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FEDERAL ENERGY
REGULATORY COMMISSION**

Régie de l'énergie
DOSSIER: R. 3669. 2008
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Date: 22 octobre 2010

132 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM10-22-000; Order No. 739]

Promoting a Competitive Market for Capacity Reassignment

(Issued September 20, 2010)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission lifts the price cap for all electric transmission customers reassigning transmission capacity based on the Commission's experience to date and a two-year study, released April 15, 2010. The removal of the price cap is intended to help facilitate the development of a market for electric transmission capacity reassignments as a competitive alternative to transmission capacity acquired directly from the transmission owner.

EFFECTIVE DATE: This rule will become effective upon publication in the *Federal Register* or at 12:00 a.m. on October 1, 2010 whichever is sooner.

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132 FERC ¶ 61,238
UNITED STATES OF AMERICA
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Before Commissioners: Jon Wellinohoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Promoting a Competitive Market for Capacity
Reassignment

Docket No. RM10-22-000

ORDER NO. 739

FINAL RULE

(Issued September 20, 2010)

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1. Based on the Commission's experience to date and a two-year study, released April 15, 2010,¹ the Federal Energy Regulatory Commission in this Final Rule makes permanent the lifting of price caps for transmission customers reassigning electric transmission capacity. This action is intended to facilitate the development of a market for electric transmission capacity reassignments as a competitive alternative to primary transmission capacity.

I. Background

2. In Order No. 888, the Commission concluded that a transmission provider's *pro forma* Open Access Transmission Tariff (OATT) must permit explicitly the voluntary reassignment of all or part of a holder's firm point-to-point capacity rights to any eligible customer.² The Commission also found that allowing holders of firm transmission capacity rights to reassign that transmission capacity would help parties manage the financial risks associated with their long-term commitment, reduce the market power of

¹ FERC Staff, *Staff Findings on Capacity Reassignment* (2010), available at <http://www.ferc.gov> (Staff Report).

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 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at 31,696 (1996), *order on reh'g*, Order No. 888-A, 62 FR 12274 (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).

transmission providers by enabling customers to compete, and foster efficient transmission capacity allocation.

3. With respect to the appropriate rate for transmission capacity reassignment, the Commission concluded it could not permit reassignments at market-based rates because it was unable to determine that the market for reassigned transmission capacity was sufficiently competitive so that resellers would not be able to exert market power. Instead, the Commission capped the rate at the highest of: (1) the original transmission rate charged to the purchaser (assignor); (2) the transmission provider's maximum stated firm transmission rate in effect at the time of the reassignment; or (3) the assignor's own opportunity costs capped at the cost of expansion (price cap). The Commission further explained that opportunity cost pricing had been permitted at "the higher of embedded costs or legitimate and verifiable opportunity costs, but not the sum of the two (i.e., 'or' pricing is permitted; 'and' pricing is not)."³ In Order No. 888-A, the Commission explained that opportunity costs for transmission capacity reassigned by a customer should be measured in a manner analogous to that used to measure the transmission provider's opportunity cost.⁴

4. To foster the development of a more robust secondary market for transmission capacity, the Commission, in Order No. 890, concluded that it was appropriate to lift the

³ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,740.

⁴ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,224.

price cap for all transmission customers reassigning transmission capacity.⁵ The Commission stated that this would allow transmission capacity to be allocated to those entities that value it most, thereby sending more accurate price signals to identify the appropriate location for construction of new transmission facilities to reduce congestion.⁶ The Commission also found that market forces, combined with the requirements of the *pro forma* OATT as modified in Order No. 890, would limit the ability of resellers, including affiliates of the transmission provider, to exert market power.

5. To enhance oversight and monitoring activities, the Commission adopted reforms to the underlying rules governing transmission capacity reassignments.⁷ First, the Commission required that all resales or reassignments of transmission capacity be conducted through or otherwise posted on the transmission provider's OASIS on or before the date the reassigned service commences.⁸ Second, the Commission required that assignees of transmission capacity execute a service agreement prior to the date on

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 808 (2007), *order on reh'g*, Order No. 890-A, 73 FR 2984 (January 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁶ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 808.

⁷ *Id.* P 815.

⁸ *Id.*

which the reassigned service commences.⁹ Third, in addition to existing OASIS posting requirements, the Commission required transmission providers to aggregate and summarize in an electric quarterly report the data contained in these service agreements.¹⁰

6. The Commission also directed staff to closely monitor the reassignment-related data submitted by transmission providers in their quarterly reports to identify any problems in the development of the secondary market for transmission capacity and, in particular, the potential exercise of market power.¹¹ Thus, the Commission directed staff to prepare, within six months of receipt of two years of quarterly reports, a report summarizing its findings.¹² In addition, the Commission encouraged market participants to provide feedback regarding the development of the secondary electric transmission capacity market and, in particular, to contact the Commission's Enforcement Hotline if concerns arise.

