Sanctuary Program, and consistent with the FAP, commercial treasure salvage has never been permitted in any national marine sanctuary prior to the Sanctuary plan. The final Sanctuary regulations and management plan, as they pertain to SCRs and commercial treasure salvage, were based on the meetings with and comments from treasure salvors, comments from historic preservationists, and the public. In response to comments, the final regulations and plan reflect changes that were made in an effort to make the permit system more pragmatic from the perspective of the commercial treasure salvors without compromising the primary objectives of protecting significant natural and historic sanctuary resources. In particular, the final plan and regulations contain more detail on the criteria for NOAA/State decisions regarding the circumstances when SCRs may recovered under the Sanctuary permit system. The regulations also establish a system by which a permittee may retain possession of the SCRs, make money off their display, and in certain circumstances, be able to privatize the public resource for sale, transfer or distribution to investors. Other changes to the regulations are further described in the Supplemental FRFA.

The SBA also received an E-mail from the Conch Coalition stating that the Florida Keys Marine Life Association had just become aware that the Sanctuary regulations would have significant adverse economic impacts on the Florida Keys marine life industry and that the FRFA did not properly deal with those impacts. The E-mail stated that detailed comments on this issue would be forthcoming from the Florida Keys Marine Life Association. Such comments were never received. Accordingly, the FRFA has not been supplemented with respect to the Florida Keys marine life industry.

A copy of the supplemental FRFA may be obtained upon request.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Education, Environmental protection, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

Dated: June 30, 1997.

Nancy Foster,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 97–17709 Filed 7–8–97; 8:45 am]

BILLING CODE 3510–12–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket Nos. RM95–8–004 and RM94–7–005]

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

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; order denying motion for stay.

SUMMARY: The Federal Energy Regulatory Commission (Commission) denies Ontario Hydro's motion for stay pending judicial review of the reciprocity provision of Order No. 888 as it applies to transmission-owning foreign electric utilities. Based on the limited information provided by Ontario Hydro, the Commission could not conclude that Ontario Hydro has demonstrated on this record that justice requires a stay.

FOR FURTHER INFORMATION CONTACT: Lois D. Cashell, Secretary, (202) 208–0400.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing 202–208–1397 if dialing locally or 1–800–856–3920 if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. The full text of this order will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS user assistance is available at 202–208–2474.

CIPS is also available through the Fed World system. Telnet software is required. To access CIPS via the Internet, point your browser to the URL address: http://www.fedworld.gov and select the ''Go to the FedWorld Telnet Site'' button. When your Telnet software connects you, log on to the FedWorld system, scroll down and select FedWorld by typing: 1 and at the command line then typing: /go FERC. FedWorld may also be accessed by Telnet at the address fedworld.gov.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, La Dorn Systems Corporation. La Dorn Systems Corporation is also located in the Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426.

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, and Donald F. Santa, Jr.

Order Denying Motion for Stay

Issued June 20, 1997.

On May 2, 1997, Ontario Hydro filed a motion for stay pending judicial review of the provision of Order No. 888 [1] ''requiring transmission-owning foreign electric utilities to provide open-access transmission services as a condition to receiving transmission access from transmission-owning public utilities in the United States (the 'Open-Access Condition').'' [2] On May 16, 1997, the Commission, in response to Ontario Hydro's motion, issued an order clarifying the reciprocity condition of Order No. 888 and requesting additional information.[3] Ontario Hydro submitted its response on May 23, 1997. Based on the limited information provided by Ontario Hydro, as set forth below, we cannot conclude that Ontario Hydro has demonstrated on this record that justice requires a stay. We therefore deny Ontario Hydro's motion.

I. Background

A. Motion for Stay

Ontario Hydro is a Canadian utility that historically has sold electric power to U.S. purchasers. It claims that the Open-Access Condition will ''disrupt'' its entire ''forecasted'' $235 million (Canadian) per year U.S. export business and that it will have no opportunity to recover any of its losses.

Ontario Hydro interprets the Open-Access Condition as applying ''not only

[1] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888–A, 62 FR 12274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *reh'g pending.*

[2] Motion for Stay at 1.

[3] Order Clarifying Order No. 888 Reciprocity Condition and Requesting Additional Information, 79 FERC ¶ 61,182 (May 16 Order).

to sales by Ontario Hydro that require delivery by Ontario Hydro to points within the U.S., but also to sales by Ontario Hydro to U.S. purchasers at the Canadian border, which do not require delivery by Ontario Hydro to points within the U.S.'' [4] It asserts that it will lose all of these sales because it ''cannot allow the required open access into Ontario without the approval of the Ontario Government, which will require a complete restructuring of the Province's electric power system and the resolution of a number of very complex financial and other issues.'' [5]

Ontario Hydro asserts that its motion for stay satisfies the test for granting a stay and maintains, among other things, that it will sustain substantial irreparable injury without a stay. In particular, it alleges that Order No. 888 has precluded Ontario Hydro and its U.S. purchasers from obtaining transmission services from interconnected utilities in the Michigan Electric Coordinated System (MECS) and Niagara Mohawk Power Corporation, has resulted in Ontario Hydro sales to a U.S. customer being interrupted by the MECS utilities, and has allowed MECS utilities to obtain commercially sensitive market information from Ontario Hydro. It further asserts that a stay would not cause harm to any other party and that a stay is in the public interest by keeping existing competitors in the bulk power market. Finally, Ontario Hydro asserts that it is likely to succeed on the merits because the Commission ''lacks express statutory authority for issuance of this rule, an appellate court has rendered a contemporaneous decision that undermines the Commission's authority to issue the new regulation,[6] and the Commission's rule is inconsistent with U.S. obligations under an international trade agreement.'' [7]

