received, whichever is earlier, until the date the unpaid portion of the payment is received.

(2) A State agency may choose to pay the amount designated as at-risk prior to resolution of any appeals. If the State agency pays such claim (in whole or in part) and the claim is subsequently overturned or adjusted through administrative or judicial appeal, any amounts paid by the State agency above what is actually due shall be promptly returned with interest, accruing from the date the payment was received until the date the payment is returned.

(3) Any interest assessed under paragraph (j)(1) of this section shall be computed at a rate determined by the Secretary based on the average of the bond equivalent of the weekly 90-day Treasury bill auction rates during the period such interest accrues. The bond equivalent is the discount rate (*i.e.*, the price the bond is actually sold for as opposed to its face value) determined by the weekly auction (*i.e.*, the difference between the discount rate and face value) converted to an annualized figure. The Secretary shall use the investment rate (*i.e.*, the rate for 365 days) compounded in simple interest for the period for which the claim is not paid. Interest billings shall be made quarterly with the initial billing accruing from the date the interest is first due. Because the discount rate for Treasury bills is issued weekly, the interest rate for State agency claims shall be averaged for the appropriate weeks.

PART 277—PAYMENTS OF CERTAIN ADMINISTRATIVE COSTS OF STATE AGENCIES

§ 277.4 [Amended]

15. In § 277.4:

a. Paragraph (b) is amended by removing paragraphs (b)(1), (b)(4), (b)(5), and (b)(6) and by redesignating paragraphs (b)(2), (b)(3), (b)(7), and (b)(8) as paragraphs (b)(1), (b)(2), (b)(3), and (b)(4), respectively.

b. Newly redesignated paragraph (b)(3) is amended by removing the words ''Beginning October 1982,'' and by removing the reference ''paragraphs (b)(2) and (b)(3)'' and adding in its place the reference ''paragraphs (b)(1) and (b)(2)''.

Dated: September 12, 2005.

Eric M. Bost,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 05–19020 Filed 9–22–05; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Chapter I

[Docket No. RM05–25–000]

Preventing Undue Discrimination and Preference in Transmission Services

September 16, 2005.

AGENCY: Federal Energy Regulatory Commission, (DOE).

ACTION: Notice of inquiry (NOI).

SUMMARY: The Federal Energy Regulatory Commission (Commission) is inviting comments on whether reforms are needed to the Order No. 888 pro forma open access transmission tariff (OATT) and the OATTs of public utilities to ensure that services thereunder are just, reasonable and not unduly discriminatory or preferential. The Commission is also inviting comments on the implementation of the newly established section 211A of the Federal Power Act (concerning the provision of open access transmission service by unregulated transmitting utilities). Finally, the Commission is inviting comments on section 1233 of the Energy Policy Act of 2005, which defines native load service obligation.

DATES: Comments on this NOI are due on November 22, 2005.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. Refer to the Procedure for Comments section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT: Daniel Hedberg (Technical Information), Office of Markets, Tariffs & Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6243.

David Withnell (Legal Information), Office of General Counsel—Markets, Tariffs & Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8421.

SUPPLEMENTARY INFORMATION:

Introduction

1. The Federal Energy Regulatory Commission (Commission) has a mandate under sections 205 and 206 of the Federal Power Act (FPA) [1] to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. Under these sections, the Commission must determine whether any rule, regulation, practice, or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and we must disapprove any of the foregoing that do not meet this standard. Pursuant to that mandate, in 1996, the Commission issued Order No. 888 [2] to remedy undue discrimination or preference in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce.[3]

2. The Commission is issuing this Notice of Inquiry to seek comments on whether reforms are needed to the Order No. 888 pro forma open access transmission tariff (OATT) and to the OATTs of public utilities to prevent undue discrimination and preference in the provision of transmission services. The Commission's preliminary view is that the pro forma OATT and public utilities' OATTs should be reformed to reflect lessons learned during nearly a decade of the electric utility industry's and the Commission's experience with open access transmission. In addition, the Commission is concerned that public utility transmission providers have come to different interpretations of

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

[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

[3] Order No. 888 at 31,669.

provisions of their OATTs and have implemented them in ways that need clarification by the Commission to avoid unduly discriminatory or preferential terms and conditions. The Commission's preliminary view is that reforms to the pro forma OATT and public utilities' OATTs appear necessary and the Commission seeks comments on how best to accomplish that. Further, the Commission is seeking comments on how best to implement section 1231 of the Energy Policy Act of 2005 (establishing section 211A of the FPA, which concerns the provision of open access transmission service by unregulated transmitting utilities). Finally, the Commission is seeking comments on section 1233 of EPAct 2005 (which defines native load service obligation).[4]

Background

3. In Order No. 888, the Commission required, as a remedy for undue discrimination, that all public utilities provide open access transmission service consistent with the terms and conditions of a pro forma OATT. The Commission determined that non-discriminatory open access transmission service, including access to transmission information, and stranded cost recovery were the most critical components of a successful transition to competitive wholesale markets. To achieve this, the Commission required all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file OATTs containing certain non-price terms and conditions, and to functionally unbundle wholesale power services from transmission services.[5] With functional unbundling, public utilities must: (1) Take wholesale transmission services under the same tariff of general applicability as they offer their customers; (2) state separate rates for wholesale generation, transmission and ancillary services; and (3) rely on the same electronic information network that their transmission customers rely on to obtain information about the utilities' transmission systems.[6] While Order No. 888 set the foundation upon which to attain competitive electric markets, the Commission has recognized that Order No. 888 did not eliminate the potential to engage in undue discrimination and preference in the provision of transmission service.[7]

4. In Order No. 888, the Commission found that transmission utilities own the transportation system over which bulk power competition occurs and transmission service was a natural monopoly.[8] The electric industry has changed considerably since Order No. 888 was issued. It has evolved from one characterized by large, vertically integrated utilities to an industry with increasing wholesale trade and increasing numbers of independent buyers and sellers of wholesale power. Public utilities today purchase significantly more wholesale power to meet their load than in the past and seek non-discriminatory access to transmission facilities. Transactions have become less localized, with trade occurring on a more regionalized basis. Improved information about transmission systems has become available to all participants in the bulk power market. The Commission has approved the voluntary formation of a number of independent system operators (ISO) and regional transmission organizations (RTOs). New generation resources have been developed in areas that had experienced generation shortages. Regional trading patterns have expanded. Large numbers of merger applications and applications to charge market-based rates have been accepted by the Commission.