7. In Order No. 890-A, the Commission affirmed its decision to remove the price cap on reassignments of electric transmission capacity but granted rehearing to limit the

⁹ *Id.* P 816.

¹⁰ *Id.* P 817.

¹¹ *Id.* P 820.

¹² *Id.*

period during which reassignments may occur above the cap.¹³ The period was limited so that the Commission could review the Staff Report to see if changes were needed based on the actual operation of the reassignment program. Accordingly, the Commission amended section 23.1 of the *pro forma* OATT to reinstate the price cap as of October 1, 2010.¹⁴

8. The Commission also clarified that, as of the effective date of the reforms adopted in Order No. 890, all reassignments of electric transmission capacity must take place under the terms and conditions of the transmission provider's OATT. As a result, there was no longer a need for the assigning party to have on file with the Commission a rate schedule governing reassigned capacity. To the extent that a reseller has a market-based rate tariff on file, the provisions of that tariff, including a price cap or reporting obligations, will not apply to the reassignment since such transactions no longer take place pursuant to the authorization of that tariff.

9. In Order No. 890-B, the Commission clarified that the *pro forma* OATT does not, and will not, permit the withholding of transmission capacity by the transmission provider and that it effectively establishes a price cap for long-term reassignments at the transmission provider's cost of expanding its system.¹⁵ The Commission further found

¹³ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 388, 390.

¹⁴ *Id.* P 390.

¹⁵ Order No. 890-B, 123 FERC ¶ 61,299 at P 78.

that the fact that a transmission provider's affiliate may profit from congestion on the system does not relieve the transmission provider of its obligation to offer all available transmission capacity and expand its system as necessary to accommodate requests for service.¹⁶ The Commission pointed out that customers that do not wish to participate in the secondary market may continue to take service from the transmission provider directly, just as if the price cap had not been lifted.¹⁷

10. With regard to the Staff Report, the Commission clarified that staff should focus on the competitive effects of removing the price cap for reassigned electric transmission capacity.¹⁸ The Commission stated that staff should consider the number of reassignments occurring over the study period, the magnitude and variability of resale prices, the term of the reassignments, and any relationship between resale prices and price differentials in related energy markets. In addition, the Commission directed staff to examine the nature and scope of reassignments undertaken by the transmission provider's affiliates and include in its report any evidence of abuse in the secondary market for transmission capacity, whether by those affiliates or other customers.

11. The Commission also granted rehearing and directed each transmission provider to include in its electric quarterly report the identity of the reseller and indicate whether the

¹⁶ *Id.*

¹⁷ *Id.* P 79.

¹⁸ *Id.* P 83.

reseller is affiliated with the transmission provider.¹⁹ The Commission also directed each transmission provider to include in its electric quarterly reports the rate that would have been charged under its OATT had the secondary customer purchased primary service from the transmission provider for the term of the reassignment.²⁰ The Commission directed transmission providers to submit this additional data for all resales during the study period and to update, as necessary, any previously-filed electric quarterly reports on or before the date they submitted their next electric quarterly reports.

12. On April 15, 2010, Commission staff published its report on the two-year study period.²¹ The Staff Report took a comprehensive look at electric point-to-point transmission capacity reassignment that occurred over the period from the second quarter of 2007 through the fourth quarter of 2009. Staff examined all reported electric transmission reassignments during this period on both a national and a regional basis. These almost 35,000 transactions encompassed 65 TWh of total volume transferred. Staff looked at the data in a number of ways, in order to better understand the market and to look for evidence of abuse. In doing so, staff looked at the magnitude and variability of resale prices, and focused on trends in those numbers over time and by region. Staff

¹⁹ *Id.* P 84.

²⁰ *Id.*

²¹ FERC Staff, *Staff Finding on Capacity Reassignment (2010)*, available at <http://www.ferc.gov> (Staff Report).

compared resale prices to the maximum tariff rates that would have otherwise been in effect for those transactions. Further, staff looked at reassignments by term – hourly, daily, monthly, and yearly and looked at differences in term by transmission provider and by volume. Where the receipt and delivery points of transactions had reported price indices with sufficient data, staff compared the prices of reassignments to the energy market spread (differential in prices between the two locations) over the same time periods.

13. Staff also compared resale prices for transactions involving affiliates versus non-affiliates. Staff compared the rate of transactions above the cap for both affiliates and non-affiliates. Staff looked for additional forms of affiliate abuse such as a transmission provider providing preferential treatment in the allocation of reassigned capacity to an affiliate. Staff also checked for complaints of the abuse in affiliate transactions, as well as for capacity reassignment in general.