B. Responses to Motion for Stay

On May 13, 1997, Consumers Energy Company (Consumers) and Detroit Edison Company (Detroit Edison) filed a preliminary joint answer opposing the motion for stay (Preliminary Joint Answer).[8] They explain that Consumers, Detroit Edison and Ontario Hydro are parties to an Interconnection Agreement under which Ontario Hydro continues to sell power into the United States through buy-sell transactions. In particular, they provide data showing that during 1996 Ontario Hydro sold $54,537,600 of electric power pursuant to the Interchange Agreement and $24,821,554 of electric power during the first four months of 1997.[9] Thus, they argue, Ontario Hydro cannot show that it will be harmed by a denial of a stay because it is able to sell power in the United States despite the reciprocity condition of Order No. 888 and Ontario Hydro's lack of a reciprocal open access tariff.

On May 16, 1997, Hydro-Quebec filed an answer opposing the motion for stay. It seeks assurance that any action the Commission takes concerning Ontario Hydro's motion will not delay the Commission's ruling on HQ Energy Services (U.S.) Inc.'s (an affiliate of Hydro-Quebec) request for market-based rate authority in Docket No. ER97–851–000.

C. Commission Order of May 16, 1997

By order issued May 16, 1997, the Commission clarified the Order No. 888 reciprocity condition and requested Ontario Hydro to provide additional information. The Commission clarified that the revised language in the Section 6 reciprocity condition in the pro forma tariff ''does not impose the reciprocity condition in circumstances where a Canadian utility sells power to a U.S. utility located at the United States/Canada border, title to the electric power transfers to the U.S. border utility, and the power is then resold by the U.S. border utility to a U.S. customer that has no affiliation with, and no contractual or other tie to, the Canadian utility.'' Because Ontario Hydro's motion contained only general, unsupported allegations of harm and did not contain sufficient information for the Commission to analyze whether a stay is appropriate, the Commission asked Ontario Hydro to respond to a number of specific questions. These questions were an attempt to ascertain specifically how Ontario Hydro has conducted transactions with U.S. border utilities and U.S. customers both pre- and post-Order No. 888, whether Ontario Hydro was indeed being denied transmission access as a result of Order No. 888 in order to continue historical transactions with U.S. utilities, and the derivation of Ontario Hydro's claimed monetary injury.

D. Further Answer of Detroit Edison

On May 19, 1997, Detroit Edison filed a further answer opposing the motion for stay.[10] It emphasizes that Ontario Hydro's sales have not been ''abruptly halted,'' but that instead, ''exports of electricity from Ontario Hydro to the State of Michigan during the first four months of 1997 totaled 1,359,238 Mwh, at a value of $24.8 million of sales, as compared with exports of 416,269 Mwh, at a value of $9.6 million of sales, during the same period of 1996.'' [11] It points out that Ontario Hydro is party to an Interconnection Agreement under which ''Ontario Hydro's sales to United States purchasers are continuing in the same manner Ontario Hydro has utilized for many years to build the export business it now claims is threatened by the requirements of Order No. 888.'' [12]

Detroit Edison further explains that the alleged interruption of sales to a U.S. customer (Toledo Edison Company) by MECS actually was undertaken as a buy/sell transaction pursuant to the Interconnection Agreement and that ''during the month of April 1997, Toledo Edison purchased 632,144 megawatthours of energy produced and sold by Ontario Hydro in 13 separate transactions.'' [13]

Detroit Edison asserts that Ontario Hydro has not demonstrated a likelihood of success on the merits of its appeal because the Commission's action was fully within its jurisdiction and consistent with the United States' NAFTA obligations. It also asserts that Ontario Hydro will not be irreparably injured by the denial of a stay as evidenced by the continuing and even increasing deliveries of energy by Ontario Hydro to MECS since issuance

[4] Motion for Stay at 2.

[5] *Id.*

[6] Motion for Stay at 7–8. Ontario Hydro cites *Altamont Gas Transmission Company* v. *FERC,* 92 F.3d 1239 (D.C. Cir. 1996), *cert. denied sub nom.* Indicated Expansion Shippers v. FERC, 117 S.Ct. 1568 (1997).

[7] Motion at 8 and 11. Ontario Hydro references the North American Free Trade Agreement (NAFTA), Article 301, *see* 32–3 Int'l Legal Materials 682 (1993); 19 U.S.C.A. § 3301 *et seq.* (1995 Supp.) (legislation implementing NAFTA), and the General Agreement on Tariffs and Trade (GATT), 61 Stat. A5, A18–A19 (1947).

[8] Consumers and Detroit Edison comprise the MECS System.

[9] The derivation of these amounts is set forth, by month, in a chart attached to the affidavit of Jon E. Weist, Staff Engineer, Transmission Operations, for the Michigan Electric Power Coordinating Center.