5. In the wake of these industry changes, questions have arisen concerning the efficacy of various terms and conditions of the transmission providers' OATTs. As the Commission noted in Order No. 888, it is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves.[9] This is still the view of the Commission. We have observed that public utilities continue to have the discretion and the incentive to interpret and apply the provisions of their OATTs in a manner that can result in unduly discriminatory behavior on each particular public utility's transmission system.[10] This is exacerbated by the fact that, in a number of respects, Order No. 888 and the pro forma OATT allow public utilities discretion in implementing the terms and conditions of providing transmission service. This not only makes it difficult for public utilities to comply, but makes it difficult for the Commission to identify violations.[11] Further, this can lead to inconsistent results across public utility systems to the detriment of customers. Transmission customers have also found ways to use the OATTs to their own advantage, particularly in the scheduling and queuing processes.[12] Moreover, OATT provisions have been modified in numerous ways on a company-by-company basis, leading to uncertainties within the industry as to the proper interpretation of those provisions and to unnecessarily inconsistent treatment of customers across public utilities. While some

[4] Energy Policy Act of 2005, Pub. L. 109–58, §§ 1231, 1233 119 Stat. 594 (2005) (EPAct 2005).

[5] The Commission did not require corporate unbundling, stating that efforts to remedy undue discrimination should begin by requiring the less intrusive functional unbundling approach.

[6] Concurrent with the issuance of Order No. 888, the Commission issued Order No. 889 that imposed standards of conduct governing communications between the utility's transmission and wholesale power functions, to prevent the utility from giving its power marketing arm preferential access to transmission information. It also required all public utilities that own, control or operate facilities used in the transmission of electric energy in interstate commerce to create or participate in an Open Access Same-Time Information Systems (OASIS) that provides existing and potential transmission customers the same access to transmission information. *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct,* Order No. 889, 61 FR 21,737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 at 31,583 (1996), *order on reh'g,* Order No. 889–A, FERC Stats. & Regs. ¶ 31,049 (1997), *order on reh'g,* Order No. 889–B, 81 FERC ¶ 61,253 (1997).

[7] In Order No. 2000, the Commission found that ''opportunities for undue discrimination continue to exist that may not be remedied adequately by [the] functional unbundling [remedy of Order No. 888] * * *.'' *Regional Transmission Organizations,* Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,105 (1999), *order on reh'g,* Order No. 2000–A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington* v. *FERC,* 272 F.3d 607 (D.C. Cir. 2001).

[8] Order No. 888 at 31,652.

[9] *Id.* at 31,682.

[10] For example, remaining corporate ties between generation and transmission within public utilities have proven problematic for transmission access by new generators and new load-serving entities. Also, transmission providers have delayed the processing of a competitor's request for new service. Further, concerns regarding the calculation of available transfer capability (ATC) have arisen. (We note that the Commission used the term ''Available Transmission Capability'' in Order No. 888 to describe the amount of additional capability available in the transmission network to accommodate additional transmission services. To be consistent with the term generally accepted throughout the industry, ''Available Transfer Capability'' will be used).

[11] *See, e.g.*, Order No. 2003 at P 696 (noting that many decisions under the OATT are ''subjective'' and that a ''[t]ransmission [p]rovider that is not an independent entity has the ability and the incentive to exploit this subjectivity to its own advantage''). *Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, 68 FR 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g,* Order No. 2003–A, 69 FR 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g,* Order No. 2003–B, 70 FR 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2005), *order on reh'g,* Order No. 2003–C, 70 FR 37,661 (June 30, 2005) FERC Stats. & Regs. ¶ 31,190 (2005).

[12] *See, e.g.*, 2004 State of the Market Report: Midwest ISO at 30–31, 34, *http://www.midwestmarket.org/publish/Document/2b8a32_103ef711180_-7bf20a48324a/2004%20MISO%20SOM%20Report.pdf?action=download&_property=Attachment.*

market participants have raised concerns with the implementation of OATTs, others may be reluctant to bring issues to the Commission.

6. We are also concerned that undue discrimination and preferential treatment is much more difficult to detect when the transmission grid is constrained. For example, some transmission constraints have created fairly small local load pockets in primarily urban areas, *e.g.*, New York City, Long Island, Boston, parts of Connecticut, and the San Francisco Bay Area. Other load pocket concerns have arisen in parts of northern Virginia, New Orleans and various load centers in the Southwest Power Pool (SPP). Still other constraints are more regional in scope: (1) From the Midwest to the Mid-Atlantic; (2) from the Midwest to the Tennessee Valley Authority (TVA); (3) into and within California; (4) from TVA and the Southern Companies into Entergy; (5) from Mid-America Interconnected Network into Wisconsin Upper Michigan Systems and (6) into Florida. The existence of these and other constraints affects transmission systems resulting in a reduction in available transfer capability, a possible increase in the frequency of denials of requests for transmission service, and a possible increase in the frequency of transmission service interruptions and/or curtailments of transmission service. While such results may be legitimate because of such things as reliability or native load priority, these same results may provide an increased opportunity for transmission providers to engage in actions that are unduly discriminatory. Distinguishing between the two may be difficult to achieve. Consequently, the existence of transmission constraints and their effect on transmission system operations make it more difficult for us to carry out our statutory responsibility to ensure that transmission providers provide nondiscriminatory open access transmission service. In recognition of this problem, Congress, in section 1241 of the EPAct 2005, has directed the Commission to issue a rule to promote investment in the transmission grid by establishing incentive-based rate treatments ''for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.'' We will do so, but in a proceeding separate from this one and at a later date.