14. Two weeks after the release of the Staff Report, based on the Commission's experience in the natural gas transportation market and the Staff Report's conclusion that the secondary market had grown substantially and that resale prices reflected market fundamentals rather than the exercise of market power, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to lift the price cap for all electric transmission customers reassigning transmission capacity beyond October 1, 2010. In addition, the Commission proposed to direct transmission providers to submit corresponding revisions to their OATTs within 30 days of publication of the Final Rule in

the *Federal Register*. The Commission also sought comment as to whether there are any other reforms that it should undertake to create a more efficient and vibrant secondary market for electric transmission capacity. In response to these NOPR proposals, the Commission received comments from 13 parties, which are addressed below.²²

II. Discussion

A. Removal of the Price Cap

1. Comments

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

16. Despite their general support for the Commission's proposal, EPSA and PG&E raise concerns about the staff study and the need for transparency. EPSA states that the Staff Report shows some gaps that will require further analysis; such as limited numbers of transmission providers reported and the majority of transactions being from Bonneville. PG&E expresses a lingering concern about the potential for transmission

²² A list of commenters is provided in Appendix A.

²³ *E.g.* Bonneville, Cargill, EPSA, FIEG, PG&E, PGE, Powerex, Seattle.

service providers to raise power prices in locations where there is insufficient competition. EPSA and PG&E urge the Commission to continue to monitor the capacity reassignment market as it matures so that the Commission will be informed and therefore able to direct necessary reforms to the market, as the needed reforms reveal themselves. EPSA further urges the Commission to look at ways of increasing transparency for transmission capacity available for reassignments as a way of promoting the secondary market for reassignment. Powerex comments that there are already a number of safeguards including requirements that transmission providers report reassignments on their systems on OASIS and in the electronic quarterly reports (EQR) that should help limit abuses. Similarly, Seattle comments that reconciliation of EQRs, audits, and OASIS transactions would go a long way to ensure that resale markets are functioning without affiliate abuse.

17. Bonneville agrees that lifting the price cap on transmission capacity reassignments appears to support the goal of a more robust secondary market for that capacity but asks the Commission to recognize the position of non-jurisdictional entities, such as itself. Bonneville contends that non-jurisdictional entities may have to place conditions upon the removal of the cap in order to obtain reciprocity and comply with their applicable statutory requirements. Bonneville contends that if its administrator determines that behavior associated with transmission capacity reassignments is occurring on its system in a manner that frustrates or is otherwise inconsistent with the administrator's statutory requirements to make all excess capacity available to utilities on a fair and

nondiscriminatory basis, the administrator must be able to act promptly to stop that behavior. Thus, Bonneville suggests that any revision to section 23 of Bonneville's OATT permanently lifting the price cap must be conditioned upon the administrator's express authority to carry out this mandate including the right to reinstate the cap expeditiously if necessary.

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

19. TAPS states that the staff study did not examine both prices offered and accepted such that the Commission could determine the level of market interest in reassigned

²⁴ *E.g.* APPA, NRECA, SCE, TAPS, Outland, and TDU Systems.

capacity, whether prices increased, the cause of price changes, and whether those prices remained in the zone of reasonableness. It notes that the staff study compared resale prices during the study period to the tariff rate, but not to the opportunity cost cap, which is likely higher. It argues that accordingly, the study does not show that the price cap constrained any prices, and thus it prevents a finding that the price cap is unjust and unreasonable. SCE requests that the Commission reconcile its proposal with findings in the Staff Report that removal of the price cap does not appear to be primarily responsible for the observed growth in the secondary market. It also states that the Staff Report did not definitively conclude that there was not abuse by resellers, even in a period with very low demand and no supply scarcity. SCE states that this is not sufficient evidence to lift the price cap. APPA, SCE and TAPS suggest that, if the Commission wishes to lift the price cap, it should only do so as a continuation of the experiment.

20. NRECA, TAPS, and TDU Systems argue that the Staff Report does not provide a sufficient factual basis for the Commission to conclude that the OATT section 23.1, which reinstates the price cap on October 1, 2010, is unjust and unreasonable or to conclude that proposed revision is just and reasonable. Moreover, TAPS and TDU Systems comment that market-based reassignment of transmission capacity should not be available to entities to the extent they lack market-based rate authority in the area in which the transmission reservation is located. TDU Systems states that each secondary transmission capacity market should be looked at individually, and that there is no single, national market for secondary transmission capacity rights. It questions why the Staff

Report considers Public Service of New Hampshire (PSNH) to be an aberration, while the nearby Central Vermont Public Service Corporation (Central Vermont) system is presented as representing national trends.

21. TAPS and TDU Systems further contend that, to permit market-based rates, the Commission remains bound by the requirement that market-based rates be supported by empirical proof that existing competition would ensure that the actual price is just and reasonable.²⁵ TDU Systems comments that courts have held that undocumented reliance on market forces is insufficient grounds for authorizing market-based rates.²⁶ Moreover, TAPS and TDU Systems argue that the Commission has a requirement to make an *ex ante* finding of the absence of market power and sufficient post-approval requirements.²⁷ SCE agrees that the Commission should engage in an *ex ante* competitive analysis to find that the transmission reseller lacks market power, or take sufficient steps to mitigate market power, as well as adopt sufficient post-approval reporting requirements.