[10] Also on May 19, 1997, Consumers filed a summary answer to Ontario Hydro's Motion for Stay concurring with the arguments contained in Detroit Edison's Answer. It explains that it is not joining with Detroit Edison's Answer simply because Detroit Edison's Answer includes some factual assertions about which Consumers has no personal knowledge.

[11] Detroit Edison Answer at 2.

[12] *Id.* Detroit Edison explains:

The electrical transmission facilities of Detroit Edison have been directly interconnected with those of Ontario Hydro since September, 1953, and the electrical generation and transmission networks in Michigan and Ontario are coordinated in accordance with the provisions of an Interconnection Agreement between Detroit Edison, Consumers Energy Company (''Consumers''), and Ontario Hydro dated as of January 29, 1975, as amended July 20, 1976, June 21, 1979, April 1, 1985, October 3, 1988, and February 1, 1991.

[13] Detroit Edison Answer at 6–7 and 13–14.

of Order No. 888. Detroit Edison further asserts that a stay would harm other parties, including itself, because Ontario Hydro would be permitted to compete in the United States with Detroit Edison and other U.S. utilities, but Detroit Edison and other U.S. utilities would not be able to compete with Ontario Hydro in Canada. Finally, Detroit Edison declares that a stay would not be in the public interest because it would substantially alter the status quo and permit Ontario Hydro to compete unfairly in the United States.

E. Response of Ontario Hydro to May 16 Order

On May 23, 1997, Ontario Hydro submitted its response to the Commission's May 16 Order. Ontario Hydro declares that because the Commission clarified that buy/sell arrangements that include a contract, link or tie between Ontario Hydro and the non-border purchaser are subject to reciprocity, all of its buy-resell transactions (now numbering 40) will now be blocked by the Open Access Condition unless it can obtain waivers.

Ontario Hydro further takes issue with the scope of the Commission's questions. It interprets the questions as implying that ''Ontario Hydro cannot be suffering much injury due to Orders 888 and 888–A, because Ontario Hydro has been conducting some sales at the international border—essentially under the 'old' pre-Order 888 rules—and should have no expectation that it could participate fully under the new rules established by the Commission for the U.S. wholesale power market.'' [14] Ontario Hydro believes that this approach ''does not fairly reflect the good faith contributions Ontario Hydro has made to U.S. utilities and other organizations over the years and its rights under the U.S. law and binding international agreements.'' [15] It maintains that it is entitled under U.S. law and international trade agreements to obtain transmission services in the United States on the same terms as U.S. public utilities.

In claiming irreparable harm, Ontario Hydro asserts that—

> [i]t would be a mistake for the Commission to focus narrowly on data from sales under the old order in assessing the injury caused by the Open-Access Condition, since the injury to Ontario Hydro will occur under the new open-access regulatory regime * * *. Ontario Hydro expects to sell power to many of these power marketers and other non-border utility merchant organizations, if the Open-Access Condition is stayed and Ontario Hydro is not forced to sell only to U.S. border utilities. [16]

Ontario Hydro adds that even though it has made sales since issuance of Order No. 888, these sales will ''dwindle away'' once U.S. utilities are aware of their right to deny foreign utilities transmission access because of the reciprocity condition.

Ontario Hydro's response does not provide the majority of the specific information requested by the Commission, but instead answers the Commission's questions in only a most general manner. In response to questions concerning the derivation of its forecasted $235 million per year loss, Ontario Hydro states that its—

> [e]lectric power sales into the U.S. fall into three main categories, those in which (1) power was transmitted to the U.S. purchaser through the purchase of transmission services by the purchaser, (2) power was delivered to the U.S. purchaser through a buy-resell arrangement, and (3) power was sold directly to a U.S. border utility. Ontario Hydro's historical records of transactions are based on billing records. These detailed, auditable records state to whom energy was sold (contractually) and the revenues received. However, the records are voluminous and individual sales data cannot be provided to the Commission in response to the May 16 Order. However, based on the experience of Ontario Hydro personnel in the Interconnect Markets Department, Ontario Hydro believes that approximately one-third of sales fall into the first two categories above, *i.e.*, have not been to an interconnected U.S. border utility—at least with respect to 1997 year-to-date sales. Most of the sales to interconnected U.S. border utilities for their own use have been to Detroit Edison. [17]

Ontario Hydro then claims that it has entered into agreements with ''many'' U.S. utilities and power marketers and if it could obtain open-access transmission in the United States, ''it would be able to increase sales to these entities dramatically.'' [18]

F. Answer of Consumers and Detroit Edison to Ontario Hydro Response

On May 30, 1997, Consumers and Detroit Edison filed a joint answer to Ontario Hydro's Response. They attach to their response a copy of the international border agreement, called the Interconnection Agreement, which governs the transmission of energy from Ontario Hydro's substations on the Canadian side of the border to the Detroit Edison/Consumers substations on the U.S. side of the border and the sale of energy to the border utilities; such transmission and sales are subject to the jurisdiction of the Department of Energy (DOE). Consumers and Detroit Edison argue that Ontario Hydro's Response fails to address material aspects of the Commission's May 16 Order and provides incomplete and ambiguous responses to other aspects. They assert that Ontario Hydro failed to explain its steadily increasing buy/sell transaction sales to U.S. customers since the effective date of Order No. 888. They also assert that every one of Ontario Hydro's contracts for the sale of power to U.S. purchasers (other than a border utility) cannot be rendered void or voidable because in transactions where a border utility in a buy-sell transaction takes title to power and energy entering its system, ''the power and energy resold and transmitted in the United States is its own.'' [19] They emphasize that such arrangements are the only ones authorized under the Interconnection Agreement. Moreover, they state that while Ontario Hydro implies that it has a formal contractual arrangement with each of its U.S. customers, the language used by Ontario Hydro suggests that its agreements with U.S. customers may not be formal contracts.[20]