7. The Commission recognizes that the question of whether Order No. 888 adequately remedies undue discrimination can be contentious. Customers often argue that undue discrimination can be remedied only through structural reforms or by applying the OATT to bundled retail load. Transmission providers often argue that the Commission should not consider such broader remedies because it lacks the authority to do so or because Order No. 888 is working well as it is. State commissions often express concern that, although the Commission should seek to remedy undue discrimination at the wholesale level, it should not do so in ways that will intrude on state jurisdiction over bundled retail load. In issuing this NOI, the Commission emphasizes its desire to avoid the more polarizing elements of this debate and to pursue instead a pragmatic approach to reforming Order No. 888 that focuses on the specific problems that continue to exist and targeted remedies to address them. To that end, we encourage the parties to identify *with specificity* any alleged defects in Order No. 888 and to recommend reforms that are *appropriately targeted* to remedying those defects. Sweeping generalizations regarding undue discrimination (or the lack thereof) are not encouraged.

The Subject of the Notice of Inquiry

8. The Commission seeks to explore whether, and if so, which, reforms are necessary to the Order No. 888 pro forma OATT and to the individual public utility OATTs, given the current state of the electric industry and the apparent uncertainties and inconsistent application concerning various tariff provisions that have arisen since implementation of Order No. 888. The Commission's goal continues to be to prevent undue discrimination and preference in the provision of transmission service. Our preliminary view is that reforms to Order No. 888 are necessary to accomplish that goal and discharge our obligations under the FPA. The Commission is particularly interested in receiving comments describing specific enhancements that are needed to: (1) Remedy any unduly discriminatory or preferential application of the pro forma OATT or (2) improve the clarity of the Order No. 888 pro forma OATT and the individual public utility OATTs in order to more readily identify violations and facilitate compliance. In addition, the Commission is seeking comments on how best to implement the newly established section 211A (concerning the provision of open access transmission service by unregulated transmitting utilities).

9. Significantly, the Commission emphasizes that it is not proposing to change the native load preference established in Order No. 888. Section 1233 of EPAct 2005 defines native load service obligation. The Commission seeks comments on whether or not the approach the Commission took in Order No. 888 is the same as that set forth in section 1233. If it is not, the Commission requests commenters to identify the differences.

Questions for Response

10. The Commission encourages any and all comments regarding the topics broadly discussed above. Commenters are invited to share with the Commission their overall thoughts, including technical and legal matters, on how the pro forma OATT has worked thus far, *e.g.*, which portions of the pro forma OATT have worked well, which portions of the pro forma OATT could be improved, and what are the best practices of individual transmission providers and should these practices be made a part of the pro forma OATT and thus applicable to all public utility transmission providers. In addition, the Commission seeks responses to the following specific questions:

A. Undue Discrimination Generally

11. In Order No. 888, the Commission adopted a functional unbundling approach as a remedy for undue discrimination. Since that time, the Commission has found that the incentive and opportunity for undue discrimination nonetheless continues to exist. The Commission therefore encouraged the structural separation of generation from transmission through RTOs, ISOs and similar organizations. The Commission is interested in receiving comments on whether there are remedies other than structural separation that would adequately address undue discrimination.

1. Is undue discrimination difficult to detect? If it is, would greater transparency allow the Commission to better understand the scope of the problem as well as to provide a disincentive to discriminate? Would increased reporting requirements (*e.g.*, regarding denials of service, congestion management, and transmission expansion) be beneficial and cost effective?

2. What are the particular circumstances under which undue discrimination is most likely to occur? For example, is discrimination most likely to occur in areas where the transmission provider retains discretion as to how to implement a particular OATT provision (*e.g.*, ATC calculation)? If so, is standardization and specification of certain practices a potential remedy to undue discrimination?

3. How should the Commission address the tension between a transmission provider's obligation to serve bundled native load customers and its obligation to provide nondiscriminatory access under the OATT? Are there certain practices that transmission providers use to serve native load customers that are not available to non-affiliates under the OATT and, if so, should they be made available on an open access basis under the OATT?

B. Transmission Pricing

12. The Commission is interested in receiving comments on whether any reforms to the Commission's transmission pricing policies should be considered as part of OATT reform.

1. Are there changes to the Commission's current pricing policies that could be made to increase the efficient use of the grid on systems that do not use locational marginal pricing?

2. In Order No. 888, 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. (Order No. 888 at 31,696 and pro forma OATT section 23.) Does this approach to capacity reassignment remain reasonable today? If not, should greater capacity reassignment rights be encouraged by, for example, different pricing policies? Please provide specific suggestions.

3. In Order No. 888, the Commission capped the price for reassigned capacity at the highest of: (1) The original transmission rate charged to the purchaser (assignor), (2) the transmission provider's maximum stated firm transmission rate in effect at the time of the reassignment, or (3) the assignor's own opportunity costs capped at the cost of expansion (Price Cap). (Order No. 888 at 31,697). Does this pricing approach continue to be reasonable or should the price cap be modified or eliminated to further encourage capacity reassignment?

4. Does capacity reassignment provide a competitive alternative to the primary capacity provided by the transmission provider? If not, how should capacity reassignments be changed to achieve this result?

5. A secondary market for transportation capacity on natural gas pipelines helps to ensure that capacity is allocated to the highest valued use. Capacity resale of electric transmission is limited, however, because network service cannot be resold under Order No. 888. Should greater resale rights be permitted under the OATT and can this be accomplished consistent with the network properties of electric transmission?

6. Should the Commission allow deviations to its ''higher of'' policy to encourage greater incremental pricing of redispatch service or transmission upgrades? Should deviations be limited to cases where transmission providers hire an independent third party to administer such pricing reforms?

7. In Order No. 888, the Commission stated that its use of the contract path model of power flows and embedded cost ratemaking was intended to initiate open access, but was not intended to signal a preference for contract path/embedded cost pricing for the future. The Commission further stated that it would entertain non-discriminatory tariff innovations to accommodate new pricing proposals in the future. Order No. 888 at 31,734–35. Should the Commission continue to use the contract path model in the future?

8. How should any new services be priced in order to maximize their availability?

C. Network and Point-to-Point Transmission Service

13. In Order No. 888, the Commission required each public utility to offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. It 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. Thus, the Commission required all public utilities to offer both firm and non-firm point-to-point transmission service and firm network transmission service on a non-discriminatory open access basis.[13]

1. Should changes be made to the different services required by Order No. 888?

2. In Order No. 888, the Commission concluded that the load ratio allocation method of pricing network service continues to be reasonable for purposes of initiating open access transmission.[14] We note that on June 14, 2005, the United States Court of Appeals for the District of Columbia Circuit remanded the issue of physical impossibility as it relates to load ratio pricing in *Florida Municipal Power Agency* v. *FERC*, 411 F.3d 287 (D.C. Cir. 2005). Does the approach established in Order No. 888 continue to be reasonable today? Are the pricing differences established by public utility transmission providers in their individual OATTs between network and point-to-point transmission services reasonable in light of the differences in the network and point-to-point transmission services?