22. Outland states that the pilot project has allowed resellers to acquire capacity “for pennies and then hold up the first renewable energy generator that comes along looking

²⁵ Citing *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984)(*Farmers Union*).

²⁶ Citing *Transwestern Pipeline*, 43 FERC ¶ 61,240, at 61,250 (1988).

²⁷ Citing *California ex. Rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004).

to use it.”²⁸ It states that parties acquire transmission when they do not need it for a real generation project, to the detriment of real projects.

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

24. In its supplemental comments, Powerex expresses concern that Bonneville might reinstate the price cap as of October 1, 2010, regardless of Commission action in this proceeding. Powerex asks the Commission to address the possible adverse consequences of non-jurisdictional transmission providers reinstating price caps on transmission reassignments and to provide guidance to customers seeking to reassign transmission on the systems of non-jurisdictional transmission providers that elect not to adopt any

²⁸ Outland at 1.

reforms the Commission directs. To address this issue, Powerex requests the Commission to clarify that its seller-specific market-based rate schedule for transmission reassignment remains operative. Alternatively, Powerex seeks guidance on how to price capacity reassignments based on the customer's opportunity cost capped at the transmission provider's cost of expansion.

2. Commission Determination

a. Removal of the Price Cap

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

26. Moreover, removal of the price cap will promote the efficient construction of new capacity. Prices serve as signals indicating where capacity shortages exist and where potentially profitable construction can take place. The Commission has previously addressed the need for new transmission and established incentives for its construction.²⁹

Removing the price cap on sales of secondary electric transmission capacity is one way to

²⁹ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 FR 43294 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, 72 FR 1152 (January 10, 2007), FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

create the proper incentives for new transmission investment in this industry. Areas with congestion tend to have higher prices and thus signal the need for investment.³⁰

However, if prices for reassigned capacity exceed the cost of construction of new transmission, the customer could request service from the transmission provider which would support investment in new transmission and lower costs prospectively by relieving constrained transmission capacity. Thus, the price of reassigned capacity will remain effectively capped at the cost of new transmission. We therefore reaffirm the Commission's finding in Order No. 890-A that removal of the price cap for reassigned capacity will help establish a competitive market for secondary transmission capacity that will send more accurate signals and that such price signals will promote more efficient use of the electric transmission system.³¹

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

Transmission providers also will continue to be obligated to construct new facilities to

³⁰ See *Interstate Nat'l Gas Ass'n of America v. FERC*, 285 F.3d 18, 32-34 (D.C. Cir. 2002) (*INGAA*) (“[B]rief spikes in moments of extreme exigency are completely consistent with competition, reflecting scarcity rather than monopoly.”).

³¹ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 388.

satisfy requests for service if those requests cannot be satisfied using existing capacity. Furthermore, the rates for transmission service provided under the *pro forma* OATT will continue to be determined on a cost-of-service basis unless the transmission provider can demonstrate, on a case-specific basis, that it lacks market power. Nothing in this Final Rule affects the obligations of transmission providers to offer service under the *pro forma* OATT at cost-based rates. The availability of firm and non-firm service from transmission providers, therefore, will limit the ability of reassignors to exercise market power. In *INGAA*, the Court of Appeals for the District of Columbia Circuit recognized that the maintenance of regulated rates for primary service would protect against the potential for the exercise of market power in the capacity release market.³²

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

³² 285 F.3d at 32 (“[i]f holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate - which is still applicable to the pipelines”); *see also*, *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 FR 37058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271, at P48-49 (2008), *order on reh'g*, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 (2008).

exercise market power.³³ Commenters did not identify any affiliate concerns that these obligations, along with the monitoring discussed below, would not address.

29. The Commission takes seriously the possibility that resellers may attempt to exercise market power in the secondary market for transmission. We continue to find, however, that the regulatory protections in place and our increased oversight of this market will limit the potential for market power abuse. Prices for secondary transmission capacity may rise above prices for primary transmission capacity but this alone does not indicate an abuse of market power. On the contrary, courts have recognized that prices in a competitive market should rise during periods when capacity is truly scarce in order to ensure that transmission capacity is being allocated appropriately.³⁴ Nevertheless, the Commission will continue to monitor the secondary transmission capacity market to

³³ See *Standards of Conduct for Transmission Providers*, Order No. 717, 73 FR 63796 (October 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, 74 FR 54463 (October 22, 2009), FERC Stats. & Regs. ¶ 31,297 (2009), *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010). The Commission's Standards of Conduct establish that a transmission provider must (1) treat all customers, affiliated and non-affiliated, on a not unduly discriminatory basis, (2) not make or grant any undue preference or advantage to any person, and (3) not subject any person to any undue prejudice or disadvantage with respect to transmission of electric energy. This would include avoiding undue prejudice or disadvantage in the initial allocation of capacity to affiliates, thereby allowing those affiliates to gain market power and then to exercise it when reassigning capacity.

