI, NSP, Arizona, United Illuminating, Entergy, SCG&E, PECO, NRECA.

FN892 E.g., EEI, Centerior, NSP, SCG&E, PECO, Tucson Power, Arizona.

893 E.g , PECO, Entergy

FN894 E.g., EEI, SCG&E, Carolina P&L.

FN895 E.g., Atlantic City. EEI also proposes that at the time of filing of a stranded cost recovery charge (whether as an amendment to a contract or a surcharge to a transmission rate), the Commission limit its inquiry to the issue of the stranded cost charge rather than allowing all aspects of a rate or contract to be opened up. EEI states that this is what the Commission did in the natural gas context, where it permitted limited rate filing cases under section 4 of the NGA.

896 E.g., Alcoa, Cleveland.

897 E.g., Mountain States Petroleum Assoc, Caparo, Torco.

898 E.g., AMP-Ohio, PA Munis, TAPS.

899 For the reasons articulated below, we accordingly will reject the various revisions to the definition that were proposed by commenters.
FN900 "Wholesale requirements contract" is defined as "a contract under which a public utility or transmitting utility provides any portion of a customer's bundled wholesale power requirements" (emphasis added). Thus, a "wholesale requirements customer" for purposes of the Rule can be either a full or a partial requirements customer. We reject AMP-Ohio's suggestion that the Commission make a blanket finding that a utility could not have had a reasonable expectation of continuing to serve a partial requirements customer. For example, a partial requirements customer may have met part of its needs with its own generation but because it could not build more of its own generation locally it had to depend on the utility for the remainder of its needs in the absence of the new open access. Also, a partial requirements customer may have been able to reach alternative suppliers for only a portion of its requirements due to transmission constraints. If this were the case, the partial requirements supplier may well have had a reasonable expectation of continuing to serve the balance of the customer's load.
FN901 The definition of "retail stranded cost" contains a similar requirement (i.e., the retail customer must become, in whole or in part, an unbundled retail transmission services customer of the public utility or transmitting utility from which the customer previously received bundled retail services). We will retain it for the same reasons discussed above.
FN902 As we have said, this Rule is not intended to insulate a utility from the normal risks of competition.

903 As the Commission has previously indicated, however, in the case of formula rates, approval of a formula rate constitutes approval of the formula, and not the underlying costs. See, e.g., New England Power Company, et al., 72 FERC 61,148 at 61,761 (1995); Boston Edison Company, Opinion No. 376, 61 FERC 61,026 at 61,145 (1992).

904 E.g., NIPSCO, Illinois Power, Centerior, Ohio Edison, EEI.

905 E.g., NSP, Ohio Edison.

906 See also Minnesota P&L.

907 See, e.g., Consolidated Edison Company of New York, Inc. and Central Hudson Gas & Electric Corp., 72 FERC 61,184 at 61,891 (1995) (ConEd).

908 72 FERC at 61,891.

909 We note that public utility marketers are required to file quarterly transaction reports so that the Commission can monitor the reasonableness of their charges and their ability to exercise market power. See Heartland Energy Services, Inc., 68 FERC 61,223 at 62,065-66 (1994). Unlike traditional public utilities, marketers do not use cost-based rates. Approval of the generation rates of non-jurisdictional transmitting utilities is not subject to our jurisdiction.

910 E.g., Central Hudson, Central Illinois Light, CVPSC, Citizens Utilities, East Kentucky, IPALCO, Montana-Dakota Utilities, Seattle, St. Joseph, Tallahassee, VT DPS.

911 Non-public utility entities could request that the Commission find that they can satisfy the reciprocity condition without meeting all or some of the requirements that public utilities must meet. The requests could encompass a wide variety of circumstances. For example, a non-public utility could agree to offer comparable transmission services but not wish to have an OASIS or separate transmission personnel from wholesale marketing personnel due to the cost of doing so. The Commission could find that the entity nevertheless satisfied the reciprocity condition.

912 FERC Stats. & Regs. 32,514 at 33,095.

913 E.g., AMP-Ohio, Missouri Joint Commission, MT Com, WEPCO, Nebraska Public Power District, Texas-New Mexico.
FN914 E.g , WEPCO, Portland, WA Com.

915 If an RTG is not a corporate person, each utility member of the RTG may file the same or complementary tariffs.
FN916 58 FR 41626 (August 5, 1993), FERC Stats. & Regs., Regulations Preambles 30,976 (RTG Policy Statement).

917 FERC Stats. & Regs. 32,514 at 33,095.

918 E.g., UT Com, ID Com, LA DWP, Nebraska Public Power District, Salt River, Nevada Power. See also NEPCO, United Illuminating, Utility Working Group.

919 Also, as we explained with respect to RTGs, we will review pricing proposals in regional tariffs pursuant to our Transmission Pricing Policy Statement.
FN920 This Rule will not resolve disputes over federal hydro preference policies or over the agreements incorporated in the Northwest Power Planning Act.

921 See also Puget, Portland, Reynolds.

922 See also Public Power Council.

923 See also Snohomish, NPPC, W&O, Public Power Council, Washington and Oregon Energy Offices, Direct Service Industries

924 16 U.S.C. 839-839h.
FN925 16 U.S.C. 838-838j.

926 PMAs, however, are transmitting utilities subject to requests for mandatory transmission services under section 211 of the FPA.
FN927 See Section IV.G.4.f.

928 TVA, however, is a transmitting utility subject to requests for mandatory transmission services under section 211 of the FPA.
FN929 We recognize that sections 212(f)(1) and 212(j) of the FPA, as amended by the Energy Policy Act, limit the applicability of section 211 to TVA, but conclude that this limitation in no way affects our application of the reciprocity requirement to TVA. Limitations on TVA's authority to market power are not the product of this rule but rather of TVA's enabling legislation. Thus, it is for Congress to decide whether TVA should be permitted greater marketing authority. As noted in our earlier discussion of reciprocity, TVA is not being required to file an open access tariff. Rather it is being precluded from taking advantage of benefits available under this rule without providing comparable use of its system to others.

930 E.g., Urban League, Latin League, Black Mayors, Homelessness Alliance, National Women's Caucus, La Raza.

931 References throughout the Environmental Statement are to emissions from the electric industry, and not to emissions from all sources.

932 Coalition on Sensible Transportation, Inc. v. Dole, 826 F.2d 60. 66 (D.C. Cir. 1987). The Court added that "[i]t is of course always possible to explore a subject more deeply and to discuss it more thoroughly. The line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts." Id.

933 See Section V, Discussion, Subsection C.

934 Generally, a relative advantage for coal is likely to increase environmental impacts while a relative advantage for natural gas is likely to create modest environmental benefits.

935 A third scenario considered improved conditions for the transmission system only. This scenario showed very small effects from the rule and is not addressed further here.

936 These results are set forth graphically and in tabular form in the FEIS at pp. ES-3 and ES-13. They are also reproduced in Appendix H.

937 Although DOE agreed with EPA's request that we analyze the frozen efficiency case as a reference case, DOE believes that the DEIS selected the appropriate base case. DOE also argues that the mitigation of any adverse consequences from the rule should be addressed by EPA under the Clean Air Act or by the Congress.

938 FEIS Table 6-10 at p. 6-17.
FN939 Id

940 For example, the data we used to project future industry generation and fuel use update by several years the data relied upon by EPA in its Regulatory Impact Analysis used as a basis for its recently proposed NO_X rule, entitled "Acid Rain Program; Nitrogen Oxides Emission Reduction Program." 61 FR 1442 (1996). We believe the data developed in the FEIS will make a useful contribution to EPA's effort.

941 18 CFR 380.4(a)(15).
FN942 60 FR 36752 (1995).

943 60 FR 58304 (1995).

944 61 Fed.Reg. 17,296 (1996).

945 See 40 CFR 1507.3 (1995); 18 CFR 380.4 (1995).

946 Vermont Yankee, 435 U.S. at 551.

947 Id.

948 Laguna Greenbelt, Inc. v. DOT, 42 F.3d 517, 524-25 (9th Cir. 1994).
FN949 Resources Limited, Inc. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1993).

950 Id.
FN951 Id
FN952 Id.
FN953 National Wildlife Federation v. Whistler, 27 F.3d 1341, 1345 (8th Cir. 1994).

954 Missouri Mining, Inc. v. ICC, 33 F.3d 980, 984 (8th Cir. 1994).
FN955 Communities, Inc. v. Busey, 956 F.2d 619, 627 (6th Cir.), cert. denied, 506 U.S. 953 (1992).

956 See Section V, Discussion, Subsection B.2.

957 Methow Valley, 490 U.S. at 350-51 (citations and footnote omitted) (emphasis added).

958 Id. at 351 (footnote omitted).

959 Id. at 351-52 (citation omitted).

960 Id. at 352-53 (citation and footnote omitted).

961 Id. at 353 n .16.

962 The process appropriate for CEQ referral of actions by an independent regulatory agency is not addressed here.

963 For example, see the discussion on transmission constraints at Section V, Discussion, Subsection C.

964 See Alaska v. Andrus, 580 F.2d 465 (D.C. Cir.), vacated in part on other grounds sub nom. Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

FN965 The Commission bears the ultimate responsibility for evaluating the environmental impacts of the rule. In doing so, it must consider EPA's comments, but is not bound by them. See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201 (D.C.Cir.), cert. denied, 502 U.S. 994 (1991). In that case the Court held that:

Congress wants the EPA to participate when other agencies prepare environmental impact statements. See 42 U.S.C. 7609(a). The EPA participated here. But the (Federal Aviation Agency), not the EPA, bore the ultimate statutory responsibility for actually preparing the environmental impact statement, and under the rule of reason, a lead agency does not have to follow the EPA's comments slavishly—it just has to take them seriously. See Alaska v. Andrus, 580 F.2d at 474.

966 See Section III.

967 See Section I.

968 As discussed below, once baselines were established to portray what is likely to happen in the electric industry without the rule, the projected impacts of the rule were then determined against this background.

969 FEIS Chapter 6.

FN970 Id.

971 See, e.g., Sierra Club v. Marita. 46 F.3d 606, 621, 623 (7th Cir. 1995).

972 Methow Valley, 490 U.S. at 354-55. The revised requirement, 40 CFR 1502.22, which pertains to incomplete or unavailable information, is inapplicable as well. The problem here is not incomplete or unavailable information, but rather which existing policies and events should be included in the analysis.

FN973 42 U.S.C. 4332.

974 Several commenters, including EPA, are concerned that increases in transmission capacities resulting from open access might increase generation levels and thus air emissions. EPA is especially concerned with the expansion of transmission links between the midwest and east coast. The FEIS examines scenarios that increase transmission capacity substantially beyond current levels. This analysis finds that postulated increases do not affect emissions attributable to the rule. We believe increases considered in the FEIS far exceed any transmission capacity increases that might occur as a result of the rule. This is due in part to the fact that state-level siting issues, the principal barrier to major capacity increases in the transmission grid, are unaffected by the rule. The issues regarding enhancement of existing lines are more complex. Competition under open access will lead to improved efficiencies in generation. Transmission, on the other hand, will remain a regulated monopoly function. The rule will reduce barriers to access, but will not open the transmission system to direct competition. Thus, we believe that the competitive effects of the rule on transmission expansion will be relatively small.

EPA urges us to assume that transmission capacity is expanded by 40 percent compared to our base case. We do not believe this is likely to occur. The experience with one proposed new transmission line in the very area EPA focuses on demonstrates this difficulty. Duquesne Light filed an application with the Pennsylvania Public Utilities Commission to construct a new 500 Kv line across Pennsylvania to supply electricity to New Jersey. Within a few days of the filing of the application, over 3,000 individuals and groups filed complaints in opposition to the proposed line. "Electricity Utility Week" (November 4, 1991). A bill was proposed in the Pennsylvania Legislature to prevent construction of the line. Another bill was introduced in Congress to halt construction of new transmission lines throughout the U.S. for two years. Duquesne ultimately decided to withdraw its proposal and the line was not constructed. "The Energy Daily" (April 4, 1994).

975 FEIS Figure ES-1 and Table ES-2, reproduced at Appendix H.

FN976 See, e.g., FEIS at ES-8.

977 These assumptions include, and go substantially beyond, the "no-action" alternative advocated by EPA and others in positing a baseline that would tend to maximize the amount of NO_X emissions attributed to the rule. This is because under a frozen efficiency scenario all increases in power trading (and resulting NO_X emissions) would be attributed to the Rule. In fact, as described below, many of the efficiencies posited under the EPA assumptions are attributable to other factors and certain of the efficiencies (e.g., 40 percent increase in transmission capacity) are wholly unrealistic.

978 Some commenters assume that large increases in transmission capacity would result in a significant expansion in generation and thus increased emissions. In reality, the analysis present in Chapter 6 of the FEIS indicates that this is not the case.

979 FEIS at ES-2.

980 See Methow Valley, 490 U.S. at 348-53.

981 FEIS at 7-5.

982 61 FR 1442 (1996).

983 Id.

984 It should be noted that the science relating to determining mercury emission levels and also to the environmental impacts of CO_2 is uncertain, particularly with regard to the impacts of CO_2 emissions. The FEIS evaluates these matters as best it can under the circumstances.

985 For example, EPA suggests that we require certain types of filings, such as a request to charge market-based rates, to include an assessment of environmental impacts and mitigation, if necessary. Joint Commenters suggest we require wheeling and interconnection applicants to demonstrate that their requests will not contribute to increased NO_X or ozone in downwind regions, and Conservation Law suggests linking recovery of stranded costs to the retirement of unsuitable generators.

FN986 The FEIS also discusses mitigation measures that can be undertaken by others. These include strategies to require some existing plants to meet more stringent, new NO_X standards, relying on market forces to control inter-regional NO_X transport, or measures that could be employed by the states to limit power purchases based on environmental considerations. See FEIS at 7-26 to 7-28.

FN987 FEIS at 7-28 to 7-43.

988 FEIS at 7-43.

989 The rule represents the Commission's remedy to unduly discriminatory practices found to exist by public utilities that own and/or control interstate transmission facilities. Having found an unlawful practice, we must remedy it. However, EPA would require that those seeking to enjoy the benefits of non-discriminatory open access transmission further agree to go beyond current environmental requirements specified by federal and state authorities authorized by Congress to regulate such matters.

990 Indeed, over 100 utilities are now providing some form of open access on a voluntary basis.

991 We are also very concerned about the time and effort involved in developing the various programs suggested by commenters. The EPA and OTAG are working on the establishment of emissions standards, which action is an essential prerequisite to three of the proposals. However, developing those standards is among the challenges that EPA believes may take up to 10 years to complete. It simply makes no sense to delay the benefits of the rule (which has slight, if any, environmental impacts) during the period required for experts in the area to develop standards that, once established, can form the basis of a program under existing Clean Air Act authority.

992 FEIS at 7-48.

993 Many commenters state that the rule does not require mitigation and urge that a mitigation plan not be adopted. We would also note in light of the substantial number of comments opposing the proposition that we have mitigation authority, that any such mitigation measure we may choose to undertake would, in all likelihood, be subject to judicial review and the inevitable delays and uncertainties that accompany litigation. In the meantime, we would expect actions by OTAG and EPA to eclipse whatever action the Commission attempted to implement during this time.

994 Alliance for Affordable Energy, et al. (Alliance); EPA; Project for Sustainable FERC Energy Policy (Project for Sustainable FERC); and Northeast States For Coordinated Air Use Management (NESCAUM).

FN995 See, e.g., AEP at 3; CINERGY at 8-9; Entergy at 11-13; GPU at 2: Midwest Ozone Group at 3; NMA at 5-8; Ohio Consumers' Counsel at 5; Ohio PUC at 1; TVA at 8; and WEPCO at 2. See also CCEM Supplemental Comments at 1-5.

FN996 See, e.g., CCAP (FERC should establish an emissions monitoring program and implement an emission neutrality requirement); EPA (either deny open access service unless the customer demonstrates no adverse environmental impact or require, through contract terms, any generating entity seeking open access service to avoid or offset emission increases for the benefit of third parties); Joint Commenters (electric generators to qualify for open access must be held responsible for mitigating any excess NO_X emissions through a revenue collection measure); Project for Sustainable FERC (pro forma tariffs to contain environmental mitigation measures imposed on generators). See generally, FEIS at 7-28 to 7-42.

997 Parts II and III of the FPA originated with the Public Utility Act of 1935, 49 Stat. 803, 838 (Aug. 26, 1935) and stemmed in part from the financial abuses in the utility industry in the late 1920s and early 1930s. See Report of National Power Policy Committee on Public-Utility Holding Companies, S. Rep. No. 621, Appendix, 74th Cong., 1st Sess. 55-60 (1935); see also H.R. Rep. No. 1318, 74th Cong., 1st. Sess. 1-3 (1935). The FPA has been amended several times, most recently by the Energy Policy Act of 1992.

998 The statutory framework established by Congress in sections 205 and 206 is not compatible with the administration of environmental regulatory regimes as a precondition to authorization. The Commission has only 60 days to review rate filings under section 205 before they become effective. Absent Commission action rejecting a rate filing or suspending its operation for up to five months within such period, a jurisdictional transaction (either the sale of energy or the transmission of energy) and the proposed rates accompanying the transaction go into effect by operation of law. Some mitigation proposals would require us to reject transactions within 60 days or allow them to go forward but with case-by-case determinations or hearings on environmental effects made within that time period. This could result in transaction gridlock for the trade of electricity in interstate commerce—a situation that is totally at odds with the regulatory framework established by Congress in the FPA and the Commission policy objectives under this rule to minimize regulatory impediments to fluid competitive power sales markets. Moreover, letting transactions go into effect subject

to environmental hearings is not likely to produce meaningful environmental controls. Clearly, our processes, which contemplate the resolution of factual matters through hearings and the use of refund obligations to adjust parties' obligations on the basis of the record, make no provision for extensive scientific inquiry and are not designed to accommodate the imposition of clean air standards on power sellers.

FN999 See FPA section 202(b), 16 U.S.C. 824c(b). See also Department of Energy Organization Act, 42 U.S.C. 7151, 7172.

FN1000 We also note that section 731 of the Energy Policy Act preserves state and local authority over environmental protection and the siting of facilities.

FN1001 For example, we do not have jurisdiction over the physical location of generation or transmission facilities, even though we have exclusive jurisdiction of the rates, terms and conditions of sales for resale or transmission of electric energy in interstate commerce by public utilities using such facilities, i.e., the economic aspects of the use of such facilities.

1002 The Federal Water Power Commission was established in 1920 with jurisdiction over the licensing of hydropower projects. 41 Stat. 1063 (June 10, 1920). In 1935, it was reconstituted as the Federal Power Commission, with expanded responsibilities over utility regulation. The jurisdiction over the licensing of hydropower was preserved as Part I of the Federal Power Act.

FN1003 See Report of National Power Policy Committee on Public Utility Holding Companies.

FN1004 FPA section 201(a), 16 U.S.C. 824(a). The House, Senate and Conference Reports concerning the Public Utility Act of 1935, i.e., concerning Parts II and III of the FPA, are silent with respect to environmental concerns.

1005 See, e.g., comments by EPA, Project for Sustainable FERC, and Attorneys General.

1006 See, e.g., Methow Valley. 490 U.S. at 350-53; see also, LaFlamme v. FERC, 852 F.2d 389, 399 (9th Cir. 1988).

1007 NAACP, 520 F.2d at 433.

FN1008 Id. at 437-38 (footnotes omitted). The authorities listed cover FPA sections 202, 203, 204, 205, 206, and 207.

1009 Id. at 438 (footnote omitted).

1010 Id.

FN1011 Id. at 440, citing New York Central Securities Co. v. United States, 287 U.S. 12, 24 (1932).

FN1012 Id., quoting Alabama Electric Cooperative, Inc. v. SEC, 353 F.2d 905, 907 (1965), cert. denied, 383 U.S. 968 (1966).

1013 Id. at 441 (emphasis in original). The Court made clear that "the conservation of natural resources" was a Commission interest only with regard to the regulation of hydropower resources under Part I of the FPA. Id. at 437.

1014 Id. at 443 and 441.

1015 NAACP, 425 U.S. 662 (1976).

1016 Id. at 670 (footnote omitted). Several commenters, e.g., Project for Sustainable FERC at 31-32 and Alliance at 53, make much of the Court's statement that there are undoubtedly other subsidiary purposes contained in the FPA and NGA, noting its reference in a footnote that the Commission has authority to consider "environmental" questions. NAACP. 425 U.S. at 670 n.6. However, they neglect to mention that the section of the FPA which the Court identified in support of this reference to environmental questions is section 10 of the FPA concerning our Part I authority over hydroelectric licensing matters, not Parts II and III. Part I contains explicit authority for the Commission to consider and require environmental mitigation measures.

1017 NAACP, 425 U.S. at 665.

1018 In analyzing the scope of the Commission's authority to act in the public interest, the NAACP Court found it useful to analogize to federal labor law. While noting that Congress had "unmistakably defined the national interest in free collective bargaining," Id. at 671, the Court found that it could not be supposed that in directing the Commission to be guided by the "public interest," Congress instructed the Commission "to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees." Id. Yet this is exactly the form of what EPA and the other commenters supporting our authority to require environmental mitigation would have us do. However, just as with discriminatory employment practices, we can consider the consequences of air pollution practices of our regulatees "only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest." Id. (emphasis added).

1019 We note that the standard the Commission is bound to apply in reviewing section 205 and section 206 transactions (which are the focus of the majority of commenters' mitigation proposals) is not a broad "public interest" standard, but rather a standard that rates, terms and conditions of such transactions be "just, reasonable and not unduly discriminatory or preferential." 16 U.S.C. 824d, 824e.

FN1020 NAACP, 425 U.S. at 665.

FN1021 The limited nature of the Commission's ability under NAACP to consider "environmental" issues is reflected in the few court decisions on this subject. See Public Utility Commission of California v. FERC, 900 F.2d 269, 281 (D.C. Cir. 1990) (The broad public interest standards in the Commission's enabling legislation are limited to "the purposes that Congress had in mind when it enacted this (NGA and FPA) legislation. This rule helps confine an agency's authorization "to those areas in which the agency fairly may be said to have expertise."); Process Gas Consumers Group v. FERC, 930 F.2d 926, 935 & n.14 (D.C. Cir. 1991) (Commission improperly

allowed in rates the costs of research intended to benefit ratepayers solely through a "cleaner environment"; the Court found that the Commission has no particular "expertise" in determining and promoting the pollution-reducing effects of natural gas vehicles).

FN1022 The Supreme Court's holding in NAACP as to the limited ability of administrative agencies to implement broad "public interest" mandates, and direction to refrain from straying beyond the specific purposes of the regulatory legislation they are entrusted to administer, is well established. See Community Television of Southern California v. Gottfried, 459 U.S. 498, 510-11 n.17 (1983) ("[A]n agency's general duty to enforce the public interest does not require it to assume responsibility for enforcing legislation that is not directed at the agency"); Hampton v. Mow Sun Wong, 426 U.S. 88, 114 (1976) ("It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies"); McLean Trucking Company v. United States, 321 U.S. 67, 79 (1944) (that Congress "has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies" does not "necessarily include either the duty or the authority to execute numerous other laws" beyond enumerated statutory responsibilities); see also Bob Jones University v. United States, 461 U.S. 574, 611 (1983) (Powell, J., concurring) ("This Court often has expressed concern that the scope of an agency's authorization be limited to those areas in which the agency fairly may be said to have expertise").

Lower courts have repeated the Court's admonition in this regard on numerous occasions in finding that federal agencies improperly have overstepped, or properly have refrained from overstepping, the limitations of their "public interest" (or similarly worded) jurisdiction. See, e.g., The Business Roundtable v. Securities and Exchange Commission, 905 F.2d 406, 413-14 (D.C. 1990) (SEC's assertion of authority under "public interest" standard to bar national security exchanges and associations from listing stock of certain corporations invaded traditional state regulatory purview); Public Utility Commission of California v. FERC, 900 F.2d 269, 281 (D.C. Cir. 1990) (FERC has no authority to consider allegations of copyright infringement or unfair trade practices in determining whether to issue certificates of public convenience and necessity); American Trucking Association v. United States, 642 F.2d 916 (5th Cir. 1981) (intention of ICC to promote competition is consistent with statutory standard; more generalized intention to promote public welfare needs, unrelated to its legislative instruction to attend to transportation needs of the public, is not), Natural Resources Defense Council, Inc. v. Securities and Exchange Commission, 606 F.2d 1031 (D.C. Cir. 1979) (SEC has no obligation to promulgate regulations requiring comprehensive disclosure of (among other things) corporate environmental policies unrelated to objectives of federal securities laws); Sunflower Electric Cooperative, Inc. v. Kansas Power & Light Company, 603 F.2d 791, 799 (D.C. Cir. 1979) (FERC does not have primary jurisdiction to consider antitrust-related issues that do not involve rate-setting practices of public utilities); O-J Transport Company v. United States, 536 F.2d 126, 131-32 (6th Cir.), cert. denied, 429 U.S. 960 (1976) (ICC properly did not stray beyond its congressionally-defined role over transportation regulation by refusing to promote more generalized public welfare concerns); see also, e.g., In re Multidistrict Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976) (under antitrust laws, federal district court has no authority to fashion an environmental remedy, intended to reduce auto emissions, that serves no antitrust purpose).

1023 Project for Sustainable FERC at 31.

1024 Richmond Power, 574 F.2d at 616-17 (footnotes omitted).

1025 Id. at 616 n.22 (emphasis added).

1026 Alliance and the Project for Sustainable FERC cite American Trucking Association, Inc. v. United States, 642 F.2d 916 (5th Cir. 1981), to support an argument that, even under NAACP, the Commission can impose conditions under the FPA "public interest" standard because there is a "nexus" between the primary goals of the FPA and the proffered conditions. As discussed below in greater detail, we disagree.

American Trucking involved review of an ICC rulemaking effort to, among other things, allow government agencies to tender a fair portion of their freight shipments to small businesses and those operated by disadvantaged persons. In reviewing the case, the Court referenced the NAACP decision to observe that under the governing law, the ICC's "useful purpose" and "public need" criterion (used here to justify the regulations) do "not (refer) to the pursuit of affirmative action goals." Id. at 921-922. Indeed, it is clear that the Court read NAACP as permitting the consideration of "racial, ethnic and social-economic factors" only when they relate to the matters within the ICC's authority, i.e., the transportation needs of the public, as opposed to some generalized notion of the general public welfare. Id. at 922 n.3

1027 NGA section 7(a), like, for example, FPA section 203(a), provides for a "public interest" standard of review. Section 7 of the NGA represents the maximum authority the Commission has over environmental issues under that Act. Section 7 provides the Commission authority to approve the siting and construction of facilities.

1028 Great Plains, 655 F.2d at 1147.

1029 Id.

1030 Id. at 1150.

FN1031 Id. at 1151.

FN1032 Id.

FN1033 Id. at 1151-52.

1034 To our knowledge the only time Congress has asked the Commission with respect to its regulation under Parts II and III of the FPA to address environmental issues was in Section 808 of the Clean Air Act Amendments of 1990. There, Congress directed the Commission, in consultation with EPA, to study the environmental externalities of electricity production. The Commission staff did so and provided the required report to Congress. While the Commission in compliance with the 1990 Amendments also addressed the accounting issues related to SO_2 emissions trading, the Commission did so within the context of its accounting authority under the FPA.

FN1035 EPA argues that the Commission would not be required to monitor compliance with the environmental mitigation measures. However, if environmental mitigation is within our statutory mandate, we could not delegate that authority to others. See EPA at 51.

1036 EPA at 4-5; see also Project for Sustainable FERC (protections achieved by the Clean Air Act Amendments of 1990 are in danger of being destroyed by the Energy Policy Act's open access policies if those policies are implemented without environmental mitigation). We would also note that the premise upon which EPA makes this argument—that air emissions will rapidly increase with implementation of the rule—is not supported by the record. See Section V, Discussion, Subsection C.