3. Should network service be converted to a contract demand service (*i.e.*, similar to *Florida Power Corp.*, 71 FERC ¶ 61,248 (1995); *Wisconsin Electric Power Co.*, 72 FERC ¶ 61,033 (1995); and *Florida Power Corp.*, 81 FERC ¶ 61,247 (1997)) or should point-to-point transmission service and network service be merged into a contract demand service?

4. Should new transmission services such as conditional firm, partial firm, and seasonal firm be required? Describe any such proposed service in detail, including necessary definitions.

5. Are the firm services being offered under the pro forma OATT (network and point-to-point) being offered in a manner comparable to the services provided to the transmission owner's unbundled retail customers?

6. Are there pricing policies that can create an incentive to maximize the use of the transmission system? If so, please explain in detail.

D. Untimely Processing of Requests for Transmission Service

14. The pro forma OATT provides deadlines for public utility transmission providers to complete system impact and other studies related to requests for transmission service. Sections 17.5 (Response to a Completed Application) and 18.4 (Determination of Available Transmission Capability) of the pro forma OATT provide that following receipt of a completed application for service the transmission provider must timely respond to transmission customer requests for determinations of firm and non-firm ATC. They then provide that the transmission provider must make the determination as soon as reasonably practicable after receipt but no later than certain specified time periods (or such time periods generally accepted in the region).

1. Are there provisions of the pro forma OATT that need to be reformed to better define the obligations of public utility transmission providers in responding to requests for transmission service?

2. Are the allowable time frames for public utility transmission providers to respond to transmission customers manageable?

3. Have transmission customers experienced delays by public utility transmission providers in responding to requests for transmission service? What delays have been experienced?

[13] Order No. 888 at 31,690.

[14] *Id.* at 31,736.

4. Have the delays by public utility transmission providers been unduly discriminatory or preferential?

5. What remedies can the Commission impose on public utility transmission providers for missing deadlines set forth in their OATTs?

E. Remedies, Penalties and Enforcement

15. Order No. 888 allows public utility transmission providers to impose penalty charges on transmission customers for certain identified tariff violations, such as penalties for imbalances, penalties in the event a customer fails to curtail as required under the pro forma OATT, and penalties for failure to maintain specified power factors. The purpose of these charges is to discourage certain behavior. Order No. 888 makes no mention of adverse consequences if a public utility transmission provider violates its OATT. Since the adoption of Order No. 888, the Commission has, in individual cases, approved a variety of remedies (*e.g.*, revoking market-based rate authority, providing refunds to customers, approving organizational changes in the transmission function). The EPAct 2005 gives the Commission civil penalty authority for violations of the FPA, including violations of the OATT. The Commission is interested in receiving comments on whether it should address the issue of remedies or penalties as part of OATT reform. The EPAct 2005 strengthened the Commission's civil penalty authority, and the Commission can now impose civil penalties for tariff violations, in addition to penalty charges.

1. Should there be identified penalty charges in the tariff to address a transmission provider violating the tariff provisions? Should there be additional penalty charges in the pro forma OATT for tariff violations by transmission customers?

2. Does the pro forma OATT need to be clarified so that transmission providers and customers are subject to the same penalty charges for the same violations?

3. Should overrun penalty charges (penalties for taking transmission service in excess of what the entity is contractually entitled to take) apply if a transmission provider takes service inconsistent with its OATT?

4. Should public utility transmission providers be subject to revocation of their market-based rate authority for certain OATT violations? Should certain violations (*e.g.*, setting aside more transmission capacity than is needed to serve native load and using the capacity for third-party sales) be considered market manipulation under the Market Behavior Rules [15] and section 1283 of the EPAct 2005 (which amends Part II of the FPA by adding a prohibition of energy market manipulation)?

5. Should the Commission provide greater specificity as to which penalty charges will apply to particular violations? Would greater specificity provide a greater deterrent effect on undue discrimination?

6. If the Commission provides greater specificity, which penalty charges should apply to which violations? For example, should penalty charges apply to failures to comply with OATT deadlines to encourage transmission providers to devote adequate resources to this area? Should a revocation of market-based rate authority be used to deter preferential treatment of an affiliate that is selling power at market-based rates?

7. Should the issue of remedies and penalties be considered in reforming Order No. 888 or as part of a broader effort to develop a comprehensive enforcement policy that would apply to all areas of Commission regulation?

F. Hourly Firm Transmission Service

16. Section 13.1 of the pro forma OATT (Term) provides that the minimum term of firm point-to-point transmission service shall be one day. In Order No. 888, the Commission adopted a one-day minimum term, explaining that this would moot a number of reliability concerns and allegations about possible ''cream-skimming.'' [16] Entities had argued that comparability would not be achieved by permitting others to have service for one hour with equal priority to native load and other long-term customers that have to pay the fixed cost of the transmission system every hour of the year. They also had expressed concern that a one-hour minimum term would promote selective use of the transmission system, impair the ability of a utility to plan its system, and adversely impact longer term transactions. Finally, some expressed concern that a one-hour firm service may encourage speculative advance requests for service during the system peak day (cream skimming). However, we note that several public utility transmission providers have individually filed for and received Commission authorization to modify their OATT to provide hourly firm point-to-point transmission service. *See, e.g., El Paso Electric Company*, (unpublished letter order dated April 9, 2004 in Docket No. ER04–567–000); *Entergy Services, Inc.*, 85 FERC ¶ 61,163 (1998), *order on reh'g*, 91 FERC ¶ 61,153 (2000).

1. Are the concerns expressed in Order No. 888 regarding minimum terms no longer relevant?

2. Should public utility transmission providers be required to offer hourly firm point-to-point transmission service?

3. For reservation and scheduling purposes, should the Commission permit transmission customers to batch hourly firm transmission requests so that the public utility transmission provider can evaluate them as if they were a single request?