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

ensure that participants are not exercising market power.³⁵ The Commission also will monitor for abuse by transmission providers in concert with their affiliates. If a customer has evidence of an exercise of market power or other abuse, it should bring the matter to the Commission's attention through a complaint or other appropriate procedural mechanism. Absent such evidence, the Commission concludes that the continued rate regulation of the primary market for electric transmission capacity and the transmission provider's obligation to expand its system to accommodate service requests adequately mitigates any market power that resellers may have in the long-term secondary market.

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

³⁵ See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 815.

31. The data do not suggest the exercise of market power. The prices during the test period appear consistent with pricing differentials between locational markets, indicating that the transactions reflect market fundamentals, not the exercise of market power.³⁶ Moreover, the Staff Report found that 99 percent of reassignments were priced at or below the transmission provider's maximum firm transmission rate, an indication that prices reflect market conditions and competition rather than the exercise of market power.³⁷ The brief spikes above the price cap are consistent with a competitive market, indicating scarcity rather than market power.³⁸

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

³⁶ See *INGAA*, 285 F.3d at 31 (indicating that differentials in prices between receipt and delivery points are indicative of the value of the transportation between those points).

³⁷ Because 99 percent of the prices were below the tariff rate, these prices are almost certainly lower than opportunity costs which TAPS suggests are likely higher than the tariff rate.

³⁸ *INGAA*, 285 F.3d 18, 32 ("A surge in the price of candles during a power outage is no evidence of monopoly in the candle market").

potential reassignment of transmission in these areas, should it develop, would face competition associated with transmission that can be acquired from other customers. Such reassignment also would compete with capacity available from the transmission provider. Although the data in the Staff Report included extensive data from Bonneville and Central Vermont, the greater number of such assignments may be due to differences in market dynamics (such as the extensive use of hydroelectric power in the Bonneville region) or reporting conventions (in the case of Central Vermont).³⁹ It also may indicate that capacity reassignment is more developed in those areas. The volume of capacity reassignments on these two systems provides an example of what may be possible in other areas of the country. As for arguments that the time period under review was atypical due to the economic downturn and, thus, not representative, we note that study began the second quarter of 2007, well before the downturn began.

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

³⁹ The Staff Report states that "the large number of [Central Vermont] transactions may be due, in part, to reporting conventions. For EQR reporting purposes, each line of data is counted as one transaction." See Staff Report at 4.

34. While it is true, as some of the commenters point out, that the reassignment transactions were limited to certain areas and utilities, we see no reason to expect different results as capacity reassignment expands. There have not been allegations of the exercise of market power in reassignment markets, and commenters do not provide any data to suggest that market power may be more prevalent as capacity reassignment increases on other transmission systems. Development of a more robust reassignment market in areas where reassignments are not prevalent should raise, rather than lower, the level of competition in markets. Moreover, we will continue to monitor the market and if anomalies develop in certain areas, they can be addressed.

35. We disagree with the comments that a market power study or other empirical competition analyses are required to lift the price cap on transmission capacity reassignments. Contrary to commenters' assertions, market power analyses are not the only method to ensure that market-based rates remain just and reasonable.⁴⁰ In *INGAA*,⁴¹ the D.C. Circuit affirmed the Commission's removal of price ceilings for short-term

⁴⁰ See *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,227-36 (1996). The Commission ultimately determined in that case that a market power analysis was required in order to allow a pipeline to use market-based pricing instead of cost-of-service rates. The Commission has not proposed to allow transmission providers to engage in sales of primary capacity at market-based rates and, as explained below, sufficient protections exist to ensure the secondary market for transmission capacity remains sufficiently competitive without requiring market power analyses from each reseller.

⁴¹ *Interstate Nat'l Gas Ass'n of American v. FERC*, 285 F.3d at 33 (D.C. Cir. 2002).

capacity releases by shippers in the natural gas market without requiring sellers to submit market power analyses. The court recognized that non-cost factors such as the need to facilitate movement of capacity into the hands of those who value it most may also justify the removal of price ceilings. The court concluded that these non-cost factors, combined with the limitation of negotiated rates to the secondary market, distinguished the case from *Farmers Union* in which the court had reversed a Commission determination to implement lighthanded regulation of the oil industry.⁴²

36. *Farmers Union* itself did not require a market power study to support a move to a more market-based regulatory regime. The court found that rates should be within a “zone of reasonableness, where [they] are neither less than compensatory nor excessive.”⁴³ Moreover, the court found that the Commission could justify a move to a more market-based focus “by a showing that under circumstances the goals and purposes of [the Commission’s statutory mandate] will be accomplished through substantially less regulatory oversight.”⁴⁴ Here, the Commission is relying on competition in the market for transmission capacity, together with the regulatory protections discussed above, to ensure just and reasonable rates. Protections, such as continuing rate regulation of the

⁴² *Interstate Nat’l Gas Ass’n of America v. FERC*, 285 F.3d 18 at 31-34 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh’g*, 106 FERC ¶ 61,088 (2004), *aff’d sub nom. American Gas Ass’n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

⁴³ *Farmers Union*, 734 F.2d at 1502; *see also, INGAA*, 285 F.3d at 31.