Consumers and Detroit Edison further argue that Ontario Hydro is seeking preferential access to transmission services in the United States and is seeking ''to build a power sales business by selling in the United States at unregulated, market-based rates without meeting any of the requirements imposed on utilities in the United States for market rate authorization.'' [21]

II. Discussion

Based on the limited information provided to us by Ontario Hydro, and in light of the additional information that has been submitted by Consumers and Detroit Edison with respect to ongoing trade with Ontario Hydro, we cannot conclude based on this record that the requested stay is warranted. The overwhelming failing of Ontario Hydro's motion for stay is that it contains not one solid figure that would indicate that Ontario Hydro is suffering or may suffer irreparable harm as the result of Order Nos. 888 and 888–A. We have carefully reviewed all of the pleadings and other information provided in this case and can only conclude that since the effective date of Order No. 888 Ontario Hydro has continued to make significant sales to U.S. purchasers contrary to its claim that ''the Open-Access Condition

[14] Ontario Hydro Response at 5–6.

[15] *Id.* at 6.

[16] Ontario Hydro Response at 7–8.

[17] Ontario Hydro Response at 9–10.

[18] Ontario Hydro Response at 10.

[19] Joint Answer at 4.

[20] Ontario Hydro failed to provide even one of the 40 ''contracts'' to which it refers.

[21] Joint Answer at 4 (footnote omitted).

will disrupt Ontario Hydro's entire $235 million per year U.S. export business, with no possibility of recovery of losses.''[22]

Additionally, from what we can glean from the filings before us, it appears that while historical trade with U.S. border utilities has not been disrupted and in fact has increased since Order No. 888 became effective, Ontario Hydro's real concern may be the potential of not being able to *increase* trade with non-border utilities in the future through the use of U.S. open access tariffs. Ironically, it is the existence of the open access tariffs required by Order No. 888 that gives rise to Ontario Hydro's ''expectation'' of growing trade in the United States. It cannot at the same time claim the benefits of open access transmission and object to one of the provisions the Commission included in Order No. 888 to ensure that competition takes place on fair terms. As discussed below, we do not believe that Ontario Hydro's potential to increase trade with U.S. non-border utilities can be said to invoke irreparable harm; moreover, we believe that to excuse Ontario Hydro from the same open access tariff provisions that apply to U.S. non-public utilities would provide an undue and anticompetitive preference to Ontario Hydro.

Justice Does Not Require a Stay

Under the Administrative Procedure Act, the Commission will grant a stay if ''justice so requires.''[23] Ontario Hydro based its motion for stay on a broad array of general statements lacking in any specificity or evidentiary support. Significantly, it failed to provide the bulk of the information the Commission sought in its May 16 Order in order to make a determination as to how the reciprocity condition might apply to Ontario Hydro, the potential dollar impact on Ontario Hydro of applying the reciprocity condition, and whether justice requires a stay. Ontario Hydro has failed to show that justice requires a stay.

Ontario Hydro has failed to demonstrate that Order Nos. 888 and 888-A have resulted or will result in the stoppage of its export trade to the United States. With regard to sales that occur through Consumers and Detroit Edison (the MECS utilities), as Consumers and Detroit Edison indicate in their Joint Preliminary Answer and Joint Answer, Ontario Hydro and the MECS utilities continue to engage in buy/sell arrangements under the Interconnection Agreement and the MECS utilities continue to provide the transmission necessary to deliver the power sold by Ontario Hydro. Based on the record before us, it appears that Ontario Hydro has not been a customer under the MECS utilities' Order No. 888 open access tariffs (thus invoking the tariff reciprocity provision), but rather the MECS border utilities either have transmitted the power pursuant to pre-existing unbundled bilateral agreements or pursuant to their own tariffs (presumably under the Order No. 888 tariff since July 9, 1996) to move the electric power purchased from Ontario Hydro to the customers designated by Ontario Hydro; in other words, the MECS utilities have been taking service under their own open access tariffs for historical trades, and Ontario Hydro has continued to make significant sales in the United States, without being subjected to the reciprocity condition.[24]

With respect to the sales that Ontario Hydro has been making in the United States, we note that from actual monthly data provided by Consumers and Detroit Edison (the only actual data provided in this proceeding) concerning Ontario Hydro's interchange transactions with MECS, Ontario Hydro has sold $58,975,770 of power to MECS during the 10 months from July 1996 (the month in which Order No. 888 became effective) to April, 1997 (the last month in which Detroit Edison had information available).[25] Moreover, for the first four months of 1997 (post Order No. 888), Ontario Hydro sold $24,821,554 of power to MECS, which is $15,178,261 more than the comparable period for 1996 (pre Order No. 888), or an increase in sales of 157 percent. Thus, rather than Ontario Hydro's dire assertions that its ''entire $235 million per year U.S. export business'' will be disrupted by Order No. 888 and that its sales will ''dwindle away'' once U.S. utilities become aware of reciprocity, based on the information in this record it appears that Ontario Hydro has actually experienced a significant increase in sales to the United States since the effectiveness of Order No. 888.