4. Should the scheduling timelines for firm and non-firm hourly transmission service be the same or should they differ? Please explain.

G. Changes in Receipt and Delivery Points (Redirects)

17. Section 22.2 of the pro forma OATT (Modification on a Firm Basis) provides that any request by a transmission customer to modify receipt and delivery points on a firm basis shall be treated as a new request for service in accordance with section 17 of the pro forma OATT (Procedures for Arranging Firm Point-to-Point Transmission Service). While this new request is pending, the transmission customer retains its priority for service at the existing firm receipt and delivery points specified in the service agreement.

1. Have transmission customers been unduly discriminated against in attempting to modify their receipt and delivery points? If so, provide specific examples.

2. If there are problems associated with this section, what reforms are needed, or is this an enforcement matter?

H. Rollover Rights

18. Section 2.2 of the pro forma OATT (Reservation Priority for Existing Firm Service Customers) provides that existing firm service customers (wholesale requirements and transmission-only, with a contract term of one-year or more) have the right to continue to take transmission service from the public utility transmission provider when the contract expires, rolls over or is renewed. It specifically provides that this transmission reservation priority is independent of whether the existing customer continues to purchase capacity and energy from the public utility transmission provider or elects to purchase capacity and energy from another supplier.

[15] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

[16] Order No. 888 at 31,751–53.

1. Have public utility transmission providers hindered customers under pre-Order No. 888 agreements from rolling over their contracts that allow purchase of capacity and energy from another supplier?

2. Does the language in section 2.2 need to be reformed to ensure that rollover rights are provided when transmission customers are seeking access to alternative supply sources, or is this an enforcement matter?

3. Should rollover right policy determinations made subsequent to Order No. 888 be included in the pro forma OATT?

4. Are there other problems with section 2.2, either as written or as implemented by public utility transmission providers, that need to be addressed?

5. Are any potential transmission customers denied transmission access by the exercise of rollover rights?

6. Should the concept of rollover rights be reconsidered? Is one-year service with rollover rights consistent with the need to create incentives for transmission investment or should a longer minimum term of service be adopted to qualify for rollover rights? If so, how can the terms and conditions of rollover rights be reformed to ensure proper incentives for transmission investment?

I. Rules, Standards and Practices Governing the Provision of Transmission Service

19. Certain rules, standards and practices governing the provision of transmission service, such as public utilities' business practices, are not reflected in the Commission's pro forma OATT or in individual public utility tariffs. The Commission has previously adopted certain uniform business practices and amended the Commission's regulations to require compliance with such practices (*see, e.g., Open Access Same-Time Information System and Standards of Conduct*, Order No. 638, 65 FR 17,370 (February 25, 2000), FERC Stats. & Regs. ¶ 31,093 (2000)). The Commission has also recently issued a Notice of Proposed Rulemaking proposing to amend its regulations to incorporate by reference standards promulgated by the North American Energy Standards Board's (NAESB) Wholesale Electric Quadrant (WEQ) dealing with OASIS business practice standards and proposing to require each electric utility to revise its OATT to include the applicable WEQ standards. (*See Standards for Business Practices and Communication Protocols for Public Utilities*, 111 FERC ¶ 61,204 (2005), 70 FR 28,222 (May 17, 2005), FERC Stats. & Regs. ¶ 32,582 (2005)).

1. Should such rules, standards and practices be required to be included in public utilities' OATTs?

2. If not all, which of such rules, standards and practices should be included in OATTs (with the exception of the NAESB standards subject to the proceeding discussed above)?

3. Should rules, standards and practices not required to be included in OATTs be required to be posted on public utilities' OASIS to increase transparency?

J. Joint Transmission Planning

20. Currently, joint planning between a public utility transmission provider and transmission customer is not required by Order No. 888. However, section 30.9 of the pro forma OATT (Network Customer Owned Transmission Facilities) provides that for facilities constructed by a network customer, the network customer must receive credit where such facilities are jointly planned and installed in coordination with the transmission provider.

1. Does the requirement that a public utility transmission provider provide credits to new customer-owned transmission facilities have the effect of discouraging joint transmission planning?

2. Should joint transmission planning be made mandatory, for example, when transmission requests affect adjacent transmission systems? If so, under what authority could the Commission impose such a requirement?

3. Should public utility transmission providers be required to report to the Commission on an annual basis the joint planning that has occurred or been requested on their systems? Should the Commission conduct audits to determine the level of compliance with any joint planning requirement?

4. Should the pro forma OATT be reformed to include a provision for credits for transmission facilities built by a point-to-point transmission customer? Should credits be provided only for point-to-point service of a longer term, *e.g.*, five years?

K. Obligation To Expand Capacity

21. The pro forma OATT requires public utility transmission providers to expand capacity, if necessary, to satisfy the needs of network transmission customers (section 28.2) and point-to-point transmission service customers (sections 13.5 and 15.4). The transmission customer, however, must agree to compensate the transmission provider for any necessary transmission facility additions.

1. Has this provision met transmission customers' needs?

2. Have public utility transmission providers fulfilled these obligations?

3. How can the pro forma OATT be reformed to ensure that public utility transmission providers' obligations to expand are clarified or is this an enforcement matter only?

4. Have transmission customers been unduly discriminated against by transmission providers failing to plan and construct their transmission systems to accommodate the needs of network customers? If so, please provide specific examples. Should the pro forma OATT be reformed?

5. Are there other changes to the pro forma OATT that could achieve the goal of having transmission built?

6. Are there transmission pricing policies, such as demand charges, that would eliminate any financial disincentive for the transmission provider not to build transmission upgrades?

7. Does ''lumpiness'' act as a disincentive to expanding the transmission system, *i.e.*, where the transmission requests received are not of a sufficient transmission capacity to cost justify a substantial system upgrade (only 100 MW requested for a minimum 200 MW upgrade)? If so, what changes could be made to lessen this disincentive?

8. Are there interconnection procedures established in Order No. 2003 *et seq.*, that may be considered as best practices that should be adopted or possibly expanded in the pro forma OATT for point-to-point or network integration transmission services?