1037 We believe that this conclusion is supported by section 205(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA) PURPA, inter alia, amended the FPA in certain respects but also gave the Commission authority in certain sections, such as PURPA sections 205(a) and 210, that did not amend the FPA. Under PURPA section 205(a), the Commission in certain circumstances may exempt electric utilities, in whole or in part, from state laws, rules or regulations which prohibit or prevent voluntary coordination, including agreements for central dispatch. (Of course, the central dispatch is dispatch of generation facilities.) However, PURPA section 205(a)(2) provides that no exemption may be granted if the state law, rule or regulation is designed, among others, to protect public health, safety or welfare or the environment. In commenting on the limitation of the Commission's exemption authority under PURPA section 205(a), the Conferees noted that the prohibition includes "regulations under the Clean Air Act." H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 95 (1978), reprinted in 1978 U.S Code Cong. & Ad. News 7797, 7829. While the Commission's statutory authority has been modified in legislation enacted subsequent to PURPA, the provisions of PURPA section 205(a) have not been modified.

1038 See, e.g., EPA at 54. See also Alliance; Project for Sustainable FERC; Coalition; Signatories; CCAP; Attorneys General.

1039 Under this logic, the Securities and Exchange Commission, for example, which facilitates utility financing for new facilities would be empowered to administer environmental requirements.

1040 We are also troubled by the confusion that persists as to the usefulness of imposing a condition on the use of open access tariffs as a means to accomplish environmental goals. As noted earlier, the Commission's decision to compel the filing of open access tariffs is intended to provide access to third party power suppliers who need access across a utility's transmission system. Open access will primarily benefit independent power suppliers offering power from new facilities, most of which under current market conditions are likely to be gas-fired facilities. Traditional utilities that own the generating plants of particular concern to commenters (i.e., coal-fired plants subject to less strict environmental controls) have extensive transmission systems that they can use to get power to market. Thus, the exercise of conditioning authority is more likely to impede sales from new, cleaner facilities than it is sales from older, coal-fired facilities. It makes no sense from an economic or environmental perspective to burden new transactions with this cumbersome condition for what will likely be little in the way of effective environmental controls.

1041 Alliance at 55. See also Project for Sustainable FERC at 37.

1042 For the same reason, we do not have authority to impose an obligation on utilities to "internalize" environmental externalities. See generally FEIS at 7-24 In effect, such proposals would involve the Commission requiring a surcharge on power sales rates fixed at some amount equal to the environmental "cost" inflicted by the generation supporting those sales. Assuming such a surcharge could be calculated, imposing such a cost would be to fix a rate without reference to any cost incurred by the public utility. Indeed, we would impose in rates, and require ratepayers to pay, a cost that was manifestly not incurred by the utility. In reality, such a surcharge would require us to impose a tax or a penalty, neither of which we are authorized to impose.

The SO_2 program created under the 1990 Clean Air Act Amendments illustrates the way in which EPA and FERC authority can intersect to accomplish the goal of internalizing externalities. There, the Congress by capping emissions and providing for a market in emission allowances required utilities to "pay for" the right to emit SO_2. These costs are legitimate costs and the Commission's role is to permit their recovery in rates. Similarly, a comparable NO_X cap and trading scheme established by EPA would "internalize" the external costs of NO_X pollution and the Commission would provide for prudently incurred allowance costs in rates.

1043 NAACP, 425 U.S. at 670.

1044 Cf. Utah Power & Light Co., Opinion No. 318, 45 FERC 61,095 at 61,280-83 (1988) (discussing the Commission's authority to condition a merger). Unlike the situation in Opinion No. 318 where the Commission had the authority under section 203 to disapprove a merger upon a finding of actual and potential anticompetitive effects, the Commission's rate authority under sections 205 and 206

does not permit the Commission to deny the proposed rates out of a concern that such action will result in an increase in air pollution. See Monongahela Power Co., 39 FERC 61,350 at 62.096, reh'g denied, 40 FERC 61,256 (1987). As a result, we have no authority to condition the same result under these sections on environmental mitigation.

FN1045 The obligation of the Commission to weigh antitrust considerations highlights this point. The Commission must take into account anticompetitive effects when setting rates. See Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968). However, we are limited as to the remedies we may impose. We cannot go further and assess the range of remedies that, for example, a Court may exact upon finding an antitrust violation. See generally NAACP. 520 F.2d at 441.

FN1046 Project for Sustainable FERC, at 32-33, and Alliance, at 41-42, have attempted to argue that NAACP actually supports the Commission having authority to order environmental mitigation. Their argument fails because they have not shown, and cannot show, the necessary direct nexus to our economic regulation.

1047 For example, our regulations permit 100 percent of any construction work in progress for pollution control facilities allocable to wholesale sales to be included in rate base. See 18 CFR 35.25 (1995). This regulatory action, directly related to our core ratemaking responsibilities, removes an economic disincentive for public utilities to invest in structures designed to reduce the amount of pollution produced by a generating facility. See 18 CFR 35.25(b) (definition of pollution control facility).

The Commission also addressed the ratemaking consequences of SO_2 emissions trading in response to a petition from the Edison Electric Institute. This is another example of the Commission's proper exercise of its jurisdiction, i e., over the costs of environmental compliance.

FN1048 Indeed, our regulations provide for such cost recovery.

1049 EPA at 50.

1050 EPA at 51. See also NESCAUM at 19; Alliance at 18, 53; Project for Sustainable FERC at 37.

1051 CCEM argues that the tracking of documentation with environmental compliance requirements will stifle the very competitive bulk power market that EPA and others profess to support. CCEM notes that "(i)t is both ironic and inexplicable why EPA, the agency charged with enforcing the nation's clean air and other environmental protection laws is so anxious to shift this responsibility away from itself and onto economic participants in the incipient, competitive power supply industry." CCEM Supplemental Comments at 4.

FN1052 We also note that under EPA's scheme those most likely to benefit from denying access—transmission sellers—would be provided the authority to lawfully deny transmission access.

1053 EPA states at 51-52 that:

In implementing section 210 of the Public Utility Regulatory Policies Act, the FERC took the approach of declining to act because of the potential adverse environmental impacts of the action. Section 210 required the FERC to prescribe regulations "to encourage cogeneration and small power production * * * Because of its concern that "diesel and dual-fuel commercial cogeneration facilities in the New York City area had the potential to cause environmentally significant effects" (46 FR 33025) (1981)), the FERC issued regulations that excluded new diesel cogeneration facilities from being "qualifying facilities." 45 FR 17964

EPA maintains that the FERC similarly has authority in the instant case to deny open access transmission to the extent such transmission would have adverse environmental impacts.

FN1054 The Commission subsequently modified this position and decided to treat diesel cogeneration facilities like other QFs.

FN1055 See CMS Midland, Inc., 50 FERC 61,098 at 61,277-278 (1990), reh'g denied, 56 FERC 61,177 (1991), aff'd mem. sub nom., Michigan Municipal Cooperative Group, v. FERC, 990 F 2d 1377 (D C Cir) (per curiam), cert. denied, 114 S.Ct. 546 (1993); see also Mesquite Lake Associates, Ltd., 63 FERC 61,351 (1993); Citizens for Clean Air and Reclaiming Our Environment v. Newbay Corporation, 56 FERC 61,428 at 62,532-33, reh'g denied, 57 FERC 61,219 (1991).

FN1056 Small Power Production and Cogeneration Facilities—Environmental Findings, 10 FERC 61,314 at 61,632 (1980). The Commission has included similar language in every order it issues finding qualifying facility status. See also Small Power Production and Cogeneration, Order No. 70-E, FERC Stats. & Regs., Regs. Preambles 1977-81 30,274 at 31,596 (1981).

1057 The important point is that the Commission has fully complied with its responsibilities under NEPA in both instances. Whatever initial decision it may have come to in 1981 with regard to the particular circumstances involved in adopting QF regulations under PURPA is irrelevant to the instant rulemaking.

1058 EPA's proposal apparently would apply only for NO_X, CO_2 and mercury. See EPA at 58 n.31 and 60 (because there is already a nationwide cap on SO_2 emissions in the Clean Air Act, there is no need for mitigation for that pollutant). In other words, EPA apparently would require us to impose environmental mitigation only in those instances in which Congress has not provided a nationwide cap for a pollutant.

1059 See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

1060 EPA at 59 (emphasis added). See also Project for Sustainable FERC at 38-39 (proposing that a regulatory plan be developed through consultations between the Commission, EPA, DOE, and appropriate regional and state regulators and then presented in the FEIS)

1061 Alliance at 62, quoting H.R. Rep. No. 474 (Part I) (Vol. 4), 103d Cong., 2d Sess. 132 (1992), reprinted in 1992 U.S. Code Cong. & Ad. News 1955.

FN1062 For example, Title XVI concerned Global Climate Change.

1063 See, e.g., S. Rep. No. 228 (concerning the Clean Air Act Amendments of 1990), 101st Cong., 2d Sess. 5 (1990), reprinted in 1990 U.S. Code Cong. & Ad. News 3391 ("The States, together with EPA, are responsible for ensuring that the primary air quality standards are met * * *"); S. Rep. No. 228, 101st Cong., 2d Sess. 9, reprinted in 1990 U.S. Code Cong. & Ad. News 3395 ("The 1970 and 1977 Clean Air Act Amendments established a partnership between the States and Federal government. EPA sets nationally uniform air quality standards and States, with the Agency's assistance, are responsible for meeting them."). See also, e.g., Connecticut v. EPA, 696 F.2d 147, 163 (2d Cir. 1982) ("One central focus of the Clean Air Act Amendments of 1977 was to ensure that the EPA would monitor and control the impact of pollution from one state on air quality in another."); Ohio Environmental Council v. EPA, 593 F.2d 24, 31 (6th Cir. 1979) ("Congress placed responsibility for enforcing the Clean Air Act in the U.S. EPA.").

We further note the following limitations on the Clean Air Act Amendments of 1990 with respect to the emission allowance program in section 403(f), which provides in pertinent part:

Nothing in this section shall be construed as requiring a change of any kind in any State law regulating electric utility rates and charges or affecting any State law regarding such State regulation or as limiting State regulation (including any prudency review) under such a State law. Nothing in this section shall be construed as modifying the Federal Power Act (16 U.S.C.A. 791a et seq.) or as affecting the authority of the Federal Energy Regulatory Commission under that Act. Nothing in this subchapter shall be construed to interfere with or impair any program for competitive bidding for power supply in a State in which such program is established.

42 U.S.C. 7651b(f). Thus, Congress expressly chose not to tie environmental authority under the emission allowance program to the Commission's and states' ratemaking authority.

1064 The conference report on the 1990 CZMA amendments expressly states that the principal objective of the 1990 revisions to the language of section 307(c)(1) was to overturn a Supreme Court decision holding that Outer Continental Shelf oil and gas lease sales were not subject to CZMA consistency determinations. H.R. Rep. No. 101-964, 101st Cong., 2d Sess. 2675 (1990).

1065 In using the phrase "federal activities" Congress did not use the term "federal action" which has clear and broad meaning under NEPA.

1066 Section 307(f) of the CZMA, 16 U.S.C. 1456(f). A state may develop more stringent standards, if they can be enforced by the state (15 CFR 923.45(c)(2)), but more stringent state air quality standards would not alter the characteristics of FPA Part II regulation that put it beyond the federal consistency requirements of the CZMA.

1067 The Connecticut Department of Environmental Protection is on the service list for the rulemaking proceeding. The Commission issued a NOPR in this proceeding on March 29, 1995 (60 FR 17662, April 7, 1995). On July 12, 1995, it issued a notice of intent to prepare an EIS in this proceeding (60 FR 36752, July 18, 1995). On November 17, 1995, the Commission issued a Draft EIS (60 FR 58304, Nov. 27, 1995).

1068 A Record of Decision (ROD) will not be issued as a separate document; instead this rule, including the FEIS as incorporated into the rule by adoption, will serve as the ROD for the rule.

1069 5 U.S.C. 601-612.

FN1070 60 FR 17662 at 17721 (April 7, 1995), FERC Stats. & Regs. 32,514 at 33,151.

1071 SBA Initial Comments at 1 and n.1.

FN1072 SBA Initial Comments at 2 n.1. SBA "defines a small electric utility as one that disposes of 4 million MWh of electricity in a given year." Id. At an average wholesale price of between $30 and $40 per MWh (Energy Information Administration, Financial Statistics of Major Investor-Owned Utilities, 1994, Table No. 1), utilities that dispose of 4 million MWh per year would have annual sales in the range of $120 million to $180 million.

FN1073 5 U.S.C. 601-612. SBA Initial Comments at 2 n.1.

1074 The Stranded Cost Final Rule is applicable to public utilities and to transmitting utilities (that are not also public utilities).

FN1075 Over 100 of these entities have already filed some type of open access tariff.

FN1076 The sources for this figure are FERC Form No. 1 and FERC Form No. 1-F data.

FN1077 The RFA defines a "small entity" as "one which is independently owned and operated and which is not dominant in its field of operation." See 5 U.S.C. 601(3) and 601(6) and 15 U.S.C. 632(a)(1) (definition of "small business concern").

FN1078 We note that five of these 19 public utilities have already filed open access tariffs with the Commission. While these five public utilities fall within SBA's definition of small electric utility, since they have already filed open access tariffs, the effect of the Open Access Final Rule on these entities should not be significant. The remaining 14 small public utilities constitute eight percent of the total number of public utilities that would have to have on file open access tariffs. To the extent these 14 small public utilities consider the impact of the Final Rule to be significant, these entities may request a waiver of the open access filing requirements under the waiver provisions of the Open Access Final Rule.

FN1079 In Mid-Tex Electric Coop., Inc v. FERC, 773 F 2d 327, 340-43 (D.C. Cir. 1985) (Mid-Tex), the court accepted the Commission's conclusion that, since virtually all of the public utilities that it regulates do not fall within the meaning of the term "small entities" as defined in the RFA, the Commission did not need to prepare a regulatory flexibility analysis in connection with its proposed rule governing the allocation of costs for construction work in progress (CWIP). The CWIP rules applied to all public utilities. The Open Access Final Rule applies to only those public utilities that own, control or operate interstate transmission facilities. These entities are a subset of the group of public utilities found not to require preparation of a regulatory flexibility analysis for the CWIP rule.

1080 Those public utilities that already have open access tariffs on file are not even required to propose rates. They may elect to continue service under the Open Access Final Rule's non-rate terms and conditions at their existing rates.

FN1081 In the Public Reporting Burden section (Section II), the Commission reaffirms the average reporting burden of 300 hours per response, which was proposed and unchallenged in the NOPR. If a cost of $200 per hour is used, the cost of making the required filing would be $60,000. On average, this is no more than one half of one percent of total annual sales for small electric utilities

1082 5 CFR 1320.11.

1083 5 U.S.C. 804(2).

1 After the Rehearing Order expanding the scope of the proceeding, AMP-Ohio and IMPA withdrew this testimony as no longer necessary. This withdrawal does not change the fact that the testimony was sworn to under oath.

2 AEP generally limited its offer of short-term transmission to buy/sell transactions; that is, AEP would buy the power from the seller and resell it to the purchaser. Supplemental testimony of AEP Witness Baker (Ex. A-73) at 27-29. Often, the terms of the buy/sell transaction required transmission dependent utilities (TDUs) to maintain reserves and meet contractual commitments for at least a year. Id.

3 All of these incidents are related to and examples of PG&E's conduct described in the NOPR (FERC Stats. & Regs. 32,514 at 33,073 n.151), that is, the history of PG&E's attempt to avoid its commitments made to the California owners of the California Oregon Transmission Project (COTP). However, these incidents are not exactly the same as the incidents described in the NOPR, because NCPA is not one of the owners of the COTP.

4 Special Condition 12 of the Integrated Operations Agreement between Edison and the Southern Cities defined certain Special Condition 12 resources and allowed the Cities to make certain uses of those resources, subject to certain restrictions.

1 Section 212(h) of the FPA provides that no order issued under the FPA shall be conditioned upon or require the transmission of electric energy directly to an ultimate consumer. 16 U.S.C. 824k(h). The Commission's assertion of jurisdiction in this final rule is over the rates, terms and conditions of retail transmission that occurs voluntarily or as a result of a state retail access program

2 U.S. Const. art I, Section 8, cl.3.

FN3 U.S. Const. art. VI, cl.2.

FN4 See Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251-52 (1951) (Montana-Dakota).

5 Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U S. 83 (1927) (Attleboro). In Attleboro, the Supreme Court held that State regulation of the interstate sale of electricity was barred by the Commerce Clause because such regulation would impose a "direct burden" on interstate commerce.

6 S Rep. No. 621, 74th Cong., 1st Sess. 48 (1935). See also H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

7 The provisions of the Senate bill regarding federal jurisdiction over generating facilities were eliminated from the final version of the bill.

8 Section 201(a) declares that Federal regulation of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. 824(a). Section 201(b)(1) states that the provisions of Part II of the FPA apply to the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce but, except as specifically provided, "shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." 16 U.S.C. 824(b)(1).

9 New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (NEPCO).

10 Id. (citation omitted).

11 While Congress may exercise its Commerce Clause authority to grant the States that "ability to restrict the flow of interstate commerce that they would not otherwise enjoy," Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980), States may not exercise such regulatory powers unless Congress has expressly stated its intention to make such an affirmative grant of power. NEPCO, 455 U.S. at 343.

12 A bus is an electrical conductor which serves as a common connection for two or more electrical circuits. Electric Utility Rate Design Study, Glossary: Electric Utility and Ratemaking Load & Management Terms, Edison Electric Institute (Sept. 11, 1978).

13 There are, of course, facilities that are used to provide delivery to both wholesale purchasers and end users. In those situations, we believe that the Commission and the States have jurisdiction to set rates for the services that are within their respective jurisdictions. That facilities are used to serve resale and retail customers does not, however, necessarily mean that the facilities are local distribution facilities.

14 16 U.S.C. 824.

15 16 U.S.C. 824(b) (emphasis added).

16 16 U.S.C. 824b (emphasis added).

17 16 U.S.C. 824e(d) (emphasis added).

18 H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7-8 (1935).

19 Id. at 27.

20 S. Rep. No. 621, 74th Cong., 1st Sess at 17 (1935). See id. at 18 ("The revision [between the original and final versions of the Senate bill] has also removed every encroachment upon the authority of the States The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States.")

21 Id. at 19.

22 Id. at 48. The provisions of the Senate bill regarding federal jurisdiction over generating facilities were eliminated from the final version of the bill.

23 H.R. Conf. Rep. No. 1903, 74th Cong., 1st Sess. 74 (1935).

24 Pub. L. No. 100-473, 102 Stat. 2299 (1988).

25 S. Rep. No. 621, 74th Cong., 1st Sess. 51 (1935) (emphasis added).

26 H.R. Rep. No. 1318, 74th Cong., 1st Sess. 29 (1935) (emphasis added).

27 The Senate Report states that interstate distribution rates are left in the States' control. Obviously, the Senate drew a distinction between interstate distribution (left in the States' control) and interstate transmission (given to the FPC). Compare S. Rep. No. 621 at 49 with H.R. Rep. No. 1318 at 51.

28 Section 201(e) defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction under this Part (other than facilities subject to such jurisdiction solely by reason of section 210, 211, or 212)." 16 U.S.C. 824(e). The section as adopted in 1935 did not contain the parenthetical, which was adopted in 1978 as part of the Public Utility Regulatory Policies Act.

29 Jersey Central, 319 U.S. at 63-65.

30 Id. at 66.

FN31 Id. at 67 (citation omitted).

FN32 Id. at 73

33 273 U.S. at 86, 89-90.

34 319 U.S. at 71 (footnote omitted)

35 CL&P, 324 U.S. at 517.

FN36 Id. at 518.

FN37 Id at 521.

FN38 Id. at 522.

FN39 Id. at 519-21.

FN40 Id.

41 Id. at 522, quoting Connecticut Light & Power Co. v. FPC, 141 F.2d 14, 18 (D.C. Cir. 1944).

42 324 U.S. at 529.

43 Id. at 529-31.

44 Id. at 531.

45 It appears that while the Company received power (at one location) at 66 kV, it primarily owned facilities at 13.8 kV and below.

FN46 324 U.S. at 531.

47 Id. at 531 (emphasis added).

48 Id. at 534.

49 See United States v. Public Utilities Commission of California, 345 U.S. 295, 316 (1953) (Public Utilities Commission): Certainly the concrete fact of resale of some portion of the electricity transmitted from a state to a point outside thereof invokes federal jurisdiction at the outset, despite the fact that the power thus used traveled along its interstate route "commingled" with other power sold by the same seller and eventually directly consumed by the same purchaser-distributor.

See also Arkansas Power & Light Co. v. FPC, 368 F.2d 376, 383 (8th Cir. 1966) ("Where a company is in fact a public utility, all wholesale sales for resale in interstate commerce are subject to the provisions of sections 205 and 206 of the (FPA), regardless of

the facilities used."). The Eighth Circuit further noted that the section 201(b) exemption applies to a company's status as a public utility and not to the Commission's jurisdiction over sales in interstate commerce for resale Id., citing Public Utilities Commission, Colton, infra, and Wisconsin-Michigan, infra.

FN50 Id. at 536.

51 197 F.2d 472 (7th Cir. 1952), cert. denied, 345 U.S. 934 (1953) (Wisconsin-Michigan).

FN52 Id. at 474.

FN53 Id ("Obviously the energy thus transmitted in interstate commerce is not changed in form or in character except that the voltage is reduced to an extent consistent with efficient economic management and operation.").

54 197 F.2d at 476 (emphasis added).

55 See H.R. Rep. No. 1318 at 27. ("Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy in wholesale in interstate commerce * * *." emphasis added).

FN56 See S. Rep. No. 621 at 48 ("Jurisdiction is asserted over all interstate transmission lines whether or not there is a sale of the energy carried by those lines * * *.").

57 197 F.2d at 477.

58 Id., citing FPC v. East Ohio Gas Co., 338 U.S. 464 (1950) (East Ohio).

59 376 U.S. 205 (1964) (Colton).

FN60 The Supreme Court noted that Edison's status as a public utility did not decide the question of whether the FPC could assert jurisdiction over the rates for the Edison-Colton sale. Id. at 208 n.3.

FN61 Id. at 208, 209 & n.5.

FN62 Id at 208. See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 380 (1983) ("(Colton) held, among other things, that * * * a California utility that received some of its power from out-of-state was subject to federal and not state regulation in its sales of electricity to a California municipality that resold the bulk of the power to others.").

63 Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 504 (1942).

64 376 U.S. at 214.

65 Id. at 215-216.

66 Id. at 216 (footnote omitted)

67 Id. at 210 n.6 (citation omitted).

68 Id. at 210 n.6.

69 401 F.2d 930 (D.C. Cir. 1968) (Duke).

FN70 Duke delivered power to Clemson at a distribution voltage of 4,160 volts. The step-down transformers by which the voltage was reduced, and the substations at which the delivery was effected, were owned by Duke. 401 F.2d at 931, n.8.

71 401 F.2d at 938-39 (emphasis added, footnotes omitted).

72 Id. (footnote omitted).

73 Id. at 949 (footnotes omitted).

74 Id. at 936 (quoting from Hearings on H.R 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 393 (1935) (testimony of then-FPC Commissioner Seavey)).

75 404 U.S. 453. reh'g denied, 405 U.S. 948 (1972) (Florida Power & Light)

FN76 404 U.S. at 456

77 Id. at 456.

FN78 A "bus" is a connector or group of connectors that serves as a common connection for two or more circuits

FN79 404 U.S. at 457.

FN80 Id.

FN81 Id. at 457 & n.8.

FN82 Id. at 461. (emphasis omitted).

FN83 Id. at 461 n.10 (emphasis added).

84 See Section 201(d), 16 U.S.C. 824(d) (1988).

FN85 Public Utilities Commission, supra note 345; City of Oakland, California v. FERC, 754 F.2d 1378 (9th Cir. 1985) (Oakland). See also Alexander v. FERC, 609 F.2d 543 (D.C. Cir. 1979) (Alexander).

86 Courts often rely on cases construing the NGA when interpreting the FPA, and vice versa. E.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981).

87 15 U.S.C. 717(b) (emphasis added).

88 H.R. Rep. No. 709, 75th Cong., 1st Sess. 3 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess. 3 (1937).

89 338 U.S. at 469-70.

90 See Mojave Pipeline Company, 35 FERC 61,199 (1986), reh'g denied, 41 FERC 61,040 (1987), reh'g denied, 42 FERC 61,351 (1988); see also Mojave Pipeline Company, 66 FERC 61,194 (1994), reh'g pending.

FN91 See Public Utilities Commission of the State of California v. FERC, et al , 900 F 2d 269, 273 (D.C. Cir. 1990) (footnote omitted) (WyCal).

92 Id. at 276.

93 Id. (emphasis in original).

94 955 F.2d 1412, 1414 (10th Cir. 1992).

FN95 Unlike the situation in WyCal where the pipeline made direct sales to end users, in Cascade the pipeline transported gas purchased from third parties. See Northwest Pipeline Corporation, 51 FERC 61,289 at 61,909 (1990).

96 Cascade, 955 F.2d at 1421.

97 345 U.S. at 316 (footnote omitted).

98 The Commission would not have jurisdiction over the rates for the sale of generation by the distant supplier because the transaction would be a retail sale of electric energy.

99 In the case of a distribution-only utility, which is franchised by a State or local government and sells only at retail, all of the circuits (and related wires, transformers, towers, and rights of way) which it owns or operates (regardless of voltage) would be local distribution facilities.

100 The Commission has analyzed utilities' filings required by the Commission's regulations. These filings are made on FERC Form No. 1. While there is no uniform breakpoint between transmission and distribution, it appears that utilities account for facilities operated at greater than 30 kV as transmission and that distribution facilities are usually less than 40 kV.

1 The Commission leaves unexplored the precise meaning of "deference" in these circumstances. At one extreme, it could mean courteous regard for another's views and, at the other, binding submission to another's judgment. I would, for example, accord state views on cost allocation considerable or presumptive, but not conclusive, weight.

2 NEPA (42 U.S.C. 4321-4370), the Council on Environmental Quality's (CEQ) regulations promulgated thereunder (40 CFR parts 1500-1508 (1995)), and our own environmental regulations supplementing those of CEQ (18 CFR part 380 (1995)) together establish an important procedural mechanism that was designed, not to impose upon this Commission substantive duties to achieve particular results, but to infuse our decisional processes with a broad awareness of the environmental consequences of our actions. Under NEPA, the Commission must in any applicable instance consider and weigh its core objectives and responsibilities under the Federal Power Act and the impacts of its actions on all aspects of the human environment—economic and social as well as ecological. This exercise requires the Commission to ascertain the availability and consider the feasibility of alternative approaches with lesser impacts. In other words, the Commission's duty is to take a "hard look" at the environmental effects of its major actions. Robertson v. Methow Valley Citizens Council, et al., 490 U.S. 332 (1988); Strycker's Bay Neighborhood Council, Inc. v. Karlen, et al., 444 U.S. 223 (1980). The EIS process fulfills that requirement.

3 18 CFR 35.25 (1995).

FN4 18 CFR 35.13(h)(38) (1995).

5 Revisions to Uniform Systems of Accounts to Account for Allowances under the Clean Air Act Amendments of 1990, Order No. 552, III FERC Statutes and Regulations 30,967 (1993).

6 My views conform generally to Commissioner Massey's partial dissent today.

7 The policy adopted with respect to Situation 3 is that the Commission would only be a forum for hearing stranded costs issues in the narrow circumstance where "the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required." The majority fails to address what would happen if a legislature addresses the issue of stranded costs directly without delegating the task to a state regulatory authority. I would hope that the Commission would not set itself up for confrontation with a state legislature and I would have preferred that to also exclude those circumstances "where the state otherwise addresses the issue" from the circumstances in which the Commission would act in Situation 3.

8 This argument is made both by commenters arguing that the Commission has no jurisdiction over stranded costs in Situation 2 or 3 (California Public Utilities Commission Initial Comments at 7) and by commenters arguing that the Commission should assert primary jurisdiction over stranded costs in both Situations (see e.g., Edison Electric Institute Initial Comments at IV-13; Coalition For Economic Competition Initial Comments at 22; Utilities For An Improved Transition Initial Comments at 16-26)

End of Document

62 FR 12274-01
RULES and REGULATIONS
DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission
18 CFR Part 35
[Docket Nos. RM95-8-001 and RM94-7-002; Order No. 888-A]

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

Friday, March 14, 1997

***12274 Issued March 4, 1997.**

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) reaffirms its basic determinations in Order No. 888 and clarifies certain terms. Order No. 888 requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. Order No. 888 also permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and Federal Power Act section 211 transmission services. The Commission's goal is to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.

EFFECTIVE DATE: This rule is effective on May 13, 1997.

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5. Recovery of Stranded Costs Associated With Existing Wholesale Requirements Contracts

6. Recovery of Stranded Costs Caused by Retail-Turned-Wholesale Customers

7. Recovery of Stranded Costs Caused by Retail Wheeling

8. Evidentiary Demonstration Necessary—Reasonable Expectation Standard

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Appendix A—List of Petitioners

Appendix B—Pro Forma Open Access Transmission Tariff

Statement of Commissioner Hoecker

Statement of Commissioner Massey

I. Introduction and Summary

On April 24, 1996, the Commission issued Final Rules (Order Nos. 888 and 889) intended to remedy undue discrimination in the provision of interstate transmission services by public utilities and to address the stranded costs that may result from the transition to more competitive electricity markets.[FN1] At the heart of these rules is a requirement that prohibits owners and operators of monopoly transmission facilities from denying transmission access, or offering only inferior access, to other power suppliers in order to favor the monopolists' own generation and increase monopoly profits—at the expense of the nation's electricity consumers and the economy as a whole.

The electric utility industry today is not the industry of ten years ago, or even five years ago. While historically it was assumed that local utilities would be the only ones to generate and transmit power for their customers, today there is a broad array of potential competitors to supply power and widespread transmission facilities that can carry power vast distances. But competitors cannot reach customers if they cannot have fair access to the transmission wires necessary to reach those customers. It is against this industry backdrop that the Commission in Order No. 888 exercised its public interest responsibilities pursuant to sections 205 and 206 of the Federal Power Act (FPA), to reexamine undue discrimination in interstate transmission services and the effect of that discrimination on the electricity customers whom we are bound to protect under the FPA.

We here reaffirm the legal and policy bases on which Order No. 888 is grounded. Utility practices that were acceptable in past years, if permitted to continue, will smother the fledgling competition in electricity markets and undermine the national policies reflected in the Energy Policy Act of 1992 to encourage the development of competitive markets. We firmly believe that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, as necessary to eliminate undue discrimination and protect electricity customers. The record supports our conclusion that, absent open access, undue discrimination will continue to be a fact of life in today's and tomorrow's electric power markets. As recent events clearly demonstrate, unbundled electric transmission service will be the centerpiece of a freely traded commodity market in electricity in which wholesale customers can shop for competitively-priced power. ***12276**

The only way to effectuate competitive markets and remedy discrimination is through readily available, non-discriminatory transmission access. The Commission estimates the potential quantitative benefits from such access will be approximately $3.8 to $5.4 billion per year in cost savings, in addition to the non-quantifiable benefits that include better use of existing assets and institutions, new market mechanisms, technical innovation, and less rate distortion.

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

The second central component of Order No. 888 was to address whether and how utilities will be able to recover costs that could become stranded when wholesale customers use the open access tariffs, or FPA section 211 tariffs,[FN2] to leave their utilities' power supply systems and shop for power elsewhere. Because of competitive changes occurring at the retail level, as numerous states have begun retail transmission access programs, Order No. 888 also clarifies whether and when the Commission may address stranded costs caused by retail wheeling and the extent of the Commission's jurisdiction over unbundled retail transmission. The Commission further addresses the circumstances under which utilities and their wholesale customers may seek to modify contracts made under the old regulatory regime, taking into account the goals of reasonably accelerating customers' ability to benefit from competitively priced power and at the same time ensuring the financial stability of electric utilities during the transition to competition.

137 entities filed requests for rehearing and/or clarification of Order No. 888. While these parties raise a variety of arguments —including legal, policy, and technical arguments—the majority (including a majority of public utilities) agree that we need to harness the benefits that competitive electricity markets can bring to the nation. The disagreements primarily focus on the mechanics of how we should do this, who should pay the costs of the transition to competition, and how long the transition should take.

First, parties disagree on what is necessary to remedy undue discrimination and to develop truly competitive wholesale markets. Many focus specifically on the tariff terms and conditions of good transmission access and seek changes in the Order No. 888 pro forma tariff. In response to these types of rehearing arguments, the Commission has fine-tuned or changed some of the pro forma tariff terms and conditions to better ensure that they do not permit discrimination and that they result in well-functioning markets. Other petitioners focus on additional structural changes which they believe are necessary, such as mandatory corporate restructuring (divestiture of generation assets) or mandatory creation of independent transmission system operators (ISOs). With regard to restructuring, the Commission continues to believe that functional unbundling of the utility's business, not corporate divestiture or mandatory ISOs, is sufficient to remedy undue discrimination at this time.

The most contentious arguments raised on rehearing involve how we deal with the transition costs associated with moving to competition. Some utilities have invested millions of dollars in facilities and purchased power contracts based on an explicit or implicit obligation to serve customers and the expectation that those customers would remain on their systems for the foreseeable future. These utilities face so-called "stranded costs" which, if not recovered from the customers that caused the costs to be incurred, could be shifted to other customers.

There are two basic categories of rehearing arguments regarding stranded cost recovery. Most utilities want a guarantee from this Commission that they will recover all stranded costs, whether caused by losing retail customers or wholesale customers. Many customers, on the other hand, want to be able to abrogate existing power supply contracts so that they can immediately leave their current suppliers' systems and shop for cheaper power elsewhere, without paying the sunk costs that their suppliers incurred on their behalf.

In response to these diverse arguments, the Commission has struck a reasonable balance that, for certain defined circumstances, permits utilities the opportunity to seek extra-contractual recovery of stranded costs from their departing customers and permits customers the opportunity to make a showing that their contracts should be shortened or terminated. Based on our experience in the natural gas area, we have learned that it is critical to address these issues early, but we also have chosen an approach different from that taken in the gas area because of the different circumstances facing the electric industry.

In balancing the wide array of interests reflected in the rehearing petitions, we have made a number of clarifications and granted rehearing on some issues, but we reaffirm the core elements and framework of Order No. 888. Since the time the final rules issued, as discussed in Section III, the pace of competitive change has continued to escalate in the industry at both the wholesale and retail levels as competitors, customers and state regulatory authorities aggressively seek ways to lower the price of electricity. We therefore believe it is all the more critical that we remedy undue discrimination in interstate transmission

services now, and that we do so generically, if we are to fulfill our responsibilities under the FPA to protect consumers and provide a fair and orderly transition to new competitive markets.

Finally, with respect to environmental issues associated with this rulemaking, certain parties on rehearing continue to challenge the adequacy of our Final Environmental Impact Statement (FEIS). The central issues are whether the Final Rule will increase emissions of nitrogen oxides (NOx) from certain fossil-fuel fired generators, which could affect air quality in downwind areas to which these emissions may be carried, and the Commission's authority to mitigate environmental consequences.

We deny rehearing on the environmental issues raised and affirm our conclusion that we have satisfied our obligations under NEPA. As discussed in detail in the Final Rule, this rulemaking is expected to slightly increase or slightly decrease total future *12277 NOx emissions, depending on whether competitive conditions in the electric industry favor the utilization of natural gas or coal as a fuel for the generation of electricity. We also examined mitigation options over the longer term, and found that the preferred approach for mitigating any adverse environmental consequences would be for the Environmental Protection Agency (EPA) and the states to address the problem through regulatory authorities available under the Clean Air Act. The petitions for rehearing have not persuaded us to change this approach. Indeed, we note that since the issuance of Order No. 888, the EPA has concluded that the Rule is unlikely to have any immediate significant adverse environmental impact and thus concurred that the Commission's analysis is adequate under NEPA. We further note that EPA has recently taken steps under the Clean Air Act to address NOx emissions as part of a comprehensive emissions control program, along the lines endorsed by the Commission in the EIS.

In summary, the Commission believes that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so to eliminate undue discrimination and protect electricity customers. The measures required in Order No. 888 are necessary to remedy undue discrimination in interstate transmission services and provide an orderly and fair transition to competitive bulk power markets.

To assist the reader, we provide below a section-by-section summary of key elements of this Order on Rehearing.

Scope of the Rule

In this section we discuss petitions to rehear our requirement that transmission and power sales services be contracted for separately (unbundled). We reaffirm that this requirement is a reasonable and workable means of assuring non-discriminatory open access transmission. In doing so we refuse invitations to require that utilities under our jurisdiction divest themselves of generation or transmission assets. We do, however, make an important clarification involving how we will deal with existing contracts that contain so-called Mobile-Sierra clauses (clauses under which one or both parties agreed not to seek modification of contract terms unless they could show that it is contrary to the public interest not to permit the modification).

In Order No. 888 we concluded that contracts would not be abrogated by operation of the Rule. Instead, preexisting contracts would continue to be honored until such time as they were revised or terminated. We also found that those who were operating under pre-existing requirements contracts containing Mobile-Sierra clauses would nonetheless be allowed to seek reform of the contracts on a case-by-case basis. On rehearing we affirm that public utilities will be allowed to file to amend their Mobile-Sierra contracts for the limited purpose of providing an opportunity to seek recovery of stranded costs, without having to make a public interest showing that such cost recovery should be permitted. However, these utilities will have the burden, on a case-by-case basis, of showing that they had a reasonable expectation of continuing to serve the departing customer after the contract term. We clarify that if the utilities under such contracts seek to modify provisions that do not relate to stranded costs, they will have the burden of showing that the provisions are contrary to the public interest.

We here make clear that, in turn, customers will be allowed to file to amend their Mobile-Sierra contracts to modify any contract term or to terminate the contract, without having to make a showing that the contract terms are contrary to the public interest. Instead, customers seeking modifications must demonstrate that the provisions they wish modified are no longer "just and reasonable." We reaffirm our conclusion in the Final Rule that if a customer seeks to shorten or eliminate the term of its contract,

however, any contract modification approved by the Commission will provide for appropriate stranded cost recovery by the customer's supplying utility.

These various provisions meet the two-fold need to deal with stranded costs and the contracts under which those costs were incurred. However, as described in Order No. 888, the opportunity to reform Mobile-Sierra contracts extends only to a limited set of contracts—those entered into on or before July 11, 1994, for requirements power.

Comparability

In this section we deal with those requesting rehearing of our conclusions regarding what "comparable" service is, who is eligible for that service, and how it is to be implemented. We reaffirm our finding that, as a matter of law, we have jurisdiction over the rates, terms and conditions of unbundled transmission service provided to retail customers. We also clarify that we have authority to order "indirect" unbundled retail transmission services and that if such transmission is ordered by us in the future, or if it is provided voluntarily, otherwise eligible customers may obtain such service under the open access tariff. We expect public utilities to provide such service in the future and, if they do not, we will not hesitate to order it.

We modify in two respects the definition of who is eligible for open access transmission service. First, we clarify that, with respect to service that this Commission is prohibited from ordering by section 212(h) of the Federal Power Act (retail wheeling directly to an ultimate consumer and "sham" wholesale wheeling), entities are eligible for such service under the tariff only if it is provided pursuant to a state requirement or is provided voluntarily. Second, we clarify that retail customers taking unbundled service pursuant to a state requirement (i.e., direct retail service) are eligible for such service only from those transmission providers that the state orders to provide service. These changes are made to make clear that our rules cannot be used to circumvent the proscriptions placed on the Commission against ordering direct retail wheeling.

Ancillary Services

In this section we deal with petitions to rehear our definitions of ancillary services—those services such as scheduling, voltage control, and supplemental reserve service that must or can attend the providing of transmission service—as well as the provisions involving these services. We reaffirm that tariffs must separately state the charges for these services. We do modify some of the definitions of these services to conform to industry needs and practices. Most importantly, we make clear that the transmission provider's sale of ancillary services associated with providing basic transmission service is not a wholesale merchant function and thus does not violate the standards of conduct imposed with Order No. 889.

Coordination Arrangements

The requirement to provide non-discriminatory open access transmission applies to any agreement between utilities that contains transmission rates, terms or conditions. This includes pooling arrangements and agreements between companies contracting to provide each other mutually beneficial transmission services. In Order No. 888 we laid out rules under which the open access comparability requirements would apply to tight and loose power pools, public utility holding companies and bilateral coordination agreements. ***12278** We also set out principles that would govern our approval of independent system operator (ISO) agreements.

In this section we affirm the rules governing coordination agreements. In doing so we clarify the definition of "loose pool." We also make clear that, unlike in other situations where we require utilities to provide not only the services they provide themselves but those they could provide themselves, we will require members of loose pools to offer to third parties only those transmission services that they provide themselves under their pool-wide agreements.

We also reaffirm our strong commitment to the concept of ISOs and the ISO principles described in Order No. 888. In doing so we reject arguments that we should require that ISOs be formed. At the same time, we emphasize that while there is no "cookie-cutter" approach to forming an acceptable ISO, the requirement of fair and non-discriminatory rules of governance (Principle

One) and the requirement that ISO employees have no financial interest in the economic interests of power marketers—backed by strict conflict of interest provisions—(Principle Two) are fundamental to our approving any ISO.

Pro Forma Tariff Provisions

The pro forma tariff is the basic mechanism implementing the requirements of comparable open access transmission. It provides the details of the transmission service obligations imposed on jurisdictional utilities by the Rule. On rehearing we affirm most of the provisions set out in Order No. 888 for the pro forma tariff. We do make changes to conform the pro forma tariff to changes adopted under other sections (for example, the definition of "eligible customer").

The rehearing petitions raised many questions about how particular aspects of the tariff will work. For the most part, these questions cannot be answered generically, but must be resolved on a case-by-case basis in the context of specific fact situations. However, the petitions brought to light issues that require clarifications and in some cases revisions to the tariff. The most significant of these involve discounting practices, provisions governing priority of service and curtailment, and the reciprocity provision.

Discounting practices. Originally, we provided different rules depending upon whether the transmission provider was offering a discount to itself or an affiliate or offering a discount to a non-affiliate. In response to the rehearing petitions, we are making three significant changes to the discounting requirements to better permit the ready identification of discriminatory discounting practices while also providing greater discount flexibility.

First, any discount offered on transmission services (including supporting ancillary services) by a transmission provider or requested by any customer must now be made only over the OASIS. With this change, all will have the same, timely access to discounted services. In making this change, we clarify that a transmission provider may limit its discounted service to particular time periods.

Second, once the provider and customer agree on a discount, the details of the discounted service—the price, points of receipt and delivery, and length of service—must be immediately posted on the OASIS.

Third, we revise our Rule respecting what other transmission paths must be offered at a discount. Originally, in Order No. 888, we required that when a discount was offered over one path, the transmission provider would have to provide that discount over all other unconstrained paths on its system. We will no longer require this. Instead, the discount will be limited to those unconstrained paths that go to the same point(s) of delivery as the discounted service being provided on the transmission provider's system. The discount will extend for the same time period and must be offered to all transmission service customers.

Priority and Curtailment. We affirm the right of first refusal policy that reservation priority continues for firm service customers served under a contract of one year or more. We also affirm that curtailment must be made on a pro-rata basis and clarify that non-firm point-to-point service is subordinate to firm service. However, we clarify that the pro-rata curtailment requirement extends to only those transactions that alleviate the constraint.

Reciprocity. In Order No. 888 we conditioned the use of a public utility's open access service on the agreement that, in return, it is offered reciprocal service by non-public utilities that own or control transmission facilities. Such reciprocal service does not have to be through an open access tariff, i.e., a tariff available to all eligible customers, but may be limited to those public utilities from whom the non-public utility obtains open access service. We affirm the reciprocity condition. In doing so, however, we make several clarifications.

First, a public utility is free to offer transmission service to a non-public utility without requiring reciprocal service in return. In other words, it may voluntarily waive the reciprocity condition. However, if it chooses to do so, transmission service must be provided through the pro forma tariff. Alternatively, bilateral agreements for transmission service provided by the public utility will not be permitted.

Second, we clarify that under the reciprocity condition a non-public utility must agree to offer the Transmission Provider any transmission service the non-public utility provides or is capable of providing on its system. This means that the non-public utility undertaking reciprocity must have an OASIS and must operate under the standards of conduct imposed under Order No. 889 unless it is granted a waiver by the Commission or, where appropriate, by a regional transmission group (RTG) of which it is a member. We also clarify that a non-public utility cannot avoid its responsibilities by obtaining transmission service through other transmission customers. Further, the seller as well as the buyer in the chain of a transaction involving a non-public utility will have to comply with the reciprocity condition.

Third, we adhere to our decision not to treat generation and transmission (G&T) cooperatives and their member distribution cooperatives as a single unit. Thus, the reciprocity provision extends to the G&T Cooperative and not to its member distribution cooperatives.

Fourth, we clarify the "safe harbor" provision under which a non-public utility may get a Commission decision that its transmission tariff suffices to meet reciprocity. A non-public utility may limit the use of any reciprocity tariff that it voluntarily files at the Commission to those transmission providers from whom the non-public utility obtains open access service. A non-public utility also may satisfy reciprocity through bilateral agreements with a public utility. As a related matter, if a public utility believes a non-public utility is violating the reciprocity condition, it may file with the Commission a petition to terminate its service to the non-public utility.

Fifth, we clarify that non-public utilities may include stranded cost provisions in their reciprocity tariffs.

Sixth, the order on rehearing removes the term "interstate" from the reciprocity provisions. This is to make clear that reciprocity applies even to those who do not own or control interstate transmission facilities; i.e., foreign utilities and those located in the ERCOT region of Texas.

As to local furnishing bonds held by some public utilities, we clarify that all costs associated with the loss of tax- ***12279** exempt status of those bonds caused by providing open access transmission service are properly considered costs of providing that service. This includes costs of defeasing, redeeming, and refinancing those bonds.

Other Clarifications. In this order on rehearing we take the opportunity to clarify various other tariff provisions. Among these: Transmission providers do not have to take service under the open access tariff for transmitting power purchased on behalf of their bundled retail customers. Also, the ability to reserve capacity to meet the reliability needs of a transmission provider's native load applies equally to present transmission and transmission that is built in the future.

Implementation

On rehearing, we make no substantive changes to the implementation provisions originally required under Order No. 888. For the most part, the implementation process has been completed. Utilities have made the requisite tariff and compliance filings and public and non-public utilities have, through other orders, been provided guidance as to obtaining waivers of Order No. 888 and Order No. 889 requirements.

We emphasize that we do not require the abrogation of existing contracts. Rather, the Rule requires only that transmission providers offer transmission under the open access tariff in addition to existing service obligations. Commitments made under existing contracts will continue. Of course, both transmission providers and their customers may seek to revise the terms and conditions of existing contracts by making the necessary filings, as appropriate, under Sections 205 or 206 of the Federal Power Act.

State and Federal Jurisdiction

On rehearing we reaffirm our decision that when transmission service is provided to serve retail customers apart from any contract for the retail sale of power, i.e., when it is provided on an unbundled basis, that transmission service is under our jurisdiction. In today's market, and increasingly in the future as more states adopt retail wheeling programs, retail transactions are, and will be, broken down into products that are sold separately—transmission and generation—and sold by different entities. The exercise of our jurisdiction over the rates, terms and conditions of unbundled retail transmission will, therefore, become more important. We also recognize that states have jurisdiction over facilities used for local distribution.

On rehearing we also reaffirm the seven-factor test of Order No. 888 to distinguish transmission under our jurisdiction from state-jurisdictional local distribution. In doing so, we recognize that our test does not resolve all possible issues. There may be other factors that should be taken into account. The test, therefore, is designed for flexibility to include unique local characteristics and usages. To that end, we will continue to defer to state findings on these matters.

In addition, we clarify that states have the authority to determine the retail marketing areas of the electric utilities within their respective jurisdictions. We also recognize that states have the concomitant authority to determine the end user services these utilities provide.

Stranded Costs

On rehearing, we reaffirm our basic decisions surrounding the recovery of stranded costs. Utilities will be allowed the opportunity to seek to recover legitimate, prudent, and verifiable wholesale stranded costs. This opportunity is limited to costs associated with serving customers under wholesale requirements contracts executed on or before July 11, 1994 that do not contain explicit stranded cost provisions; and costs associated with serving retail-turned-wholesale customers.

We clarify that we will consider on a case-by-case basis whether to treat a contract extended or renegotiated without a stranded cost provision as an existing contract for stranded cost purposes.

In each case, the opportunity to seek stranded costs is limited to situations in which there is a direct nexus between the availability and use of a Commission-required transmission tariff and the stranding of the costs. The Rule does not allow the recovery of costs that do not arise from the new, accelerated availability of non-discriminatory transmission access.

The Commission also reaffirms its decision that stranded costs should be recovered from the customer that caused the costs to be incurred. The Commission is not requiring other remaining customers, or the utility, to shoulder a portion of its stranded costs that meet the requirements for recovery.

The Commission, as described in Order No. 888, will be the primary forum for addressing the recovery of stranded costs caused by retail-turned-wholesale customers. With respect to such cases, we have made several changes.

First, the Commission has reconsidered its decision respecting cases involving existing municipal utilities that annex retail customer service territories. Under Order No. 888, we found that in such cases the Commission should not be the primary forum for determining stranded cost recovery. On rehearing we now find that such cases should fall within our province.

Second, we clarify that the opportunity for recovery of stranded costs associated with retail-turned-wholesale customers applies regardless of whether the customer or its new supplier is the one requesting and contracting for the transmission service. To this end, we have revised the definition of "wholesale stranded cost."

With respect to the recovery of stranded costs caused by unbundled retail wheeling, we affirm that the only circumstance in which we will entertain requests for these types of costs is when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required. We clarify that if a state regulatory authority has in fact addressed such costs, regardless of whether it has allowed full recovery, partial recovery or no recovery, utilities may not apply to the Commission to recover stranded costs caused by the retail wheeling.

Other

In this section we resolve questions concerning our information reporting requirements, regional transmission groups, and the special situations posed by utilities in the Pacific Northwest and by federal power marketing and similar agencies. Here we make some minor clarifications but make no significant changes to Order No. 888.

We are not persuaded that the information reporting requirements need to be changed at this time. Finally, we reject arguments that would have us fix generically any particular rate methodology for providing open access transmission service under the pro forma tariff.

II. Public Reporting Burden

This order on rehearing issues a number of minor revisions to the Final Rule. We find, after reviewing these revisions, that they do not, on balance, increase the public reporting burden.

The Final Rule contained an estimated annual public reporting burden based on the requirements of the Open Access Final Rule and the Stranded Cost Final Rule.[FN3] Using the ***12280** burden estimate contained in the Final Rule as a starting point, we evaluated the public burden estimate contained in the Final Rule in light of the revisions contained in this order and assessed whether this estimate needed revision. We have concluded, given the minor nature of the revisions, and their offsetting nature, that our estimate of the public reporting burden of this order on rehearing remains unchanged from our estimate of the public reporting burden contained in the Final Rule. The Commission has conducted an internal review of this conclusion and has assured itself that there is specific, objective support for this information burden estimate. Moreover, the Commission has reviewed the collection of information required by the Final Rule, as revised by this order on rehearing, and has determined that the collection of information is necessary and conforms to the Commission's plan, as described in the Final Rule, for the collection, efficient management, and use of the required information.

Persons wishing to comment on the collections of information required by the Final Rule, as modified by this order on rehearing, should direct their comments to the Desk Officer for FERC, Office of Management and Budget, Room 3019 NEOB, Washington, D.C. 20503, phone 202-395-3087, facsimile: 202-395-7285 or via the Internet at hillier_t@a1.eop.gov. Comments must be filed with the Office of Management and Budget within 30 days of publication of this document in the Federal Register. Three copies of any comments filed with the Office of Management and Budget also should be sent to the following address: Ms. Lois Cashell, Secretary, Federal Energy Regulatory Commission, Room 1A, 888 First Street, N.E., Washington, D.C. 20426. For further information, contact Michael Miller, 202-208-1415.

III. Background

In the Final Rule, we detailed the events that led up to this rulemaking, including the significant technical, statutory and regulatory changes that have occurred in the electric industry since the FPA was enacted in 1935.[FN4] In particular, we focused on the competitive influences of the Public Utility Regulatory Policies Act of 1978, the Congressional mandate in the Energy Policy Act of 1992 to encourage competition in electricity markets, and the need for reform in the industry if consumers are to achieve the benefits that greater competition can bring.

In the ten months since the Final Rule issued, competitive changes have escalated at an even faster pace in virtually all areas of the electric industry. These changes are driven not only by the Commission's Final Rule, but also by state restructuring initiatives and by continuing pressures from customers to take advantage of emerging competitive markets and the lower electricity rates they can bring.

All of the existing 166 public utilities that own, control or operate interstate transmission facilities (listed as Group 1 and Group 2 utilities in the Final Rule) have filed the Order No. 888 pro forma open access tariff or requested a waiver of the requirement.

Similarly, they either have adopted an electronic information network or requested a waiver of the requirement. Five non-public utilities have submitted reciprocal transmission tariffs and more than 20 have requested a waiver of the reciprocity condition in the pro forma tariff.[FN5]

Significant competitive changes also have accelerated with respect to power pooling, state restructuring initiatives, and Independent System Operators (ISOs). Under Order No. 888 and subsequent implementation orders, the Commission required the filing of revised pooling agreements and joint pool-wide transmission tariffs by December 31, 1996, in order to remedy undue discrimination in transmission services provided through interstate power pooling arrangements. Among the power pool filings were a New England (NEPOOL) comprehensive restructuring proposal, a New York proposal, a Pennsylvania-New Jersey-Maryland (PJM) compliance filing and a Western Systems Power Pool filing.

In response to the Commission's encouragement in Order No. 888 of ISOs as a possible means for accomplishing comparable access, a number of utilities and states are well underway in developing this new institution. The fundamental purpose of an ISO is to operate the transmission systems of public utilities in a manner that is independent of any business interest in sales or purchases of electric power by those utilities. The Commission has received several proposals for forming ISOs, one as part of the multi-docketed filing engendered by California's restructuring plan, and others relating to power pool filings. A number of regions are also developing ISO proposals. Some regions previously considering regional transmission groups (RTGs), whose primary purpose is regional planning of transmission facility construction and upgrades, have now broadened their discussions to include an ISO.

Investor-owned utilities in California, at the order of both the state commission and the legislature, have filed proposals with the Commission that would transfer control of transmission facilities to an ISO in conjunction with the formation of a state-wide power exchange to facilitate both wholesale and retail access. While the case presents many complex issues for the Commission to resolve, the California proposal is fundamentally compatible with the pro-competitive open-access requirements of Order Nos. 888 and 889. The Commission's open-access policies therefore have provided a framework for California, and other states, to explore customer choice initiatives.

Other major regions of the country also are instituting ISOs. Member utilities of the PJM Power Pool filed competing ISO proposals with the Commission and are currently working to reconcile the differences between their proposals. The New York Power Pool recently filed a proposal to create an ISO and a power exchange for New York. The New England Power Pool is exploring a new industry structure for its region that centers on the creation of an ISO. Utilities and other market participants in the Electric Reliability Council of Texas have also formed an ISO. Discussions are underway among utilities from Virginia to Wisconsin in an attempt to create a Midwestern ISO. Members of the Mid-America Power Pool are discussing an ISO proposal. In the Pacific Northwest, utilities are involved in negotiations intended to lead to the formation of an independent grid operator (Indego).

The combined available generation resources of the utilities in these groups is on the order of 428 GW out of a total of approximately 732 GW for total U.S. resources (as of the end of 1996). Thus, assuming these ISO arrangements come to fruition, about three-fifths of the industry may have independent system operators controlling their transmission systems.

Moreover, every state but one has proposed or is considering or developing retail competition programs. For example, New Hampshire, Illinois ***12281** and Massachusetts began pilot programs in the past year, and retail transmission service for these pilot programs currently is being taken pursuant to tariffs approved by both the state commissions and this Commission. The Massachusetts Department of Public Utilities has sent a proposal to the state legislature calling for retail competition to begin in January 1998. The New York Public Service Commission has issued an order proposing that retail competition begin in early 1998. The New Jersey Board of Public Utilities has issued a proposal permitting customer choice beginning in October of 1998. The Vermont Public Service Board has sent a plan to the legislature recommending that full customer choice begin by the end of 1998. The Arizona Corporation Commission has adopted rules to phase in competition over four years, beginning in January 1999. Recently, the Maine Public Utilities Commission issued a final report and recommendation to the legislature for

retail competition to begin in January 2000. In addition, Rhode Island and Pennsylvania both have new laws requiring customer choice. These are only a few of the many state initiatives that are under way that will dramatically alter the structure of the electric industry.

Since Order No. 888 was issued, significant efforts also have been made to ensure that reliability of the transmission grid is maintained and that reliability criteria are compatible with competitive markets. The North American Electric Reliability Council (NERC) has continued its efforts to broaden its membership and to fashion reliability requirements to fit a more competitive electric power industry. For example, the NERC Board of Directors voted to require mandatory compliance by all power market participants with its reliability standards. NERC is also establishing new entities called regional security coordinators to oversee the stability of grid operations and to direct the development of an extensive new communications network. Various NERC committees are considering ways to improve the tracking of power transactions, identify the network impacts of transactions, and reflect the actual flow of power over the network when making reservations for transmission service. These efforts are likely to intensify as the industry continues to adapt to competitive changes occurring in the marketplace.

Thus, all segments of the electric industry have taken significant steps in the past year in response to the emerging wholesale competitive markets enabled by Order No. 888 as well as state retail competition initiatives. The competitive framework established by Order No. 888, whose centerpiece is non-discriminatory transmission services and a fair and orderly stranded cost recovery mechanism, is critical to the successful transition to, and full development of, the industry restructuring proposals that are well underway in all major regions of the country.

IV. Discussion

A. Scope of the Rule

1. Introduction

Rehearing Requests

Severability of Rules

Several entities assert that the Commission should find that the requirements of open access transmission and stranded cost recovery are not severable.[FN6] They argue that if one of these provisions is invalidated by a court or otherwise removed, the orders in their entirety should be withdrawn or stayed pending reconsideration by the Commission, and public utilities should be allowed to withdraw or file amended transmission tariffs.

Commission Conclusion

The Commission will not, at this time, make any determination whether or not the open access transmission, stranded cost recovery and OASIS provisions of Order Nos. 888 and 889 are severable. Accordingly, we make no finding whether, if one of these provisions is invalidated, Order Nos. 888 and 889 should be withdrawn or stayed in their entirety. We believe that our decisions in Order Nos. 888 and 889 will be upheld by the courts. Moreover, it would be premature to consider the appropriateness of a stay or withdrawal at this time. Circumstances at the time of any court order would dictate how we should proceed and we would consider all such circumstances, and the entirety of our policy decisions, before determining how to respond to a court decision.

2. Functional Unbundling

In the Final Rule, the Commission found that functional unbundling of wholesale generation and transmission services is necessary to implement non-discriminatory open access transmission.[FN7] At the same time, the Commission recognized that additional safeguards were necessary to protect against market power abuses. Thus, the Commission adopted a code of conduct, discussed in detail in the final rule on OASIS, to ensure that the transmission owner's wholesale power marketing personnel

and the transmission customer's power marketing personnel have comparable access to information about the transmission system. The Commission also noted that section 206 of the FPA is available if a public utility seeks to circumvent the functional unbundling requirements.

As a further precaution against unduly discriminatory behavior, the Commission stated that it will continue to monitor electricity markets to ensure that functional unbundling adequately protects transmission customers. The Commission also indicated that it would continue to observe both the evolution of competitive power markets and the progress of the industry in adapting structurally to competitive markets. If it subsequently becomes apparent that functional unbundling is inadequate or unworkable in assuring non-discriminatory open access transmission, the Commission indicated that it would reevaluate its position and decide whether other mechanisms, such as ISOs, should be required.

The Commission concluded that functional unbundling, coupled with these safeguards, is a reasonable and workable means of assuring that non-discriminatory open access transmission occurs. In the absence of evidence that functional unbundling will not work, the Commission indicated that it was not prepared to adopt a more intrusive and potentially more costly mechanism —corporate unbundling—at this time.

Rehearing Requests

Several entities disagree with the Commission's decision to require functional unbundling of wholesale generation and transmission as a means of assuring non-discriminatory open access transmission.[FN8] American Forest & Paper argues that utilities must be required to divest or spin-off their generating assets through operational unbundling or divestiture. It alleges that it was arbitrary and capricious, and not supported by evidence, for the Commission to rely on a monopolist's code of conduct to protect against monopoly abuses. Nucor asserts that a financial conflict of interest remains and that the Commission cannot monitor the exchanges of information between utility generation and transmission employees. It declares that a credible ***12282** information disclosure requirement is needed that makes generation cost and production data visible to all participants on a same-time basis. NY Municipal Utilities also believes that the Commission did not go far enough and argues that the Commission should have required operational unbundling, at least for tight power pools.

Commission Conclusion

The Commission reaffirms its finding in the Final Rule that, based on the information available at this time, functional unbundling, along with the flexible safeguards discussed in the Final Rule, is a reasonable and workable means of assuring non-discriminatory open access transmission. We see no need to adopt a more intrusive and potentially more costly approach at this time based on speculative allegations that functional unbundling may not work and that more severe measures may be needed. Indeed, despite a number of opportunities to do so, no entity has submitted any evidence suggesting that this less intrusive approach would not work. We do emphasize, however, that we have not adopted a rigid approach, but have indicated a willingness to monitor the situation and, if events require, reevaluate our decision and decide whether another mechanism may be more appropriate. Until we see evidence that functional unbundling will not work, we will continue to require functional unbundling, with the safeguards enumerated in the Final Rule and in Order No. 889.

3. Market-Based Rates

a. Market-Based Rates for New Generation

In the Final Rule, the Commission codified its determination in Kansas City Power & Light Company (KCP&L)[FN9] that the generation dominance standard for market-based sales from new capacity should be dropped.[FN10] The Commission explained that it had yet to find an instance of generation dominance in long-run bulk power markets and no commenter had presented any evidence to that effect. However, the Commission emphasized that it will not ignore specific evidence presented by an intervenor that a seller requesting market-based rates for sales from new generation nevertheless possesses generation dominance.

The Commission further clarified that dropping the generation dominance standard for new capacity does not affect the demonstration that an applicant must make in order to qualify for market-based rates for sales from its existing generating capacity.

Rehearing Requests

Several entities take issue with the Commission's determination to drop the generation dominance standard for market-based sales from new capacity.[FN11] American Forest & Paper argues that the Commission should delay its decision until effective competition has been demonstrated to exist in all markets. SC Public Service Authority maintains that the Commission must determine on a case-by-case basis whether public utilities have market power (for both existing and new capacity). It further argues that the Commission must develop an analysis of structural conditions to use in assessing the potential for market power consistent with that used by DOJ and FTC in merger proceedings and that reflects the conditions of the industry. SC Public Service Authority also asserts that the Commission must require as a condition of market rates for sales in the bulk power market, which it defines to be limited to sales to integrated utilities, that the selling utility file rate cases with the Commission and the applicable state commissions to avoid subsidization by captive consumers.

TDU Systems alleges that the long-run bulk power market upon which the KCP&L decision was based is overly broad and ignores the distinction between firm power, which "entities subject to others' market power are most commonly in need of" and other bulk power services. TDU Systems take issue with the Commission's conclusion in KCP&L that large numbers of capacity offers from IPPs and QFs demonstrate that the market abounds with competitors. TDU Systems argues that the Commission's "assumption that large numbers of offers of power equate with large numbers of offers of firm power is questionable at best, and very likely incorrect."[FN12] Similarly, LEPA argues that the Commission ignored evidence submitted by LEPA in comments "that the transmission dominant utility still retained monopoly power over RQ [requirements] markets on which LEPA's members are dependent for their bulk power supply." Because the Commission ignored the RQ market and the evidence of concentration in that market, LEPA asserts that the Commission's decision is reversible error. LEPA further argues that the Commission ignored the undisputed testimony of LEPA's witness that reliability requirements constrain the geographic scope of the RQ market severely.

San Francisco argues that the burden to demonstrate affirmatively the absence of capacity constraints as a precondition to receiving authority to charge market-based rates for sales from new capacity should be upon public utility applicants, who possess the information concerning capacity constraints.

Commission Conclusion

We reaffirm our decision to codify the determination in KCP&L that the generation dominance standard for market-based sales from new capacity should be dropped. Petitioners have not presented any evidence that demonstrates generation dominance in long-run bulk power markets and, as discussed in Order No. 888, we have found no such evidence of generation dominance in any of the numerous market-based rate cases decided by the Commission since KCP&L. In addition, as described in Order No. 888, the Commission will consider evidence of generation dominance, including generation dominance that results from transmission constraints, when such evidence is presented by an intervenor in a market-based rate case in which a utility seeks market-based pricing associated with new capacity.

American Forest & Paper's argument that the Commission should delay codification of KCP&L until effective competition has been demonstrated to exist in all markets ignores the fact that we have eliminated the generation dominance standard for market-based rates from new capacity only, and that the generation standard still applies to applications for market-based rates from existing generation. Other entities similarly argue that other markets in which utilities may sell power from new capacity may be highly concentrated with respect to generation, or that these utilities may otherwise be able to exert market power. Specifically, TDU Systems and LEPA express concern that the new policy may result in the exercise of market power over very specific bulk power products.

To allay these concerns, we note that eliminating the generation dominance showing applies only to sales from new capacity. It does not apply to entire classes of service or to specific products. In addition, the policy eliminates the showing only as a matter of routine in each filing. We reemphasize that the Commission will consider specific evidence of generation dominance *12283 associated with new capacity at the time the seller seeks market-based rates for the new capacity, including whether the addition of the new capacity, when combined with existing capacity, results in generation dominance. This clearly includes situations where existing sources of generation must be combined with new resources to produce a firm power supply. Where entry barriers are a concern, intervenors are free to raise the issue.

SC Public Service Authority also raises a number of concerns relating to the ability of utilities to exercise market power if they are permitted to sell new capacity at market-based rates. These concerns generally include how the Commission determines product and geographic markets, and the standards used to determine whether sellers can exercise market power. In response to these concerns, as noted above public utility owners of new capacity must still seek case-by-case approval before they can sell power from new capacity at market-based rates and, as stated in the Final Rule, intervenors may present specific evidence that a seller requesting such market rates possesses generation dominance or otherwise has market power.[FN13] These requirements include considerations of transmission market power, whether other barriers to entry exist and whether there is evidence of affiliate abuse or reciprocal dealing.

b. Market-based Rates for Existing Generation

In the Final Rule, the Commission found that there is not enough evidence on the record to make a generic determination about whether market power may exist for sales from existing generation.[FN14] The Commission indicated that it would continue its case-by-case approach that allows market-based rates based on an analysis of generation market power in first tier and second tier markets.[FN15] The Commission further indicated that while it will continue to apply the first-tier/second-tier analysis, it will allow applicants and intervenors to challenge the presumption implicit in the Commission's practice that the relevant geographic market is bounded by the second-tier utilities. Finally, the Commission stated that it would maintain its current practice of allowing market-based rates for existing generation to go into effect not subject to refund.[FN16] To the extent that either the applicant or an intervenor in individual cases offers specific evidence that the relevant geographic market ought to be defined differently than under the existing test, the Commission indicated that it will examine such arguments through formal or paper hearings.

Rehearing Requests

No rehearing requests were filed with respect to this matter.

4. Merger Policy

In the Final Rule, the Commission explained that it had issued a Notice of Inquiry (NOI) on the Commission's merger policy in Docket No. RM96-6-000.[FN17] The Commission indicated that it will review whether its criteria and policies for evaluating mergers need to be modified in light of the changing circumstances, including the Final Rule, that are occurring in the electric industry. The Commission concluded that it would review its merger policy in the ongoing NOI proceeding.[FN18]

Rehearing Requests

No rehearing requests were filed with respect to this matter.

Commission Conclusion

We note that on December 18, 1996, the Commission issued, in the NOI proceeding, a Policy Statement that updates and clarifies the Commission's procedures, criteria and policies concerning public utility mergers.[FN19]

5. Contract Reform

Requirements and Transmission Contracts

In the Final Rule, the Commission concluded that it was not appropriate to order generic abrogation of existing requirements and transmission contracts, but concluded nonetheless that the modification of certain requirements contracts (those executed on or before July 11, 1994) on a case-by-case basis may be appropriate.[FN20] The Commission further concluded that, even if customers under such requirements contracts are bound by so-called Mobile-Sierra clauses, they ought to have the opportunity to demonstrate that their contracts no longer are just and reasonable.

The Commission found that it would be against the public interest to permit a Mobile-Sierra clause in an existing wholesale requirements contract[FN21] to preclude the parties to such a contract from the opportunity to realize the benefits of the competitive wholesale power markets. Thus, it explained, a party to a requirements contract containing a Mobile-Sierra clause no longer will have the burden of establishing independently that it is in the public interest to permit the modification of such contract. The party, however, still will have the burden of establishing that such contract no longer is just and reasonable and therefore ought to be modified.

The Commission explained that this finding complements the Commission's finding that, notwithstanding a Mobile-Sierra clause in an existing requirements contract, it is in the public interest to permit amendments to add stranded cost provisions to such contracts if the public utility proposing the amendment can meet the evidentiary requirements of the Final Rule. Accordingly, the Commission required that any contract modification approved under this Section must provide for the utility's recovery of any costs stranded consistent with the contract modification. Further, the Commission concluded that if a customer is permitted to argue for modification of existing contracts that are less favorable to it than other generation alternatives, then the utility should be able to seek modification of contracts that may be beneficial to the customer.

Coordination Agreements

The Commission concluded that to assure that non-discriminatory open access becomes a reality in the relatively near future, it was necessary to modify existing economy energy coordination agreements. The Commission stated that it would condition future sales and ***12284** purchase transactions under existing economy energy coordination agreements[FN22] to require that the transmission service associated with those transactions be provided pursuant to the Final Rule's requirements of non-discriminatory open access, no later than December 31, 1996. The Commission also required that, for new economy energy coordination agreements[FN23] where the transmission owner uses its transmission system to make economy energy sales or purchases, the transmission owner must take such service under its own transmission tariff as of the date trading begins under the agreement.[FN24]

Finally, the Commission concluded that it would not require the modification of non-economy energy coordination agreements. However, the Commission noted that this does not insulate such agreements from complaints that transmission service provided under such agreements should be provided pursuant to the Final Rule pro forma tariff.

Rehearing Requests

Various utilities oppose the Commission's finding that it is in the public interest to permit the modification of existing requirements contracts that contain Mobile-Sierra clauses. On the other hand, a number of customers assert that the Commission did not go far enough and seek enhanced contract reformation rights.

Utilities Against Contract Reformation

Several utilities argue that the Commission's finding is not supported by substantial evidence.[FN25] Utilities For Improved Transition asserts that the Commission cannot rely on economic theory as a substitute for substantial evidence.[FN26] It argues that the record in this proceeding demonstrates that the marketplace is becoming increasingly competitive without mandatory

tariffs, which is evidence of market health, not market problems. It further argues that even if undue discrimination is proven, the remedy is not needed because the record shows that existing programs are meeting the industry's needs.

Southwestern argues that the Commission has improperly chosen to ignore the public interest standard and has failed to make the contract specific analysis here that it performed in Northeast Utils. Serv. Co., 66 FERC 61,332 (1994), aff'd, 55 F.3d 686 (1st Cir. 1995). PSE&G and Carolina P&L also argue that the Commission failed to demonstrate the "unequivocal public necessity" for generically abrogating the Mobile-Sierra clauses and assert that the Commission has presented no evidence as to how the public interest will be served by abrogating these contracts. PSE&G and Carolina P&L further argue that the Commission cannot avoid making a public interest determination "by the simple expedient of asserting that the public interest requires it to ignore the Mobile-Sierra clauses that required that public-interest determination in the first place."[FN27]

Union Electric and PSE&G argue that the Commission, in justifying its public interest finding, inappropriately focused on the interests of the parties to the contract instead of on whether non-parties will be adversely affected by the existing contracts.

Public Service Co of CO asserts that the Commission should clarify the definition of requirements contract to include long-term block purchases of electricity. It states that it purchases a large percentage of its system requirements under long-term block purchase agreements, and that under the Commission's abrogation policy in Order No. 888, its ability to abrogate these supply arrangements would be treated differently because its contracts do not meet the definition of a "wholesale requirements contract," as defined in new section 35.26(b)(1) of the Commission's Regulations. Public Service Co of CO further asserts that the Commission has not adequately explained why it is appropriate or in the public interest to allow partial requirements customers to abrogate their contracts, but not similarly to allow a public utility to abrogate its supply arrangements.[FN28]

PSE&G and Carolina argue that the availability of stranded cost recovery cannot support allowing customers to modify rates under Mobile-Sierra clauses that required that public-interest determination in the first place.

PSE&G and Carolina P&L also argue that no Mobile-Sierra contracts entered into after October 24, 1992 (the date EPAct became law) should be subject to the Rule because since that date customers have been able to apply for an order under section 211 to have power transmitted to them from suppliers other than the utility to whom they are interconnected.

PSE&G requests that the Commission clarify that the just and reasonable standard used in considering a contract abrogation claim will be limited to a determination of whether the rate is just and reasonable within the cost-based zone of reasonableness of the selling public utility. Such an analysis, PSE&G asserts, should not include a comparison to what other utilities offer to their customers.[FN29]

Customers Seek Enhanced Contract Reformation Rights

TAPS argues that the Commission should apply a just and reasonable standard to requests by all "victims" of undue discrimination to seek modifications of requirements or transmission contracts, whether they are subject to Mobile-Sierra or not. On the other hand, TAPS asserts that utilities should be bound to the bargain they extracted from transmission customers. Wisconsin Municipals request that the Commission clarify that parties may seek mandatory abrogation of preexisting transmission contracts or provisions and that the Commission will apply a rebuttable presumption that terms and conditions inferior to the pro forma tariff are unjust and unreasonable on their face.

CCEM argues that requirements customers should receive blanket conversion rights. At a minimum, CCEM asserts, if a customer seeks conversion, the burden of proof in the proceeding should shift to the utility. CCEM also emphasizes that the question remains why conversion was deemed essential in natural gas markets, but not in the transition to competition in the electric industry.

Blue Ridge argues:

In neither the power supply nor transmission access case should a provider be allowed to modify existing power supply contracts under any but the Mobile Sierra public interest burden of proof. In both the power supply or transmission access cases, the Commission should articulate the suggested standards for what constitutes a prima facia case. [[FN30]]

Commission Conclusion

Before responding to the rehearing arguments raised, we wish to clarify our Mobile-Sierra findings. We explained in Order No. 888 that we were making two ***12285** complementary public interest findings. First, as discussed further in Section IV.J, we found that it is in the public interest to permit public utilities to seek stranded cost amendments to existing requirements contracts with Mobile-Sierra clauses. Second, we found that a "party" to a requirements contract containing a Mobile-Sierra clause no longer will have the burden of establishing independently that it is in the public interest to permit the modification of such contract, but still will have the burden of establishing that such contract no longer is just and reasonable and therefore ought to be modified. We clarify that, in making this second finding, our reference to a "party" to a requirements contract containing a Mobile-Sierra clause was directed at modification of contract provisions by customers.[FN31] Additionally, it applies to any contract revisions sought, whether or not they relate to stranded costs.[FN32]

In response to the Mobile-Sierra rehearing arguments described above, as well as the Mobile-Sierra arguments described in Section IV.J concerning our determinations regarding stranded cost amendments to contracts, the Commission believes it is important to first address the general context in which our Mobile-Sierra determinations have been made. In Order No. 888, the Commission removed the single largest barrier to the development of competitive wholesale power markets by requiring non-discriminatory open access transmission as a remedy for undue discrimination. This action carries with it the regulatory public interest responsibility to address the difficult transition issues that arise in moving from a monopoly, cost-based electric utility industry to an industry that is driven by competition among wholesale power suppliers and increasing reliance on market-based generation rates.

There are two predominant, overlapping transition issues that arise as a result of our actions in this rulemaking: first, how to deal with the uneconomic sunk costs incurred, and second, how to deal with the contracts that were entered into, under an industry regime that rested on a regulatory framework and set of expectations that are being fundamentally altered. To address these issues, the Commission has balanced a number of important interests in order to achieve what it believes will be a fair and orderly transition to competitive markets. These interests include the financial stability of the electric utility industry and permitting customers to obtain the benefits of competitive markets without undue disruption or unfairness to other customers or industry participants.

As the above rehearing arguments demonstrate, there is no consensus on how the Commission should manage the transition. In fact, parties offer diverse and conflicting views as to what the Commission should do regarding existing contracts. Some would have us let all contracts run their course with no opportunity for customers to modify or terminate their contracts, no matter how long the contracts or how onerous their terms. Others advocate automatic generic abrogation of all contracts. Yet others want a guaranteed automatic right to renew a contract if it happens to contain favorable rates and terms.[FN33]

Rather than adopting one extreme position or the other, the Commission has taken a measured approach with regard to contract modification, including modification of contracts that contain Mobile-Sierra clauses. Our goal is to balance the desire to honor existing contractual arrangements with the need to provide some means to accelerate the opportunity of parties to participate in competitive markets. To accomplish this balance, the Commission, first, has made Mobile-Sierra public interest findings (discussed further below) only as to a limited set of contracts: those wholesale requirements contracts executed on or before July 11, 1994, which is the date of our first stranded cost proposed rulemaking and which served to put the industry and customers on notice that future contracts should explicitly address the rights, obligations and expectations of parties, including stranded cost obligations.[FN34]

Second, with regard to contract modifications sought by utilities, as discussed in more detail in Section IV.J, utilities that seek to add stranded cost provisions have a high evidentiary burden to meet before they can add contract provisions that permit

stranded cost recovery beyond the end of their contract terms; the burden is particularly high in the case of contracts with notice provisions. With regard to modifications of contract provisions that do not relate to stranded costs, a utility with a Mobile-Sierra contract clause will have the burden of showing that the provisions are contrary to the public interest.[FN35]

Third, with regard to contract modifications sought by customers, a customer will have to show that the provisions it seeks to modify are no longer just and reasonable.[FN36] If a customer seeks to shorten or eliminate the term of an existing contract, any contract modification approved by the Commission will take into account the issue of appropriate stranded cost recovery by the customer's supplying utility.

In permitting customers the opportunity to seek these types of modifications, even for contracts that contain Mobile-Sierra clauses, the Commission has based its public interest findings on the unprecedented industry changes facing utilities and their customers. While, as we stated in the Final Rule, there is no market failure in the electric industry that would justify generic abrogation of existing contracts, nevertheless the industry is in the midst of fundamental change. We cannot conclude that it is in the public interest to require all customers to be ***12286** held to requirements contracts that were executed under the prior industry regime, no matter what the circumstances of those contracts.

In response to parties who challenge the Commission's finding that it would be against the public interest to deny customers an opportunity to seek modification of wholesale requirements contracts executed on or before July 11, 1994,[FN37] these parties ignore the fact that these contracts were entered into during an era in which transmission providers exercised monopoly control over access to their transmission facilities.[FN38] The majority of customers under these types of contracts were captive, i.e., they had no realistic choice but to purchase generation from their local utility because they had no transmission to reach another supplier. Many of these contracts were the result of uneven bargaining power between customers and monopolist transmission providers.[FN39] While monopolist transmission providers may not have exercised monopoly power in all situations,[FN40] the unprecedented competitive changes that have occurred (and are continuing to occur) in the industry may render their contracts to be no longer in the public interest or just and reasonable. These changed circumstances, discussed at length in the Final Rule, and the further changes that will occur as a result of open access transmission, may affect whether such contracts continue to be just and reasonable or not unduly discriminatory both as to the direct customers of the contracts, as well as to indirect, third-party consumers as well.[FN41]

We therefore reject arguments that there is no "evidence" to support our finding that it is in the public interest to permit review of these contracts in light of the specific circumstances surrounding the contracts and in light of dramatically changed industry circumstances. We emphasize, however, that our decision is to permit an opportunity for review and that we will require a case-by-case showing that any modifications should be permitted. [FN42] As we explained in the Final Rule, this decision complements our decision that it is in the public interest to permit amendments to add stranded cost provisions to existing contracts if case-by-case evidentiary burdens are met.

As we discuss further in our detailed stranded cost discussion in Section IV.J, we do not interpret the Mobile-Sierra public interest standard as practically insurmountable[FN43] in the extraordinary situation before us where historic statutory and regulatory changes have converged to fundamentally change the obligations of utilities and the markets in which both they and their customers will operate. The ability to meet our overarching public interest responsibilities and to protect consumers would be virtually precluded if we were to apply a practically insurmountable standard of review before taking into account these fundamental industry-wide changes.[FN44]

With respect to Public Service Co of CO's argument, we disagree that the definition of a wholesale requirements contract should be modified to include a long-term block purchase of electricity. In the majority of circumstances, such long-term supply contracts are voluntary arrangements in which neither party had market power. It would be inappropriate to make generic Mobile-Sierra findings as to these types of contracts. Parties can avail themselves of the section 205 and 206 procedures already available to them if they want to seek modification of such contracts.

Finally, we reject CCEM's argument that all customers should receive automatic conversion rights because customers were provided such a right in the restructuring of the natural gas industry. We have taken, as is within our discretion, a substantially different approach here from that taken when we restructured the natural gas industry. As we stated in the Final Rule, and as alluded to above, at the time the Commission addressed this situation in the natural gas industry it was faced with shrinking natural gas markets, statutory escalations in natural gas ceiling prices under the Natural Gas Policy Act, and increased production of gas.[FN45] Moreover, the natural gas industry was plagued with escalating take-or-pay liabilities.

There was a market failure in the natural gas industry that required the ***12287** extraordinary measure of generically allowing all customers to break their contracts with pipelines. In contrast, market circumstances in the electric industry today do not compel generic abrogation of contracts. The more moderate approach we have taken will permit us to take into account the fundamental industry changes that have occurred (and will continue to occur), to balance the interests of all affected parties, and to help avoid drastic shocks to industry participants.

Right of First Refusal

In the Final Rule, the Commission concluded that all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, should have the right to continue to take transmission service from their existing transmission provider.[FN46] If not enough capacity is available to meet all requests for service, the right of first refusal gives the existing customer who had contractually been using the capacity on a long-term, firm basis the option of keeping the capacity. However, the limitations imposed by the Commission are that the underlying contract must have been for a term of one-year or more and the existing customer must agree to match the rate offered by another potential customer, up to the transmission provider's maximum filed transmission rate at that time, and to accept a contract term at least as long as that offered by the potential customer.[FN47] Moreover, the Commission indicated that this right of first refusal is an ongoing right that may be exercised at the end of all firm contract terms (including all future unbundled transmission contracts).

Requests for Rehearing

On rehearing, most petitioners agree with or do not contest the notion of providing existing transmission customers with a right of first refusal, but many have requested modification or clarification of the Commission-imposed limitations on such a right. A variety of transmission customers assert that the Commission's right of first refusal provision fails to adequately protect existing transmission customers' rights to continued service and seek changes to the Commission's provision. On the other hand, a number of utilities believe that the Commission should provide additional restrictions on the right of first refusal.

Customers' Positions

APPA argues that (1) existing customers should only have to agree to service that matches the term of any power supply contract for which it will use the transmission arrangement or, in the absence of a generation contract, one year, and (2) the pricing provision should be changed to reflect the current just and reasonable rate, as approved by the Commission, for similar transmission service.

NRECA also argues that the term and pricing provisions of section 2.2 need to be changed. With respect to the term of the contract the customer should be required to match, NRECA asserts that it should be one year, which corresponds to the definition of long-term firm service in the tariff. With respect to the rate, NRECA requests that the Commission cap the obligation to match the price offered by another customer at the maximum transmission rate the incumbent customer is obligated to pay to the transmission provider at the close of the prior contract term.

TDU Systems argue that the right of first refusal provision fails to take into consideration amounts that TDUs have contributed to the development of the transmission systems through prior transmission rates. TDU Systems are concerned about the possibility

of an increase in the price of transmission capped only by the cost of increasing the capacity of the provider's transmission system.

TAPS requests that the Commission clarify that the transmission provider may only charge its then effective rates for existing, non-constrained transmission capacity because to allow opportunity or expansion costs would perpetually put the existing transmission customers on the margin at the end of their contract terms subjecting them to higher rates than the transmission provider.[FN48]

Blue Ridge raises a possible discrepancy between the language in the tariff and the language in the preamble. It asserts that section 2.2 "requires the existing customer to 'pay the current just and reasonable rate, as approved by the Commission,' while the Regulatory Preamble requires the customer to 'match the rate offered by another potential customer, up to the transmission provider's maximum filed transmission rate at that time.' Order No. 888, mimeo at 88."

Tallahassee asks the Commission to clarify that the right of first refusal to presently bundled transmission capacity accrues to the power customer paying the bundled rate and not to the intermediary acting on behalf of the customer.

AEC & SMEPA maintain that the price and term limitations of section 2.2 would place TDUs at a competitive disadvantage vis-a-vis the transmission provider by subjecting TDUs to incremental costs, including the costs of system upgrades, if other new customers are vying to use the transmission system. They state that the Commission must provide existing transmission customers the same rights as the transmission provider's other native load customers.

Utilities' Positions

PSNM argues that imposing a right of first refusal is inconsistent with the Commission's finding that contracts should not be abrogated. In effect, it argues that imposition of the right of first refusal abrogates existing contracts executed with the expectation that capacity could be recalled for the utility's own use upon expiration of the contracts. PSNM explains that it has a constrained transmission system and has been balancing specific contract durations against projected future native loads so that required capacity may be made available for use by third parties in the short-term, but not be committed to those parties at the time it is needed to be recalled. Moreover, PSNM asserts that Order No. 888 is not supported by the right of first refusal process of Order No. 636 because the Commission does not have abandonment authority under the FPA and its authority to require continuation of service is not well-defined and is controversial.[FN49]

Utilities For Improved Transition and Florida Power Corp argue that section 2.2 of the pro forma tariff should be modified by "restricting rollover rights to the same points of receipt and delivery as the terminating service and ***12288** by providing the customer notice of a competing application and 90 days in which to file its own application for service for a term at least as long as the competing application." (Florida Power Corp at 11-13; Utilities For Improved Transition at 50-53). Similarly, EEI argues that to obtain a priority for continuation of service, customers must be seeking service that is substantially similar to or a continuation of the service they already receive and must be subject to a time limit on the reservation priority. CSW Operating Companies assert that it is unclear how the right of first refusal provision will be implemented.

State Commission Position

VT DPS states that the right of first refusal provision offers inadequate protection: "While it is true that the existing customer could secure a five year transmission arrangement under a new contract, its right to continuous service is placed in jeopardy if it does not match the six year offer of the competing bidder." VT DPS argues that the Commission's bare bones provision opens the opportunity for competitive mischief by the transmission provider. VT DPS proposes that "the existing customer should be able to renew its contract by matching the highest transmission price offered in the marketplace (up to the tariff maximum rate) and by offering to extend its contract for seven years or the prevailing length of firm transmission contracts in the marketplace, whichever is shorter." (VT DPS at 17-21).

Commission Conclusion

In this order, the Commission reaffirms its decision to give a reservation priority to existing and future firm transmission customers served under a contract of one year or more, and also addresses petitioner arguments regarding the Commission-imposed limitations associated with the exercise of that priority.

Rationale

Our policy rationale for giving an existing firm transmission customer (requirements and transmission-only),[FN50] served under a contract of one year or more, a reservation priority (right of first refusal) when its contract expires is that it provides a mechanism for allocating transmission capacity when there is insufficient capacity to accommodate all requestors. If there are capacity limitations and both customers (existing and potential) are willing to pay for firm transmission service of the same duration, the right of first refusal provides a tie-breaking mechanism that gives priority to existing customers so that they may continue to receive transmission service.[FN51]

Contract Term Limitation

We reject arguments to modify the requirement in section 2.2 that existing long-term firm transmission customers seeking to exercise their right of first refusal must agree to a contract term at least as long as that sought by a potential customer. The objective of a right of first refusal is to allow an existing firm transmission customer to continue to receive transmission service under terms that are just, reasonable, not unduly discriminatory, or preferential. Absent the requirement that the customer match the contract term of a competing request, utilities could be forced to enter into shorter-term arrangements that could be detrimental from both an operational standpoint (system planning) and a financial standpoint.

Rate Limitation

We also reject the proposition that either existing wholesale customers or transmission providers providing service to retail native load customers should be insulated from the possibility of having to pay an increased rate for transmission in the future. The fact that existing customers historically have been served under a particular rate design does not serve to "grandfather" that rate methodology in perpetuity. Because the purpose of the right of first refusal provision is to be a tie-breaker, the competing requests should be substantially the same in all respects.[FN52]

In response to Blue Ridge's concern regarding a discrepancy between the language in section 2.2 of the tariff and the preamble, we clarify that existing customers who exercise their right of first refusal will be required to pay the just and reasonable rate, as approved by the Commission at the time that their contract ends.[FN53]

Mechanics of the Right of First Refusal Process

CSW Operating Companies asked the Commission to clarify the mechanics of exercising the right of first refusal. We have determined not to specify in this order the mechanics by which the right of first refusal mechanism will be exercised for existing firm transmission arrangements. Instead, we intend to address such issues on a case-by-case basis, if and when a dispute arises. However, we encourage utilities and their customers to include specific procedures for exercising the right of first refusal in future transmission service agreements executed under the pro forma tariff. And of course, utilities are free to make section 205 filings to propose additions to the pro forma tariff to generically specify procedures for dealing with the issues.

Existing Contracts

By providing existing customers a right of first refusal, we are not, as PSNM claims, abrogating contracts. Moreover, PSNM's concern that the right of first refusal will prohibit utilities from "recalling" existing capacity to meet native load growth that was anticipated at the time existing third-party transmission contracts were executed can be addressed in the context of a specific filing by a utility demonstrating that it had no reasonable expectation of continuing to provide transmission service

to the wholesale transmission customer at the end of its contract. For future transmission contracts, Order No. 888 permits utilities to reserve existing transmission capacity to serve the needs (current and reasonably forecasted) of its existing native load (retail) customers. Moreover, if a utility provides firm transmission service to a third party for a time until native load needs the capacity, it should specify in the contract that the right of first refusal does not apply to that firm service due to a reasonably forecasted need at the time the contract is executed.

Informational Filings

With respect to all existing requirements contracts and tariffs that provide for bundled rates, the Commission, in the Final Rule, required all public utilities to make informational ***12289** filings setting forth the unbundled power and transmission rates reflected in those contracts and tariffs.[FN54]

Requests for Rehearing

Utilities For Improved Transition and VEPCO ask the Commission to clarify whether the unbundled transmission rate should be the current transmission tariff rate (bundled rate likely not to include the current price for transmission service) or an approximation of the rate at the time the contract was executed (may be impossible to determine).

Commission Conclusion

We previously addressed the determination of the unbundled transmission rate in informational filings in an order issued October 16, 1996.[FN55] In that order, we noted that Order No. 888 does not prescribe any specific method for calculating separately-stated transmission and generation rates and public utilities have used different methods in their informational filings. Because of the general lack of controversy over the informational filings and the fact that they are for informational purposes as a benefit to existing customers, the Commission accepted the vast majority of the informational filings. The Commission added, however, that it did not consider the informational rates binding for any future transactions. Accordingly, we need not now prescribe a specific method to calculate the unbundled transmission rate included in informational filings.

Existing Contracts

In the Final Rule, the Commission explained that because it was not abrogating existing requirements and transmission contracts generically and because the functional unbundling requirement applies only to new wholesale services, the terms and conditions of the Final Rule pro forma tariff do not apply to service under existing requirements contracts.[FN56]

Rehearing Requests

San Francisco asks that the Commission clarify that nothing in Order No. 888 is intended to affect prices, or price-setting methodologies, in existing contracts.

Commission Conclusion

By order issued July 2, 1996, we clarified that

the filing of an open access compliance tariff on or before July 9, 1996 does not supersede an existing transmission agreement that has been accepted by the Commission unless specifically permitted in the agreement on file. If a utility seeks to modify or terminate an existing transmission agreement, it must separately file to modify or terminate such contracts under appropriate procedures under section 205 or 206 of the Federal Power Act, consistent with the terms of its contract.[[FN57]]

Thus, nothing in Order No. 888 affects prices or price-setting methodologies in existing contracts, unless specifically permitted in the contract on file.

6. Flow-based Contracting and Pricing

In Order No. 888, the Commission explained that it would not, at that time, require that flow-based pricing and contracting be used in the electric industry.[FN58] It recognized that there may be difficulties in using a traditional contract path approach in a non-discriminatory open access transmission environment. At the same time, however, the Commission noted that contract path pricing and contracting is the longstanding approach used in the electric industry and it is the approach familiar to all participants in the industry. Thus, the Commission was concerned that to require a dramatic overhaul of the traditional approach —such as a shift to some form of flow-based pricing and contracting—could severely slow, if not derail for some time, the move to open access and more competitive wholesale bulk power markets. In addition, the Commission indicated its belief that it would be premature to impose generically a new pricing regime without the benefit of any experience with such pricing. Accordingly, the Commission welcomed new and innovative proposals, but determined not to impose some form of flow-based pricing or contracting in the Final Rule.

Rehearing Requests

American Forest & Paper argues that contract path pricing should be prohibited. American Forest & Paper asserts that QFs and other independents are being forced by contract path wheeling utilities to indemnify them from liability for third-party claims of inadvertent flow costs resulting from the transaction, while paying postage stamp rates for the entire amount of contracted transmission. American Forest & Paper supports an average postage stamp rate by region, with the utilities within the region agreeing on a way to divide up the rate appropriately.

Commission Conclusion

As the Commission explained in the Final Rule, we are concerned that a dramatic overhaul of the traditional contract path approach could slow or derail the move to open access and, in any event, is premature without the benefit of any experience with alternative pricing regimes. The Commission, however, welcomes new and innovative proposals from the industry. American Forest & Paper has not presented a case-specific proposal of any detail that would provide the Commission and interested parties the opportunity to test the appropriateness of a change from the contract path approach. Until the Commission has such an opportunity, we are not prepared to change generically the traditional contract path approach with which the electric industry is so familiar.

Moreover, American Forest & Paper's proposal to prohibit contract path pricing and mandate regional postage-stamp rates would be inconsistent with the rate flexibility that the Commission provided in the Transmission Pricing Policy Statement and embraced in the Final Rule.

B. Legal Authority

In the Final Rule, the Commission responded to commenters challenging the Commission's authority to require open access and reaffirmed its conclusion in the NOPR that it has the authority under the FPA to order wholesale transmission services in interstate commerce to remedy undue discrimination by public utilities.[FN59]

Rehearing Requests

Authority To Order Open Access Tariffs

Union Electric challenges the Commission's authority to require wheeling based on arguments that: (1) the Rule overlooks the fact that the AGD case[FN60] pertained to voluntary actions by the pipelines and the Commission's imposition of open access requirements as a condition on permitting the desired authorizations; (2) the Commission incorrectly treats the Otter Tail case; [FN61] (3) the legislative histories of the NGA and FPA are different and the legislative history of the FPA does not support the Commission's authority to order wheeling; (4) the Commission made prior contrary statements to the U.S. ***12290** Supreme Court [in its opposition to the grant of certiorari to review the AGD decision] about the nature of Commission authority to order

open access and judicial construction of that authority in AGD and Otter Tail;" (5) as a matter of statutory construction, the Commission cannot rely on sections 205 and 206, which are silent as to wheeling, when sections 211 and 212 contain express wheeling provisions; (6) the four relevant cases recognized by the Commission indicate that the Commission may not directly or indirectly order a public utility to wheel or transmit energy for another entity under sections 205 and 206, notwithstanding the Commission's circumscribed ability to order wheeling under sections 211 and 212; (7) prior to the issuance of the Final Rule the Commission, with a full appreciation of the legislative history behind Part II, consistently held that it lacks the authority to order wheeling under FPA Part II; (8) the Rule fails to assign "considerable importance" to the Commission's "longstanding interpretation of the statute in accordance with its literal language;" and (9) in legislative hearings preceding enactment of EPAct, the Office of the General Counsel acknowledged the limitations on the Commission's wheeling power.

Carolina P&L also challenges the Commission's authority to order open access tariffs, arguing that: (1) Otter Tail specifically states: "So far as wheeling is concerned, there is no authority granted the commission under Part II of the Federal Power Act to order it, * * *"; (2) the Richmond and FPL cases[FN62] prohibit the Commission from doing indirectly what it cannot do directly; (3) the AGD case does not support the Commission's authority to order open access through the filing of generic tariffs—in AGD the Commission's authority was based on voluntary actions by the affected pipelines and there are substantial differences between the NGA and the FPA; (4) the legislative history of EPAct indicates that the Commission does not have the authority to mandate open access and can only order open access if section 211 procedures are followed—citing NYSEG and FPL; and (5) section 211 limits the Commission's authority to order open access on a generic basis—where a specific statute addresses an issue, a more general statute should not be read in a manner that conflicts with the specific statute.

PA Com argues that the Commission's reliance on AGD "impermissibly expands the limited holding of AGD" and the Commission improperly relied on sections 205 and 206 of the FPA to require open access generically—the Commission only has case-by-case jurisdiction.

VA Com declares that the plain meaning of the FPA and cases interpreting sections 206 and 211 show that the Commission does not have the authority to order industry-wide open access.

FL Com and El Paso argue that the Commission only has limited authority to order wheeling and that the Commission has not made the required findings under section 211.[FN63]

Group Two Section 205 Filings

Union Electric argues that the requirement that Group 2 Public Utilities make section 205 filings is contrary to the voluntary filing scheme inherent in section 205.

Commission Conclusion

Overview

The fundamental legal question before us is the scope of the authority granted to the Commission in 1935 to remedy undue discrimination in interstate transmission services and whether that authority permits us sufficient flexibility to define undue discrimination in light of dramatically changed industry circumstances, in order to provide electricity customers the benefits of more competitively priced power. In the NOPR and Order No. 888, the Commission comprehensively examined case law and legislative history relevant to our authority to order open access transmission services as a remedy for undue discrimination. [FN64] We also responded at length in Order No. 888 to arguments that questioned our authority to take this step.[FN65]

On rehearing, as described above, only a few parties continue to question the Commission's authority. As a general matter their rehearings do not raise any arguments, cases, or legislative history not previously considered, and they do not convince us that our action in Order No. 888 is not within our authority under sections 205 and 206 of the FPA. We therefore reaffirm our

determination that we have not only the legal authority, but the responsibility, to order the filing of non-discriminatory open access tariffs if we find such order necessary to remedy undue discrimination or anticompetitive effects.

There are several broad points we wish to emphasize in response to the rehearings that have been filed:

First, there is no dispute that the FPA does not explicitly give this Commission authority to order, sua sponte, open access transmission services by public utilities. However, the fact remains that the FPA does explicitly require this Commission to remedy undue discrimination by public utilities.[FN66] The finding of the D.C. Circuit in the AGD case, with regard to sections 4 and 5 of the NGA (which parallel sections 205 and 206 of the FPA), are equally applicable here: the Act "fairly bristles" with concerns regarding undue discrimination and it would turn statutory construction on its head to let the failure to grant a general power prevail over the affirmative grant of a specific one.[FN67]

Second, there also is no dispute that before Congress enacted the FPA in 1935, it rejected provisions that would have explicitly granted the Commission authority to order transmission to any person if the Commission found it "necessary or desirable in the public interest." However, the fact that Congress rejected an extremely broad common carrier provision does not limit the remedies available to the Commission to enforce the undue discrimination provisions in the FPA.[FN68]

Third, entities on rehearing understandably have focused on statements in case law that indicate limits on the Commission's wheeling authority. They particularly focus on certain statements by the Supreme Court in Otter Tail. The Commission in Order No. 888 fully addressed and considered all relevant case law of which we are aware, including statements in Otter Tail and other court cases indicating limitations on our authority.[FN69] We do not dispute these statements and we ***12291** recognize limitations on our authorities. However, the fact remains that none of the cases cited, including Otter Tail, involved the issue of whether this Commission can order transmission as a remedy for undue discrimination and none addressed industry-wide circumstances such as those before us in Order No. 888.

Fourth, while Congress in 1978 gave the Commission certain case-by-case authority to order transmission access by both public utilities and non-public utilities, and broadened this case-by-case authority in 1992, Congress also specifically provided in section 212(e) of the FPA that the case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of law.[FN70] Indeed, the legislative history of EPAct shows that when Congress amended the section 211-212 wheeling provisions and the section 212(e) savings clause in 1992,[FN71] it was well aware of arguments regarding the scope of the Commission's wheeling authority as a remedy for undue discrimination under section 206. Whereas Congress in 1992 decided to add a flat prohibition on the Commission ordering direct retail wheeling under any provision of the FPA, it did not add a prohibition on the Commission ordering wholesale wheeling to remedy undue discrimination under section 206. It instead retained and modified the savings clause. The issue before us, therefore, hinges on the scope of authority given to this Commission to remedy undue discrimination, not on the scope of authority given to us in 1978 and 1992.

The Commission is significantly influenced by the decision and case law discussion by the D.C. Circuit in the AGD case. This court opinion contains the most recent and comprehensive discussion of the Commission's legal authority to remedy undue discrimination under NGA provisions that mirror those in the FPA, including the relevant case law concerning the Commission's authority to order transmission under the FPA.[FN72] The rehearing arguments do not, and we believe cannot, reconcile the AGD court's discussion and findings with a conclusion that the Commission cannot under any circumstances (as these parties advocate) order wheeling under sections 205 and 206 to remedy undue discrimination.

In sum, we believe that the essential question of the Commission's legal authority to impose the requirements of Order No. 888 turns on the flexibility of the Commission's remedial authority under sections 205 and 206 of the FPA to remedy undue discrimination. As was true with respect to the natural gas industry, we acknowledge that Commission precedent for many years nurtured the expectation that we would not, under our authority under the FPA, preclude utilities from using their monopoly power over the nation's transmission systems to secure their monopoly position as power suppliers. However, as described at

length in Order No. 888, these policies arose in the context of practical, economic, and regulatory circumstances that gave rise to vertically integrated monopolies and little, if any, competition among power suppliers. In this kind of regime, the interests of customers were most effectively served by the kind of cost-based regulatory regime that has prevailed until very recently. The evolution of third-party generation, facilitated by PURPA and significant technological advances, dramatically altered the economics of power production. The enactment of EPAct recognized these changes and established a national policy intended to favor the development of a competitive generation market, so that the efficiencies of the new marketplace will be available to customers in the form of lower costs for electricity. Utility practices that may have been acceptable a few years ago would, if permitted to continue, smother the fledgling competitive wholesale markets and undermine the efforts of customers to seek lower-price electricity. We firmly believe that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, if that is necessary to eliminate undue discrimination and protect electricity customers.

Specific Arguments[FN73]

The Factual Circumstances Underlying AGD Do Not Mandate A Different Conclusion In This Proceeding

Both Union Electric and Carolina P&L argue that the Commission cannot rely on AGD in support of its actions in the electric industry, and they attempt to distinguish the legal basis on which the Commission acted in requiring open access transportation for gas pipelines. Specifically, they argue that AGD (Order No. 436) pertained to voluntary actions by gas pipelines and that the Commission's imposition of open access requirements was a condition of certificate authorizations to transport gas, whereas the Commission's action in Order No. 888 is a direct mandate.[FN74] We believe this is a distinction without a difference. While it is true that the Commission required open access as a condition of granting blanket authorizations for pipelines and authorizations for pipelines authorizing pipelines to transport natural gas,[FN75] the critical point is that in both Order No. 436 and Order No. 888 the Commission's actions hinged as a legal matter on the parallel provisions of the NGA (sections 4 and 5) and the FPA (sections 205 and 206) that prohibit undue discrimination. Whether persons are seeking to transport natural gas or wheel electric power in interstate commerce, by law they must not unduly discriminate or grant undue preference.[FN76]

In AGD, the court upheld the Commission's reliance upon sections 4 and 5 of the NGA to impose an open-access commitment on any pipeline that secured a blanket certificate to provide gas transportation under section 7 of the NGA or provided transportation under section 311 of the NGPA.[FN77] Order No. 436 was not a simple order that relied on the "voluntary actions" of affected pipelines. As the court in AGD understood:

The Order envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry.* * * ***12292**

***12292** At stake is the role of interstate natural gas pipelines. Although they are obviously transporters of gas, they have until recently operated primarily as gas merchants. They buy gas from producers at the wellhead and resell it, mainly to local distribution companies ("LDCs") but also to relatively large end users. The Commission has concluded that a prevailing pipeline practice—particularly their general refusal to transport gas for third parties where to do so would displace their own sales—has caused serious market distortions. It has found this practice "unduly discriminatory" within the meaning of §5 of the NGA. Order 436 is its response.

The essence of Order No. 436 is a tendency, in the industry metaphor, to "unbundle" the pipelines' transportation and merchant roles. If it is effective, the pipelines will transport the gas with which their own sales compete; competition from other gas sellers (producers or traders) will give consumers the benefit of a competitive wellhead market. [[FN78]]

Indeed, since Order No. 436 issued, virtually all jurisdictional natural gas pipelines became "open access" transporters of natural gas.

In analyzing the Commission's authority to remedy undue discrimination, the court never made the distinctions now being put forth by Union Electric and Carolina P&L. Rather, the court specifically focused on the Commission's authority under section 5 of the NGA and upheld the Commission's authority to remedy undue discrimination in the transportation of natural gas by requiring pipelines transporting natural gas to do so on a non-discriminatory basis.[FN79] Similarly, the Commission in Order No. 888 found undue discrimination in the transmission of electric energy and required, pursuant to section 206 of the FPA (the FPA provision that parallels section 5 of the NGA), that if public utilities transmit electric energy in interstate commerce, they must do so on a non-discriminatory basis (i.e., offer non-discriminatory open access transmission).

Moreover, while the Commission may have imposed a "condition" on pipelines obtaining blanket certificates or providing section 311 transportation in Order No. 436, this does not detract from the court's core finding in AGD that the Commission had the authority under section 5 of the NGA to remedy undue discrimination by requiring open access transportation.[FN80] The Commission chose in Order No. 436 to impose its open access remedy as a condition to pipelines obtaining a blanket certificate to transport natural gas, but its authority was rooted in the undue discrimination provisions of section 5. Additionally, the practical result of the conditioning was that all jurisdictional pipelines would have to provide open access transportation, a result that was clearly anticipated by the AGD court.[FN81] Thus, there is no distinction in the result intended, or the result achieved, in either industry; in both cases, the intent was to remedy undue discrimination pursuant to the statutes governing each industry, and in both cases the result was that all transporters/transmitters must agree to open access non-discriminatory services if they seek to continue owning, controlling or operating monopoly interstate transportation facilities.

Legislative History Behind the FPA and EPAct Does Not Preclude Our Action

We disagree with the arguments that the legislative history behind Part II of the FPA establishes that the Commission cannot under any circumstance order wheeling under FPA sections 205 and 206.[FN82] We examined the legislative history of sections 205 and 206 at length in the NOPR and Order No. 888 and concluded that it supports our authority to order open access transmission as a remedy for undue discrimination.[FN83] We also have examined the legislative history of the EPAct amendments to sections 211 and 212 and conclude that Congress in EPAct did not resolve the issue of our authority under sections 205 and 206 and left untouched whatever pre-existing authorities we had under these sections. The parties have raised nothing new on rehearing to persuade us that our interpretation is wrong. However, there are several arguments that we believe warrant further discussion.

Parties on rehearing argue that the existence of sections 211 and 212 limit the Commission's wheeling authority and, in effect, remove our authority under section 206 to order any transmission as a remedy for undue discrimination.[FN84] We disagree. In enacting EPAct, Congress did not resolve the extent of our wheeling authority outside the context of sections 211 and 212.[FN85] As we explained above, while Congress in 1978 gave the Commission certain case-by-case authority to order transmission access, it also specifically provided in section 212(e) of the FPA that the case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of law. Congress retained a similar savings clause when it amended sections 211 and 212 in 1992. Moreover, the legislative history of EPAct shows that when Congress amended sections 211 and 212, it was well aware of arguments regarding the scope of the Commission's remedial authority under section 206.[FN86] Whereas Congress added an amendment prohibiting the Commission from ordering direct retail wheeling under any provision of the FPA, it chose not to add a prohibition on the Commission ordering wholesale wheeling as a remedy for undue ***12293** discrimination under sections 205 and 206.[FN87]

We are not persuaded that this conclusion is wrong based on rehearing arguments that we ignored other legislative history of EPAct. Carolina P&L argues that we ignored various statements of Senator Wallop following the enactment of EPAct, which it alleges are counter to our claim of authority to order open access transmission as a remedy for undue discrimination. The utility is simply in error that we ignored these statements. We explicitly mentioned Senator Wallop's statements in Order No. 888 and gave our rationale for why section 211 does not limit our authority to remedy undue discrimination.[FN88] However, we believe it is important to elaborate on the context in which those statements were made and our interpretation of those statements.

The primary focus of Senator Wallop's statements is on the transmission authority given by the EPAct amendments to sections 211 and 212. These statements emphasize restrictions on our section 211 wheeling authority, including the fact that section 211 does not give the Commission authority to order transmission access on its own motion or to order open access transmission. [FN89] We do not quarrel with these statements because sections 211 and 212 clearly do place restrictions on our authority to order access under those provisions. The statements also discuss the differences between the House introduced amendments to sections 211 and 212 (which would have provided broader and in some instances mandatory access authority) and the amendments that finally passed (which were more limited). We also do not disagree that changes were made to the bill that originally was introduced. At issue here, however, is not whether there are restrictions on our section 211 authority, but rather whether we have authority outside the context of section 211 to order transmission as a remedy for undue discrimination. The only statement among Senator Wallop's remarks that addresses this specific issue is one in which he says, "In my opinion, neither the amendments made by this Act nor existing law give the FERC any authority to mandate open access transmission tariffs for electrical utilities." (emphasis added). We do not view one senator's opinion as in any way dispositive of the issue. As discussed supra, when Congress enacted the 1992 section 211 amendments it was well aware of the outstanding legal issue of the Commission's authority to order access as a remedy for undue discrimination under section 206. It chose not to clarify this issue by prohibiting the Commission from ordering access, but instead retained the savings clause in section 212(e).

The issue of our legal authority thus turns on the undue discrimination authority given to us in 1935, and the legislative history of sections 205 and 206. We discussed this at length in Order No. 888.[FN90] On rehearing, several entities emphasize the Otter Tail case and the legislative history referred to in that case. In particular, Union Electric recites Justice Stewart's discussion of the legislative history in his partial dissent in Otter Tail. We do not interpret that discussion to suggest that we do not have the authority to remedy undue discrimination by requiring open access transmission under any circumstance. As we explained in Order No. 888:

In the FPA, while Congress elected not to impose common carrier status on the electric power industry, it tempered that determination by explicitly providing the Commission with the authority to eradicate undue discrimination---one of the goals of common carriage regulation. By providing this broad authority to the Commission, it assured itself that in preserving "the voluntary action of the utilities" it was not allowing this voluntary action to be unfettered. It would be far-reaching indeed to conclude that Otter Tail, which was a civil antitrust suit that raised issues entirely unrelated to our authority under section 206, is an impediment to achieving one of the primary goals of the FPA—eradicating undue discrimination in transmission in interstate commerce in the electric power industry.[[FN91]]

In response to Union Electric's arguments that Congress explicitly rejected common carrier provisions in 1935, we do not disagree with Union Electric's statement that "the mandatory wheeling language was not dropped inadvertently."[FN92] The point that we made in Order No. 888 (quoting AGD) in this regard was that

(1) "Congress declined itself to impose common carrier status" (emphasis added) and (2) there is no "support for the idea that the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common carriage duty."[[FN93]]

Nowhere did we ever suggest that the mandatory wheeling language was dropped inadvertently; we simply distinguish a general common carrier obligation imposed "in the public interest" from an obligation to provide transmission service deemed necessary to eliminate undue discrimination. Finally, we fully agree with Union Electric's statement that [a]lthough this "first Federal effort" occurred in 1935, the resulting FPA Sections 205 and 206 have not been modified in any relevant respect since that time. Therefore, the range of authority conveyed to the Commission in such sections remains the same today as it did then.[[FN94]]

We never suggested otherwise and our conclusion in Order No. 888 is not based on a finding to the contrary.

Case Law Does Not Prohibit Our Ordering Wheeling Under Sections 205 and 206 of the FPA

Union Electric, discussing the very cases cited by the Commission in Order No. 888, asserts that "the Commission fails to recognize their dispositive results prohibiting it from ordering wheeling under the Sections 205 and 206 of the FPA."[FN95] We thoroughly examined all of the case law cited by Union Electric, as evidenced by our discussions in the NOPR and Order No. 888, and disagree that any of those cases prohibit the Commission from ordering wheeling under sections 205 and 206 of the FPA to remedy undue discrimination. Indeed, the AGD court reached the same conclusion.[FN96]

Union Electric further cites to a variety of FPC cases that it claims demonstrate that the Final Rule exceeds the Commission's statutory authority.[FN97] It appears to have proffered every negative Commission statement it could find with respect to our authority to order wheeling under Part II of the FPA. ***12294** As in the Commission cases cited, we recognize that our authority to order transmission service is not unbounded; if we order transmission, it must be within the scope of authority available to us under the FPA. However, the fact is that none of the cases cited as establishing limits on the Commission's authority addresses the issue before us now, i.e., the Commission's authority to order transmission as a remedy for undue discrimination. Simply stated, the Commission has never before been faced with generic findings of undue discrimination in the provision of interstate electric transmission services, and the extent of its authority to remedy that undue discrimination.

The Commission's General Counsel Never Asserted, or Even Suggested, That the Commission Does Not Have the Authority to Order Wheeling as a Remedy for Undue Discrimination

Union Electric spends several pages of its rehearing request asserting that the Commission's own General Counsel has acknowledged the limitations on the Commission's authority to order wheeling.[FN98] In particular, it points to a statement by a Commission OGC witness that "if Congress intends for the Commission to be able to deal with transmission on its own motion and thereby go further than simply dealing with industry proposals," Congress would need "to include an affirmative statement somewhere in the Act that the Commission could require wheeling on its own motion."[FN99] This same statement was previously raised by EEI and previously addressed in Order No. 888. We do not disagree that this statement was made. However, it must be read in the context of the witness' entire testimony in which the witness stated four times the view that the case law supports the argument that the Commission has authority to order wheeling as a remedy for undue discrimination. [FN100] Indeed, contrary to Union Electric's assertion, the extensive legal analysis set forth by the Commission's witness supports the position relied upon in this proceeding.[FN101] Thus, viewed in the context of the witness' entire testimony, Union Electric's arguments to the contrary are unavailing. Moreover, nowhere did the witness ever suggest, as asserted by Union Electric, that FPA sections 205 and 206 could only be used "to eliminate unduly discriminatory terms in a wheeling arrangement voluntarily filed with the Commission."[FN102]

The Commission Has the Authority to Order Public Utilities to Make Rate Filings in This Proceeding

We reject Union Electric's argument that our requirement that Group 2 Public Utilities make section 205 filings is contrary to the voluntary filing scheme inherent in section 205. It is true that the Commission ordinarily cannot require a utility to make a section 205 filing. However, in this situation the section 205 filing was required as a remedy under section 206 of the FPA to establish rates for non-discriminatory open access transmission. Acting pursuant to section 206 of the FPA, we found that undue discrimination exists in the wholesale transmission of electric power and ordered the filing of non-discriminatory open access transmission tariffs to remedy this discrimination. Section 206 further requires that upon such a finding the Commission "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force. * * *" Thus, we had the authority to set the rates that would be observed and in force following the effectiveness of open access transmission and initially proposed to set rates for each public utility. However, rather than take this intrusive approach, which necessarily would have required a number of generic assumptions and resulted in less than public utility-specific rates, upon issuance of the Final Rule, we chose to permit these public utilities to make section 205 filings to propose their own rates for the services provided in the pro forma tariff.

The Commission's Prior Failure to Order Wheeling as a Remedy for Undue Discrimination Is Not Dispositive

After discussing several cases that it asserts address the Commission's authority to remedy undue discrimination, Carolina P&L declares that "[p]erhaps the strongest evidence that the Commission lacks the power to compel wheeling under FPA section 206 is the fact that the Commission has never previously exercised this alleged power, despite numerous opportunities to do so."[FN103] However, the court in AGD succinctly dismissed a similar argument:

It is finally argued that the Commission's not having imposed any requirements like those of Order No. 436 in the period from enactment in 1938 until the present demonstrates the lack of any power to do so. * * * But as our introductory review of the economic background sought to illustrate, the Commission here deals with conditions that are altogether new. Thus no inference may be drawn from prior non-use.[[FN104]]

Undue Discrimination/Anticompetitive Effects[FN105]

A number of utilities and state commissions argue that the Commission lacks evidence to support a finding of undue discrimination.[FN106]

VA Com argues that the Commission failed to make a legally supportable finding of industry-wide undue discrimination: "FERC apparently drew a conclusion that there was undue discrimination in the NOPR without support and later accepted customers' allegations, without further inquiry, and relied on them in making its finding of industry-wide undue discrimination." (VA Com at 2-3).

PA Com and Carolina P&L assert that allegations of undue discrimination do not form a sufficient basis to compel a generic rulemaking. Not coming forward with specific accusations and the identity of specific accusers, PA Com asserts, is unconstitutional as a deprivation of due process. ***12295**

With regard to specific allegations of undue discrimination, SoCal Edison argues that the Commission inappropriately relied upon allegations involving SoCal Edison as evidence of undue discrimination. SoCal Edison asks that the Commission declare that it is not making a factual determination as to any particular allegation especially since prior to 1994 the Commission defined discrimination differently. Dalton similarly argues that the Commission has no basis for finding that Georgia Power Company is engaged in unlawful undue discrimination as to new or roll-over transmission services in the operation of the Integrated Transmission System in Georgia (ITS) under the ITS agreement. Moreover, Dalton argues, even if it is found that GPC acted in unduly discriminatory manner, it is not practical or lawful to order open access tariff for new and roll-over services.

Finally, Carolina P&L argues that the comparability standard does not eliminate the "requirement" that parties must be similarly situated before discrimination is present, and that the Commission has not provided factual support for its implicit finding that public utilities and their native load customers are similarly situated to third parties. It cites City of Vernon v. FERC, 845 F.2d 1042 at 1045-46 (D.C. Cir. 1988), in support.

Commission Conclusion

As an initial matter, the Commission grants SoCal Edison's request for clarification that in Order No. 888 we did not make a factual determination as to any particular allegation of past discrimination described in the Final Rule.[FN107] However, we reject arguments that the Commission cannot rely in part on the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the NOPR. The specific allegations are illustrative. However, they present examples of the types of discriminatory incentives and behavior inherent in ownership of monopoly transmission facilities, and also present credible examples of the types of discriminatory behavior in which public utilities could engage in the future. We also reject arguments that customers and the Commission must litigate and make specific findings of discrimination against each public utility before we can take any action to preclude discriminatory behavior that will harm competition and, ultimately, electricity consumers. This is particularly true where the discriminatory behavior clearly is in the economic self-interest of a monopoly transmission owner facing the markedly increased competitive pressures that are driving today's electric utility industry. As we recognized in Order No. 888,

[t]he inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices. As the AGD court stated: "Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[FN108]
We believe that the same general discriminatory circumstances that faced us when we required open access transportation in the natural gas industry[FN109] are also before us today in the electric industry. First, it is uncontested that market power continues to exist in the ownership and operation of the monopoly-owned facilities that comprise the nation's interstate transmission grid. Second, utilities, as a general matter, did not in the past offer comparable transmission services to competitors or to customers. Open access services simply were not made available by utilities until the late 1980s when the Commission began to impose open access as a condition of approval of market-based rates and utility mergers in order to mitigate market power and remedy anticompetitive effects. Rather, the vast majority of utilities historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales. Third, discrimination in transmission services, when viewed in light of utilities' own uses of their transmission systems compared to what they offer third parties, has denied and will continue to deny customers access to electricity at the lowest reasonable rates. The entities on rehearing have raised nothing to persuade us that it is in the interests of consumers to maintain the self-evident incentives for transmission owners to exercise their monopoly power over transmission to discriminate in favor of their own generation sales —incentives that will only increase in the future as competitive pressures continue to escalate.

The Commission addressed the same argument as that being made by Carolina P&L, that the Commission has not made the requisite finding that third-party transmission customers are similarly situated to public utilities and their native load customers, in 1994 in the NEPOOL and AEP cases.[FN110] In these cases, we recognized that the traditional focus of our undue discrimination analysis had been whether factual differences justify different rates, terms and conditions for similarly situated customers, but concluded that due to changing conditions in the electric utility industry, it was necessary to reevaluate our traditional analysis. As we stated in NEPOOL, the focal point of undue discrimination claims has shifted from claims of undue discrimination in rates and services which the utility offers different customers to claims of undue discrimination in rates and services which the utility offers when compared to its own use of the transmission system.[FN111] "In this context, framing the analysis in terms of how a public utility treats similarly situated customers is not applicable or instructive."[FN112] The Commission concluded that it therefore must reexamine its application of the standard for undue discrimination claims under sections 205 and 206 of the FPA.

The Commission further elaborated on its re-examination of undue discrimination in AEP. The Commission cited its NEPOOL discussion and set for hearing the different uses that AEP made of its transmission system and whether there were any operational differences between any particular use that AEP made of the system and the use third parties might need, and, in particular, the degree of flexibility AEP accorded itself in using its transmission system for different purposes. The Commission subsequently set the same issue for hearing in several other cases.[FN113] In the NOPR, however, the Commission concluded that based on what it had learned in the ongoing cases, it would address this issue generically in this rulemaking. We announced in the NOPR our belief that ***12296** all utilities use their own systems in two basic ways: to provide themselves point-to-point transmission service that supports coordination sales, and to provide themselves network transmission service that supports the economic dispatch of their own generation units and purchased power resources (integrating their resources to meet their internal load). Third parties may need one or both of these basic uses in order to obtain competitively priced generation or to have the opportunity to be competitive sellers of power, and the Commission proposed that all public utilities must offer both services on a non-discriminatory open access basis.[FN114]

We affirmed this determination in the Final Rule. We concluded that a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. Because a public utility that is reasonably capable of providing transmission services may provide itself such services at any time it finds those services desirable, it is irrelevant that it may not be using or providing that service today.[FN115] Thus, based on the analysis in this record, the Commission has determined that undue discrimination in the provision of transmission services in today's industry

does not turn on whether utilities and their native load customers are similarly situated to third parties, but instead turns on whether the utility is providing comparable service, that is, service that it is reasonably capable of providing to other users of the interstate transmission system.

In short, the Commission is not bound to a static application of its undue discrimination analysis under the FPA and, indeed, has a public interest responsibility to reexamine undue discrimination in light of changed circumstances in the industry.[FN116] That is what we began in NEPOOL and AEP and have completed in this rulemaking. The traditional "similarly situated" test, while applicable to discrimination among third-party customers, simply is not applicable when analyzing discrimination between third-party transmission customers and transmission owners. Under Carolina P&L's theory, presumably the only customers that could be shown to be similarly situated would be those who own monopoly transmission facilities and have native load (i.e., captive) customers. This would preserve customer captivity, perpetuate monopoly power and profits, and deny the lowest reasonable rates to consumers. We therefore reject Carolina P&L's arguments.

Moreover, the fact that public utilities and their native load customers have been treated differently from third-party transmission customers because they are not among those traditionally considered to be "similarly situated" is precisely the target at which Order No. 888 takes aim. Historically, competitively-priced power was not broadly available to wholesale customers because the industry was dominated by vertically integrated IOUs[FN117] and, to the extent cheaper generation alternatives were available in the marketplace, transmission owners either took the cheaper power for their own uses or purchased and re-sold it at a profit.[FN118] Prior to EPAct, most power customers took power from the vertically integrated utilities that provided their transmission service. Transmission-only transactions played a secondary role in bulk power markets, facilitating certain economy transactions and coordination and pooling arrangements that improved utility operational efficiencies, largely as a complement to bundled bulk power transactions. Given the predominantly vertically-integrated industry and efficiencies that could be gained through encouragement of coordination and pooling transactions, the Commission was willing to accept utility practices that provided third parties with transmission services that were distinctly inferior to the utility's own uses of the transmission system.

In the future, however, unbundled transmission service will be the centerpiece of a freely traded commodity market in electricity, in which all wholesale customers can shop for power. In a market characterized by a significant increase in non-vertically integrated power suppliers and competitively priced power that is now meaningfully available, it is no longer in the interest of wholesale customers for the Commission to tolerate the types of practices that were previously accepted. We cannot allow what have become unduly discriminatory practices to erect barriers between customers and the rapidly emerging competitive electricity marketplace. Accordingly, a primary goal of Order No. 888 is to provide that in the future transmission providers and third-party transmission customers are "similarly situated" in the quality of transmission service available to them.

C. Comparability

1. Eligibility to Receive Non-discriminatory Open Access Transmission

In the Final Rule, the Commission modified the definition of "eligible customer" and, among other things, clarified that any entity engaged in wholesale purchases or sales of electric energy, not just those "generating" electric power, is eligible.[FN119] The Commission also clarified that entities that would violate section 212(h) of the FPA (prohibition on Commission-mandated wheeling directly to an ultimate consumer and sham wholesale transactions) are not eligible. Further, the Commission clarified that foreign entities that otherwise meet the eligibility criteria may obtain transmission services. The Commission also provided for service to retail customers in circumstances that do not violate FPA section 212(h). Persons that would be eligible section 211 applicants also would be eligible under the open access tariff.

a. Unbundled Retail Transmission and "Sham Wholesale Transactions"

Rehearing Requests

Several entities assert that there is an inconsistency between tariff language and preamble language and argue that section 1.11 of the tariff should be made consistent with the preamble to ensure that, absent a state-approved program, retail wheeling is not available under the tariff, no matter which party requests service.[FN120] They maintain that the limitation in section 1.11 that the transmission provider only must provide retail transmission service voluntarily or under a state-approved program appears to apply only when a retail customer is the purchaser, not when the transmission purchaser is an electric utility. They suggest the *12297 following language to remedy the problem: "however, such entity is not eligible for transmission service that would be prohibited by Sections 212(h)(1) and/or 212(h)(2) of the Federal Power Act, unless such service is provided pursuant to a state retail access program or pursuant to a voluntary offer of unbundled retail transmission service by the Transmission Provider." (PSE&G at 22; Carolina P&L at 8-9).

Detroit Edison argues that the Commission should modify the definition to exclude any reference to transmission service provided to retail customers so as to avoid confusion and possible forum shopping. At the least, Detroit Edison argues, the Commission should modify the language to state that transmission service is available to an ultimate consumer to the extent, and only to the extent, that the service is authorized by a lawful state retail access program or pursuant to a voluntary offer of unbundled retail transmission service by the transmission provider.

NYSEG asserts that the Commission did not apply the section 212(h) limitation to service to retail customers under the tariff. NYSEG requests that the Commission clarify that it will not require retail wheeling beyond the scope of state-mandated retail access programs or beyond the terms of a transmission provider's voluntary offer of retail wheeling service.

Oklahoma G&E asks the Commission to clarify that the term eligible customer differentiates between a customer eligible to receive transmission service and a customer whose transaction is a sham or would result in mandatory retail wheeling and would therefore be prohibited by section 212(h).

NYSEG further asserts that the right of first refusal provision would permit a retail customer receiving wheeling service to continue to take that service upon expiration of its contract, which could require the transmission provider, in violation of section 212(h), to continue retail wheeling beyond the scope of its voluntary offer of service or beyond the scope of a state-mandated retail access program.

SoCal Edison argues that the Commission cannot compel a utility to supply retail transmission service if the utility challenges the authority of the state to require retail wheeling and section 1.11 should be revised to reflect this.

IL Com declares that it "does not recognize FERC's claim of jurisdiction over retail transmission service provided directly to a retail customer and disputes that unbundled retail wheeling directly to a retail customer is a service provided in interstate commerce." (IL Com at 35). Thus, "if FERC's proposed 'deference' to states is to be given any effect, states must be allowed to determine whether the retail transmission component of the retail wheeling program will be provided pursuant to the utility's existing filed wholesale tariff or whether the retail transmission will be provided pursuant to a 'separate retail transmission tariff' that is different from the wholesale tariff." (IL Com at 36). IL Com concludes that it is inappropriate (and illegal if FERC is overturned on its retail transmission jurisdiction assertion) to include retail customers taking final delivery of unbundled power for their own end uses under retail wheeling programs as eligible customers.

PA Com argues that it is relevant whether a customer is receiving retail or wholesale service and redefining transmission and local distribution service does not automatically convey jurisdiction to the Commission.

CCEM asks that the Commission clarify that a retail customer eligible to seek transmission service should be able to seek transmission service not only from the transmission provider, but from any other transmission provider. CCEM also asks that the Commission add the word "ultimate" before the word transmission provider in section 1.11 of the tariff.

EEI asks the Commission to "clarify that the transmission service provider should be allowed to supplement the terms and conditions of the pro forma tariff with additional provisions that specifically relate to the totality of the transmission service being provided, including the use of distribution facilities and any other transmission facilities not currently included in wholesale rates." (EEI at 24 (emphasis in original)).[FN121]

Union Electric argues that a literal reading of the eligibility definition could require retail wheeling by utilities in states other than those required to participate in a particular retail wheeling program.

Commission Conclusion

The Commission agrees with those entities that argue that section 1.11 of the pro forma tariff does not explicitly prohibit "sham wholesale transactions" that could currently be arranged under the tariff by a utility applying for service and designating the retail customer as a point of delivery. We therefore have modified section 1.11 to clarify that, with respect to service that we are prohibited from ordering by section 212(h) of the FPA (whether direct retail wheeling or "sham" wholesale wheeling), otherwise eligible entities may obtain such service under the tariff only if it is pursuant to a state requirement that such service be provided or pursuant to a voluntary offer of such service. We also have modified the language to clarify that eligibility for unbundled direct retail service required by a state applies only to service from transmission providers that the state orders to provide the service. The modified language states:

Eligible Customer: (i) Any electric utility (including the Transmission Provider and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an eligible customer under the tariff. Electric energy sold or produced by such entity may be electric energy produced in the United States, Canada, or Mexico. However, with respect to transmission service that the Commission is prohibited from ordering by Section 212(h) of the Federal Power Act, such entity is eligible only if the service is provided pursuant to a state requirement that the Transmission Provider offer the unbundled transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider. (ii) Any retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider offer the transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider, is an eligible customer under the tariff.

Regarding SoCal Edison's argument, the Commission stated in the Final Rule:

Moreover, we are mindful of the fact that we are precluded under section 212(h) from ordering or conditioning an order on a requirement to provide wheeling directly to an ultimate consumer or sham wholesale wheeling. We therefore clarify that our decision to eliminate the wholesale customer eligibility requirement does not constitute a requirement that a utility provide retail transmission service. Rather, we make clear that if a utility chooses, or a state lawfully requires, unbundled retail transmission service, such service should occur under this tariff unless we specifically approve other terms.[FN[122]]

Therefore, the Commission is not compelling a utility to provide unbundled retail transmission service.[FN123] Rather, the Commission requires that ***12298** should such service be provided, either pursuant to state mandate or voluntarily, it must be provided pursuant to the pro forma tariff unless the Commission approves alternative terms and conditions.

However, in light of CCEM's request that we clarify that a retail customer eligible to seek transmission service under the tariff should be able to seek service not only from the transmission provider, but also from any other transmission provider, and in light of Union Electric's concerns regarding retail service eligibility, we believe certain clarifications of our jurisdiction and of the statements made in Order No. 888 are necessary. The statements cited above that were made in Order No. 888 and the eligible customer tariff definition in (ii) above refer to direct retail transmission, i.e., the transmission of electric energy "directly" to an ultimate consumer. The Commission is prohibited by section 212(h)(1) of the FPA from ordering this type of retail transmission and that is why customers are eligible for such transmission under the tariff only if the transmission is pursuant to a state order or is provided voluntarily. However, on its face, section 212(h) does not prohibit the Commission from ordering public utilities to provide "indirect" unbundled retail transmission in interstate commerce, i.e., the transmission necessary to transmit unbundled

electric energy to a utility that ultimately will deliver the energy to a customer that is purchasing the unbundled energy at retail either pursuant to a state retail access order or pursuant to voluntary delivery by the local utility.

We clarify that we believe we have the jurisdiction under the FPA to order indirect retail transmission to an ultimate consumer and that if the Commission under sections 205, 206 or 211 of the FPA orders such transmission, entities that otherwise qualify as eligible customers under the tariff will take transmission service for such indirect retail wheeling pursuant to the pro forma tariff. We note that the Commission may order such transmission on a case-by-case basis or may determine to do so generically in the future. We expect public utilities to provide such indirect retail access under the pro forma tariff and, if they do not, we will not hesitate to order them to do so.

In response to IL Com's argument that it does not recognize this Commission's claim of jurisdiction over the rates, terms and conditions of unbundled retail transmission that is provided directly to an ultimate consumer, the Commission reaffirms its legal conclusion set forth in the Final Rule.[FN124] As to its claim that we should give deference to the state as to whether such service could be taken under the wholesale tariff or a separate retail tariff on file with the Commission, we reaffirm our conclusion to address this on a case-by-case basis. Since the Final Rule issued, the Commission has addressed this in several orders. In New England Power Company, the Commission stated:[FN125]

As we explained in the Open Access Rule and in the New Hampshire Interim Order, we generally expect retail transmission customers to take service under the same Commission tariff that applies to wholesale customers. While we generally will defer to state requests for a separate retail tariff to accommodate the design and special needs of a state retail access program, the Massachusetts Commission has made no such request in this case.[FN15]

Subsequently, in New England Power Company, 76 FERC 61,008 (1996), the Commission granted a limited waiver of the Open Access Rule requirements for the New Hampshire retail electric competition pilot project. Specifically, the Commission waived the requirement for individual service agreements, and the requirement for customer deposits. The Commission further announced that:

other public utilities that provide unbundled retail service under a pro forma tariff do not need to apply to retail customers the tariff provisions regarding individual service agreements or customer deposits, unless a state retail program so requires. [[FN126]]
Concerning EEI's request for clarification, the Commission stated in the Final Rule:

all tariffs need not be "cookie-cutter" copies of the Final Rule tariff. Thus, under our new procedure, ultimately a tariff may go beyond the minimum elements in the Final Rule pro forma tariff or may account for regional, local, or system-specific factors. The tariffs that go into effect 60 days after publication of this Rule in the Federal Register will be identical to the Final Rule pro forma tariff; however, public utilities then will be free to file under section 205 to revise the tariffs, and customers will be free to pursue changes under section 206.[FN[127]]
Utilities are free to include customer-specific terms and conditions or terms and conditions limited to certain customers (e.g., a distribution charge) in the customer's service agreement and/or the network customer's network operating agreement.

b. Transmission Providers Taking Service Under Their Tariff

Rehearing Requests
TAPS states that section 1.11 does not seem to require a transmission provider to take service for its purchases, but the preamble does (citing mimeo at 57, 191, 266 and regulatory text in section 35.28(c)(2)). It argues that transmission providers should be required to treat their own usage of the transmission system to serve retail customers under the network service provisions of the tariff. TAPS argues that this result could be achieved through an ISO or by requiring transmission providers to abide by all

non-price terms of Parts I and III of the tariff. TAPS also argues that the rates charged network customers must be developed on the same basis as the transmission component of retail rates. It states that the transmission provider's purchases would then be made under Part III of the tariff to the extent they are made for serving retail customers. It further asserts that the Commission's authority and obligation to consider transmission owners' service to retail load in establishing wholesale transmission rates has been long established. At the least, TAPS argues that the Commission should require that a transmission provider take its wholesale purchases under some tariff.

Similarly, Coalition for Economic Competition asks the Commission to clarify that the requirement to use the pro forma tariff for wholesale purchases and to functionally unbundle wholesale purchases and sales does not apply to purchases made solely to serve retail customers on a bundled basis. It asserts that there is conflicting language in Order No. 888 (citing mimeo at 191) and Order No. 889 (citing mimeo at 12) and the pro forma tariff. Coalition for Economic Competition asserts that the Commission does not have jurisdiction over transmission that is part of a bundled retail sale. ***12299**

Commission Conclusion

Several parties have noted on rehearing that there is conflicting language among the Final Rule, Order No. 889 and the pro forma tariff as to whether and to what extent the transmission provider must take service for "wholesale purchases" under its own tariff. As discussed below, we clarify that a transmission provider does not have to "take service" under its own tariff for the transmission of power that is purchased on behalf of bundled retail customers.

In a situation in which a transmission provider purchases power on behalf of its retail native load customers, the Commission does not have jurisdiction over the transmission of the purchased power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities,[FN128] and therefore the pro forma tariff does not have to be used for such transmission. Moreover, we recognize that purchases made collectively on behalf of native load[FN129] cannot necessarily be identified as going to any particular customer. However, the Commission does have jurisdiction over transmission service associated with sales to any person for resale, and such transmission must be taken under the transmission provider's pro forma tariff.[FN130]

Order No. 888, relying on the principle of comparability, established the terms and conditions for network service provided to network customers under the pro forma tariff. Network customers may include the transmission provider itself as well as any other entity receiving Network Integration Service. If the transmission provider purchases energy from another power supplier in order to make sales to its wholesale native load customers, it must take the transmission service necessary to transmit the power from its point(s) of receipt to its point(s) of delivery under the same terms and conditions as other Network Customers. [FN131] As we explained in AES Power, Inc., network customers are entitled to make economy energy purchases from non-designated network resources at no additional charge on a basis comparable to the economy energy purchases made by the transmission provider on behalf of its bundled retail customer.[FN132] This applies to the transmission provider as a network transmission customer under its own tariff as well as to other network transmission customers that make economy energy purchases on behalf of their customers. Thus, insofar as all wholesale transmission customer usage is concerned, third-party network customers are treated the same as the transmission owner.

2. Service that Must be Provided by Transmission Provider

In the Final Rule, the Commission found that a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others.[FN133] The Commission explained that because a public utility that is reasonably capable of providing transmission services may provide itself such services at any time it finds those services desirable, it is irrelevant that it may not be using or providing that service today. However, the Commission explained that if a customer seeks a customized service not offered in an open access tariff, a customer may, barring successful negotiation for such service, file a section 211 application.

Rehearing Requests

Cleveland requests that the Commission make explicit that comparability will be evaluated not only by reference to a transmission provider's wholesale services, but also by comparison to the terms, conditions, and prices applicable to its retail services, whether bundled or unbundled. Cleveland asserts that this is needed so that TDUs are not at a competitive disadvantage in competing with the transmission provider for retail customers. It maintains that this is consistent with the Transmission Pricing Policy and established precedent.

Commission Conclusion

No clarification is necessary. In determining what transmission services a utility must offer for wholesale sales of electric energy in interstate commerce, the Final Rule explicitly states that "a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others."[FN134] Further, the Final Rule requires that network service customers receive service comparable to the service provided to the transmission provider's native load. Because the Rule applies to retail transmission that is voluntarily offered or pursuant to a state retail access program, the requirements to offer services that the utility is reasonably capable of providing and services comparable to those provided to native load would also apply to retail service in these limited retail circumstances.

3. Who Must Provide Non-discriminatory Open Access Transmission

In the Final Rule, the Commission explained that its authority under sections 205 and 206 of the FPA permits it to require only public utilities to file open access tariffs as a remedy for undue discrimination.[FN135] The Commission further explained that it has no authority under those sections of the FPA to require non-public utilities to file tariffs with the Commission.

The Commission also discussed three mechanisms that would help alleviate the problems associated with not being able to require non-public utilities to provide open access: (1) Broad application of section 211; (2) the reciprocity requirement set forth in the Final Rule; and (3) the formation of RTGs.

The Commission also indicated that it will not allow public utilities that jointly own interstate transmission facilities with non-jurisdictional entities to escape the requirements of open access. Thus, the Commission required each public utility that owns interstate transmission facilities jointly with a non-jurisdictional entity to offer service over its share of the joint facilities, even if the joint ownership contract prohibits service to third parties. The Commission required the public utilities, in a section 206 compliance filing, to file with the Commission, by December 31, 1996, a proposed revision (mutually agreeable ***12300** or unilateral) to their contracts with non-jurisdictional owners.

Rehearing Requests

Jointly-Owned Facilities

Union Electric argues that the Final Rule improperly requires a public utility to unilaterally file a modification to agreements that a non-jurisdictional entity opposes, which amounts to a litigation coercion provision. Union Electric notes that it has been told by Associated Electric Cooperative, Inc. that it will oppose any modifications to Union Electric's agreements. Union Electric further states that these facilities are not commonly owned, but rather each party wholly owns its segment of the facilities.

Dalton asserts that Georgia Power Company cannot comply with the requirement to offer service over its share of joint facilities because the ITS is not owned by members as tenants in common, but instead each member owns specific segments of the transmission grid. Dalton further argues that it is unjust and unreasonable to require Georgia Power Company to give access to the ITS to new and roll-over transmission customers under the Order No. 888 tariff that are unwilling to accept an investment responsibility and an obligation to make balancing payments.

Associated EC argues that the Commission may modify non-jurisdictional contracts only under section 211 of the FPA; the Commission cannot simply modify the contract with respect to the public utility.

NE Public Power District states that it is party to an agreement with a public utility involving jointly constructed transmission facilities that prohibits use of the transmission capacity by a non-party. It asserts that "[t]he District's contractual rights under its contract constitute valuable property, and the summary annulment of those rights constitutes a violation of Due Process." (NE Public Power District at 18-20). Moreover, it argues that blanket invalidation of the terms and conditions of the contracts is contrary to the Sierra-Mobile doctrine.

Commission Conclusion

We reject those arguments that maintain that the Commission cannot properly require a public utility to file unilaterally a modification to agreements concerning joint transmission facilities that a non-jurisdictional entity opposes. It is without question that the Commission has the exclusive authority to regulate public utilities engaged in the sale for resale and/or transmission of electric energy in interstate commerce to assure that rates, terms and conditions are just and reasonable and not unduly discriminatory. The fact that a public utility may jointly own, with a non-jurisdictional entity, transmission facilities through which it engages in sales for resale and/or transmission of electric energy in interstate commerce does not alter the Commission's authority to regulate that public utility.[FN136] If the Commission finds that a matter needs to be remedied, it may issue an order directed at the public utility. The fact that such an order may affect a non-jurisdictional joint owner does not undermine the validity of the Commission's order.[FN137] Otherwise, a public utility could simply enter into joint agreements with non-jurisdictional utilities to the frustration of the Commission's mandate to protect consumers from undue discrimination.[FN138]

Nor does the exercise of the Commission's powers under the FPA to remedy undue discrimination by public utilities constitute a violation of due process vis-a-vis the non-jurisdictional entity. When the contract was entered into and filed with the Commission it was with the explicit knowledge that the Commission could regulate the rates, terms and conditions of the contract with respect to the jurisdictional services provided thereunder by the public utility. If and when a public utility unilaterally files either to amend or terminate the agreement, the non-jurisdictional party is free to raise any arguments it wishes to support its position that no changes are necessary to ensure that the contract is just and reasonable and not unduly discriminatory or preferential.

4. Reservation of Transmission Capacity by Transmission Customers

In the Final Rule, the Commission concluded that firm transmission customers, including network customers, should not lose their rights to firm capacity simply because they do not use that capacity for certain periods of time.[FN139]

Rehearing Requests

No rehearing requests addressed this matter.

5. Reservation of Transmission Capacity for Future Use by Utility

In the Final Rule, the Commission concluded that public utilities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonably forecasted within the utility's current planning horizon. [FN140] However, the Commission determined that any such capacity that a public utility reserves for future growth, but is not currently needed, must be posted on the OASIS and made available to others through the capacity reassignment requirements, until such time as it is actually needed and used.

Rehearing Requests

CCEM argues that it is discriminatory to allow public utilities and network transmission customers to reserve existing transmission capacity for their native load growth because it (1) limits the determination of ATC, (2) is likely to increase the cost of transmission for other customers, and (3) is inconsistent with a capacity reservation-based system. CCEM argues, however,

that if the reservation feature is retained, franchise utilities that reserve capacity must pay the full reservation charges, with no cost shifting to other customers. CCEM further recommends that all reservation payments should be credited directly to firm transmission services and the planning horizon should be limited to a reasonable time into the future.

American Forest & Paper argues that to achieve comparability, utilities must not be permitted to withhold capacity from the market for the benefit of native load. American Forest & Paper further argues that the Commission must establish mechanisms for evaluating the reasonableness of the utilities' requirements and projections, otherwise they have an incentive to over-forecast and to extend their planning horizons. American Forest & Paper suggests that requiring utilities to establish separate entities to purchase transmission on behalf of their native load would help solve this problem.

VA Com requests that the Commission clarify what will happen if a utility's forecast of load growth is too low. It argues that native load should not have to bear the burden of any forecast errors and that utilities should be required to reserve sufficient capacity to serve the current and projected needs ***12301** of native load customers. VA Com would also have the definition of native load in section 1.19 of the tariff expanded to include existing distribution cooperatives and others who currently provide service to end users. With respect to reservation priority, VA Com states that the Commission should establish the following reservation priority: native load customers, firm contract customers, and non-firm customers. Finally, VA Com asserts that the calculation of ATC must not include any capacity that may be needed by native load customers.

Commission Conclusion

We will deny the requests of CCEM and American Forest and Paper. We continue to believe that public utilities should be allowed to reserve existing transmission capacity needed for native load growth and network customer load growth reasonably forecasted within the utility's current planning horizon.

We note that network service is founded on the notion that the transmission provider has a duty to plan and construct the transmission system to meet the present and future needs of its native load and, by comparability, its third-party network customers. In return, the native load and third-party network customers must pay all of the system's fixed costs that are not covered by the proceeds of point-to-point service. This means that native load and third-party network customers bear ultimate responsibility for the costs of both the capacity that they use and any capacity that is not reserved by point-to-point customers. In this regard, native load and third-party network customers face a payment risk that point-to-point customers generally do not face. For these reasons, we do not believe that it is appropriate to require native load and network customers to assume any additional cost responsibility for the capacity that is reserved for their future use.

In response to CCEM's concerns, we recognize that offering load-based network service and reservation-based point-to-point service in one tariff may have disadvantages in that it may result in less than optimal use of the system if a utility overestimates its load. However, by requiring that available capacity reserved for native load be posted on OASIS and be available to others except when actually needed to serve native load, we believe Order No. 888 substantially relieves the incentive to over-reserve for native load and goes a long way toward assuring full and efficient use of the system.

With regard to the concern raised by VA Com, the transmission provider has an ongoing duty to plan and construct its system in a prudent manner in order to meet all of its firm service obligations. We also reiterate that public utilities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonably forecasted within the utility's current planning horizon.[FN[141]]

There is a risk of under-or over-projecting the transmission needs of native load and network customers, and the native load and network customers' cost responsibilities reflect this additional risk. In response to VA Com's request, we note that nothing in our regulations prohibits a state commission from overseeing a utility's retail native load growth projections. Finally, concerns regarding the accuracy of load growth projections for native load and network customers may be raised when a transmission service agreement is filed with the Commission or in a separate section 206 proceeding.

6. Capacity Reassignment

In the Final Rule, the Commission concluded that a public utility's tariff must explicitly permit the voluntary reassignment of all or part of a holder's firm transmission capacity rights to any eligible customer.[FN142]

(1) Reassignable Transmission Services

The Commission concluded that point-to-point transmission service should be reassignable, but that network transmission service is not reassignable.[FN143]

(2) Terms and Conditions of Reassignments

a. General

In effecting a reassignment, the Commission found that the assignor may deal directly with an assignee without involvement of the transmission provider.[FN144] Alternatively, the Commission explained that the assignor may request the transmission provider to effect a reassignment on its behalf, in which case the transmission provider must post the available capacity on its OASIS and assure that any revenues associated with the reassignment are credited to the assignor. The Commission further found that, among other things, any assignment must be posted on the transmission provider's OASIS within a reasonable time after its effective date.

b. Contractual Obligations

The Commission concluded that while assignors and assignees may contract directly with each other, the assignor will remain obligated to the transmission provider and the assignee will be liable solely to the assignor.[FN145] The Commission, however, did permit mutually agreeable alternatives to this approach.

c. Price Cap

The Commission concluded that the rate for any capacity reassignment must be capped by 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).[FN146]

Rehearing Requests

Scheduling Transmission Service by Assignees

CCEM requests that the Commission clarify that an assignee of transmission capacity, or its agent, is permitted to schedule transmission service directly with the transmission provider.

Network Transmission Service

American Forest & Paper declares that the Commission erred in finding that network service is not reassignable. American Forest & Paper argues that there is no technical reason for the Commission's position. According to American Forest & Paper, the Commission merely perpetuates the myth that in point-to-point transmission the contract actually determines the path of the flow of electrons. In fact, American Forest & Paper argues, the only issue is arriving at a nondiscriminatory and equitable price.

VT DPS argues that there is no reason network capacity rights cannot be defined during the period of a reassignment as VT DPS suggested in its comments:

Section 2.6 of the NorAm NIS Rate Schedule (Appendix B to the Initial NOPR comments of VDPS) is a provision which allows the reassignment of network service. Reassignment under the NorAm tariff would work this way: During the period of the assignment, both the original and replacement customers' network service entitlements are defined as specified contract quantities, the sum of which is equal to the original customer's highest coincident peak load during the 12 months preceding the ***12302** assignment. During the period of the assignment, that contract quantity, not the actual use of the system by the original and replacement shipper, will be used to determine the two customers' load ratio share responsibility. The original and replacement customers are free to divide responsibility for interim contract demand between them as they see fit.[[FN147]]

PA Coops argue that the Commission failed to explain why network customers have no capacity rights and points to a statement in Order No. 888 that network customers "should not lose their rights to firm capacity" as being inconsistent with the Commission's conclusion with respect to the reassignment of network service.

AMP-Ohio asserts that absent an ongoing pass-through to network customers of the revenue credits associated with sales of point-to-point service, the Commission should permit the reassignment of unused transmission capacity by network customers.

TDU Systems argue that the Commission should permit the assignment of a network customer's right to network transmission service for certain specific purposes. In particular, TDU Systems state that the Commission should permit assignment to allow a customer to coordinate, jointly operate, or pool its system with the systems of other local and regional network customers. TDU Systems argue that this provides an opportunity to maximize efficiencies without presenting the complication that the Commission has perceived with respect to the reassignment of point-to-point transmission capacity.

Price Cap

EEI asserts that the Commission's price cap creates several problems: (1) non-comparable treatment because transmission providers must credit revenues, but resellers can keep the revenues; (2) allowing sale at a price higher than paid could encourage speculation and hoarding; and (3) the transmitting utility's maximum stated rate should not include the utility's opportunity costs.

CCEM argues that transmission customers that are not transmission providers or affiliates of transmission providers should be freed from the price cap. CCEM claims that in a secondary market at market-based prices, opportunity costs can be communicated and lost opportunity costs averted.

NRECA believes that the price cap provision that permits an assignor to assign capacity at its own opportunity costs (capped at the cost of expansion) may provide firm point-to-point customers a strong economic incentive to buy up substantial firm capacity for speculative purposes and argues that this provision should be eliminated. NRECA also argues that this provision presents difficult rate substantiation questions when the assignor is not a public utility. Further, NRECA and SoCal Edison note that section 23.1 of the tariff does not include the cap at the cost of expansion.

Calculation of Assignor's Opportunity Costs

SoCal Edison asserts that the Commission must indicate how an assignor should calculate its own opportunity costs with respect to determining the price cap and should indicate that an assignor must abide by the same standard for recovering opportunity costs as the transmission provider. Carolina P&L also asserts that assignors must be held to the same standard as transmission providers when calculating opportunity costs. Carolina P&L further explains that if the opportunity costs are based on the cost of foregone transactions, the assignor should be required to post the price on OASIS.

Carolina P&L also asks that the Commission clarify how an assignor is to calculate its own opportunity costs. In particular, Carolina P&L asks if an assignor is limited to recovering the opportunity costs to which it is subject under the transmission provider's tariff or can the assignor forfeit the transaction underlying the transmission service and call the resulting difference an opportunity cost?

Resellers Into the Secondary Market

CCEM argues that the Commission should free resellers, "who but-for the resell would not be public utilities," from regulation as public utilities or should minimize the regulatory burden on them.[FN148] It further asserts that resellers that are not transmission providers should be treated like unaffiliated power marketers and granted waivers from public utility regulations.

Participation in the Secondary Market

CCEM argues that those customers that are permitted to continue to take service under existing agreements "should be excluded from participating in the secondary market until such time as they agree to comply with the pro forma tariff." (CCEM (889 rehearing request) at 7).

Commission Conclusion

Scheduling Transmission Service by Assignee

The pro forma tariff does not prohibit the assignee of transmission capacity from scheduling transmission service with the transmission provider. In fact, the tariff provides that "the Assignee will be subject to all terms and conditions of this Tariff" (tariff section 23.1), which would include the scheduling provision of tariff sections 13.8 and 14.6.

Network Transmission Service

We reaffirm our conclusion that network transmission service is not reassignable in the secondary market.[FN149] Parties have raised no new arguments that would persuade us otherwise. PA Coops are nevertheless correct in noting that network customers do have rights to firm capacity. However, a network customer's rights (as well as the transmission provider's planning responsibilities) are defined only in terms of the capacity needed to integrate the network customer's designated resources and its designated loads. These are usage- or load-based rights that are not fixed; they vary as the customer's load varies. Thus, the network customer's capacity rights are not well enough defined to be generally reassignable in the secondary market.[FN150]

VT DPS proposes a formula for defining a network customer's entitlement that would be operative during the period of an assignment. However, the proposed definition is simply an artifice derived from the load ratio share calculation. The formula does not result in a reassignable capacity right.

AMP-Ohio's suggestion regarding the proper treatment of the revenue credits associated with point-to-point service raises a rate issue that should be addressed in a ratemaking proceeding. However, we note that the proper treatment of such credits does not turn on the assignability of network service.

Finally, TDU Systems' recommendation that network service be reassignable only for pooling and coordination purposes is without merit. If customers wish to avail themselves of network service in order to realize ***12303** benefits associated with joint or coordinated operations with other systems, they can jointly request network service from the transmission provider. To allow customers to opt into and out of network service arrangements under the guise of capacity reassignment would be an abuse of the terms and conditions of the service, which, among other things, requires the transmission provider to plan for the long-term needs of network customers.

Price Cap

We will also reaffirm our conclusions regarding the price cap applicable to capacity reassignment. We continue to believe that customers must be given limited pricing flexibility in order to achieve the full efficiency and risk management benefits of capacity reassignment.

Contrary to the assertions of EEI and NRECA, we are not persuaded that allowing the customer to reassign capacity at a rate higher than it paid, as a result of charging its own opportunity costs, will lead to speculation and hoarding. As a condition of the open access tariff, the Commission will require customers reassigning transmission capacity to fully develop their method for calculating opportunity costs and provide all information necessary to their customers in order to verify such costs. Further, we reiterate that the potential for hoarding can be mitigated by (1) allowing the transmission provider to sell any reserved but unscheduled point-to-point transmission capacity on a non-firm basis, and (2) having a price cap, which allows the reseller to charge no more than a cost-based rate, including its own opportunity cost for reassigned capacity. Therefore, the reseller will find that reassigning transmission capacity to others with higher valued uses will be in its economic self interest. In addition, any hoarding of capacity that has anticompetitive effects can be addressed under section 206.

We deny CCEM's request to remove the price cap for transmission customers that are not transmission providers or affiliates of transmission providers. As we stated in the Final Rule, we are unable to conclude that competition in the market for reassigned transmission capacity is sufficient to prevent assignors from exerting market power. Thus, we believe the opportunity cost cap should be retained.[FN151]

Finally, in response to EEI's request, we clarify that "the transmission provider's maximum stated firm transmission rate in effect at the time of the reassignment" does not include the transmission provider's opportunity costs.[FN152] Also, as suggested by NRECA and others, section 23.1 of the pro forma tariff will be revised to indicate that the assignor's opportunity costs are capped at the transmission provider's cost of expansion.

Calculation of Assignor's Opportunity Costs

In response to the requests of SoCal Edison and Carolina P&L, we clarify that the assignor's opportunity costs should be measured in a manner that is analogous to that used to measure the transmission provider's opportunity costs. That is, an assignor's opportunity costs include: (1) increased costs associated with changes in power purchases or in the dispatch of generating units necessary to accommodate a reassignment, and (2) decreased revenues that arise from the assignor having to reduce sales of power in order to effect the reassignment.[FN153]

Regarding the calculation of opportunity costs, we intend to hold assignors to the same general standard as transmission providers. Thus, consistent with our treatment of transmission providers, we will not require assignors to post their opportunity costs on the OASIS or to make the costs routinely available to the public. We will, however, require assignors to describe to their assignees their derivation of opportunity costs in sufficient detail to satisfy the assignees that the price charged does not exceed the higher of (i) the original rate paid by the reseller, (ii) the transmission provider's maximum rate on file at the time of the assignment, or (iii) the reseller's opportunity cost, as set forth in section 23.1 of the tariff.

Resellers Into the Secondary Market

The issues raised by CCEM with respect to the regulation of resellers into the secondary market are fact specific and, accordingly, we will address such issues on a case-by-case basis.

Participation in the Secondary Market

We reject CCEM's argument that those customers that are permitted by Order No. 888 to continue to take service under existing agreements should be denied access to the secondary market until they agree to comply with the pro forma tariff. CCEM's approach would undermine our determination not to generically abrogate existing agreements, and would slow the growth of the secondary market by limiting the number of eligible participants.

7. Information Provided to Transmission Customers

In the Final Rule, the Commission concluded that all necessary transmission information, as detailed in the OASIS Final Rule, must be posted on an OASIS.[FN154]

Rehearing Requests
No requests for rehearing addressed this matter.

8. Consequences of Functional Unbundling

a. Distribution Function
In the Final Rule, the Commission concluded that the additional step of functionally unbundling the distribution function from the transmission function is not necessary at this time to ensure non-discriminatory open access transmission.[FN155]

Rehearing Requests
No requests for rehearing addressed this matter.

b. Retail Transmission Service
In the Final Rule, the Commission explained that although the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability, it did not believe it was necessary.[FN156] The Commission further explained that the matter raises numerous difficult jurisdictional issues that are more appropriately considered when the Commission reviews unbundled retail transmission tariffs that may come before the Commission in the context of a state retail wheeling program.

Rehearing Requests
CCEM argues that all transmission must be unbundled, including currently bundled retail transmission service, because failure to do so is inconsistent with the Commission's assertion of jurisdiction over the rates, terms, and conditions of unbundled interstate transmission to retail customers and ***12304** authority to address retail stranded costs through its jurisdiction over such costs. CCEM notes that the Commission found it necessary in Order No. 636 to unbundle the pipeline's direct retail sales to achieve comparability (CCEM cites FPC v. Conway Corp., 426 U.S. 271, 273 (1976) and Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215 (D.C. Cir. 1992) for the proposition that the Commission has jurisdiction over all interstate transmission).

NY Municipal Utilities and American Forest & Paper also argue that the Commission erred in not requiring the unbundling of the transmission component of retail sales. American Forest & Paper believes that such unbundling will facilitate competition by making the generation price transparent to all participants.

Commission Conclusion
We disagree with those entities that argue that the Commission erred in not requiring the unbundling of all transmission service, including the unbundling of transmission from retail service. As we explained in the Final Rule:

when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves only the provision

of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation.[FN157]
Nor is our decision not to unbundle transmission from retail generation service inconsistent with our assertion of jurisdiction over unbundled interstate transmission to retail customers. As we explained in the Final Rule and described further above, we have exclusive jurisdiction under the FPA over "transmission in interstate commerce" by public utilities, which includes the unbundled interstate transmission component of a previously bundled retail transaction.[FN158] Our assertion of jurisdiction in such a situation arises only if the retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail program.

c. Transmission Provider

1. Taking Service Under the Tariff
In the Final Rule, the Commission concluded that public utilities must take all transmission services for wholesale sales under new requirements contracts and new coordination contracts under the same tariff used by others (eligible customers).[FN159] For sales and purchases under existing bilateral economy energy coordination agreements, the Commission gave an extension until December 31, 1996 for public utilities to take transmission service under the same tariff used by others. The Commission also gave an extension of time to December 31, 1996 for certain existing power pooling and other multi-lateral coordination agreements to comply with this requirement.[FN160]

Rehearing Requests
This issue is discussed above in Section IV.C.1.b.

2. Accounting Treatment
In the Final Rule, the Commission directed utilities to account for all uses of the transmission system and to demonstrate that all customers (including the transmission provider's native load) bear the cost responsibility associated with their respective uses.[FN161]

Rehearing Requests
No requests for rehearing addressed this matter.

D. Ancillary Services
In the Final Rule, the Commission concluded that the following six ancillary services must be included in an open access transmission tariff: (1) Scheduling, System Control and Dispatch Service; (2) Reactive Supply and Voltage Control from Generation Sources Service; (3) Regulation and Frequency Response Service; (4) Energy Imbalance Service; (5) Operating Reserve—Spinning Reserve Service; and (6) Operating Reserve—Supplemental Reserve Service.[FN162] The Commission adopted NERC's recommendations for ancillary service definitions and descriptions with modifications.[FN163]

The Commission determined that the transmission provider must provide and the transmission customer must purchase from the transmission provider the first two services, subject to conditions set out in the Rule. The transmission provider must offer the remaining four services to the transmission customer serving load in the transmission provider's control area. The transmission customer that is serving load in the transmission provider's control area must acquire these four services from the transmission provider or a third party, or self provide.

1. Specific Ancillary Services

a. Scheduling, System Control and Dispatch Service

In the Final Rule, the Commission concluded that Scheduling, System Control and Dispatch Service is necessary to the provision of basic transmission service within every control area.[FN164] The Commission further stated that this service can be provided only by the operator of the control area in which the transmission facilities used are located.

Rehearing Requests

Wisconsin Municipals asks that the Commission eliminate Schedule 1 (Scheduling, System Control and Dispatch Service) as an ancillary service and require transmission providers to include these costs in the transmission revenue requirement so the transmission provider cannot recover these costs twice. Alternatively, Wisconsin Municipals asks that, if customers do their own scheduling through an electronic data link, the charge for scheduling and dispatch be waived.

Commission Conclusion

We disagree with Wisconsin Municipals that we should eliminate this ancillary service and include its ***12305** costs with the transmission revenue requirement. Scheduling requires action by both the customer who provides information about a transaction and the control area that evaluates and accepts (schedules) the transaction. If a transmission provider allows a transmission customer to supply its schedules through an electronic data link, it is merely offering an alternate method of providing the transaction information required. The control area must still decide whether it can schedule a transaction. Further, scheduling a transaction is only one aspect of Scheduling, System Control and Dispatch Service. A control area must also dispatch generating resources to maintain generation/load balance and maintain security during the transaction. Only the control area operator can perform these functions. A transmission provider must unbundle the cost of these functions, including scheduling, from its base transmission rate. This requirement to unbundle ancillary services costs from the base transmission rate ensures that double recovery of scheduling costs will not occur.

b. Reactive Supply and Voltage Control From Generation Sources Service

In the Final Rule, the Commission concluded that Reactive Supply and Voltage Control from Generation Sources Service is necessary to the provision of basic transmission service within every control area.[FN165] Although a customer is required to take this ancillary service from the transmission provider or control area operator, the Commission stated that a customer may reduce the charge for this service to the extent it can reduce its requirement for reactive power supply.

Rehearing Requests

NRECA and TDU Systems ask that Schedule 2 of the tariff, Reactive Supply and Voltage Control from Generation Sources Service, be modified to reflect that generation facilities outside a control area can provide reactive power. They argue that parties other than the transmission provider and the transmission customer are able to supply reactive power. Similarly, Santa Clara and Redding ask the Commission to revise Schedule 2 to require the transmission provider to offer this service, but to allow the transmission customer to arrange for this service through a purchase from the transmission provider, self-provision, or purchases from third parties.[FN166] Blue Ridge also argues that the Commission should permit self-supply or other local supply when it is feasible and economic to do so.

APPA, Santa Clara, Redding and Cajun point out an inconsistency between Schedule 2 and the preamble. They assert that Schedule 2 of the tariff should be revised to reflect the preamble language that allows a transmission customer to supply at least a portion of its reactive power service. California DWR says that it is capable of providing Reactive Supply and Voltage Control from Generation Sources Service and that mandating that it purchase this ancillary service makes no sense. California DWR asks the Commission to clarify that it is not required to purchase this ancillary service.

TAPS asks the Commission to make clear that (1) customer-owned generation facilities that are available to supply reactive power to the transmission provider's transmission system receive a credit, (2) the extent of customer-supplied reactive power

may be sufficient to eliminate the need for a separate reactive power charge paid to the transmission provider, and (3) customer-owned generation outside the control area may be eligible for a credit if it is located nearby where it can provide reactive support for the transmission provider's transmission system.[FN167] TAPS further asserts that reactive supply service should be viewed not on a transaction basis but on a gridwide or regionwide basis. Under this approach, according to TAPS, payments would be based on whether the user supplies more than it uses or uses more than it supplies.

Commission Conclusion

Control area operators use sources of reactive support to control voltage and maintain a stable power supply system. Because of the limited ability to transmit reactive power, these facilities must be available at or near the point of need. Therefore, reactive power support, and hence the facilities able to provide (or absorb) reactive power, must be distributed throughout the transmission system for the reliable operation of the power system. Over- or under-supply of reactive power at other points in the network do not contribute to a stable system and could harm the reliability of the system.

Although we agree with NRECA and TDU Systems that generation resources just outside the boundaries of a control area may provide some reactive support within the control area, the control area operator must be able to control the dispatch of reactive power from these generating resources. Accordingly, we will modify Schedule 2 to refer to generating facilities that are under the control of the control area operator instead of in the control area. The transmission customer's service agreement should specify the generating resources made available by the transmission customer that provide reactive support.

As noted in the Final Rule, a transmission customer can reduce (but not eliminate completely) the reactive supply and voltage control needs and costs that its transaction imposes on the transmission provider's system. For example, a customer who controls generating units equipped with automatic voltage control equipment may be able to use those units to help control the voltage locally and reduce the reactive power requirement of the transaction.[FN168] However, if these units are not always available or are not subject to the direction of the control area operator, their occasional use may not reduce the investment required by the control area operator in reactive power facilities. It merely reduces temporarily the cost of operating these facilities. Consistent with this understanding, we will modify Schedule 2 of the tariff to allow a transmission customer to supply at least part of the reactive power service it requires. We will continue to require reactive power service to be provided by and purchased from the transmission provider. However, a transmission customer may satisfy part of its obligation through self-provision or purchases from generating facilities under the control of the control area operator. The transmission customer's service agreement should specify all reactive supply arrangements.

We deny the California DWR and TAPS request that customer-owned generation facilities that are available to supply reactive power should automatically receive a credit. However, as the Final Rule states, a customer may reduce the charge for this service to the extent it can reduce its requirement for reactive power supply. We do not believe a transmission customer can satisfy all of its reactive requirements or allow the transmission provider to avoid ***12306** investment in reactive power related facilities. Concerning the other request of TAPS, we will not require that the supply of reactive power be on a gridwide or regionwide basis. Because reactive power must be supplied near the point of need, we are not persuaded that gridwide supply is feasible.

c. Energy Imbalance Service

In the Final Rule, the Commission concluded that Energy Imbalance Service must be offered for transmission within and into the transmission provider's control area to serve load in the area.[FN169] However, the Commission noted, a transmission customer can reduce or eliminate the need for energy imbalance service in several ways.

Energy Imbalance Service is provided when the transmission provider makes up for any difference that occurs over a single hour between the scheduled and the actual delivery of energy to a load located within its control area. For minor hourly differences between the scheduled and delivered energy, the transmission customer is allowed to make up the difference within 30 days (or other reasonable period generally accepted in the region) by adjusting its energy deliveries to eliminate the imbalance. A minor difference is one for which the actual energy delivery differs from the scheduled energy by less than 1.5 percent, except

that any hourly difference less than one megawatt-hour is also considered minor. Thus, the Final Rule established an hourly energy deviation band of #/1.5 percent (with a minimum of 1 MW) for energy imbalance. The transmission customer must compensate the transmission provider for an imbalance that falls outside the hourly deviation band and for accumulated minor imbalances that are not made up within 30 days.

(1) Description of Energy Imbalance

Rehearing Requests

North Jersey asserts that the definitions of Energy Imbalance Service and Backup Supply Service are conflicting and need clarification. North Jersey proposes that Energy Imbalance Service be clarified to state that a transmission provider will be required to supply power to a customer "within the dispatch period of the transmission provider's tariff." It states that this assures power when a customer is unable to change its nominations to match its generation capabilities. On the other hand, North Jersey states that Backup Supply Service should be the supply of power for a period longer than the tariff dispatch period.

NIMO asserts that the Commission should recognize that there is another type of Energy Imbalance Service. If a generator is located in one control area, but transfers the power to load in another control area, there is a potential mismatch between the amount of power scheduled for delivery by the generator and the amount it actually provides to the operator of the control area where it is located.

Nebraska Public Power District (NPPD) states that allowing third parties to provide Energy Imbalance Service and Regulation and Frequency Response Service could jeopardize system reliability. It argues that the transmission provider must have the right to approve the third party provider of these services and the right to physically meter the loads located out of the transmission provider's control area or otherwise monitor these services to be assured that they are provided satisfactorily.

NCMPA argues that because of the potential for abuse, the Commission should grant an exemption from an energy imbalance charge if the source of the energy shortfall is a generating resource that has been turned over to the transmission provider's dispatching control for meeting control area requirements.

Commission Conclusion

We clarify that Energy Imbalance Service is used to supply energy for mismatches between scheduled deliveries and actual loads that may occur over an hour. We do not intend it to be used as a substitute for operating reserves when there is an outage of generation supply or transmission. The Final Rule states that if a customer uses either type of operating reserve, it must expeditiously replace the reserve with backup power to reestablish required minimum reserve levels.[FN170]

Order No. 888 specifies that there is no obligation on the transmission provider to provide power to the customer for a "time longer than specified in the tariff" for the customer's own backup supply to be made available.[FN171] The order also states that "any arrangements for the supply of such service [i.e., Backup Supply Service] by the transmission provider should be specified in the customer's service agreement."[FN172] We revise the first statement to clarify that the transmission customer's service agreement, not the tariff, should specify any arrangements for backup service by the transmission provider, including the time within which backup power supply will be made available. The time should correspond to the time necessary to restore operating reserves that is generally accepted in the region and consistently followed by the transmission provider.

NIMO asserts that two types of energy imbalance can occur if the generator and the load are in different control areas. These are (1) a mismatch between the energy scheduled to be received in the load's control area and the actual hourly energy consumed by the load, and (2) a mismatch between energy scheduled for delivery from the generator's control area and the amount of energy actually generated in the hour. The Energy Imbalance Service in the Final Rule applies to the first case only. Although we agree that the second type of mismatch can occur, we will not designate as Energy Imbalance Service a mismatch between

energy scheduled and energy generated. Energy Imbalance Service in this Rule applies only to the obligation of the transmission provider to correct the first type of energy mismatch, one caused by load variations.

In general, the amount of energy taken by load in an hour is variable and not subject to the control of either a wholesale seller or a wholesale requirements buyer. The Energy Imbalance Service that we require as our ancillary service has a bandwidth appropriate for load variations and should have a price for exceeding the bandwidth that is appropriate for excessive load variations. Although NIMO states correctly that, where two control areas are involved, there can also be a mismatch between energy scheduled and energy generated, NIMO has not explained why this mismatch should have the same bandwidth and price as our Energy Imbalance Service. Indeed, we believe it should not.

A generator should be able to deliver its scheduled hourly energy with precision. If we were to allow the generator to deviate from its schedule by 1.5 percent without penalty, as long as it returned the energy in kind at another time, this would discourage good generator operating practice. A generation supplier could intentionally generate less power when its generating cost is high and make it up when its cost is lower if the second type of mismatch is included in our Energy Imbalance Service. Instead, a generator will have an interconnection agreement with its ***12307** transmission provider or control area operator, and we expect that this agreement will specify the requirements for the generator to meet its schedule, and for any consequence for persistent failure to meet its schedule. This agreement will be tailored to the parties' specific standards and circumstances, and, although such arrangements must not be unduly preferential or discriminatory (e.g., must be comparable for all wholesale sellers, including the transmission provider's own wholesale sales), we prefer not to set these standards generically for all parties.[FN173]

We disagree with NCMPA's argument regarding an exemption from Energy Imbalance Service when the control area operator controls the generating resource. As discussed above and in the Final Rule, energy imbalance results from a mismatch between a scheduled receipt and actual load in the control area of the transmission provider. Energy imbalance can occur if the actual load differs from the scheduled receipt regardless of who controls the generating resource.

As specified in the Final Rule, to ensure the reliability of the power system, a transmission customer is obligated to obtain Energy Imbalance Service and Regulation and Frequency Response Service for its transactions. We clarify for NPPD that the transmission customer may not decline the transmission provider's offer of these ancillary services unless it demonstrates to the transmission provider that it has acquired the services from another source. This demonstration must show that the customer's alternative arrangement for ancillary services is adequate and consistent with Good Utility Practice. The transmission customer's service agreement should specify any alternative arrangements for the provision of these (or any other) ancillary services.

(2) Energy Imbalance Bandwidth

As explained above, Schedule 4 (Energy Imbalance Service) of the tariff allows the transmission provider to charge a transmission customer serving load in its control area for taking an amount of energy in any hour that is 1.5 percent more or less than the amount of energy scheduled for that hour. In the pro forma tariff, the minimum amount of energy that can be assessed a charge in an hour is one megawatt-hour.

Rehearing Requests

Several entities argue that this energy imbalance bandwidth is too narrow and should be increased.[FN174] APPA asserts that the narrow bandwidth imposes obligations on the transmission customer that the transmission provider does not impose on itself.[FN175] TAPS argues that the 1.5 percent bandwidth "makes no sense because it simply imposes a penalty for existence as a small utility." Redding states that the 1.5 percent energy imbalance bandwidth is not appropriate for transmission to a small utility that does not operate a control area. In opposing the narrow bandwidth, TDU Systems notes that metering error is typically within a range of #2 percent. It further argues that it is impossible for smaller systems with low load factors, larger load swings, and the need to change the output quickly for a single unit to operate within the narrow bandwidth. Others assert

that a too-narrow bandwidth creates a burdensome level of billings unless schedule changes are permitted more frequently than hourly.[FN176] They fear that meeting the 1.5 percent bandwidth would require expensive dynamic scheduling.

Some entities recommend a particular alternative bandwidth.[FN177] TDU Systems suggests a sliding scale as follows. There would be a bandwidth of #5 percent of scheduled energy for transactions of 500 MW or less, decreasing to #1.5 percent for transactions of 5,000 MW or more, with a minimum bandwidth of #5 MWh in all cases. Alternatively, TDU Systems says that network customers could be entitled to a bandwidth equal to their load ratio share of the amount (not percentage) of their transmission provider's inadvertent interchange, again subject to a minimum of 5 MWh. TAPS recommends that the deviation bandwidth be changed to 6 percent of the transmission customer's daily peak demand, with a minimum bandwidth of 4 MWh.

NRECA proposes an alternative approach (previously set forth in its comments on the proposed rule): a customer's "energy compensation balance" should be determined for each hour based on the net energy deviation from the "bandwidth base," which NRECA defines as the greater of (i) the customer's total on-line and available generator capacity associated with the generation dispatched, or (ii) the sum of a customer's maximum hourly demands at each of its recipient interfaces. NRECA states that its proposal sets forth separate compensation based on whether there is an overdelivery or an underdelivery outside a five percent bandwidth.

Wabash argues that the Commission should use a deviation bandwidth based on a period other than a single hour; for example, use a known historical number, such as the maximum hourly load during the previous calendar year. Wabash states that if a larger bandwidth is not adopted, the Commission should permit a transmission customer that is purchasing spinning or supplemental operating reserves as an ancillary service to use those purchases as the basis for an expanded deviation bandwidth. In addition, Wabash asks the Commission to clarify that an imbalance resulting from a system emergency situation caused by loss or failure of facilities should be counted as "inadvertent loads" and repaid in like hours at mutually agreed times and pay-back amounts.

Redding points out that the NERC (A2 Criterion) establishes a constant bandwidth for every hour of the year and should be used instead. For energy imbalances of less than 1.5 percent, Schedule 4 of the tariff allows the energy to be returned in kind within 30 days, after which payment must be made. Redding argues that the 30-day period should be deleted. Instead the Commission should follow current industry practice of allowing reasonable deviations to be carried forward into the next month so as to avoid an accounting nightmare. Finally, Redding argues that the bandwidth for network service should apply to the entire network load and not to a "scheduled transaction."

Wisconsin Municipals asks the Commission to clarify that if parties have reached a settlement that establishes a wider band, the transmission provider may not use Order No. 888 to avoid this settlement obligation.

TAPS argues that any charges for exceeding the bandwidth should be cost-based and compensation should be symmetrical for over-and under-deliveries.[FN178] TAPS further argues that ***12308** the bandwidth should not be applied by transaction, and customers should not have to pay for imbalances caused by transmission provider dispatch mistakes.

TDU Systems states that public utilities should be placed on notice that they will not be permitted to collect 100 mills per kWh for energy supplied by a customer in excess of its schedules, as some have sought in tariffs already filed.

Commission Conclusion

Energy Imbalance Service includes a bandwidth to promote good scheduling practices by transmission customers. It is important that the implementation of each scheduled transaction not overly burden others.

We do not agree with APPA that the bandwidth imposes an obligation on the transmission customer that the transmission provider does not impose on itself. The Final Rule treats all wholesale customers comparably. The transmission provider must also use its pro forma tariff and apply the same bandwidth for sales to its wholesale customers.

Many commenters assert that the energy imbalance bandwidth of #1.5 percent is too narrow and is difficult to meet for small utilities. Several propose an alternative bandwidth or a larger minimum deviation. We believe that the bandwidth included in the Final Rule pro forma tariff is consistent with what the industry has been using as a standard and is as close to an industry standard as anyone can set at this time. However, we will set a larger minimum deviation to meet the needs of small customers. The minimum energy imbalance is now two megawatt-hours per hour (2 MW minimum in the pro forma tariff). This adequately addresses the concerns raised by small utilities because they may exceed the bandwidth without exceeding this minimum. For example, a transmission customer that transfers less than 133 MW (1.5 percent of 133 MW is 2 MW, the minimum energy imbalance) has a larger percentage bandwidth than #1.5 percent. The bandwidth set forth in the pro forma tariff provides a needed incentive for a transmission customer to deliver an amount of energy each hour that is reasonably close to the amount scheduled, while at the same time recognizing the needs of small utilities. To help customers with the difficulty of forecasting loads far in advance of the hour, the Final Rule pro forma tariff permits schedule changes up to twenty minutes before the hour at no charge. By updating its schedule before the hour begins, a transmission customer should be able to reduce or avoid energy imbalance and associated charges. However, we will allow the transmitting utility and the customer to negotiate and file another bandwidth more flexible to the customer, subject to a requirement that the same bandwidth be made available on a not unduly discriminatory basis.

We disagree with Wabash's request to require a transmission provider to expand its energy imbalance bandwidth for a transmission customer purchasing spinning and supplemental reserves. Unlike Energy Imbalance Service, which treats deviations between scheduled and actual hourly energy deliveries, spinning and supplemental reserves provide generating capacity that responds to contingency situations (e.g., loss or failure of facilities). Order No. 888 requires a transmission customer to obtain these operating reserve ancillary services for its transactions. Therefore, Wabash is simply requesting a larger energy imbalance bandwidth. We have selected the bandwidth to promote good scheduling practices by transmission customers. A larger bandwidth may introduce poor operating practices that could affect the reliability of the system. If the Energy Imbalance Service bandwidth were larger, energy supplied within this expanded bandwidth could be provided from reserve capacity. Some reserve capacity may not then be available when needed for system reliability. However, as stated in the Final Rule, we will allow a transmission provider to assemble packages of ancillary services (not bundled with basic transmission service) that can be offered at rates that are less than the total of individual charges for the services if purchased separately.[FN179]

In response to Wabash's other concern, we believe that emergency situations caused by loss or failure of facilities should be addressed in the transmission customer's service agreement (or the generation supplier's separate interconnection agreement) and not as part of Energy Imbalance Service.

In response to Redding's statement that the NERC (A2 criterion) establishes a constant bandwidth for imbalances, we note that NERC has set a standard for a kind of deviation that is different from our Energy Imbalance Service. NERC's bandwidth is for inadvertent interchange between a control area and all other control areas. Redding has presented no reason that our Energy Imbalance Service bandwidth should be the same as NERC's inadvertent interchange bandwidth. Regarding its concern about the in-kind repayment period, we note that Schedule 4 does not always require a 30-day period for in-kind repayment of energy imbalances; it also permits a term that the transmission provider consistently follows and is generally accepted in the region. In addition, we clarify that the bandwidth for network service applies to the entire network load.

With respect to Wisconsin Municipals' request, we clarify that the Final Rule does not require parties to a contract that went into effect prior to July 9, 1996 to stop using a wider bandwidth established by settlement. However, service provided pursuant to a settlement that was expressly approved subject to the outcome of Order No. 888 on non-rate terms and conditions must be revised in the subsequent compliance filing to reflect the language contained in the pro forma tariff.[FN180] Subsequent to the compliance tariff filing, public utilities are free to file under section 205 to revise the tariffs (e.g., to reflect various settlement provisions) and customers are free to pursue changes under section 206.[FN181]

In response to arguments regarding the price of Energy Imbalance Service, we note that the Final Rule intentionally does not provide detailed pricing requirements. We require the transmission provider to determine and apply to the Commission for appropriate rates for Energy Imbalance Service as part of its transmission tariff. Transmission customers may address any disagreements with a specific charge in the company's transmission rate case.

2. Ancillary Services Obligations

In the Final Rule, the Commission distinguished two groups or categories of ancillary services: (1) services that the transmission provider is required to provide to all of its basic transmission customers under the tariff, and (2) services that the transmission provider is required to offer to provide only to transmission customers serving load in the provider's control area. The Commission required a transmission provider that operates a control area to provide the first group of ancillary services and the transmission customer *12309 to purchase these services from the transmission provider. The Commission required a transmission provider to offer to provide the ancillary services in the second group to transmission customers serving load in the transmission provider's control area. The Commission required the transmission customer serving load in the transmission provider's area to acquire these services, but allowed the transmission customer to do so from the transmission provider, a third party or self-supply.

If the transmission provider is a public utility providing basic transmission service, but is not a control area operator, the Commission allowed the transmission provider to fulfill its obligation to provide, or offer to provide, ancillary services by acting as the customer's agent. In this case, if the control area operator is a public utility, the Commission required the control area operator to offer to provide all ancillary services to any transmission customer that takes transmission service over facilities in its control area whether or not the control area operator owns or controls the facilities used to provide the basic transmission service.

a. Obligation of a Control Area Utility

Rehearing Requests

Carolina P&L asks the Commission to clarify that the transmission provider is not required to provide control area services to another utility operating a control area that simply chooses not to provide for its own control area obligations. It argues that this is not justified in a competitive bulk power market.

Maine Public Service asserts that a transmission provider that is not a NERC-recognized control area can provide ancillary services from its own facilities. It asks that the Commission clarify that this is permissible. At a minimum, Maine Public Service states that the Commission must allow transmission providers on a case-by-case basis to establish that they provide ancillary services even if they are not NERC-recognized control areas or do not satisfy the Commission's definition (citing the initial decision in Maine Public Service Company, 74 FERC 63,011 (1996)).

Similarly, California DWR states that it has been operating since 1983 as a quasi-control area, self-providing most, if not all, of the ancillary services it uses. It also notes that it provides such services to its utility transmission providers. California DWR argues that it is entitled to appropriate compensation for all ancillary services that it provides to its transmission providers or other parties.

Commission Conclusion

In response to Carolina P&L, we clarify that the Final Rule does not require a control area operator to provide control area services within another control area.

Except for the ancillary service called Scheduling, System Control and Dispatch,[FN182] the Final Rule does not preclude a transmission provider that is not a control area operator from offering ancillary services to its transmission customers.

Order No. 888 requires that a transmission customer obtain or provide ancillary services for its transactions. If a transmission customer can self-supply a portion of its requirement for ancillary services (other than Scheduling, System Control, and Dispatch Service), it should pay a reduced charge for these services. As with the transmission provider, a third party may offer ancillary services voluntarily to other customers if technology permits. However, simply supplying some duplicative ancillary services (e.g., providing reactive power at low load periods or providing it at a location where it is not needed) in ways that do not reduce the ancillary services costs of the transmission provider or that are not coordinated with the control area operator does not qualify for a reduced charge. The transmission customer must make separate arrangements with the transmission provider or control area operator to supply its own ancillary services and specify such arrangements in its service agreement.

b. Obligation to Provide Dynamic Scheduling

Dynamic scheduling electronically moves a generation resource or load from the control area in which it is physically located to a new control area. In the Final Rule, the Commission concluded that it would not require the transmission provider to offer Dynamic Scheduling Service to a transmission customer, although a transmission provider may do so voluntarily. If the customer wants to purchase this service from a third party, the Commission stated that the transmission provider should make a good faith effort to accommodate the necessary arrangements between the customer and the third party for metering and communication facilities.

Rehearing Requests

AMP-Ohio asks that the Commission clarify that the transmission provider is required to provide dynamic scheduling "to the extent a transmission customer needs and is willing to pay for reasonably priced dynamic scheduling in order to support its operations, including in order to integrate its loads and resources located in more than one control area." Wisconsin Municipals also asks the Commission to clarify that dynamic scheduling must be provided if technically feasible and permitted by regional reliability practices.

Wisconsin Municipals further asks that the Commission clarify that if the transmission provider has agreed to provide dynamic scheduling in a settlement, it may not use its Order No. 888 implementation filing to void this obligation.

EEI asks that the Commission clarify the residual obligations of a control area utility to an entity that electronically leaves the control area via dynamic scheduling.

Commission Conclusion

In response to Amp-Ohio and Wisconsin Municipals, we note that dynamic scheduling is not a required ancillary service in Order No. 888, and we do not require a transmission provider to offer this service. However, nothing in the Final Rule precludes a transmission provider from offering it as a separate service. Furthermore, offering dynamic scheduling to integrate loads and resources in more than one control area is also not required.

Wisconsin Municipals' argument with respect to prior settlements has been previously addressed in Section IV.D.1.c.(2) (Energy Imbalance Service).

We clarify for EEI that, once dynamic scheduling is arranged, each of the two control areas has ancillary service responsibilities under the Rule. The reactive power obligations of the original control area remain and cannot be completely supplied by distant sources. Order No. 888 requires, in the case of dynamic scheduling, both control areas to provide the first two ancillary services in their respective control areas, that is, (1) Scheduling, System Control, and Dispatch Service and (2) Reactive Supply and Voltage Control from Generation Sources Service, and the new control area to offer the remaining ancillary services to the dynamically scheduled entity. In addition, the actual energy transfers between the two control areas will require basic transmission service. We ***12310** expect that any additional obligations of a control area operator to an entity that electronically

leaves the control area via dynamic scheduling, such as backup procedures for the failure of telemetering equipment, will be set out in the transmission customer's service agreement.

c. Obligation As Agent

Rehearing Requests

A transmission provider must act as an agent to help the customer acquire ancillary services if the transmission provider cannot provide them itself. NRECA asks whether a non-public utility may collect a reasonable fee for its agency services in fulfilling its reciprocity requirement.

Commission Conclusion

While the Final Rule does not allow a public utility transmission provider acting as an ancillary services agent to collect a fee for its agency service, we do not have similar authority to deny a non-public utility the opportunity to charge a fee for providing an agency service. However, to the extent a non-public utility seeks to collect an agency fee from a public utility, it must meet our comparability requirements and charge a comparable fee to its own wholesale merchant function.

3. Miscellaneous Ancillary Services Issues

a. Transmission Provider as Ancillary Services Merchant

Rehearing Requests

Allegheny asserts that the sale of power in connection with ancillary services would make the transmission provider a wholesale merchant under the Commission's standards of conduct (citing section 37.3 of the Commission's Regulations). Allegheny asks that the Commission clarify that a transmission provider's employee responsible for providing ancillary services is not engaged in a wholesale merchant service that would trigger the functional separation requirement.

Commission Conclusion

We clarify that the transmission provider's sale of ancillary services associated with its provision of basic transmission service is not a wholesale merchant function for purposes of Order No. 889. This is because the provision of ancillary services is essential for providing transmission service. However, the sale of ancillary services not associated with the transmission provider's provision of basic transmission service is a wholesale function for purposes of Order No. 889. Thus, if an employee is marketing an ancillary service independent of the transmission provider's obligations to provide transmission service, i.e., as a third party to another transmission provider's basic transmission service customer, the employee would be providing a wholesale merchant function and the Order No. 889 Standards of Conduct apply.

b. QF Receipt of Ancillary Services

Rehearing Requests

North Jersey argues that the Commission did not engage in reasoned decisionmaking in ruling that Real Power Loss Service is not an ancillary service. It asserts that this service must be provided by the transmission provider. North Jersey further argues that, because the Commission describes the furnishing of real power loss as a sale of power, this could prevent a PURPA qualifying facility (QF) from being a transmission service customer. North Jersey states that a QF faces power purchase and resell restrictions under the Commission's regulations. North Jersey asks that the Commission find that receipt of Real Power Loss Service from a third party to complete a transmission transaction is not a purchase and resale of power. In addition, North Jersey requests that the Commission clarify that receipt of ancillary services by a QF does not constitute a purchase and resale of electric power that would jeopardize its status as a QF (clarification also requested in ER95-791-000).[FN183]

Commission Conclusion

The Commission disagrees with North Jersey's assertion that Real Power Loss Service should be an ancillary service that must be provided by the transmission provider. As stated in the Final Rule, it is not necessary for the transmission provider to supply Real Power Loss Service to effect a transmission service transaction. Although the transmission customer is responsible for losses associated with its transmission service, supply of losses is purely a generation service that can be (1) self supplied; (2) purchased from the transmission provider, if it offers this service; or (3) purchased from a third party.

We clarify that a QF arrangement for receipt of Real Power Loss Service or ancillary services from the transmission provider or a third party for the purpose of completing a transmission transaction is not a sale-for-resale of power by a QF transmission customer that would violate our QF rules.

c. Pricing of Ancillary Services

In the Final Rule, the Commission concluded that it would consider ancillary services rate proposals on a case-by-case basis and offered general guidance on ancillary services pricing principles.[FN184]

Rehearing Requests

NRECA and TDU Systems argue that there should be truth in transmission pricing so that the rate is clearly identified as including or excluding ancillary services.

AEP asserts that if a purchaser of ancillary services has alternative suppliers of these services, then either the transmission provider should not be required to provide those services or it should be able to charge market rates for them. Otherwise, according to AEP, the market is skewed in favor of the customer.

Illinois Power argues that if a transmitting utility demonstrates that it incurs incremental costs from its obligation to offer to provide the required ancillary services, it should be permitted to recover such costs through an adjustment to base transmission rates.

Commission Conclusion

The Final Rule requires unbundling of individual ancillary services from basic transmission service. We point out to NRECA and TDU Systems that the transmission provider must post and update prices for basic transmission and each ancillary service on its OASIS. As discussed below in Section IV.G.1.h. (Discounts), the Commission is revising its policy regarding the discounting of the price of transmission services. There, we establish three principal requirements for discounting basic transmission service. [FN185] We clarify here that these principal requirements apply to discounts for ancillary services provided by the transmission provider in support of its provision of basic transmission service. However, because ancillary services are generally not path-
***12311** specific, a discount agreed upon for an ancillary service must be offered for the same period to all eligible customers on the transmission provider's system. In addition, if a transmission provider offers any rate or packaged ancillary service discounts, it must post them on its OASIS and make them available to affiliates and non-affiliates on a basis that is not unduly discriminatory. In this manner, any discounting of ancillary service prices is visible to all market participants. We will require that, as soon as practicable, any "negotiation" of discounts between a transmission provider and potential transmission (and ancillary) service customers should take place on the OASIS.[FN186]

We continue to require a transmission provider to provide or offer to provide the six ancillary services, even if the transmission customer has some alternative suppliers. We distinguished these six services from others (e.g., Real Power Loss Services) for which many suppliers are typically available. In some cases, only the transmission provider can provide the ancillary service; in other cases too few providers are available to create a market for these services. Further, we were persuaded by the comments of NERC and others that these services are essential for reliability; if a customer must obtain these services to obtain transmission