Ontario Hydro, essentially ignoring these increased sales, implies that it is not entirely concerned with the historical transactions it has undertaken with U.S. utilities, but is concerned with additional transactions that it may enter into pursuant to the open access tariffs of U.S. utilities, and that these future transactions may be jeopardized by the reciprocity condition of Order Nos. 888 and 888–A. However, in attempting to analyze this concern, we are again faced with a lack of information and the incomplete answers provided by Ontario Hydro to our questions. For example, we have no way of knowing, as discussed below, the type of transactions included in Ontario Hydro's *forecast* of ''$235 million per year U.S. export business'' and whether any of that amount may be subject to the reciprocity condition.[26] Ontario Hydro chose not to provide any derivation of that forecasted amount, even after being requested to do so by the Commission in its May 16 Order.[27] Without an understanding of the composition of the forecasted $235 million, the Commission finds it impossible to determine what portion of the $235 million may involve transactions subject to the reciprocity condition and arguably subject to loss by Ontario Hydro.

The significance of Ontario Hydro's failure to explain the derivation of the $235 million is underscored by Ontario Hydro's own explanation that its electric power sales into the United States fall into three categories: ''(1) power was transmitted to the U.S. purchaser through the purchase of transmission services by the purchaser, (2) power was delivered to the U.S. purchaser through a buy-resell arrangement, and (3) power was sold directly to a U.S. border utility.''[28] Ontario Hydro does not explain in any detail how the buy-sells under Category (2) are accomplished, including the specifics of any ''contractual or other tie'' between the ultimate purchaser and Ontario Hydro, so the Commission cannot definitively determine whether

[22] Motion for Stay at 1.

[23] 5 U.S.C. § 705 (1994).

[24] The reciprocity condition of the open access tariff (section 6 of the tariff) applies to third-party customers that take service under the tariff. As clarified in Order No. 888-A, it also applies to any third-party entity in the chain of a transaction that involves the use of an open access tariff by a third-party customer. With regard to sales through the MECS border utilities, which all appear to be buy-sell transactions, it does not appear on this record that Ontario Hydro, any of the 40 power purchasers with whom it says it has contracts, or any other third party has been a transmission customer under the MECS utilities' open access tariffs.

[25] All dollar amounts used in this order are in Canadian dollars. As reported in the Wall Street Journal of June 11, 1997, the exchange rate was $1 Canadian equals $0.7208 U.S.

[26] Similarly, Ontario Hydro referenced in its Motion for Stay an historical amount of $750 million in gross proceeds from the sale of wholesale power to U.S. purchasers over the last three years, but again failed to provide the breakdown of that amount, as requested by the Commission in its May 16 Order.

[27] The fact that its historical records of transactions are based on billing records that are voluminous, as claimed by Ontario Hydro as justification for not providing the information to the Commission, is no reason for not providing the derivation of the ''forecasted'' $235 million.

[28] Ontario Hydro Response at 9.

or not the reciprocity provision of the open access tariff would apply to this category.[29] However, even assuming that the first two categories would subject Ontario Hydro to the reciprocity condition, but not the third, as Ontario Hydro implies, it is significant to note that Ontario Hydro itself admits that only approximately one-third of its sales fall into the first two categories, thus leaving two-thirds of its sales, or approximately $157 million, under category three and not subject to reciprocity.[30] Moreover, as noted, it is not clear that the transactions that Ontario Hydro has placed in Category (2) are subject to reciprocity since Ontario Hydro has failed to inform us as to whether it, its non-border utility purchasers or a third-party intermediary would be seeking transmission access under the Order No. 888 tariff to effectuate the buy-sells, thus invoking the reciprocity condition. In either case, it appears based on this record that historical sales through the MECS utilities have continued, with the MECS utilities either transmitting power pursuant to pre-existing unbundled bilateral agreements or pursuant to their own transmission tariffs.

Because Ontario Hydro failed to provide any of the detailed information requested by the Commission, we cannot calculate how much of the alleged loss of sales falls into each of the three categories; however, we expect that the vast majority of the estimated one-third of sales falling into the first two categories actually fall into category 2 because neither Ontario Hydro nor Detroit Edison has made any reference to actual transactions under which a U.S. purchaser obtained transmission service from a border utility's open access tariff. Since Ontario Hydro's sales appear to have continued (and increased) since issuance of Order No. 888, we fail to see how there can be any significant harm to Ontario Hydro as a result of Order Nos. 888 and 888–A. The transactions with the MECS utilities have continued since the effective date of Order No. 888 and appear likely to continue. Moreover, Ontario Hydro has not demonstrated that any of its 40 agreements for sales to U.S. purchasers (other than the U.S. border utilities) cannot take place pursuant to the Interchange Agreement.

The above discussion has focused on border sales through the MECS utilities Consumers and Detroit Edison. While Ontario Hydro has made vague allegations regarding sales that would require it to use Niagara Mohawk's open access tariff, it has failed to give any detail regarding these transactions. For example, it has not described the New York border utilities through whom it would transmit power nor provided copies of any of the agreements it has with these or other U.S. utilities or customers, nor provided any other of the requested information.

Additionally, in the affidavit of Bruce D. Mackay, attached to Ontario Hydro's Motion for Stay, Ontario Hydro asserts that it responded to three specific requests for proposals (RFPs) for the supply of electric power and implies that it was not chosen because it was unable to obtain transmission service. However, seeking to clarify the circumstances involving these RFPs, the Commission sought additional information from Ontario Hydro. For whatever reason, Ontario Hydro chose not to respond to our question of whether it could not make the trades because it was denied transmission access by a U.S. transmission provider.

With regard to the *potential* inability to *increase* trade with U.S. utilities, Ontario Hydro has failed to demonstrate that this constitutes irreparable harm. There is nothing in this record to indicate that Ontario Hydro is in any worse a position than it was prior to Order No. 888, at which time it had to rely solely on voluntary transmission services from U.S. public utilities to sell to U.S. utilities other than border utilities. As noted, to our knowledge trade with border utilities has continued uninterrupted since issuance of Order No. 888. Additionally, even if we were to accept Ontario Hydro's implication that it is irreparable harm not to be able to increase trade, other than two allegations of denials of transmission access by U.S. utilities (Niagara Mohawk and Detroit Edison with respect to one transaction involving Toledo Edison), it does not appear that there has been any significant impedance to additional trade.

Additionally, contrary to Ontario Hydro's claim, we conclude that a stay would substantially harm other U.S. utilities, including Consumers and Detroit Edison, as well as U.S. non-public utilities. As required by Order No. 888, all U.S. public utilities that own, operate or control interstate transmission facilities now have open access transmission tariffs on file with the Commission that require the provision of transmission service to all eligible customers (or have sought or obtained the necessary waiver from the Commission). Eligible customers include Canadian entities. Moreover, any entity receiving transmission service (whether domestic or foreign) must agree to provide comparable transmission service to the public utility from whom it received open access transmission service unless it receives a waiver from the transmission provider or the Commission. Thus, if the reciprocity condition of Order Nos. 888 and 888–A is stayed as requested by Ontario Hydro, we would not be allowing Ontario Hydro to obtain transmission services in the United States on the *same* terms as U.S. public utilities. Rather, Ontario Hydro would be able to obtain transmission access from U.S. public utilities and compete for customers on those public utilities' transmission systems on preferential terms. U.S. public utilities would not be able to obtain reciprocal transmission service from Canadian utilities and compete for customers in Canadian markets. This less than equal treatment could cause U.S. public utilities to face a declining customer base brought about by Canadian utilities taking U.S. customers through their new-found access to U.S. markets, but without the U.S. public utilities having a similar opportunity to seek customers in Canadian markets.

U.S. non-public utilities would also be put at a disadvantage because they must also satisfy reciprocity (unless waived) as a condition of using an open access tariff. Contrary to any implication by Ontario Hydro, there is no separate ''foreign'' reciprocity provision. The reciprocity provision set forth in Order No. 888 applies to all eligible customers, whether foreign or domestic. Further, as is the case with foreign utilities, reciprocity applies to a U.S. non-public utility if any third party in the transactional chain (the power purchaser or a third-party intermediary such as a power marketer) uses the open access tariff. Thus, we are treating Ontario Hydro no differently than we are treating domestic non-public utilities, e.g., federal public power entities such as BPA, state power authorities such as New York Power Authority, and municipals and cooperatives.

Furthermore, the public interest does not favor Ontario Hydro's motion for

[29] In fact, Ontario Hydro does not give any detail for *any* of the categories. However, reciprocity (unless waived by the transmission provider or the Commission) would appear to apply to Category (1) because it would involve the use of the open access tariff by the U.S. customer that is purchasing power from Ontario Hydro. Reciprocity would not appear to apply to Category (3) because these appear to be transactions in which the border utility is the purchaser and re-sells to a U.S. customer unknown to Ontario Hydro.

[30] While Ontario Hydro provides this breakdown of sales, it indicates that the breakdown is applicable ''at least with respect to 1997 year-to-date sales,'' leaving one to guess the breakdown of its $235 million forecast. Moreover, Ontario Hydro fails to provide the Commission with the year-to-date sales to which it refers.

stay. As described above, a stay would unfairly permit Canadian utilities to compete in U.S. markets, but deprive U.S. utilities of the opportunity to likewise compete in Canadian markets. This unequal treatment could detrimentally affect the financial well-being of U.S. public utilities. It also would give Canadian utilities a preferential advantage over U.S. non-public utilities that seek to compete with public utilities in U.S. markets. Further, we note that Ontario Hydro is the only Canadian utility that has sought a stay and claimed any harm from Order Nos. 888 and 888–A.[31]

On the other hand, a denial of the stay would not have such potentially dire consequences. Ontario Hydro would still be permitted to continue the buy/sell transactions with MECS (and possibly with other border utilities), which, as we described in detail above, are continuing to occur at greater levels than prior to the effectiveness of Order No. 888.

Moreover, Ontario Hydro has the option to obtain open access transmission in the United States in return for providing transmission access only to those public utilities from whom it receives service. As we have repeatedly explained, this does not require Ontario Hydro to offer an open access tariff that is available to any eligible customer, but permits Ontario Hydro simply to negotiate comparable transmission access for the public utility from whom it seeks transmission service.[32]

Finally, Ontario Hydro's arguments as to the legal sufficiency of Order No. 888 are unavailing. First, Ontario Hydro asserts that the Commission does not have the authority to place conditions on the import of power from Canada. The Commission, however, has placed no conditions on the *import* of power from Canada. The reciprocity condition applies solely to the transmission of electric energy in interstate commerce and treats Canadian entities the same as any non-public utility in the United States. The question of whether Canadian power may be imported into the United States remains subject to the U.S. Department of Energy's jurisdiction and is unaffected by Order Nos. 888 and 888–A. Similarly, imports of U.S. power into Canada remain subject to Canadian jurisdiction and are unaffected by Order Nos. 888 and 888–A. Moreover, as the Commission explained in Order No. 888–A, ''[j]ust as we are not asserting jurisdiction over domestic non-public utilities under sections 205 or 206 of the FPA, we also are not asserting jurisdiction over foreign entities. Rather, we are simply placing the same reasonable and fair condition on both types of entities' uses of the transmission ordered in the Final Rule.'' [33]

Second, Ontario Hydro cites a recent U.S. Court of Appeals decision that it claims prevents the Commission from placing conditions on non-jurisdictional entities and business practices.[34] It further asserts that while section 211 of the FPA gives the Commission limited authority to order wheeling by U.S. non-public utilities, it does not provide the Commission with authority to regulate power imports or exports. Ontario Hydro's citation to *Altamont* is simply not pertinent to this proceeding. Its second assertion, while true, is irrelevant.

In *Altamont*, the Court addressed the Commission's conditioning authority under section 7 of the Natural Gas Act (NGA) and found that the Commission could not condition a jurisdictional pipeline's certificate in order to affect state regulatory practices and policies.[35] *Altamont* dealt with the narrow question of the scope of Commission and state jurisdiction under section 1(c) of the NGA.

The situation here is in an entirely different context. The Commission has required all public utilities to provide open access transmission to all eligible customers, including non-jurisdictional Canadian utilities such as Ontario Hydro. However, as a condition of receiving the benefits of this new service, eligible customers that are non-public utilities must agree to provide comparable transmission service to the public utility from whom they receive service. There is no requirement that a non-public utility customer provide open access to all eligible customers, as the Commission required of public utilities. In adopting this reciprocity condition, the Commission explained that—

> [w]hile we do not take issue with the rights these non-public utilities may have under other laws, we will not permit them open access to jurisdictional transmission without offering comparable service in return. We believe the reciprocity requirement strikes an appropriate balance by limiting its application to circumstances in which the non-public utility seeks to take advantage of open access on a public utility's system. [36]

Additionally, because transmission providers can waive the tariff reciprocity provision, the net effect of the provision is no different than the situation prior to Order No. 888 when all transmission service (other than pursuant to section 211) was at the voluntary discretion of the transmission owner.

As to Ontario Hydro's second assertion, Ontario Hydro has misread Order Nos. 888 and 888-A. Nowhere in those orders has the Commission asserted any jurisdiction (section 211 or 205) over domestic non-public utilities. Indeed, it has no jurisdiction over U.S. non-public utilities under section 205 and it can assert section 211 jurisdiction over such utilities only upon application. Additionally, nowhere in those orders has the Commission asserted jurisdiction over foreign imports or exports. Rather, as the Commission explained in Order Nos. 888 and 888–A, we are simply placing a reasonable and fair condition on domestic non-public utilities' and foreign utilities' uses of open access transmission that U.S. public utilities are required to provide.

Ontario Hydro further claims that the reciprocity condition violates the U.S. national treatment obligations under NAFTA and GATT. The Commission fully responded to this argument in Order No. 888–A in response to Ontario Hydro's rehearing request.[37] We explained that—

> [w]e disagree with Ontario Hydro's claim that NAFTA's national treatment principle requires us to allow a Canadian transmission-owning entity (or its corporate affiliate) to take advantage of a United States public utility's open access tariff—a tariff we have

[31] The Commission has found that Hydro-Quebec's transmission tariff meets the reciprocity provision of Order No. 888. *See* H.Q. Energy Services (U.S.) Inc., 79 FERC ¶ 61,152 (1997).

[32] While Ontario Hydro recognizes this limited reciprocal access, it asserts that under NAFTA and GATT, ''Ontario Hydro cannot provide open-access transmission services to any entity on an ad hoc basis, because all U.S. entities could expect and demand full access to such services if Ontario Hydro provides them to any one entity. That is the meaning of national treatment.'' Ontario Hydro Response at 11. We disagree with Ontario Hydro's interpretation of national treatment. National treatment means that each country must treat the goods of the other countries no less favorably than the most favorable treatment afforded to its own like goods. NAFTA, Article 301. Thus, unless Canadian law requires a Canadian utility to provide *open access* transmission service (that is, transmission to all eligible customers) to all Canadian utilities, such Canadian utility need not provide *open access* transmission service to any U.S. utility or to any Canadian utility. Additionally, as noted, the open access tariff reciprocity provision does not require *open access* service; rather it limits reciprocal service only to those transmission providers from whom the Order No. 888 tariff user obtains service.

[33] FERC Stats. & Regs. ¶ 31,048 at 30,292.

[34] Motion for Stay at 10–11 (citing *Altamont*).

[35] The court explained that the Hinshaw Amendment, section 1(c) of the NGA, 15 U.S.C. § 717(c), ''provides that intrastate rates and services, such as those of PG&E in this case, are exempt from Commission scrutiny.'' 92 F.3d at 1243.

[36] FERC Stats. & Regs. ¶ 31,036 at 31,762.

[37] FERC Stats. & Regs. ¶ 31,048 at 30,291–92.

required the utility to adopt—while simultaneously refusing to allow the United States utility to use the Canadian entity's transmission facilities.[38]

We emphasized that Ontario Hydro's interpretation would twist the national treatment concept ''into a requirement that Canadian entities be treated better than United States entities, including United States non-public utilities that are subject to the reciprocity condition.'' [39] Under Order Nos. 888 and 888–A, the same reciprocity condition applies to foreign utilities as applies to U.S. non-public utilities.[40] Ontario Hydro's reading of NAFTA, however, [w]ould place transmission-owning Canadian entities (or their corporate affiliates) in a *better* position that any domestic entity; not only would Canadian entities not be subject to the open access requirement, but, unlike domestic non-public utilities, they would be able to use the open access tariffs we have mandated without providing *any* reciprocal service. Ontario Hydro has cited no precedent demonstrating that NAFTA imposes such an unreasonable requirement.[41]

The Commission Orders: Ontario Hydro's motion for stay is hereby denied.

By the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 97–17800 Filed 7–8–97; 8:45 am]

BILLING CODE 6717–01–P

[38] FERC Stats. & Regs. ¶ 31,048 at 30,291.

[39] *Id.*

[40] Ontario Hydro's citation to Conference of State Bank Supervisors v. Conover, 715 F.2d 604 (D.C. Cir. 1983), *cert. denied,* 466 U.S. 927 (1984), as prohibiting a reciprocity condition is entirely inapposite. This case dealt with the International Banking Act, a federally enacted statute, which the court explained ''sought to provide foreign banks with 'national treatment' under which 'foreign enterprises * * * are treated as competitive equals with their domestic counterparts.' '' 715 F.2d at 606. The court found that an individual state's attempt to impose state reciprocity requirements on a federally-chartered foreign bank would conflict with the national treatment provided under the federal act and thus was precluded. *Id.* at 617. No such state/federal conflict exists with respect to the reciprocity condition set forth in Order Nos. 888 and 888–A.

[41] FERC Stats. & Regs. ¶ 31,048 at 30,291–92.

PENSION BENEFIT GUARANTY CORPORATION

29 CFR PART 4007

RIN: 1212–AA66

Disclosure of Premium-Related Information

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation is amending its premium payment regulation to provide for the submission to the PBGC of information contained in records relating to premium filings. The amendment is intended to assist the PBGC in obtaining timely information for premium audits.

EFFECTIVE DATE: August 8, 1997.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or James L. Beller, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024 (202–326–4179 for TTY and TDD).

SUPPLEMENTARY INFORMATION: On December 17, 1996, the PBGC published in the **Federal Register** (61 FR 66247) a proposed rule to provide for submission to the PBGC of plan records that are necessary to support premium filings within 30 days of the date of the PBGC's request, or by a different time specified in the request. The PBGC received three comments, all of which stated that the 30-day time period was too short for large, multi-location companies because of the need to gather data from different locations.

Most companies do not have special problems and can comply within a short period of time. The PBGC recognizes that, due to delays in the mail and other circumstances, companies may need more than 30 days to comply, and has therefore replaced the 30-day time period with a 45-day time period. For companies that, for valid reasons (*e.g.*, difficulty in retrieving off-site files) are unable to provide the records within 45 days, the final rule provides an automatic extension of up to an additional 45 days. To qualify for the extension, the plan administrator must certify that, despite reasonable efforts, the additional time is necessary to comply with the PBGC's request. The PBGC may shorten the original or extended deadline if the collection of unpaid premiums (or any associated interest or penalties) would be jeopardized.

Paperwork Reduction Act

This rule contains information collection requirements. As required by the Paperwork Reduction Act of 1995, the PBGC has submitted a copy of this information collection to the Office of Management and Budget for its review. Affected parties do not have to comply with the information collection requirements of this rule until the PBGC publishes in the **Federal Register** the control number assigned by OMB to this information collection. Publication of the control number notifies the public that OMB has approved these information collection requirements.

E.O. 12866 and the Regulatory Flexibility Act

The PBGC has determined that this rule is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

The PBGC certifies that the amendment will not have a significant economic effect on a substantial number of small entities. This rule merely changes the manner in which the plan administrator complies with an existing requirement to provide PBGC with information. Sending that information to the PBGC instead of making it available for on-site review by the PBGC will not impose any significant additional burden on the plan administrator. Accordingly, as provided in section 605(b) of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 29 CFR Part 4007

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons set forth above, the PBGC is amending 29 CFR part 4007 as follows:

PART 4007—PAYMENT OF PREMIUMS

1. The authority citation for part 4007 is revised to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1303(a), 1306, 1307.

2. In § 4007.10, the section heading is revised; paragraph (a) is amended by removing the last sentence; and new paragraphs (c) and (d) are added, to read as follows:

§ 4007.10 Recordkeeping; audits; disclosure of information.

* * * * *

(c) *Providing record information. (1) In general.* The plan administrator shall