9. Should there be lower charges for longer-term transmission service that require transmission system upgrades, such as for five years rather than one year, because of the possibility of lower risk of revenue recovery for the transmission provider? If so, how would such a rate be designed?

L. Joint Ownership

22. In Order No. 888–A, the Commission required each public utility that owns interstate transmission facilities with a non-jurisdictional entity to offer open access transmission service over its share of the joint facilities.[17] Some current jointly-owned transmission facilities are the Georgia Integrated Transmission System, owned by Southern Company subsidiary Georgia Power, the Municipal Electric Authority of Georgia (MEAG Power), the

[17] Order No. 888–A at 30,218–19.

Georgia Transmission Corporation—a cooperative utility—and Dalton Utilities—a municipal system; the Pacific Intertie and Path 15. Order No. 888 did not address the possibility of existing transmission customers participating with the transmission provider in the joint ownership of new transmission facilities.

1. Should public utility transmission providers be required to offer their network service and point-to-point transmission customers the opportunity to participate in the joint ownership of new transmission facilities and network upgrades? If so, under what authority would the Commission impose such a requirement?

2. Would joint ownership reduce disputes over cost allocation for new capacity and provide a source of additional capital?

3. How would ownership rights affect the usage of the jointly owned facilities and how would this affect the rights of non-owners?

4. Should a provision(s) be included in the pro forma OATT concerning joint ownership? If so, please describe in detail.

M. Tariff Compliance Reviews

23. The Commission has relied primarily on transmission customer complaints and staff audits to identify OATT violations.

1. Should the Commission establish a regime of systematic tariff compliance reviews in order to monitor transmission providers' compliance with the terms and conditions of their OATTs?

2. Should these reviews be the equivalent of audits and investigations with due process and remedies for any violations?

3. Should the Commission require public utility transmission providers to hire independent reviewers to prepare reports for submission to the Commission and release to the public? If so, what role should the Commission play in such a process?

N. Hoarding of Transmission Capacity

24. In Order No. 888, the Commission acknowledged that hoarding of transmission capacity was a possibility. For example, the Commission found that firm transmission customers should not lose their rights to firm capacity simply because they do not use that capacity for certain periods of time. It explained that it would not limit the amount of transmission capacity that a customer may reserve, except in the face of evidence of hoarding or other anticompetitive practices.

1. Is there evidence of hoarding or anticompetitive practices by public utility transmission providers or customers that warrants reforms to the pro forma OATT? If so, please provide specific examples.

2. Are transmission providers adequately making non-firm transmission service available when it is not used by firm point-to-point and network service customers? Is the non-firm service made available in a non-discriminatory fashion?

3. Are there pricing policies that would further encourage transmission providers to make additional non-firm transmission service available?

O. Curtailments

25. Section 1.7 of the pro forma OATT defines curtailment as ''a reduction in firm or non-firm transmission service in response to a transmission capacity shortage as a result of system reliability conditions.'' Curtailment provisions for point-to-point transmission service are established in sections 13.7 and 14.7 for firm and non-firm transmission services respectively and the curtailment provisions for network integration transmission service are contained in section 33. Complaints regarding improper curtailment of service by transmission providers have been made in a variety of proceedings and the Commission has found cases of improper curtailment in the past.[18]

1. Is there evidence of improper curtailment practices by public utility transmission providers or customers that warrants reforms to the pro forma OATT? If so, please provide specific examples.

2. Should curtailments determined to be improper be subject to monetary penalties?

3. Should curtailments of firm transmission service designed to permit wholesale power sales by the merchant function of the transmission provider, or an affiliate, be considered market manipulation?

P. Reservation Priority

26. Section 13.2 of the pro forma OATT (Reservation Priority) provides that long-term firm point-to-point transmission service will be available on a first-come, first-served basis. With regard to short-term point-to-point transmission service requests, this section establishes that reservations will be conditional based upon the length of the requested transaction. This section further provides, in the context of short-term firm point-to-point transmission service, that if ATC is insufficient for all service requests, customers with a reservation for shorter-term service will have a right of first refusal to match longer-term reservations before losing their reservation priority.

1. Has the first-come, first-served approach to reservation priorities resulted in a fair and equitable means to allocate transmission capacity when the transmission system is oversubscribed? If not, what alternative approach should be implemented?

2. Is the right of first refusal with respect to short-term point-to-point transmission service working fairly and effectively to provide ATC to those customers who request the longest duration of short-term firm point-to-point transmission service or does it provide an unfair competitive advantage or an opportunity for abuse?

3. Should the right of first refusal in this context be eliminated?

Q. Designation of Network Resources

27. Section 30.1 of the pro forma OATT (Designation of Network Resources) provides that network resources shall include all generation owned, purchased or leased by the network customer designated to serve network load under the Tariff. Section 30.2 of the pro forma OATT (Designation of New Network Resources) provides that the network customer may designate a new network resource by providing the transmission provider with as much advance notice as practicable. Section 30.4 of the pro forma OATT (Operation of Network Resources) provides that network customers may not make firm off-system sales from designated network resources. Section 30.7 of the pro forma OATT (Limitation on Designation of Network Resources) provides that the network customer must demonstrate that it owns or has committed to purchase generation pursuant to an executed contract in order to designate a generating resource as a network resource.

1. Is there a problem with over-designation of network resources?

2. If so, how can the pro forma OATT be reformed to eliminate the problem?

3. Should network resource designations be limited to a specific ratio of the monthly peak load for the customer?

4. Are network resources consisting of firm contracts that do not specify generation sources until the energy is scheduled (sometimes referred to as ''seller's choice'') a problem? If so, should these generation sources only be allowed to be designated as network

[18] *See, e.g., Consolidated Edison Company of New York,* 108 FERC ¶ 61,120 (2004).

resources after the seller has identified the specific generating sources?

5. Have network customers been unduly discriminated against in attempting to modify their receipt and delivery points?

6. What specific difficulties have been experienced with designation of network resources?

7. If there are problems associated with this provision, what reforms to the provision are needed or is this an enforcement matter?

8. Should customers be allowed to ''undesignate'' portions of their designated network resources on a short-term basis in order to make firm sales from these resources?