⁴⁴ *Farmers Union*, 734 F.2d at 1510.

transmission provider's primary capacity, retention of the requirement for transmission owners to build additional capacity at cost-based rates, competition among resellers, reforms to the secondary market for transmission capacity, and reporting requirements combined with enforcement proceedings, audits, and other regulatory controls, will assure that prices in the secondary market for electric transmission capacity remain within a zone of reasonableness.⁴⁵

b. Implementation of the Requirement

37. Because the current OATTs reinstate the price cap as of October 1, 2010, transmission providers will need to revise section 23 of the *pro forma* OATT, as indicated in Appendix B. We direct transmission providers to file these changes within 30 days from publication of this Final Rule in the *Federal Register*. Bonneville requests a blanket waiver of the requirement for non-jurisdictional entities that are unable to satisfy reciprocity conditions with regard to the reassignment of transmission capacity. Whether the particular terms and conditions of a non-jurisdictional transmission provider's reciprocity tariff satisfy the Commission's open access principles must be determined on a case-by-case basis. Therefore, the Commission denies, without prejudice, Bonneville's request for a blanket waiver.

⁴⁵ See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 811; see also Order No. 712, 73 FR 37058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271 at P 39 (2008), order on reh'g, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 (2008), *aff'd sub nom. Interstate Natural Gas Ass'n of America*, No. 09-1016 (D.C. Cir. Aug. 13, 2010).

38. We find Powerex's concern that Bonneville will reinstate the price cap as of October 1, 2010 to be premature, since Bonneville has not made a final decision at this point. Moreover, when Bonneville submitted its tariff revisions pursuant to Order No. 890, it declined to adopt certain *pro forma* provisions related to the reassignment of transmission capacity and several transmission customers within Bonneville, including Powerex, filed stand-alone rate schedules allowing them to sell transmission capacity above the price cap.⁴⁶ These customers may submit any necessary revisions to their rate schedules before October 1, 2010 and request waiver of the prior notice requirement, if they find such action to be necessary and appropriate.

B. Non-Rate Reforms to Promote Secondary Market

1. NOPR Proposal

39. In the NOPR, the Commission sought comment as to whether there are any reforms, other than removal of the price cap, that it should undertake to create a more efficient and vibrant secondary market for transmission capacity. The Commission asked if there are non-price limitations or regional factors that may be continuing to limit the utility of reassignment. By way of an example, the Commission asked if there are

⁴⁶ See *Portland General Electric Co.*, Docket No. ER09-93-000 (Dec. 3, 2008) (unpublished letter order); *Idaho Power Co.*, Docket No. ER09-524-000 (Mar. 5, 2009) (unpublished letter order); *Puget Sound Energy, Inc.*, Docket No. ER09-528-000 (Mar. 5, 2009) (unpublished letter order); *Avista Corp.*, ER09-729-000 (May 12, 2009) (unpublished letter order); *PacifiCorp*, Docket No. ER09-921-001 (Sept. 29, 2009) (unpublished letter order); *Powerex Corp.*, Docket No. ER09-926-000 (May 21, 2009) (unpublished letter order).

reforms to the redirect process that would enable all firm customers to use their firm capacity more flexibly and thereby facilitate capacity reassignment by making point changes by the buyer of reassigned capacity more efficient.

2. Comments

40. Although FIEG supports the Commission's proposal to allow redirects of reassigned capacity, several other commenters raise concerns. Powerex admits that the ability to modify receipt and delivery points of reassigned capacity may make the capacity more attractive to a potential third-party assignee but warns that this practice would erode the priority that firm capacity should be accorded. NRECA expresses similar concern that this proposal may give higher priority to point-to-point customers who wish to redirect by awarding them service over those non-firm customers who do not redirect and over secondary network customers. APPA contends that any reforms to firm point-to-point service proposed to increase the attractiveness of re-sales of firm point-to-point capacity would have to be carefully assessed to ensure that they do not result in a degradation of the quality of network integration transmission service. TAPS and TDU Systems urge the Commission to not use a narrowly focused rulemaking to implement a sweeping change to point-to-point transmission service.

41. Commenters offered suggestions about various other reforms as well. Bonneville and Seattle argue that requiring transmission providers to act as financial intermediaries in capacity reassignments imposes an undue burden and complicates settlements. Powerex and Bonneville raise concerns about transmission providers failing to

recalculate available transfer capability or available flowgate capability in a timely manner, thereby inhibiting reassignments. Bonneville recommends that a firm redirect request receive a credit for any available flowgate capability the parent reservation has on the flowgates impacted by the firm redirect request. TAPS suggests that the Commission require the posting of transmission capacity available for reassignment on the transmission provider's OASIS. Cargill recommends that the reseller not remain responsible or liable to the transmission provider for the reassigned capacity if it is a complete reassignment (the full quantity of capacity for the remainder of the reservation) or if the reseller performs a long-term assignment of the reservation for any quantity up to the full amount of the capacity of the reservation.

42. Seattle advocates a transition from comma separated data to structured XML data in order to enhance data exchange and validation between "front-end" and "back-end systems" used by transmission customers and providers. It also advocates more meaningful forms of transaction umbrella agreements, such as the WSPP agreement. EPSA advocates consistent rules about posting the entities and market participants that have active umbrella agreements with the transmission provider. It says that such postings would give competitive suppliers transparency about which market participants can purchase reassigned capacity.

3. Commission Determination

43. The Commission declines to implement the non-rate reforms proposed in this proceeding at this time. Although some of these proposals may have merit, we are

unable to make a determination that they are appropriate at this time based on the record in this proceeding. With respect to the issues raised by Seattle and EPSA regarding data structures, such issues are best addressed through the standards development process of the North American Energy Standards Board, which sets voluntary wholesale electric market standards including those related to data exchanges and posting requirements.

III. Information Collection Statement

44. The following collection of information contained in this proposed rule is subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act of 1995.⁴⁷ OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.⁴⁸

Burden Estimate: The public reporting and records retention burdens for the reporting requirements and the records retention requirement are as follows.⁴⁹ The Commission solicited comments on the need for this information and did not receive any specific comments regarding its burden estimates. Where commenters raised concerns that specific information collection requirements would be burdensome to implement, the Commission has addressed those concerns elsewhere in the rule.

⁴⁷ 44 U.S.C. § 3507(d) (2006).

⁴⁸ 5 C.F.R. § 1320.11 (2010).

⁴⁹ These burden estimates apply only to this Final Rule and do not reflect upon all of FERC-516 or FERC-717.

Data Collection	Number of Respondents	Number of Responses	Hours per Response	Total Annual Hours
Conforming tariff changes	132	1	10	1,320

Cost to Comply: \$150,480

1,320 hours @ \$114 an hour (average cost of attorney (\$200 per hour), consultant (\$150), technical (\$80), and administrative support (\$25))

OMB’s regulations require it to approve certain information collection requirements imposed by an agency rule. The Commission is submitting a copy of this Final Rule to OMB for their review approval of the information collection requirements.

Title: FERC-516, Electric Rate Schedules and Tariff Filings;

FERC-717 Standards for Business Practices and Communication Protocols for Public Utilities.

Action: Collection

OMB Control Nos. 1902-0096 and 1902-0173

Respondents: Transmission Providers

Frequency of responses: One time.

Necessity of the Information:

45. The Federal Energy Regulatory Commission is adopting amendments to the *pro forma* OATT to ensure that transmission services are provided on a basis that is just, reasonable and not unduly discriminatory or preferential. The purpose of this rulemaking is to strengthen the *pro forma* OATT by encouraging more robust competition. The Final

Rule achieves this goal by removing the price cap previously imposed on reassignments of transmission capacity.

46. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502-8415, fax: (202) 273-0873, e-mail: michael.miller@ferc.gov.]

47. For submitting comments concerning the collections of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395-4638, fax: (202) 395-7285. Due to security concerns, comments should be sent electronically to the following e-mail address: oira_submission@omb.eop.gov. Please reference the docket number of this rulemaking in your submission.

IV. Environmental Analysis

48. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.⁵⁰ The Commission concludes that neither an Environmental

⁵⁰ *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (December 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

Assessment nor an Environmental Impact Statement is required for this Final Rule under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the Federal Power Act (FPA) relating to the filing of schedules containing all rates and charges for the transmission or sale subject to the Commission's jurisdiction, plus the classification, practices, contracts and regulations that affect rates, charges, classifications and services.⁵¹

V. Regulatory Flexibility Act

49. The Regulatory Flexibility Act of 1980 (RFA)⁵² generally requires a description and analysis of Final Rules that will have significant economic impact on a substantial number of small entities. This Final Rule applies to public utilities that own, control, or operate interstate transmission facilities, not to electric utilities per se. The total number of public utilities that, absent waiver, would have to modify their current OATTs by filing the revised *pro forma* OATT is 176.⁵³ Of these only six public utilities, or less than two percent, dispose of four million MWh or less per year.⁵⁴ The Commission does not consider this a substantial number, and in any event, these small entities may seek waiver

⁵¹ 18 CFR § 380.4(a)(15) (2010).

⁵² 5 U.S.C. § 601-612 (2006).

⁵³ The sources for this figure are FERC Form No. 1 and FERC Form No. 1-F data.

⁵⁴ *Id.*

of these requirements.⁵⁵ Moreover, the criteria for waiver that would be applied under this rulemaking for small entities is unchanged from that used to evaluate requests for waiver under Order Nos. 888 and 889. Thus, small entities who have received waiver of the requirements to have on file an open access tariff or to operate an OASIS would be unaffected by the requirements of this proposed rulemaking.

VI. Document Availability

50. 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 FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

⁵⁵ The Regulatory Flexibility Act 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)(2000); 15 U.S.C. 632(a)(1) (2000). In *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 340-343 (D.C. Cir. 1985), 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 Regulatory Flexibility Act, 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 revised *pro forma* OATT will apply only to 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.

51. From FERC's Home Page on the Internet, this information is available on 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 of this document in the docket number field.

52. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

VII. Effective Date and Congressional Notification

53. These regulations shall become effective upon publication in the *Federal Register* or at 12:00am on October 1, 2010, whichever is sooner. Section 553(d) of the Administrative Procedure Act (APA) generally requires a rule to be effective not less than 30 days after publication in the *Federal Register* unless, *inter alia*, the rule relieves a restriction or good cause is otherwise found to shorten the time period.⁵⁶ Section 553(b)B) of the APA authorizes agencies to dispense with certain procedures when the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or

⁵⁶ 5 U.S.C. § 553(d) (2006).

contrary to public interest.”⁵⁷ For the following reasons the Commission is using the “Good Cause” exemption. This Final Rule must become effective by 12:00 a.m. on October 1, 2010 or the price cap on reassignments of electric transmission capacity will be reinstated. Reinstating the price cap would impose a restriction on the rights of transmission customers. Thus, this Final Rule relieves a restriction. Furthermore, the Commission finds that good cause exists to make this Final Rule effective immediately because allowing the price cap to be reinstated temporarily could disrupt the efficient management of the secondary market for electric transmission capacity and reduce opportunities for further reduction of transmission congestion.

54. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a “major rule” as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of subjects in 18 CFR Part 35

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁷ 5 U.S.C. § 553(b)(B) (2006).

Appendix A**List of Commenters**

Commenter Name	Abbreviation
American Public Power Association	APPA
Bonneville Power Administration	Bonneville
Cargill Power Markets, LLC	Cargill
Electric Power Supply Association	EPSA
Financial Institutions Energy Group	FIEG
National Rural Electric Cooperative Association	NRECA
Outland Renewable Energy LLC	Outland
Pacific Gas & Electric Co.	PG&E
Portland General Electric Co.	PGE
Powerex Corp.	Powerex
Southern California Edison Co.	SCE
Seattle City Light	Seattle
Transmission Access Policy Study Group	TAPS
Transmission Dependent Utility Systems	TDU Systems

Appendix B

**RM05-17-001, -002 & RM05-25-001, -002
(Issued)**

**PRO FORMA OPEN ACCESS
TRANSMISSION TARIFF**

23 Sale or Assignment of Transmission Service

23.1 Procedures for Assignment or Transfer of Service:

(a) ~~Subject to Commission approval of any necessary filings, a~~

Transmission Customer may sell, assign, or transfer all or a portion of its rights under its Service Agreement, but only to another Eligible Customer (the Assignee). The Transmission Customer that sells, assigns or transfers its rights under its Service Agreement is hereafter referred to as the Reseller.

~~Compensation to Resellers shall 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 capped at the Transmission Provider's cost of expansion; provided that, for service prior to October 1, 2010, c~~Compensation to Resellers shall be at rates established by agreement between the Reseller and the Assignee.

(b) The Assignee must execute a service agreement with the Transmission Provider governing reassignments of transmission service prior to the date on which the reassigned service commences. The Transmission Provider shall

charge the Reseller, as appropriate, at the rate stated in the Reseller's Service Agreement with the Transmission Provider or the associated OASIS schedule and credit the Reseller with the price reflected in the Assignee's Service Agreement with the Transmission Provider or the associated OASIS schedule; provided that, such credit shall be reversed in the event of non-payment by the Assignee. If the Assignee does not request any change in the Point(s) of Receipt or the Point(s) of Delivery, or a change in any other term or condition set forth in the original Service Agreement, the Assignee will receive the same services as did the Reseller and the priority of service for the Assignee will be the same as that of the Reseller. The Assignee will be subject to all terms and conditions of this Tariff. If the Assignee requests a change in service, the reservation priority of service will be determined by the Transmission Provider pursuant to Section 13.2.