R. Queuing for Long-Term Transmission Service

28. The pro forma OATT did not explicitly address queuing issues, but rather established provisions addressing the obligations and timeframes for a public utility transmission provider to address requests for transmission service that cannot be immediately granted due to a lack of ATC. The pro forma OATT also required public utility transmission providers to separately establish their ''Methodology for Completing a System Impact Study'' as Attachment D to the pro forma OATT. In Order No. 2003–A, the Commission found that although interconnection and delivery, and transmission service under the pro forma OATT, are separate services, it agreed that the queues for the two services must be closely coordinated.[19] Thus, in general, interconnection customers and transmission delivery service customers should have equal access to ATC, with priority being established on a first come, first served basis according to the date on which service is requested. Furthermore, studies for interconnection services should be coordinated with the facilities studies performed for transmission delivery services. This ensures that all required upgrades are planned and designed in a least cost manner.

1. What problems associated with the queuing process have been encountered?

2. Should the pro forma OATT be reformed to establish more specific rules about how other transmission requests in the queue should be accounted for when conducting studies?

3. Should clustering, *i.e.*, the studying of transmission requests as a group, be required? The Commission has allowed this practice on a case-by-case basis, *see, e.g., Southwest Power Pool, Inc.,* 110 FERC ¶ 61,028 (2005).

4. Are there blocking issues where a customer submits multiple requests intending to proceed with a single request specifically to keep others out of the queue? If so, how would the Commission decide which requests are legitimate versus blocking in nature? Would charging a processing fee that would increase with the duration of service for requests reduce the incentive to submit multiple self competing requests?

5. Should the public utility transmission provider's planning process be required to reflect plans for all new generation sources in the interconnection and transmission queues to ensure that customers can request transmission as easily for power and energy from independent power producers' generation as from the public utility transmission provider's own generation?

6. Should the duration of the long-term transmission request affect the transmission customer's queue position, for example a request for a five-year firm service receive a higher queue position for study purposes than a one-year firm service request?

S. Ancillary Services

29. In the pro forma OATT, the Commission established six ancillary services to be offered, including the following Schedules: (1) Scheduling, System Control and Dispatching services; (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. The Commission explained that it generally adopted the North American Electric Reliability Council's recommendations for ancillary service definitions and descriptions.

1. Have the correct ancillary services needed to provide open access transmission service been identified?

2. Are there additional ancillary services that should be included in the pro forma OATT? If so, please identify such services and provide proposed definitions.

3. Are there ancillary services identified in the pro forma OATT that should be treated separately as distinct services, such as regulation and frequency response service?

4. Are the definitions for the ancillary services used in Order No. 888 still viable? If not, please provide proposed revised definitions.

5. Should the Commission address ancillary service pricing issues in this proceeding?

i. Energy Imbalances

30. In Order No. 888, the Commission explained that 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.'' [20] The Commission also explained:

> [f]or 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.

The Commission further explained that this bandwidth promotes good scheduling practices and that it is important that the implementation of each scheduled transaction not overly burden others.[21] The pricing for energy within and outside of this bandwidth was left for public utility transmission providers to propose on a case-by-case basis. Since the issuance of Order No. 888, the Commission has approved energy imbalance service pricing provisions on a case-by-case basis. Generally, public utility transmission providers proposed energy imbalance charges, including penalty charges for scheduling deviations set at a percentage of the energy price, *e.g.*, 90 percent for excess energy and 110 percent for energy shortfalls.

1. Does the deviation band of ±1.5 percent continue to be appropriate?

2. Should penalty charges be eliminated entirely for transmission customers and/or should they be charged no more than the control area's cost of supplying energy to correct the imbalance? Should there be low or no penalty charges when reliability is not threatened and higher penalty charges only when reliability is threatened? Provide examples of threats to reliability in this context.

[19] Order No. 2003–A at P 541.

[20] Order No. 888 at 31,703; *see also* Schedule 4 of the pro forma OATT.

[21] Order No. 888–A at 30,232.

3. Would increased scheduling flexibility help?

4. Should transmission customers be allowed to aggregate energy imbalances over a greater time period than 30 days or be allowed to net energy imbalances?

5. Is it unduly discriminatory or preferential for a transmission customer to be charged energy imbalance penalties when the public utility transmission provider does not have to pay a penalty and incurs only a cost no higher than its incremental cost of energy for imbalances occurring in its control area or between control areas (return in kind)?

ii. Generator Imbalances

31. In Order No. 888, the Commission defined generator imbalance as the difference between the scheduled and actual delivery of energy from the generator. The Commission did not adopt a pro forma generator imbalance schedule, explaining that a generator should be able to deliver its scheduled hourly energy with precision. It also expressed concern that if a generator was allowed to deviate from its schedule by 1.5 percent without penalty (as permitted for energy imbalances), it would discourage good generator operating practices.[22] The Commission concluded that generator imbalances should be specified in each generator's interconnection agreement with its transmission provider or control area operator.

1. Should the Commission require that a generator imbalance schedule be included in the pro forma OATT? Is comparability in the treatment of generator imbalances needed?

2. How should generator imbalances be priced?

3. Should there be low or no penalty charges when reliability is not threatened and higher penalty charges only when reliability is threatened?

T. Pro Forma OATT Definitions

32. In order to promote consistency and clarity in the non-discriminatory provision of open access transmission service, the Commission included certain common service provisions in the pro forma OATT, including a definitions section to establish a common understanding of the terms used throughout the pro forma OATT.

1. Are the existing pro forma OATT terms and their definitions sufficient to ensure not unduly discriminatory transmission?

2. If not, what reforms or additional terms are needed? Please provide specific definitions.

3. The new FPA section 215(a)(4) established by EPAct 2005 defines reliable operation. Is there any reason that this definition of reliability should not be incorporated in the pro forma OATT?

U. ISO, RTO, and ITC Tariffs

33. In Order No. 888, the Commission encouraged the voluntary formation of properly-structured ISOs and provided the industry guidance on ISO formation, in the form of ISO principles to be used to assess ISO proposals submitted to the Commission. In addition, in 1999, the Commission issued a Final Rule in Order No. 2000 to advance the voluntary formation of RTOs with the objective of having all transmission-owning entities place their transmission facilities under the control of appropriate RTOs. The Commission concluded that such regional institutions could address the operational and reliability issues confronting the industry, and eliminate undue discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility. Subsequently, the electric industry has made significant progress in the development of voluntary RTOs/ISOs (*e.g.*, Midwest Independent Transmission System Operator, Inc. and Southwest Power Pool, Inc.) and the Commission has accepted a wide range of ISO and RTO proposals. Further, the Commission has also authorized the formation of independent transmission companies (ITC).[23]

1. Which of the matters discussed throughout this NOI, if any, need not be applied to ISO and RTO tariffs? Please provide specifics.

2. Which of the matters discussed throughout this NOI, if any, need not be applied to ITCs? Please provide specifics.

V. Open Access by Unregulated Transmitting Utilities (Section 1231 of the Energy Policy Act of 2005)

34. In Order No. 888, the Commission concluded that it was appropriate to require a reciprocity provision in the pro forma OATT, which applied to all customers, including non-public utility entities that own, control or operate transmission facilities and that take service under the open access tariff.[24] The Commission did not require non-public utilities to provide transmission access; instead, the Commission conditioned the use of open access services on an agreement to offer open access services in return. The Commission found that while it did not have the authority to require non-public utilities to make their systems generally available, it did have the ability, and the obligation, to ensure that open access transmission is as widely available as possible and that Order No. 888 did not result in a competitive disadvantage to public utilities.

35. The Commission noted that while many non-public utilities were willing to offer reciprocal access, including through an open access tariff, these non-public utilities were fearful that a public utility may deny service based simply on a claim that the open access tariff offered by a non-public utility is not satisfactory. To assist these non-public utilities, the Commission developed a voluntary safe harbor procedure to alleviate those concerns. Under this procedure, non-public utilities could submit to the Commission a transmission tariff and a request for declaratory order that the tariff meets the Commission's comparability (non-discrimination) standards.[25] If the Commission found that a tariff contains terms and conditions that substantially conform or are superior to those in the pro forma tariff, the Commission deemed it an acceptable reciprocity tariff and required public utilities to provide open access service to that particular non-public utility.

36. The EPAct 2005 now authorizes the Commission to require non-public utilities (or ''unregulated transmitting utilities'') to provide open access transmission service. Section 1231 of the EPAct 2005 establishes a new section 211A in Part II of the FPA, which states in part that the Commission ''may, by rule or order, require an unregulated transmitting utility to provide transmission services'' at rates that are comparable to those it charges itself and under terms and conditions (unrelated to rates) that are comparable to those it applies to itself

[22] *Id.* at 30,230.

[23] *See, e.g., Trans-Elect, Inc.,* 98 FERC ¶ 61,142 (2002), *order on reh'g,* 98 FERC ¶ 61,368 (2002); *ITC Holdings Corp.,* 102 FERC ¶ 61,182, *order on reh'g,* 104 FERC ¶ 61,033 (2003); *American Transmission Co.,* 103 FERC ¶ 61,388 (2003), *order on reh'g,* 107 FERC ¶ 61,117 (2004); *See also Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission,* 111 FERC ¶ 61,473 (2005) (stating that the Commission would entertain proposals for market participants to hold passive equity interests in ITCs).

[24] Order No. 888 at 31,760–63; Order No. 888–A at 30,281–90.

[25] The Commission explained that ''a nonpublic utility seeking to take service under a transmission provider's OATT must agree to offer to provide the transmission provider any service that the nonpublic utility provides or is capable of providing on its system in order to satisfy reciprocity.'' Order No. 888–A at 30,286.

and that are not unduly discriminatory or preferential.

1. Should the Commission require unregulated transmission utilities to provide transmission service under rates that are comparable to those they charge themselves and under terms and conditions that are comparable to those they apply to themselves and that are not unduly discriminatory or preferential?

2. If so, should the Commission impose this requirement on all unregulated transmission utilities through a rulemaking proceeding, or should the Commission apply this new law on a case-by-case basis, through complaints, motions seeking enforcement or sua sponte action by the Commission?

3. Section 1231 of the EPAct 2005 authorizes the Commission to require unregulated transmitting utilities to provide transmission service on terms and conditions that are comparable to those under which the utility provides transmission service to itself and that are not unduly discriminatory or preferential. Can terms and conditions be both comparable and unduly discriminatory or preferential or are comparable terms and conditions necessarily not unduly discriminatory or preferential?

Procedure for Comments

37. The Commission invites interested persons to submit comments, and other information on the matters, issues and specific questions identified in this notice. Comments are due on or before November 22, 2005. Comments must refer to Docket No. RM05–25–000, and must include the commenters' name, the organization they represent, if applicable, and their address.

38. To facilitate the Commission's review of the comments, commenters are requested to provide an executive summary of their position, not to exceed ten pages. Commenters are requested to identify each specific question posed by the NOI that their discussion addresses and to use appropriate headings. Additional issues the commenters wish to raise should be identified separately. The commenters should double space their comments.

39. Comments may be filed on paper or electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE., Washington, DC 20426.

40. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters are not required to serve copies of their comments on other commenters.

Document Availability

41. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

42. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits) in the docket number field.

43. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact the Commission's Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@ferc.gov*) or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

By direction of the Commission.

Magalie R. Salas,

Secretary.

[FR Doc. 05–19003 Filed 9–22–05; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 365 and 366

[Docket No. RM05–32–000]

Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005

September 16, 2005.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Pursuant to Title XII, Subtitle F of the Energy Policy Act of 2005 (EPAct 2005), the Federal Energy Regulatory Commission (Commission) proposes to issue rules implementing the repeal of the Public Utility Holding Company Act of 1935, and the enactment of the Public Utility Holding Company Act of 2005, EPAct 2005. The Commission also proposes to remove its exempt wholesale generator rules, 18 CFR part 365 (2005), as they are no longer necessary. The Commission seeks public comment on the rules proposed herein.

DATES: Comments are due October 14, 2005. Reply comments are due October 21, 2005.

ADDRESSES: Comments and reply comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* Commenters unable to file comments electronically must send an original and 14 copies of their comments and reply comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC, 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments and reply comments.

FOR FURTHER INFORMATION CONTACT: Brandon Johnson (Legal Information), Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6143.

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SUPPLEMENTARY INFORMATION: