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Contents

Federal Register

Vol. 63, No. 3

Tuesday, January 6, 1998

Agricultural Marketing Service
RULES
Tart cherries grown in Michigan et al., 399–406

Agriculture Department
See Agricultural Marketing Service
See Animal and Plant Health Inspection Service
See Natural Resources Conservation Service
See Rural Housing Service

Alcohol, Tobacco and Firearms Bureau
NOTICES
Agency information collection activities:
Proposed collection; comment request, 598–599

Animal and Plant Health Inspection Service
RULES
Exportation and importation of animals and animal products:
Ruminants, meat and meat products from ruminants, and other ruminant products from countries where bovine spongiform encephalopathy exist; restrictions, 406–408

Census Bureau
NOTICES
Surveys, determinations, etc.:
Retail trade; annual, 469
Wholesale trade; annual, 469–470

Coast Guard
NOTICES
Meetings:
Houston/Galveston Navigation Safety Advisory Committee, 595–596

Commerce Department
See Census Bureau
See National Oceanic and Atmospheric Administration
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 469

Defense Department
RULES
Federal Acquisition Regulation (FAR):
Preaward survey of prospective contractor; quality assurance
Correction, 648
PROPOSED RULES
Federal Acquisition Regulation (FAR):
Contractor purchasing system review exclusions, 649
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities—
Proposed collection; comment request, 473
Submission for OMB review; comment request, 472–473

Drug Enforcement Administration
NOTICES
Meetings:
Suspicious Orders Task Force, 574–575
Applications, hearings, determinations, etc.:
King, John Paul, M.D., 573–574

Education Department
NOTICES
Grants and cooperative agreements; availability, etc.:
Character education pilot projects, 638
Meetings:
President's Advisory Commission on Educational Excellence for Hispanic Americans, 473–474

Employment and Training Administration
NOTICES
Adjustment assistance:
Can Corp. of America et al., 575
Johns-Manville et al., 575–576
Onan Corp. et al., 576–577
R.G. Thomas Corp., 577
Sweatt's Prefade, Inc., 577
NAFTA transitional adjustment assistance:
Delphi Energy and Engine et al., 577–579

Energy Department
See Federal Energy Regulatory Commission
See Hearings and Appeals Office, Energy Department
See Southwestern Power Administration
See Western Area Power Administration
NOTICES
Electricity export and import authorizations, permits, etc.:
USGen Power Services, et al., 474–475
Public Utility Regulatory Policies Act:
Electric and gas utilities covered in 1998; list, 475–476

Environmental Protection Agency
RULES
Acquisition regulations:
Confidential business information; certification requirements, 418
Air programs:
Clean Air Act—
Accidental release prevention requirements; regulated substances and thresholds; amendments, 640–645
Air quality implementation plans; approval and promulgation; various States:
Pennsylvania; correction, 415–416
Utah, 414–415
Clean Air Act:
Enhanced monitoring program compliance assurance monitoring; credible evidence revision
Correction, 414
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Sodium bicarbonate, etc.; correction, 417–418
Zinc phosphide; correction, 416–417
PROPOSED RULES
Air quality implementation plans; approval and promulgation; various States:
Indiana, 456–459
NOTICES
Agency information collection activities:
Proposed collection; comment request, 559–560
Submission for OMB review; comment request, 560–561

Executive Office of the President
See Presidential documents

Federal Aviation Administration
NOTICES
Passenger facility charges; applications, etc.:
Quad City International Airport, IL, 597
Reno/Tahoe International Airport, NV, 596–597
Yeager Airport, WV, 597–598

Federal Communications Commission
PROPOSED RULES
Common carrier services:
Telecommunications Act of 1996; implementation—
Digital television spectrum ancillary or supplmentary use by DTV licensees; fees, 460–466
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 561
Reporting and recordkeeping requirements, 561–563

Federal Energy Regulatory Commission
NOTICES
Environmental statements; availability, etc.:
California Department of Water Resources; Feather River Hydroelectric Project, 478
New docket prefix IC establishment, 478–479
Applications, hearings, determinations, etc.:
High Island Offshore System, 476
National Fuel Gas Supply Corp., 476–477
Sierra Pacific Power Co., 477
Southern California Edison Co., 477
U-T Offshore System, 477–478
Williams Natural Gas Co., 478

Federal Maritime Commission
NOTICES
Agreements filed, etc., 563

Federal Reserve System
NOTICES
Banks and bank holding companies:
Change in bank control, 563
Formations, acquisitions, and mergers, 563–564
Meetings; Sunshine Act, 564

Federal Trade Commission
PROPOSED RULES
Textile Fiber Products Identification Act:
Fluoropolymer, 447–449
Melamine; new fiber name and identification, 449–451

Federal Transit Administration
RULES
Prohibited drug use and alcohol misuse prevention in transit operations:
Random drug and alcohol drug testing rates, 418–419

Fish and Wildlife Service
NOTICES
Endangered and threatened species permit applications, 570–571
Marine mammal permit applications, 571–572
Marine mammals:
Incidental taking; authorization letters, etc.—
Oil and gas industry activities; polar bears, 572–573

Food and Drug Administration
RULES
Animal drugs, feeds, and related products:
Sponsor name and address changes—
Alpharma Inc.; correction, 408–409
NOTICES
Agency information collection activities:
Proposed collection; comment request, 564–565
Medical devices; premarket approval:
Abbott Laboratories, 565–566

General Services Administration
RULES
Federal Acquisition Regulation (FAR):
Preaward survey of prospective contractor; quality assurance
Correction, 648
PROPOSED RULES
Federal Acquisition Regulation (FAR):
Contractor purchasing system review exclusions, 649
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities—
Proposed collection; comment request, 473
Submission for OMB review; comment request, 472–473

Health and Human Services Department
See Food and Drug Administration
See Health Care Financing Administration
See Substance Abuse and Mental Health Services Administration

Health Care Financing Administration
NOTICES
Senior Executive Service:
Performance Review Board; membership, 566

Hearings and Appeals Office, Energy Department
NOTICES
Cases filed, 479–483

Indian Affairs Bureau
NOTICES
Tribal-State Compacts approval; Class III (casino) gambling:
Pyramid Lake Paiute Tribe, NV, 573

Interior Department
See Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau
See Surface Mining Reclamation and Enforcement Office

Internal Revenue Service
RULES
Income taxes:
Reorganizations; nonqualified preferred stock, 411–412
Reorganizations; receipt of rights to acquire corporation securities, 409–410
PROPOSED RULES
Income taxes:
Reorganizations; nonqualified preferred stock; cross-reference, 453–454

International Trade Commission
NOTICES
Meetings; Sunshine Act, 573

Justice Department
See Drug Enforcement Administration

Labor Department
See Employment and Training Administration
See Occupational Safety and Health Administration
See Mine Safety and Health Administration

Land Management Bureau
NOTICES
Environmental statements; availability, etc.:
Golden Valley Electric Association Northern Intertie Project; AK, 573

Mine Safety and Health Administration
PROPOSED RULES
Coal and metal and nonmetal mine safety and health:
Occupational noise exposure--
Miners and miners' representatives; right to observe required operator monitoring, etc.; correction [**Editorial Note:** The listing for this document, published in the **Federal Register** of January 5, 1998 (63 FR 290), was inadvertently omitted from that issue's Table of Contents.]

National Aeronautics and Space Administration
RULES
Federal Acquisition Regulation (FAR):
Preaward survey of prospective contractor; quality assurance
Correction, 648
PROPOSED RULES
Federal Acquisition Regulation (FAR):
Contractor purchasing system review exclusions, 649
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities—
Proposed collection; comment request, 473
Submission for OMB review; comment request, 472–473

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
Caribbean, Gulf, and South Atlantic fisheries—
Gulf of Mexico reef fish and red snapper, 443–444
Fisheries of the Northeastern United States—
Summer flounder, scup and black sea bass, 444–445
Magnuson Act provisions, 419–443
PROPOSED RULES
Fishery conservation and management:
Northeastern United States fisheries—
New England Fishery Management Council; meetings, 466–467
NOTICES
Agency information collection activities:
Proposed collection; comment request, 470–471
Permits:
Marine mammals, 471–472

National Transportation Safety Board
NOTICES
Meetings; Sunshine Act, 579–580

Natural Resources Conservation Service
PROPOSED RULES
Technical assistance:
State Technical Committees; membership and role expansion
Comment period extension, 446–447

Nuclear Regulatory Commission
NOTICES
Applications, hearings, determinations, etc.:
Consumers Energy Co., 580–581

Occupational Safety and Health Administration
NOTICES
Variance applications, etc.:
Dixie Divers, Inc., 579

Personnel Management Office
PROPOSED RULES
Health benefits; Federal employees:
Minimum salary requirement removed, 446
NOTICES
Meetings:
National Partnerhip Council, 581–582

Presidential Documents
ADMINISTRATIVE ORDERS
Libya; continuation of emergency (Notice of January 2, 1998), 653

Agricultural Marketing Service
RULES
Tart cherries grown in Michigan et al., 399–406

Public Health Service
See Food and Drug Administration
See Substance Abuse and Mental Health Services Administration

Rural Housing Service
NOTICES
Agency information collection activities:
Proposed collection; comment request, 468–469

Securities and Exchange Commission
PROPOSED RULES
Federal regulatory review:
Rules list and comment request, 451–453
NOTICES
Agency information collection activities:
Proposed collection; comment request, 582–583
Investment Companies Act of 1940:
Deregistration applications—
Lexington Tax Free Money Fund, Inc., et al., 583–584
Self-regulatory organizations; proposed rule changes:
Chicago Stock Exchange, Inc., 584
Municipal Securities Rulemaking Board, 585–586
National Association of Securities Dealers, Inc., 586–595
Applications, hearings, determinations, etc.:
Public utility holding company filings, 583

Sentencing Commission, United States
See United States Sentencing Commission

Southwestern Power Administration
NOTICES
Electric power marketing:
Open access transmission service tariff; final, 483–521

Substance Abuse and Mental Health Services Administration
NOTICES
Grants and cooperative agreements; availability, etc.:
Funding opportunities FY 1998, 566–570

Surface Mining Reclamation and Enforcement Office
PROPOSED RULES
Permanent program and abandoned mine land reclamation plan submissions:
Oklahoma, 454–456

Transportation Department
See Coast Guard
See Federal Aviation Administration
See Federal Transit Administration
NOTICES
Aviation proceedings:
Agreements filed; weekly receipts, 595
Certificates of public convenience and necessity and foreign air carrier permits; weekly applications, 595

Treasury Department
See Alcohol, Tobacco and Firearms Bureau
See Internal Revenue Service

United States Information Agency
NOTICES
Art objects; importation for exhibition:
The Invisible Made Visible: Angels in the Vatican, 599

United States Sentencing Commission
NOTICES
Sentencing guidelines and policy statements for Federal courts, 602–635

Veterans Affairs Department
RULES
Adjudication; pensions, compensation, dependency, etc.:
Active military certification; eligibility, 413
Minimum income annuity, 412–413

Western Area Power Administration
NOTICES
Electric power marketing:
Open access transmission service tariff; final, 521–559

Separate Parts In This Issue

Part II
United States Sentencing Commission, 602–635

Part III
Department of Education, 638

Part IV
Environmental Protection Agency, 640–645

Part V
Department of Defense, General Services Administration, National Aeronautics and Space Administration, 648–649

Part VI
The President, 653

Reader Aids
Additional information, including a list of telephone numbers, finding aids, reminders, and a list of Public Laws appears in the Reader Aids section at the end of this issue.

Electronic Bulletin Board
Free **Electronic Bulletin Board** service for Public Law numbers, **Federal Register** finding aids, and a list of documents on public inspection is available on 202–275–1538 or 275–0920.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Administrative Orders:

Notice of January 2, 1998 653

5 CFR

Proposed Rules:

890....446

7 CFR

930....399

Proposed Rules:

610....446

9 CFR

94....406
96....406

16 CFR

Proposed Rules:

303 (2 documents) 447, 449

17 CFR

Proposed Rules:

Ch. II....451

21 CFR

510....408
520....408
558....408

26 CFR

1 (2 documents) 409, 411

Proposed Rules:

1....453

30 CFR

Proposed Rules:

936....454

38 CFR

3 (2 documents) 412, 413

40 CFR

51....414
52 (3 documents) 414, 415
60....414
61....414
68....640
180(2 documents)....416, 417

Proposed Rules:

52....456

47 CFR

Proposed Rules:

1....460

48 CFR

53....648
1535....418
1552....418

Proposed Rules:

44....649

49 CFR

653....418
654....418

50 CFR

600....419
622....443
648....444
660....419

Proposed Rules:

648....466

Rules and Regulations

Federal Register
Vol. 63, No. 3
Tuesday, January 6, 1998

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV97–930–4 IFR]

Tart Cherries Grown in the States of Michigan, et al.; Temporary Suspension of Proviso for Exporting Juice and Juice Concentrate; Establishment of Regulations for Handler Diversion

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule and temporary suspension of order provisions with request for comments.

SUMMARY: This interim final rule implements provisions of the Federal tart cherry marketing order (order) by establishing regulations concerning handler diversion, including diversion credit for exempt uses, and by defining certain terms relating to exemptions. In addition, this rule temporarily suspends language in a provision of the order which would result in allowing handlers to receive diversion credit for exporting juice and juice concentrate to eligible countries for the 1997–98 crop year only. Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement when volume regulation is in effect by diverting cherries or cherry products rather than by placing them in an inventory reserve.

DATES: Effective January 7, 1998; comments received by February 5, 1998 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456, Fax # (202) 720–5698. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, room 2530–S, P.O. Box 96456, Washington, DC 20090–6456, telephone: (202) 720–5053, Fax: (202) 720–5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone (202) 720–2491; Fax: (202) 720–5698.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930) regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

The tart cherry marketing order was recently promulgated and the Cherry Industry Administrative Board (Board) met March 12–13, June 26–27, and September 11–12, 1997, to establish, and recommend to the Secretary, rules and regulations to implement the order authorities, and to consider volume regulation for this crop year. On or about July 1 of each crop year the Board is required to review sales data, inventory data, crop forecasts and market conditions in order to establish an optimum supply volume which is then used in calculating a preliminary free market tonnage percentage. In the event that a restricted percentage is recommended and imposed, handler diversion is one method under the order that handlers can utilize to meet restricted percentage requirements. The Board established and announced the optimum supply level and preliminary free and restricted percentages for the 1997–98 crop year as required by the order. On September 11–12, 1997, the Board reviewed its marketing policy and previous recommendations, and recommended a 55 percent final free market tonnage and a restricted percentage of 45 percent for this crop year.

All handlers were notified of this recommendation pursuant to section 930.50(h) of the order. Pursuant to § 930.50, final percentages for volume regulation are required to be recommended to the Secretary by September 15. Whenever it is found by the Secretary that it would be appropriate to set free market tonnage and restricted percentages for cherries acquired by handlers, volume regulations would be issued through informal rulemaking.

This rule establishes procedures for handler diversion. Handler diversion is authorized under § 930.59 of the order and, when volume regulation is in effect, handlers may fulfill restricted percentage requirements by diverting cherries or cherry products. Volume regulation is intended to help the tart cherry industry stabilize supplies and

prices in years of excess production. The volume regulation provisions of the order provide for a combination of processor owned inventory reserves and grower or handler diversion of excess tart cherries. Reserve cherries may be released for sale into commercial outlets when the current crop is not expected to fill demand. Under certain circumstances, such cherries may also be used for charity, experimental purposes, nonhuman use, and other approved purposes.

Section 930.59(b) of the order provides for the designation of allowable forms of handler diversion. These include: uses exempt under § 930.62; contribution to a Board approved food bank or other approved charitable organization; acquisition of grower diversion certificates that have been issued in accordance with § 930.58; or other uses, including diversion by destruction of the cherries at the handler's facilities.

A new § 930.159 is added to the rules and regulations concerning handler diversion. One method of diversion available to handlers is by destruction of cherries at the handler's facility. Disposal at the handler's facility will take place prior to placing the product into the processing line. This is to ensure that the product diverted is not simply an undesirable by-product of processing. Handlers electing to divert cherries or cherry products must first notify the Board and submit a plan for approval. Such notification and plan shall include an agreement that diversion will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision is to be paid by the handler. USDA inspectors will supervise diversion of cherry products at the current hourly rate of $41.00 under USDA's inspection fee schedule (7 CFR § 54.42). Board employees will supervise diversion at the same rate. Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with rules and regulations governing the issuance of grower diversion certificates (§ 930.100, 62 FR 44881, August 25, 1997). Diversion by means other than destruction of cherries at handlers' facilities would also be subject to supervision as found necessary by the Board. Fees would be charged as discussed above.

Once diversion is satisfactorily accomplished, handlers will receive diversion certificates stating the weight of cherries diverted. Such diversion certificates can be used to satisfy handlers' restricted percentage obligations. Cherries and cherry products which have been diverted shall not be subject to assessment.

A handler will have one crop year to fulfill the diversion plan which was submitted and approved by the Board. The details of the plan shall show, among other things, the name and address of the handler, the total product processed at-plant, cherries diverted at-plant, in-orchard diversion certificates redeemed, and anticipated donations to charitable outlets. A handler will also have one crop year to dispose of cherries or cherry products for exempt uses approved by the Board, unless granted a renewal. By February 5, 1998 for the 1997 crop year only, and November 1 for subsequent crop years, each handler must submit on Board Form No. 4 the details of how such handler will satisfy the restricted percentage obligation. The Board may extend this date in individual cases pursuant to a written request showing good cause why the plan cannot be provided by the due date. The November 1 date corresponds with the date that grower diversion certificates are no longer valid (this date is extended by this action to February 5, 1998 for the 1997–98 crop year). Other reports detailing the inventory reserve summary are also due by February 5, 1998 for the 1997 crop year only, and November 1 for subsequent crop years. Any information obtained by the Board which is of a confidential and/or proprietary nature would be protected from disclosure pursuant to § 930.73 of the order.

Section 930.59(b) which specifies the diversion options for handlers, includes uses exempt under § 930.62. Section 930.62 provides that the Board, with the approval of the Secretary, may exempt from the provisions of §§ 930.41, 930.44, 930.51, 930.53, and 930.55 through 930.57 cherries which are diverted in accordance with section 930.59, which are used for new product and new market development, which are used for experimental purposes, or which are used for any other purpose designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries were utilized. One such use which may be designated as an exempt use and granted diversion credit is the exportation of cherries. Tart cherries used for exempt purposes are not subject to certain marketing order provisions. These provisions include assessment, quality control, volume regulation, and reserve provisions.

For the purposes of the regulation concerning exempt uses, the Board has recommended that certain terms be defined. Also, the Board recommended that handlers who use cherries or cherry products for approved exempt purposes receive diversion credit pursuant to section 930.59(b).

Thus, a new section 930.162 is added to the rules and regulations defining exempt use terms and authorizing exemptions under the marketing order. Terms defined include new product development, new market development, development of export markets, and experimental purposes.

The first term defined is ''new product development.'' New product development includes the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry. For example, a handler may ask for an exemption for product such as ground meat in combination with raw tart cherries to form a leaner meat product. The Board determined that when a new product is commercially viable, which is defined as the time when total industry utilization for the product exceeds 2 percent of the five year average production of tart cherries, the exemption shall terminate. Therefore, the Board has recommended that when the utilization of the product exceeds 2 percent of the five year average production, the product has received consumer acceptance and should no longer be eligible for a new product development exemption.

The second term which is defined is ''new market development.'' Under the definition, new market development means the development of markets for cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry. For example, a handler may seek to establish sales of cherry preserves to India or China, currently undeveloped markets. The Board determined that a new market becomes commercially established when the total industry utilization in that market exceeds 2 percent of the five year average production of tart cherries.

The third term which is defined is ''development of export markets.'' This is defined as exports to countries other than Canada, Mexico and Japan, including the development of sales for new or different tart cherry products or the expansion of sales for existing tart cherry products. An example of

development of sales for new or different tart cherry products could be a handler seeking to establish sales of dried cherries in Germany, which is primarily a hot pack market. Board members and meeting participants discussed the favorable export market this season. Handlers have exports to many countries, including Italy, France, Belgium, Germany and The Netherlands and have enjoyed a significant increase in volume of exports into these countries. Handlers have indicated that exports of tart cherry products have increased significantly over previous years' exports. Board members indicated that last year's exports totaled about 10 million pounds. This year, handlers are expected to experience the largest volume of exports on record, estimated at up to 50 million pounds. Handlers have been able to expand existing export markets and establish new markets for the future. Board members also commented that hot pack product (canned tart cherries) have been shipped to export markets that have never received such product before. Contributing to their success is the excellent quality of this year's crop. Growers and handlers have experienced high quality fruit due to favorable growing conditions for tart cherries this season. This high quality fruit has resulted in high quality products which are very competitive in export markets. The availability of such high quality cherry products increases the likelihood of maintaining such markets in future seasons. Handlers also have experienced a growth in IQF (Individually Quick Frozen) sales in the export market this season. If handlers are not able to use this option, more product might be destroyed to avoid the possibility of processing and storage costs associated with placing cherries into an inventory reserve. Exports to Mexico, Canada, and Japan are not included in this exemption because, according to the Board, tart cherry markets are well established in those countries.

The fourth term which is defined is ''experimental purposes.'' Uses for experimental purposes include preliminary and/or developmental activities, such as a handler working with cereal companies to develop a cereal using dried cherries. Such experimental purposes should be intended to result in new products, new applications and/or new markets for existing tart cherry products. Any exemption for experimental purposes shall be limited in scope, duration, and volume which the applicant shall specify at the time a request for exemption is made. In no case shall an exemption for experimental purposes last longer than five years or exceed 100,000 pounds raw product equivalent per handler of tart cherries during the duration of the experiment. The Board has recommended that the five year or 100,000 pound raw product equivalent per handler limits are sufficient to determine whether such cherries for experimental purposes can be developed into new products or uses.

To qualify for an exemption under section 930.62, a handler must apply to the Board for a new exemption or for renewal of an existing exemption by November 1 for the next succeeding year. Handlers may apply for an exemption through February 5, 1998 for the 1997 year only, and by November 1 for subsequent crop years. These dates were changed from the Board's recommendation of June 1 in order to provide handlers ample time to harvest and assess their crop each year. When applying to the Board for an exemption, the handler must detail the nature of the product or market, how it differs from current, existing products and/or markets and the estimated short and long term sales volume for the exemption. In addition, in order to obtain diversion credit for cherries used for exempt purposes, the application must also contain an agreement that the proposed exempt use diversion is to be carried out under the supervision of the Board, and that the cost of any such supervision that is needed is to be paid by the applicant. The fees for such USDA or Board supervision, as previously stated, will be the current hourly rate of $41.00 under USDA's inspection fee schedule (7 CFR 54.42). The information which is provided will allow Board staff to assess the request for exemption and render a determination concerning its approval. Any information received by the Board which is of a confidential and/or proprietary nature would be protected from disclosure pursuant to section 930.73 of the order.

The Board discussed providing assistance to its staff with reviewing applications pertaining to exemptions. The Board recommended that a subcommittee be formed to assist staff members to ensure that exemptions are properly reviewed and granted. The Board suggested that a subcommittee of three persons, which could include the manager, a public member and one industry member who is not on the Board, be established. Handlers whose requests for exemption or renewal of exemption are denied would be able to appeal such denial to the Deputy Administrator, Fruit and Vegetable Programs.

Each handler that is granted an exemption must submit to the Board an annual progress report, due May 1 of each year. The progress report shall include the results of the exemption activity (comparison of intended activity with actual activity) for the year in its entirety, the volume of exempted fruit, an analysis of the success of the exemption program, and such other information the Board may request.

As previously discussed, the Board has recommended that exports to countries other than Canada, Mexico and Japan be exempted pursuant to § 930.62. The Board has also recommended that diversion credit be granted for such exports. Handlers wishing to receive diversion credit for exports must provide to the Board on-board bill of lading documentation or other documentation to verify export before the Board will issue diversion credit.

The Board will grant diversion credit for exempted products after it has received the necessary information concerning the particular exemption and when it is satisfied that the handler requesting the diversion credit has satisfied all the requirements relevant to the exemption. The Board recommended for the 1997 season (July 1, 1997 through June 30, 1998) only, that handlers receive diversion credit for up to one million pounds of exempted products per handler for new market development and new product development. The Board believes this will provide adequate flexibility for individual handlers to obtain diversion credit for exempt uses this season, but recommended providing some restriction on the absolute volume of such allowable diversions until more experience with the program has been obtained. However, the one million pound limit for exempted products per handler does not apply to handlers desiring to receive diversion credit for exports. As stated previously, this is the first season this program is in effect and handlers have exported or contracted to export tart cherry products. Some of these handlers may have shipped in excess of the one million pound limit. Allowing full diversion credit for the amount of product shipped abroad, will prevent both growers and handlers from incurring financial losses. The Board is continuing to review the issue of what limits to impose on exempted products.

Handlers desiring to receive diversion credit for donations to charitable organizations should follow the requirements specified in the regulations. For contributions to qualify for diversion credit, the contributed product should be marked clearly ''NOT

FOR RESALE''. The receiving organization must be approved by the Board as a qualified recipient of contributions of tart cherry products. Such organizations must be tax-exempt, must not sell the donated products and must be noncompetitive with other tart cherry industry sales outlets. Once products are donated to an organization, the Board must receive satisfactory documentation of the transaction. Handlers should provide the Board with information on how the product was used and the volume of product used.

Handlers desiring to receive diversion credit for cherries diverted under § 930.59, including uses exempt under § 930.62, but who fail to meet the terms and conditions in the regulation for such diversion would not receive diversion credit for the cherries or cherry products. Any cherries not properly diverted in accordance with Board Form No. 4 must be placed into the handler's secondary reserve if one has been established or the primary reserve if a secondary reserve has not been established. The primary reserve is the first reserve where handlers in volume regulated districts can place tart cherries or tart cherry products to hold from primary markets in order to meet restricted percentage obligations. The primary reserve is limited to a capacity of 50 million pounds. A secondary reserve is established only after the primary reserve has been filled to the 50 million pound capacity. The secondary reserve is where the balance of reserve cherries or cherry products are held. There is no maximum capacity for the secondary reserve. Both primary and secondary reserves are operated at the handler's expense and no cherries can be removed from the secondary reserve until the primary reserve has been depleted. Upon termination of an exemption, any volume of tart cherry products that were exempted from order requirements but which were not utilized should be placed into the secondary inventory reserve if one has been established, or into the primary reserve. It is the handler's responsibility to fulfill the restricted percentage obligations established by volume regulation. A handler may fulfill the restricted percentage obligation by either transferring cherries from his/her own inventory, purchasing additional cherries or cherry products or obtaining diversion certificates from other handlers to meet such obligation.

In addition to the recommendation already discussed, the Board, at its March meeting, also recommended that the Department modify the optimum supply formula by deducting exports from the calculation. The Department is not proceeding with this recommendation since the order promulgation record indicates that average sales should include sales to all markets, including exports.

At its meeting in March, when discussing exports, the Board also recommended that juice and juice concentrate, to countries other than Canada, Mexico, and Japan, receive diversion credit. During the production and processing of the crop, handlers have exported, or have contracted to export, tart cherry juice or juice concentrate for this season. Many of these exports were for the purpose of expanding existing markets or developing new markets. According to the Board, if diversion credit is not allowed for export juice or juice concentrate, some of these handlers could suffer substantial financial losses since they would have to pack or purchase additional cherries to place in their inventory reserves or default on contracts. These costs would likely be passed on to growers. Therefore, the Board recommended at its September 11–12, 1997, meeting that the proviso in § 930.59(b) of the order be suspended for this year only and that diversion credit for exports of juice and juice concentrate be allowed for the 1997–1998 crop year. The temporary suspension of the proviso for the 1997–98 crop year would allow handlers to receive diversion credit for juice and juice concentrate exported to countries other than Canada, Mexico and Japan.

New export sales of juice and juice concentrate this crop year are estimated to be in the range of 4–7 million pounds. While significant to the handlers making such sales, traditional sellers of juice and juice concentrate products in established domestic and export markets have not indicated any undue increase in competition. This is because the bulk of the new export sales of juice and juice concentrate probably represent sales to new markets or expansion of existing markets. Therefore, the Board has recommended that diversion credit be granted this crop year only to those handlers exporting juice and juice concentrate to eligible countries. This action is not intended to establish a precedent for future seasons. It will be used to correct any misunderstandings that have occurred in the industry about order operations concerning juice and juice concentrate, to prevent disorderly marketing conditions and unnecessary financial losses by handlers. Not proceeding with the suspension this season could result in disorderly marketing in the domestic market, since, in addition to the problems already mentioned, juice and juice concentrate intended for export would likely have to be sold domestically. This situation will be avoided in subsequent seasons since handlers should be fully aware of the order's restrictions.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this initial regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) would allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities. However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opt for such certification, but rather perform regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic impacts.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the order and approximately 1,220 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $500,000. The majority of handlers and producers of tart cherries may be classified as small entities.

Section 930.59 of the tart cherry marketing order provides authority for handler diversion. Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirements which may be in effect in full or in part through diversion of cherries or cherry products in a program approved by the Board, rather than placing cherries in an inventory reserve. Handlers can divert by destruction of

the cherries at the handler's facility, making charitable donations, and using cherries or cherry products for exempt purposes, or by redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board. Once diversion is satisfactorily accomplished, handlers will receive a diversion certificate stating the weight of cherries diverted. Such diversion certificates can be used to satisfy the handler's restricted percentage obligation. This enables handlers to either place cherries into an inventory reserve or select the diversion option most advantageous to their particular business operation. Costs for supervision of such actions will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision is to be paid by the handler. USDA inspectors will supervise diversion of cherry products at the current hourly rate of $41.00 under USDA's inspection fee schedule (7 CFR 54.42). Board employees will supervise diversion at the same rate. Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with rules and regulations governing the issuance of grower diversion certificates (§ 930.100, 62 FR 44881, August 25, 1997). Diversion by means other than destruction of cherries at handlers' facilities would also be subject to supervision as found necessary by the Board. Fees would be charged as discussed above. Providing such options allows handlers to minimize processing and storage costs associated with meeting restricted percentage obligations. Such cost savings may also be passed on to growers and consumers. Thus, providing these options accomplishes the purposes of the order and the Act.

The Board also recommended granting handlers diversion credit for cherries used for exempt purposes under section 930.62. Those purposes include cherries used for new product development, for the development of export markets, for experimental purposes, and the export of cherries and cherry products, including juice or juice concentrate, to approved countries.

In order to provide for juice and juice concentrate as a diversion outlet, the Board recommended that the proviso under § 930.59 (b) of the order be suspended. Therefore, this rule temporarily suspends language in the proviso under § 930.59 (b) of the order. The suspension would temporarily remove a prohibition against allowing diversion credit for juice and juice concentrate for this crop year only. However, the Board would only grant diversion credit for juice or juice concentrate exported to eligible countries. The Board recommended this suspension be used to correct any misunderstandings that have occurred in the industry about order operations concerning juice and juice concentrate, to prevent disorderly marketing conditions and unnecessary financial losses by handlers.

The temporary suspension of the juice and juice concentrate proviso was discussed at the most recent Board meeting. It was the Board's view that if the proviso is not suspended, affected handlers will have to expend additional funds to meet their restricted obligations by placing products that they could have sold in export markets into an inventory reserve or at-plant divert. The costs of these actions would likely be passed on to growers.

New export sales of juice and juice concentrate this crop year are estimated to be in the range of 4–7 million pounds. While significant to the handlers making such sales, traditional sellers of juice and juice concentrate products in established domestic and export markets have not indicated any undue increase in competition this season. This is because the bulk of the new export sales of juice and juice concentrate probably represent sales to new markets or expansion of existing markets, rather than an increase in competition among sellers for previously developed markets. As previously stated, handlers have indicated that exports of tart cherry products have increased significantly over previous years' exports. Board members indicated that last year's exports totaled about 10 million pounds. This year, handlers are expected to experience the largest volume of exports on record, estimated at up to 50 million pounds. Handlers have been able to expand existing export markets and establish new markets for the future. Board members also commented that hot pack product (canned tart cherries) have been shipped to export markets that have never received such product before. Contributing to their success is the excellent quality of this year's crop. Growers and handlers have experienced high quality fruit due to favorable growing conditions for tart cherries this season. This high quality fruit has resulted in high quality products which are very competitive in export markets. The availability of such high quality cherry products increases the likelihood of maintaining such markets in future seasons. Not proceeding with the suspension this season could result in disorderly marketing in the domestic market.

The impact of this rule would be beneficial to growers and handlers. Authorizing various diversion outlets and allowing diversion credit for exempt uses means handlers will not be required to divert excess cherries at their plants. Instead, fruit can be processed into a usable form, thereby promoting the development of new products and the expansion of new markets for tart cherries. Authorizing exemptions for various uses of tart cherries should also promote such market development and expansion, as well as making cherries available for charitable purposes. Suspending an order provision for this season only will allow handlers to take advantage of export markets and obtain diversion credit for such exports, increasing the utilization of this season's crop and grower and handler returns.

The Board considered alternatives to these recommendations. With respect to handler diversion and diversion credit for exempt uses, if volume regulation is imposed this season and diversion credits are not granted, handlers would have to divert cherries by other means or place cherries in an inventory reserve, which may not be desirable for some handlers since storage costs of the reserve are borne by the handler. For example, the Board discussed not granting handlers diversion credit for at-plant diversion. However, the Board felt that providing such a diversion option increased handler flexibility to process and pack the best cherries available during a year when volume regulation is in effect and to reduce the costs of processing and storing reserve cherries.

The Board also discussed not granting exemptions, and diversion credit for such exemptions, for exports to eligible countries (including juice and juice concentrate), other exempt uses, and charitable donations. However, the Board felt this would not be in the best interest of the industry or the public. As previously discussed, the Board expressed that not allowing the export and other exemptions would have a detrimental effect on the market this season if free and restricted percentages are imposed. Without such exemptions and diversion credits for export sales, new market development and other specified uses, about 50 million pounds of cherries would not be removed from

the domestic market this season, depressing grower returns for all cherries. The marketing order was designed to increase grower returns by stabilizing supplies with demand as well as stabilizing prices and creating a more orderly and predictable marketing environment. Expanding markets and developing new products is key to meeting this marketing order's goals.

Not granting exemptions and diversion credit for exports to countries other than Canada, Mexico, and Japan was also discussed at Board meetings. However, the Board expressed that this recommendation is very important to creating stable conditions in the export marketplace this season and would encourage future market growth. The Board further stated that such action will improve returns to growers because of the tremendous growth in the export market this season.

This rule imposes certain reporting and recordkeeping requirements on tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department has not identified any relevant Federal rules which duplicate, overlap or conflict with this rule.

Paperwork Reduction

In compliance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements imposed by the order have been previously approved by OMB and assigned OMB Number 0581–0177. This includes the requirements contained in this regulation (i.e. progress reports, applications). The components of the Handler Reserve Plan and Final Pack Report which handlers must submit to utilize at-plant and exempt use diversion and the requirements for other reports related to handler diversion and handlers meeting their restricted percentage obligations (i.e., Inventory Reserve Summary, Cherries Acquired from Producers, Handler Reserve Plan and Final Pack Report, and Inventory Location Report) have received approval by OMB. It was anticipated that as many as 45 handlers might be regulated if volume regulations are established. Many reports are submitted a single time each season, while some are submitted more frequently. In addition, the bulk of the information handlers must report is obtained during the normal course of their business operations. It would take handlers approximately 15 minutes per report to complete for a total of 60 minutes per handler and approximately 2,700 minutes annually for the estimated 45 handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Board's meetings were widely publicized throughout the tart cherry industry and all interested persons were invited to attend them and participate in Board deliberations. Like all Board meetings, the March, June, and September 1997, meetings were public meetings and all entities, both large and small, were able to express their views on these issues. The Board itself is composed of 18 members, of which 17 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review certain issues and make recommendations. The Board's Diversion Subcommittee met on March 12, 1997, and discussed handler diversion in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views. A majority of these entities expressed that, in their opinion, the recommendations made by the Board would have a positive impact on both small and large entities. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

Pursuant to section 930.50 of the order, the Board met on June 26–27, 1997, to formulate a 1997–98 marketing policy using a USDA crop estimate of 242 million pounds. The Board met on September 11–12, 1997, and revised its marketing policy based on actual 1997–98 tart cherry production of 284 million pounds.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is also found that, for the 1997–98 crop year only, the proviso under § 930.59(b), which prohibits handlers from receiving diversion credit for juice and juice concentrate, should be suspended since such proviso does not tend to effectuate the declared policy of the Act.

This rule invites comments on the establishment of rules and regulations for handler diversion and granting exemptions from certain order provisions, allowing diversion credit for exempt uses and charitable donations, the suspension of an order provision in section 930.59(b), and the possible impacts of these actions on both small and large entities.

Pursuant to 5 U.S.C. 553, it is found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This is the first season the marketing order has been in effect and regulations are needed to implement its authorities; (2) these rules need to be in place this season since the industry is marketing its crop currently and that the crop year began on July 1, 1997; (3) the Board unanimously recommended these changes at public meetings and interested parties had an opportunity to provide input; (4) handlers need to know the procedures in order to operate their plants this season; and (5) this rule provides a 30-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 930

Marketing agreements, Tart cherries, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 930.59 [Amended]

2. In § 930.59, paragraph (b) the words, ''*Provided, That* diversion may not be accomplished by converting cherries into juice or juice concentrate'' are suspended through June 30, 1998.

3. A new § 930.159 is added to read as follows:

§ 930.159 Handler diversion.

(a) *Methods of diversion.* Handlers may divert cherries by redeeming grower diversion certificates, by destroying cherries at handlers' facilities (at-plant), by donating cherries or cherry products to Board approved charitable organizations, or by using cherries or cherry products for exempt purposes

under § 930.162, including export to countries other than Canada, Mexico and Japan. Once diversion is satisfactorily accomplished, handlers will receive diversion certificates stating the weight of cherries diverted. Diversion credit may be used to fulfill any restricted percentage requirement in full or in part. Any information received of a confidential and/or proprietary nature pursuant to this section will be protected from disclosure pursuant to § 930.73 of the order.

(b) *Board notification and handler plan.* Any handler intending to divert cherries or cherry products pursuant to § 930.59 of the order (except through exempt uses under § 930.62 of the order) must notify the Board of such intent and provide a plan by November 1 which shows how the handler intends to meet the restricted percentage obligation, except that, for the 1997–98 season only, the deadline is February 5, 1998. The Board may extend this date in individual cases pursuant to a written request showing good cause why the plan cannot be provided by the due date. A handler will have one year to fulfill such plan. The details of the plan shall include, but not be limited to, the name and address of the handler, the total product processed at-plant, product diverted at-plant, in-orchard diversion certificates redeemed, anticipated donations to charitable outlets, disposition to exempt outlets or uses and detailed plans for how and where such disposition will be made, and inventory reserve amount. It shall also contain an agreement that the proposed diversion is to be carried out under the supervision of the Board and that the cost of such supervision is to be paid by the handler. Supervision of diversion by means other than destruction of the cherries at a handler's facility will be subject to supervision as found necessary by the Board. USDA inspectors or Board employees will supervise diversion of cherry products at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42). Any cherries not diverted in accordance with the handler's plan will be placed into the secondary inventory reserve or the primary inventory reserve if a secondary inventory reserve has not been established.

(c) *At-plant diversion.* Diversion by disposal at-plant will take place prior to placing the cherries into the processing line. Such diversion will take place under the supervision of USDA Inspection Service or Board employee inspectors. USDA inspectors or Board employees will supervise diversion of cherry products at-plant at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42).

(d) *Contributions to approved charitable organizations.* When diverting by donating cherries or cherry products to charitable organizations, handlers should follow the requirements specified herein. For contributions to qualify for diversion credit, the contributed product should be marked clearly ''NOT FOR RESALE''. The receiving organization must be approved by the Board as a qualified recipient of contributions of tart cherry products. Such organizations must be tax-exempt, must not sell the donated products and must be noncompetitive with other tart cherry industry sales outlets. Once products are donated to an organization, the Board must receive satisfactory documentation of the transaction. Handlers should provide the Board with information on how the product was used and the volume of product used.

(e) *Grower diversion certificates.* To satisfy restricted percentage obligations by redeeming grower diversion certificates handlers must present to the Board grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with the applicable rules and regulations governing the issuance of grower diversion certificates. For this crop year July 1, 1997, through June 30, 1998, grower diversion certificates will be valid until February 5, 1998.

(f) *Exempt uses.* To receive diversion credit for cherries used for exempt purposes, handlers must meet the terms and conditions specified in § 930.162. Each handler may receive diversion credit for up to one million pounds of exempted products each crop year, except that, for the 1997 season only, the one million pound exemption limitation for diversion credit does not apply to handlers exporting juice or juice concentrate.

4. A new § 930.162 is added to read as follows:

§ 930.162 Exemptions.

(a) *General.* Tart cherries which are used for the purpose of new product development, for new market development, for development of export markets, for experimental purposes, for export (including juice, juice concentrate or puree, for the 1997–98 crop year only) to countries other than Canada, Mexico and Japan, or which are donated to charitable organizations may be granted an exemption by the Board and will be exempt from §§ 930.41, 930.44, 930.51, 930.53, and §§ 930.55 through 930.57, subject to the following terms and conditions. Any information received of a confidential and/or proprietary nature included in this application will be protected from disclosure pursuant to § 930.73 of the order.

(b) *Definitions.* The terms in paragraph (a) of this section shall have the following meaning:

(1) *New product development.* The development of new tart cherry products or of foods or other products in which tart cherries or tart cherry products are incorporated which are not presently being produced on a commercial basis. New product development can also include the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry. Once total industry utilization for a new product exceeds 2 percent of the five year average production of tart cherries, the product shall no longer be considered under development and not eligible for a new product development exemption.

(2) *New market development.* The development of markets for tart cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry (including the development of new export markets). A new market becomes commercially established, when total industry utilization in the market exceeds 2 percent of the five year average production of tart cherries.

(3) *Development of export markets.* The sale of cherries or cherry products, including the development of sales for new or different tart cherry products or the expansion of sales for existing tart cherry products, to countries other than Canada, Mexico, and Japan: *Provided,* That such cherry products cannot include juice or juice concentrate: *Provided further,* That the exclusion of juice or juice concentrate shall not apply for the 1997 season only (through June 30, 1998).

(4) *Experimental purposes.* The use of cherries or cherry products in preliminary and/or developmental activities intended to result in new products, new applications and/or new markets for tart cherry products. Any exemption for experimental work shall be limited in scope, duration and volume based on information supplied by the applicant at the time a request for exemption is made. In no case shall an individual exemption for experimental purposes last longer than five years or exceed 100,000 pounds raw product equivalent of tart cherries.

(c) *Obtaining approval for exempt uses.* In order to receive exemptions for cherries or cherry products utilized for exempt purposes, handlers must apply to the Board for a new exemption or for renewal of an existing exemption by November 1 for the next succeeding year, except for the 1997 year only, handlers may apply through February 5, 1998. A handler shall have one crop year to dispose of cherries or cherry products to exempt outlets approved by the Board, unless granted a renewal. Handlers applying to the Board for a new exemption or for renewal of an existing exemption are subject to the following conditions:

(1) When applying to the Board for an exemption for new product development, handlers must detail the nature of their new product, how it differs from current, existing products and the anticipated short and long term sales volume for the exemption. It will be the Board staff's responsibility to analyze and investigate any request and upon completion of that analysis authorize or deny the exemption.

(2) When applying to the Board for an exemption for new market development, handlers must detail the nature of their new market, how it differs from current, existing markets and the anticipated short and long term sales volume for the exemption. It will be the Board staff's responsibility to analyze and investigate any request and upon completion of that analysis authorize or deny the exemption.

(3) When applying to the Board for an exemption for the development of export markets for tart cherries or cherry products (including juice and juice concentrate through June 30, 1998 only) in countries other than Canada, Mexico and Japan, including the expansion of sales in existing export markets, handlers must detail the nature of their product, specify whether such product differs from current products being sold in export markets, and estimate the anticipated short and long term sales volumes for the requested exemption.

(4) When applying to the Board for an exemption for experimental purposes, handlers must indicate the preliminary and/or developmental experimental activity. Such experimental purposes should be intended to result in new products, new applications and/or new markets for existing tart cherry products. Any exemption for experimental work shall be limited in scope, duration and volume which the proposing party shall specify at the time a request for exemption is made. In no case shall an exemption for experimental purposes last longer than five years or exceed 100,000 pounds raw product equivalent per handler of tart cherries during the duration of the experiment.

(d) *Review of applications.* A Board appointed subcommittee of three persons which shall include the manager (or a Board member acting in the Manager's stead), the public member and one industry person who is not on the Board, shall review applications for exemption or renewal of exemption and either approve or deny the exemption. Any denial of an application for exemption or renewal of an existing exemption shall be served on the applicant by certified mail and shall state the reasons for the denial. Within 10 days after the receipt of a denial, the applicant may file an appeal, in writing, with the Deputy Administrator, Fruit and Vegetable Programs, supported by any arguments and evidence the applicant may wish to offer as to why the application for exemption or renewal of exemption should have been approved. The Deputy Administrator upon consideration of such appeal will take such action as deemed appropriate with respect to the application for exemption or renewal of exemption.

(e) *Progress report.* Each handler that is granted an exemption must submit to the Board an annual progress report, due May 1 of each crop year. The progress report shall include the results of the exemption activity (comparison of intended activity with actual activity) for the year in its entirety, the volume of exempted fruit, an analysis of the success of the exemption program, and such other information as the Board may request.

(f) *Diversion credit; failure to meet terms and conditions of exemption.* Handler diversion certificates for exempt uses shall be issued to handlers provided that terms and conditions applicable to exempt uses are satisfied. Diversion certificates will not be issued to handlers for any volume of tart cherry products for which such terms and conditions are not satisfied and such cherries would be subject to all of the terms and conditions of §§ 930.41, 930.44, 930.51, 930.53, and §§ 930.55 through 930.57.

(g) *Failure to meet terms and conditions for exemption.* Upon termination of an exemption, any volume of tart cherry products that were granted an exemption but were not utilized for the authorized exempt purpose would be subject to all of the terms and conditions of §§ 930.41, 930.44, 930.51, 930.53, and §§ 930.55 through 930.57.

Dated: December 30, 1997.

Enrique E. Figueroa,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 98–283 Filed 1–5–98; 8:45 am]

BILLING CODE 3410–02–U

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 94 and 96

[Docket No. 97–127–1]

Restrictions on the Importation of Ruminants, Meat and Meat Products From Ruminants, and Certain Other Ruminant Products

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the regulations governing the importation into the United States of ruminants, meat and meat products from ruminants, and other ruminant products to restrict the importation of live ruminants, meat and meat products from ruminants, and certain other ruminant products from countries in which bovine spongiform encephalopathy (BSE) may exist. This action is necessary to ensure that animals and animal products affected with BSE are not imported into the United States.

DATES: Interim rule effective December 12, 1997. Consideration will be given only to comments received on or before March 9, 1998.

ADDRESSES: Please send an original and three copies of your comments to Docket No. 97–127–1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 97–127–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Dr. Julia Sturm, Supervisory Staff Veterinarian, Products Program, National Center for Import and Export, VS, APHIS, USDA Center, Unit 40, 4700 River Road, Riverdale, MD 20737–1231, (301) 734–3399.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR parts 92, 93, 94, 95, and 96 (referred to below as the regulations) govern the importation of certain animals, birds, poultry, meat, other animal products and byproducts, hay, and straw into the United States in order to prevent the introduction of various animal diseases, including bovine spongiform encephalopathy (BSE).

BSE is a neurological disease of bovine animals and other ruminants and is not known to exist in the United States.

It appears that BSE is primarily spread through the use of ruminant feed containing protein and other products from ruminants infected with BSE. Therefore, BSE could become established in the United States if materials carrying the BSE agent, such as certain meat and other animal products and byproducts from ruminants infected with BSE, are imported into the United States and are fed to ruminants in the United States. BSE could also become established in the United States if ruminants from countries or other regions in which BSE exists are imported.

Sections 94.18, 95.4, and 96.2 of the regulations prohibit or restrict the importation of certain meat and other animal products and byproducts from ruminants that have been in regions in which BSE exists. These regions, which currently consist only of countries, are listed in § 94.18 of the regulations. Furthermore, § 93.404(a)(3) states that the Animal and Plant Health Inspection Service (APHIS) may deny the importation of ruminants from regions where a communicable disease such as BSE exists. The current regulations at § 94.18(a) list the following countries as regions in which BSE exists: Belgium, France, Great Britain, Northern Ireland, the Republic of Ireland, Luxembourg, The Netherlands, Oman, Portugal, and Switzerland.

We now consider it necessary to restrict the importation of ruminants, meat and meat products from ruminants, and certain ruminant products and byproducts not only from countries and other regions in which BSE is known to exist, but also from countries and other regions which, because of import requirements less restrictive than those that would be acceptable for import into the United States and/or because of inadequate surveillance, present a significant risk of introducing BSE. Specifically, we consider it necessary to apply these restrictions to all countries of Europe. In addition to the countries listed above, we are applying such restrictions to Albania, Austria, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, the Federal Republic of Yugoslavia, Finland, Germany, Greece, Hungary, Italy, the former Yugoslav Republic of Macedonia, Norway, Poland, Romania, the Slovak Republic, Slovenia, Spain, and Sweden.

Additionally, in this rule, in the list of regions in which BSE exists, we are including Great Britain and Northern Ireland under ''United Kingdom,'' which also encompass The Falklands.

Reasons for New Restrictions

Our decision to establish the restrictions set forth in this interim rule is based on recent developments in Europe that lead us to believe that the BSE agent may be present, but as yet undetected, throughout Europe. The Netherlands, Belgium, and Luxembourg have recently reported their first cases of BSE in native-born cattle. Additionally, Belgium and Luxembourg have reported that cattle diagnosed with BSE were inadvertently processed into the animal food chain. Because of the movement of ruminants and ruminant products within Europe, the possibility exists that this potentially contaminated animal feed may have been moved from Belgium and Luxembourg to other European countries.

We consider the risk posed by this potential movement to be especially great in light of new scientific research that has identified BSE infectivity in bone marrow, dorsal root ganglion, and trigeminal ganglion. This new research expands the list of specific bovine tissues and organs of concern for BSE infectively. Previously, the list included only terminal (distal) ileum, brain, eye (retina), and spinal cord. Based on ongoing research, it appears likely that other tissues may contain the BSE infectious agent.

Therefore, we are amending the list in § 94.18(a) to include the countries discussed above. Due to the research findings that additional tissues may contain the BSE infectious agent, we are also amending § 94.18(b) to remove an exception that allowed fresh, frozen, and chilled meat and meat products to be imported into the United States from countries listed in § 94.18(a) if the meat was deboned, free of visually identifiable lymphatic and nerve tissue, and met certain other requirements.

In part 96 of the regulations, § 96.2(b) prohibits the importation of bovine casing, except stomachs, that originated in or were processed in any country where BSE exists, as listed in existing § 94.18(a). In this interim rule, we are rewording that reference in § 96.2(b) so that it also encompasses the countries we are adding to § 94.18(a) in this interim rule, and are changing the heading to the section accordingly. Additionally, we are expanding the prohibition on casings to include those from both bovines and other ruminants.

Because the following products present a minimal risk of BSE transmission, we have not been prohibiting their importation from BSE-affected countries under the existing regulations, and we are excluding them from the restrictions established by this interim rule: semen, milk and milk products, hides and skins, tallow and tallow derivatives, and certain blood products used in microbiologic media.

Procedures for Requesting Removal of Restrictions

In § 94.18(a)(3) of this rule, we provide that countries or other regions that wish to request removal from the list of regions considered high risk for BSE must submit to APHIS certain information described in § 92.2 of the regulations. This information is as follows:

1. The authority, organization, and infrastructure of the veterinary services organization in the region (country).
2. Disease status—i.e., is the BSE agent known to exist in the region? If ''yes,'' at what prevalence? If ''no,'' ''when was the most recent diagnosis?
3. The status of adjacent regions with respect to the agent.
4. The extent of an active disease control program, if any, if the agent is known to exist in the region.
5. The degree to which the region is separated from regions of higher risk through physical or other barriers.
6. The extent to which movement of animals and animal products is controlled from regions of higher risk, and the level of biosecurity regarding such movements.
7. Livestock demographics and marketing practices in the region.
8. The type and extent of disease surveillance in the region—e.g., is it passive and/or active; what is the quantity and quality of sampling and testing?
9. Diagnostic laboratory capabilities.
10. Policies and infrastructure for animal disease control in the region—i.e., emergency response capacity.

Emergency Action

The Administrator of the Animal and Plant Health Inspection Service has determined that an emergency exists that warrants publication of this interim rule without prior opportunity for public comment. We are making this

action effective retroactively to December 12, 1997, which is the date APHIS issued a policy stating it had stopped issuing import permits for the live ruminants and ruminant products and byproducts covered by this interim rule. This effective date is necessary to ensure that ruminant and ruminant products and byproducts infected with BSE are not imported into the United States.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 533 to make the rule effective December 12, 1997. We will consider comments that are received within 60 days of publication of this rule in the **Federal Register**. After the comment period closes, we will publish another document in the **Federal Register**. It will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

This emergency situation makes compliance with section 603 and timely compliance with section 604 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) impracticable. If we determine this rule would have a significant economic impact on a substantial number of small entities, then we will discuss the issues raised by section 604 of the Regulatory Flexibility Act in our Final Regulatory Flexibility Analysis.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has retroactive effect to December 12, 1997; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB), and there are no new requirements. The assigned OMB control number is 0579–0040.

List of Subjects

9 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

9 CFR Part 96

Imports, Livestock, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR, chapter I, subchapter D, as follows:

PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY; PROHIBITED AND RESTRICTED IMPORTATIONS

1. The authority citation for part 94 continues to read as follows:

Authority: 7 U.S.C. 147a, 150ee, 161, 162, and 450; 19 U.S.C. 1306, 21 U.S.C. 111, 114a, 134a, 134b, 134c, 134f, 136, and 136a; 31 U.S.C. 9701; 42 U.S.C. 4331 and 4332; 7 CFR 2.22, 2.80, and 371.2(d).

§ 94.18 [Amended]

2. Section 94.18 is amended by revising the heading to the section and paragraphs (a) and (b) to read as follows:

§ 94.18 Restrictions on importation of meat and edible products from ruminants due to bovine spongiform encephalopathy.

(a)(1) Bovine spongiform encephalopathy exists in the following regions: Belgium, France, the Republic of Ireland, Luxembourg, Oman, The Netherlands, Portugal, Switzerland, and the United Kingdom.

(2) The following regions, because of import requirements less restrictive than those that would be acceptable for import into the United States and/or because of inadequate surveillance, present and undue risk of introducing bovine spongiform encephalopathy into the United States: Albania, Austria, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, the Federal Republic of Yugoslavia, Finland, Germany, Greece, Hungary, Italy, the Former Yugoslav Republic of Macedonia, Norway, Poland, Romania, the Slovak Republic, Slovenia, Spain, and Sweden.

(3) A region may request at any time that the Administrator considers its removal from a list set forth in paragraphs (a)(1) or (a)(2) of this section by following the procedures set forth §§ 92.2(b) (1) through (4), 92.2(b) (5) through (11), and 92.2(c) of this chapter.

(b) Except as provided in paragraph (d) of this section, the importation of fresh, frozen, and chilled meat, meat products, and edible products other than meat (excluding gelatin, milk, and milk products), from ruminant that have been in any of the countries listed in paragraph (a) of this section is prohibited.

* * * * *

PART 96—RESTRICTION OF IMPORTATIONS OF FOREIGN ANIMAL CASINGS OFFERED FOR ENTRY INTO THE UNITED STATES

3. The authority citation for part 96 continues to read as follows:

Authority: 21 U.S.C. 111, 136, 136a; 7 CFR 2.22, 2.80, and 371.2(d).

§ 96.2 [Amended]

4. Section 96.2 is amended by revising the heading to the section and paragraph (b) to read as follows:

§ 96.2 Prohibition of casings due to African swine fever and bovine spongiform encephalopathy.

* * * * *

(b) The importation of casings, except stomachs, from bovines and other ruminants that orginated in or were processed in any region listed in § 94.18(a) of this subchapter is prohibited.

Done in Washington, DC, this 31st day of December 1997.

Joan M. Arnoldi,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 98–266 Filed 1–5–98; 8:45 am]

BILLING CODE 3410–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510, 520, and 558

New Animal Drugs and Related Products; Change of Sponsor; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a document that appeared in the **Federal Register** of October 23, 1997 (62 FR 55159). The document amended the animal drug regulations to reflect a change of sponsor for three new animal drug applications (NADA's) and three abbreviated new animal drug applications (ANADA's) from Wade-Jones Co., Inc., and its manufacturing subsidiary Arkansas Micro Specialties,

Inc., to Alpharma Inc. The document was published with two inadvertent errors. This document corrects those errors.

EFFECTIVE DATE: January 6, 1998.

FOR FURTHER INFORMATION CONTACT: Judith O'Haro, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–3664.

SUPPLEMENTARY INFORMATION: In FR Doc. 97–28011, appearing on page 55159, in the **Federal Register** of Thursday, October 23, 1997, the following corrections are made:

On page 55159, in the third column, in the **SUMMARY** paragraph, in lines five and six, the phrase ''three abbreviated new animal drug applications (ANADA's)'' is corrected to read ''two abbreviated new animal drug applications (ANADA's)'' and on the same page, the table is corrected by removing the last entry.

Dated: December 22, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–152 Filed 1-5-98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8752]

RIN 1545–AU67

Reorganizations/ Treatment of Warrants as Securities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that in certain instances provide for nonrecognition of gain or loss on the receipt, in pursuance of a reorganization, of rights to acquire stock of a corporation that is a party to the reorganization. These regulations change the existing rules for such rights under sections 354, 355, and 356 of the Internal Revenue Code. These regulations will affect holders of these rights who are involved in corporate reorganizations under sections 355 and 368.

DATES: These regulations are effective March 9, 1998.

FOR FURTHER INFORMATION CONTACT: Michael J. Danbury, (202) 622–7750 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 23, 1996, the IRS and Treasury Department published a notice of proposed rulemaking (REG–249819–96) in the **Federal Register** (61 FR 67508) containing proposed amendments to the Income Tax Regulations (26 CFR part 1) under sections 354, 355, and 356, relating to exchanges of stock and securities in certain reorganizations and corporate divisions. Written and oral comments responding to this notice were received. There were no requests to attend a public hearing and none was held. After consideration of all comments received, the proposed amendments are adopted as revised by this Treasury decision. The principal changes to the regulations, as well as the major comments and suggestions, are discussed below.

Explanation of Provisions

A. The Proposed Regulations

In general, sections 354, 355, and 356 provide for nonrecognition of gain or loss, in whole or in part, to a stockholder or security holder on the exchange of stock or securities of parties to a reorganization and in pursuance of a plan of reorganization.

The proposed regulations would extend the nonrecognition rule of sections 354, 355, and 356 to certain rights to acquire stock. Thus, for purposes of sections 354, 355, and 356, the proposed regulations would treat rights to acquire stock issued by a corporation that is a party to a reorganization as securities of the corporation with no principal amount. The preamble to the proposed regulations provided that, for this purpose, the term *rights to acquire stock* issued by that corporation would have the same meaning as the term has in sections 305(d)(1) and 317(a). In addition, the preamble stated that the proposed regulations would have no effect on other Internal Revenue Code rules that pertain to securities, including sections 83 and 421 through 424 and the regulations thereunder.

B. Comments on the Proposed Regulations

1. Elaboration on the Definition of ''Rights To Acquire Stock''

Commentators recommended that the final regulations include an explicit definition of *rights to acquire stock*. They submitted particular examples for inclusion in the definition.

The final regulations add a cross-reference to sections 305 and 317(a) in defining *rights to acquire stock*. This cross-reference should provide sufficient guidance in most cases for taxpayers to determine the consequences on a receipt of rights. The IRS and Treasury believe that illustrating the terms of sections 305 and 317 is outside the scope of these regulations. Accordingly, the final regulations provide no definition other than the cross-reference.

2. Treatment of Stock-for-Warrant Exchanges

Section 1.354–1(d), *Example 3*, states that section 354 does not apply to a shareholder's receipt of solely debt securities in exchange for stock. Commentators requested confirmation that section 354 also does not apply to a shareholder's receipt of solely securities that are rights to acquire stock in exchange for stock. The final regulations confirm this result in *Example 4* to § 1.354–1(d).

3. Effective Date

These final regulations are effective March 9, 1998. This accords with the delayed effective date in the proposed regulations. Commentators requested more immediate effectiveness.

The IRS and Treasury are concerned that taxpayers who have planned transactions based on the proposed regulations' delayed effective date could be disadvantaged by a change in the effective date. Accordingly, the final regulations retain the delayed effective date.

4. Interrelationship With Section 83

The preamble to the proposed regulations noted that the rules would apply to rights to acquire stock only for purposes of sections 354 through 356, and that such rights may remain subject to other special rules under the Internal Revenue Code and the regulations including sections 83 and 421 through 424.

Commentators recommended an explicit statement to that effect in the final regulations. The regulations adopt this recommendation.

5. Effect in ''B'' Reorganizations

Commentators requested a review of published guidance that concerns exchanges of rights to acquire stock as part of a larger transaction that includes a stock-for-stock reorganization under section 368(a)(1)(B). The IRS intends to address this issue in the near future.

6. No Principal Amount

Commentators sought clarification of the proposed rule that rights to acquire stock would have no principal amount.

The IRS and Treasury add *Examples 7, 8, and 9* to § 1.356–3(b) to illustrate the effect of a right to acquire stock having no principal amount.

7. Comments Not Addressed in the Final Regulations

Comments were received with regard to the tax issues of rights to acquire stock under sections 302, 305, 306, and 351. Resolution of these issues is beyond the scope of this project and they are not addressed herein.

8. Interrelationship With Nonqualified Preferred Stock Provisions

In connection with the finalization of these regulations, the IRS and Treasury became aware that additional rules were needed to coordinate these regulations with the treatment of rights to acquire nonqualified preferred stock and new sections 354(a)(2)(C), 355(a)(3)(D), and 356(e). See § 1.356–6T (TD 8753) published elsewhere in this issue of the **Federal Register**.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose a collection of information requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information: The principal author of these regulations is Michael J. Danbury of the Office of Assistant Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par 2. Section 1.354–1 is amended by:

1. In paragraph (d), redesignating *Example (1)* through *Example (3)* as *Example 1* through *Example 3*.

2. Adding *Example 4* to paragraph (d).

3. Revising paragraph (e).

The addition and revision read as follows:

§ 1.354–1 Exchanges of stock and securities in certain reorganizations.

* * * * *

(d) * * *

Example 4. The facts are the same as in *Example 3* of this paragraph (d), except that C receives solely rights to acquire stock in Corporation Z. Section 354 does not apply.

(e) Except as provided in § 1.356–6T, for purposes of section 354, the term *securities* includes rights issued by a party to the reorganization to acquire its stock. For purposes of this section and section 356(d)(2)(B), a right to acquire stock has no principal amount. For this purpose, rights to acquire stock has the same meaning as it does under sections 305 and 317(a). Other Internal Revenue Code provisions governing the treatment of rights to acquire stock may also apply to certain exchanges occurring in connection with a reorganization. See, for example, sections 83 and 421 through 424 and the regulations thereunder. This paragraph (e) applies to exchanges occurring on or after March 9, 1998.

Par 3. Section 1.355–1 is amended by removing the last sentence of paragraph (b) and adding paragraph (c) to read as follows:

§ 1.355–1 Distribution of stock and securities of a controlled corporation.

* * * * *

(c) *Stock rights.* Except as provided in § 1.356–6T, for purposes of section 355, the term *securities* includes rights issued by the distributing corporation or the controlled corporation to acquire the stock of that corporation. For purposes of this section and section 356(d)(2)(B), a right to acquire stock has no principal amount. For this purpose, rights to acquire stock has the same meaning as it does under sections 305 and 317(a). Other Internal Revenue Code provisions governing the treatment of rights to acquire stock may also apply to certain distributions occurring in connection with a transaction described in section 355. See, for example, sections 83 and 421 through 424 and the regulations thereunder. This paragraph (c) applies to distributions occurring on or after March 9, 1998.

Par 4. Section 1.356–3 is amended by:

1. Redesignating paragraph (b) as paragraph (c).

2. Adding a new paragraph (b).

3. In newly designated paragraph (c), redesignating *Example (1)* through *Example (6)* as *Example 1* through *Example 6*.

4. Revising paragraph (c) introductory text.

5. Adding *Example 7* through *Example 9* to paragraph (c).

The revisions and additions read as follows:

§ 1.356–3 Rules for treatment of securities as ''other property.''

* * * * *

(b) Except as provided in § 1.356–6T, for purposes of this section, a right to acquire stock that is treated as a security for purposes of section 354 or 355 has no principal amount. Thus, such right is not other property when received in a transaction to which section 356 applies (regardless of whether securities are surrendered in the exchange). This paragraph (b) applies to transactions occurring on or after March 9, 1998.

(c) In the examples in this paragraph (c), stock means common stock and *warrants* means rights to acquire common stock. The following examples illustrate the rules of paragraph (a) of this section:

* * * * *

Example 7. G, an individual, exchanged stock for stock and a warrant. The warrant had no principal amount. Thus, G received no excess principal amount within the meaning of section 356(d).

Example 8. H, an individual, exchanged a warrant for stock and a warrant. The warrants had no principal amount. Thus, H received no excess principal amount within the meaning of section 356(d).

Example 9. I, an individual, exchanged a warrant for stock and a debt security. The warrant had no principal amount. The debt security had a $100 principal amount. I received $100 of excess principal amount within the meaning of section 356(d).

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

Approved: December 17, 1997.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 98–5 Filed 1–5–98; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8753]

RIN 1545–AV85

Reorganizations; Nonqualified Preferred Stock

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains a temporary regulation providing guidance under section 356(e) of the Internal Revenue Code (Code) on when nonqualified preferred stock (as defined in section 351(g)(2)) will not be treated as stock or securities for purposes of sections 354, 355, and 356 of the Code. The guidance also addresses the treatment of the receipt of a right to acquire nonqualified preferred stock. The temporary regulation provides that in some circumstances the terms *stock* and *securities* will not include nonqualified preferred stock, or a right to acquire such stock, when received in exchange for stock or rights to acquire stock. The text of this temporary regulation also serves as the text of the proposed regulation set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: This regulation is effective March 9, 1998.

FOR FURTHER INFORMATION CONTACT: Concerning the temporary regulation, Michael J. Danbury, (202) 622–7750 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

A. In General

This document contains a temporary regulation under section 356(e) of the Internal Revenue Code as added by section 1014 of the Taxpayer Relief Act of 1997 (TRA of 1997), Public Law 105–34. Section 1014 of the TRA of 1997, enacted on August 5, 1997, amended sections 351, 354, 355, 356, and 1036 of the Code. As amended, sections 354, 355, and 356, in general, provide that nonqualified preferred stock (as defined in section 351(g)(2)) received in exchange for stock other than nonqualified preferred stock will not be treated as stock or securities but, instead, will be treated as ''other property'' or ''boot.'' As a result, unless the transition rule of section 1014(f)(2) of TRA of 1997 or another exception applies, the receipt of nonqualified preferred stock will result in gain recognition.

Section 351(g)(4) provides authority to issue regulations coordinating the rules for nonqualified preferred stock with other provisions of the Code. In connection with the issuance of final regulations treating certain rights to acquire stock as securities which can be received tax-free under sections 354, 355, and 356 (see §§ 1.354–1(e), 1.355–1(c), and 1.356–3(b) (TD 8752) also published in the Rules and Regulations section of this issue of the **Federal Register**), the IRS and Treasury became aware that additional rules were needed to address the treatment of rights to acquire nonqualified preferred stock to coordinate with new sections 354(a)(2)(C), 355(a)(3)(D), and 356(e). Accordingly, this temporary regulation provides that, notwithstanding §§ 1.354–1(e), 1.355–1(c), and 1.356–3(b), a right to acquire nonqualified preferred stock received in exchange for stock other than nonqualified preferred stock (or for a right to acquire stock other than nonqualified preferred stock) will not be treated as a security, and that nonqualified preferred stock received in exchange for stock other than nonqualified preferred stock (or for a right to acquire stock other than nonqualified preferred stock) will not be treated as stock or a security.

This regulation does not attempt to address all questions and issues that may arise regarding the exchange or receipt of nonqualified preferred stock. The IRS and Treasury recognize that further guidance is necessary on these matters and intend to provide it in the future. Accordingly, comments are requested not only on these temporary and proposed regulations, but also with regard to the types of guidance needed and other issues under section 351(g) and the related provisions.

B. Effective Date

Except as provided in section 1014(f)(2) of TRA of 1997, this temporary regulation applies to nonqualified preferred stock (or a right to acquire such stock) received in connection with a transaction occurring on or after March 9, 1998.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. Because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking accompanying this regulation is being sent to the Small Business Administration for comment on its impact on small business.

Drafting Information: The principal author of this regulation is Michael J. Danbury of the Office of Assistant Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.356–6T is added to read as follows:

§ 1.356–6T Rules for treatment of nonqualified preferred stock as ''other property'' (temporary).

(a) *In general.* For purposes of §§ 1.354–1(e), 1.355–1(c), and 1.356–3(b), the terms *stock* and *securities* do not include—

(1) Nonqualified preferred stock, as defined in section 351(g)(2), received in exchange for (or in a distribution with respect to) stock, or a right to acquire stock, other than nonqualified preferred stock; or

(2) A right to acquire such nonqualified preferred stock, received in exchange for (or in a distribution with respect to) stock, or a right to acquire stock, other than nonqualified preferred stock.

(b) *Exceptions.* The following exceptions apply:

(1) *Certain recapitalizations.* Paragraph (a) of this section does not apply in the case of a recapitalization under section 368(a)(1)(E) of a family-owned corporation as described in section 354(a)(2)(C)(ii)(II).

(2) *Transition rule.* Paragraph (a) of this section does not apply to a transaction described in section 1014(f)(2) of the Taxpayer Relief Act of 1997 (111 Stat. 921).

(c) *Effective date.* This section applies to nonqualified preferred stock, or a

right to acquire such stock, received in connection with a transaction occurring on or after March 9, 1998.

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

Approved: December 17, 1997.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 98–4 Filed 1–5–98; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AI83

Minimum Income Annuity

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations to provide for payment of the minimum income annuity, authorized by Public Law 92–425 as amended, to certain surviving spouses. This amendment is necessary to reflect statutory revisions contained in the National Defense Authorization Act for Fiscal Year 1997 that transfers the responsibility for paying this benefit from the Department of Defense (DoD) to VA.

EFFECTIVE DATE: January 6, 1998.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273–7230.

SUPPLEMENTARY INFORMATION: Public Law 92–425, section 4, 86 Stat. 706, 712 (1972) (10 U.S.C. 1448 note), provides for payment of a guaranteed minimum annual income (the so-called minimum-income-widow annuity, hereinafter referred to as the minimum income annuity) to certain surviving spouses of persons entitled to military retired or retainer pay at the time of their death. To be eligible, a person must: (1) Be the surviving spouse of a military retiree who died on or before March 20, 1974; (2) be eligible for VA nonservice-connected death pension; (3) have annual income that is less than the maximum annual rate of pension under 38 U.S.C. 1541(b); and (4) be ineligible to receive an annuity under the Survivor Benefit Plan (10 U.S.C. 1447–1455).

Section 638 of the National Defense Authorization Act for Fiscal Year 1997, Public Law 104–201, section 638, 110 Stat. 2422, 2581, transfers responsibility for the payment of the minimum income annuity to the Secretary of Veterans Affairs from DoD. However, DoD remains responsible for funding this benefit and determining basic eligibility. This transfer was effective on July 1, 1997, and applies with respect to payments of benefits for any month after June 1997.

VA published an interim rule with a request for comments to implement section 638 of Pubic Law 104–201 in the **Federal Register** of July 3, 1997 (62 FR 35970–72). Interested persons were invited to submit written comments on or before September 2, 1997. No comments were received. The interim rule is now adopted with a technical change noting that, as required by statute, in certain instances, the Department of Transportation will determine whether an individual meets the criteria of section 4(a) of Pub. L. 92–425 as amended.

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance program number is 64.105.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: December 23, 1997.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

For the reasons set forth in the preamble, the amendment to 38 CFR part 3 published July 3, 1997 (62 FR 35970) is adopted as final with the following changes:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Section 3.811 is revised to read as follows:

§ 3.811 Minimum income annuity.

(a) *Eligibility.* The minimum income annuity authorized by Public Law 92–425 as amended is payable to a person:

(1) Whom the Department of Defense or the Department of Transportation has determined meets the eligibility criteria of section 4(a) of Pub. L. 92–425 as amended other than section 4(a)(1) and (2); and

(2) Who is eligible for pension under subchapter III of chapter 15 of title 38, United States Code, or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978; and

(3) Whose annual income, as determined in establishing pension eligibility, is less than the maximum annual rate of pension in effect under 38 U.S.C. 1541(b).

(b) *Computation of the minimum income annuity payment*—(1) *Annual income.* VA will determine a beneficiary's annual income for minimum income annuity purposes under the provisions of §§ 3.271 and 3.272 of this part for beneficiaries receiving improved pension, or under §§ 3.260 through 3.262 of this part for beneficiaries receiving old law or section 306 pensions, except that the amount of the minimum income annuity will be excluded from the calculation.

(2) VA will determine the minimum income annuity payment for beneficiaries entitled to improved pension by subtracting the annual income for minimum income annuity purposes from the maximum annual pension rate under 38 U.S.C. 1541(b).

(3) VA will determine the minimum income annuity payment for beneficiaries receiving old law and section 306 pensions by reducing the maximum annual pension rate under 38 U.S.C. 1541(b) by the amount of the Retired Servicemen's Family Protection Plan benefit, if any, that the beneficiary receives and subtracting from that amount the annual income for minimum income annuity purposes.

(4) VA will recompute the monthly minimum income annuity payment whenever there is a change to the maximum annual rate of pension in effect under 38 U.S.C. 1541(b), and whenever there is a change in the beneficiary's income.

(c) An individual otherwise eligible for pension under subchapter III of chapter 15 of title 38, United States Code, or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978 shall be considered eligible for pension for purposes of determining eligibility for the minimum income annuity even though as a result of adding the amount of the minimum

income annuity authorized under Public Law 92–425 as amended to any other countable income, no amount of pension is due.

(d) *Termination.* Other than as provided in paragraph (c) of this section, if a beneficiary receiving the minimum income annuity becomes ineligible for pension, VA will terminate the minimum income annuity effective the same date.

(Authority: Pub. L. 92–425 as amended (10 U.S.C. 1448 note); Sec. 638, Pub. L. 104–201, 110 Stat. 2581)

[FR Doc. 98–179 Filed 1–5–98; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AI91

Active Military Service Certified Under Section 401 of Public Law 95–202

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning persons who are included as having served on active duty. This action is necessary because the Secretary of the Air Force has determined that the service of two groups known as ''U.S. Flight Crew and Aviation Ground Support Employees of Northeast Airlines Atlantic Division, Who Served Overseas as a Result of Northeast Airlines' Contract With the Air Transport Command During the Period December 7, 1941, Through August 14, 1945'' and ''U.S. Civilian Flight Crew and Aviation Ground Support Employees of Braniff Airways, Who Served Overseas in the North Atlantic or Under the Jurisdiction of the North Atlantic Wing, Air Transport Command (ATC), as a Result of a Contract With the ATC During the Period February 26, 1942, Through August 14, 1945'' constitutes active military service in the Armed Forces of the United States. The intended effect of this amendment is to reflect eligibility of members of these groups for VA benefits.

EFFECTIVE DATE: June 2, 1997.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273–7230.

SUPPLEMENTARY INFORMATION: Section 401 of Pub. L. 95–202 states that under certain circumstances the service of certain groups that had rendered service to the Armed Forces of the United States in the capacity of civilian employment or contractual service shall be considered active duty for the purposes of all laws administered by VA. In order for members of such a group to be eligible for VA benefits, the Secretary of Defense, or his or her designee, must determine that the service of the group constituted active military service and issue discharges to members of the group.

In the **Federal Register** of July 7, 1997 (62 FR 36263–64), the Secretary of the Air Force published a notice that she had determined that for VA purposes the service of two groups constituted active military service: the U.S. Flight Crew and Aviation Ground Support Employees of Northeast Airlines Atlantic Division, Who Served Overseas as a Result of Northeast Airlines' Contract With the Air Transport Command During the Period December 7, 1941, Through August 14, 1945, and U.S. Civilian Flight Crew and Aviation Ground Support Employees of Braniff Airways, Who Served Overseas in the North Atlantic or Under the Jurisdiction of the North Atlantic Wing, Air Transport Command (ATC), as a Result of a Contract With the ATC During the Period February 26, 1942, Through August 14, 1945. Under these circumstances, members of these groups are eligible for VA benefits. The effective date of the determination by the Secretary of the Air Force was June 2, 1997. Accordingly, this document amends 38 CFR 3.7(x) to recognize that the service of these groups constitutes active military service for the purposes of laws administered by VA.

Additionally, we have amended the heading and introductory text of 38 CFR 3.7 to make it easier for interested individuals to clearly identify the topic of the regulations. These are not substantive changes.

This document reflects determinations totally within the purview of the Secretary of the Air Force and also reflects statutory determinations. In addition, this document contains other changes which are nonsubstantive. Under these circumstances, the changes made by this document are exempt from the notice-and-comment and from the delayed-effective-date provisions of 5 U.S.C. 553.

Since a notice of proposed rulemaking is unnecessary, this amendment is not a ''rule'' as defined in and made subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(2). Nonetheless, the Secretary certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the RFA, 5 U.S.C. 601–612. This final rule will not affect any small entity.

There is no affected Catalog of Federal Domestic Assistance program number.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: December 23, 1997.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for Part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.7, the section heading and introductory text are revised and new paragraphs (x)(29) and (x)(30) are added to read as follows:

§ 3.7 Individuals and groups considered to have performed active military, naval, or air service.

The following individuals and groups are considered to have performed active military, naval, or air service:

* * * * *

(x) * * *

(29) U.S. Flight Crew and Aviation Ground Support Employees of Northeast Airlines Atlantic Division, Who Served Overseas as a Result of Northeast Airlines' Contract With the Air Transport Command During the Period December 7, 1941, Through August 14, 1945.

(30) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Braniff Airways, Who Served Overseas in the North Atlantic or Under the Jurisdiction of the North Atlantic Wing, Air Transport Command (ATC), as a Result of a Contract With the ATC During the Period February 26, 1942, Through August 14, 1945.

(Authority: Sec. 401, Pub. L. 95–202, 91 Stat. 1449)

[FR Doc. 98–176 Filed 1–5–98; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 60 and 61

[FRL–5943–4]

Technical Amendments to Credible Evidence Revisions; Correction of Effective Date Under Congressional Review Act (CRA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction of effective date under CRA.

SUMMARY: On February 24, 1997 (62 FR 8314), the Environmental Protection Agency (EPA) published in the **Federal Register** a final rule concerning credible evidence to clarify that non-reference test data can be used in enforcement actions, and to remove any potential ambiguity regarding this data's use for compliance certifications under Section 114 and Title V of the Clean Air Act. This rule established an effective date of April 25, 1997. This document corrects the effective date of the rule to December 30, 1997 to be consistent with sections 801 and 808 of the Congressional Review Act (CRA), enacted as part of the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 801, 808.

EFFECTIVE DATE: December 30, 1997.

FOR FURTHER INFORMATION CONTACT: Jon Silberman at (202) 564–2429.

SUPPLEMENTARY INFORMATION:

A. Background

Section 801 of the CRA precludes a rule from taking effect until the agency promulgating the rule submits a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the General Accounting Office (GAO). EPA recently discovered that it had inadvertently failed to submit the above rule as required; thus, although the rule was promulgated on February 24, 1997, by operation of law, the rule did not take effect on April 25, 1997 as stated. After EPA discovered its error, the rule was submitted to both Houses of Congress and the GAO on December 11, 1997. This notice amends the effective date of the rule consistent with the provisions of the CRA.

Pursuant to section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b), when EPA finds for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the Agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA merely is correcting the effective date of the promulgated rule to be consistent with the congressional review requirements of the Congressional Review Act as a matter of law and has no discretion in this matter. Thus, notice and public procedure are unnecessary. Moreover, since today's action does not create any new regulatory requirements and affected parties have known of the underlying rule since February 24, 1997, EPA finds that good cause exists to provide for an immediate effective date pursuant to 5 U.S.C. 553(d)(3) and 808(2).

B. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the February 24, 1997 **Federal Register** notice.

Pursuant to 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office; however, in accordance with 5 U.S.C. 808(2), this rule became effective on December 30, 1997. This rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

This final rule only amends the effective date of the underlying rule; it changes no other aspects of rule. Accordingly, to the extent it is available, judicial review is limited to the amended effective date. Pursuant to section 307(b)(1) of the Clean Air Act, challenges to this amendment must be brought by March 9, 1998.

Dated: December 30, 1997.

Carol M. Browner,

Administrator, Environmental Protection Agency.

[FR Doc. 98–255 Filed 1–2–98; 10:01 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–5945–2]

Technical Amendments to Approval and Promulgation of Air Quality Implementation Plans: Utah; Improved Motor Vehicle Inspection and Maintenance Program: Correction of Effective Date Under Congressional Review Act (CRA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction of effective date under CRA.

SUMMARY: On June 9, 1997 (62 FR 31349), the Environmental Protection Agency published in the **Federal Register** an interim final rule under the Clean Air Act concerning an interim approval of a revision to the state implementation plan in Utah County relating to an improved basic inspection and maintenance program. The rule established an effective date of July 9, 1997. This document corrects the effective date of the rule to December 30, 1997 to be consistent with sections 801 and 808 of the Congressional Review Act (CRA), enacted as part of the Small Business Regulatory Enforcement Fairness Act.

EFFECTIVE DATE: December 30, 1997.

FOR FURTHER INFORMATION CONTACT: Tom Eagles at (202) 260–9766.

SUPPLEMENTARY INFORMATION:

A. Background

Section 801 of the CRA precludes a rule from taking effect until the agency promulgating the rule submits a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the General Accounting Office (GAO). EPA recently discovered that it had inadvertently failed to submit the above rule as required; thus, although the rule was promulgated June 9, 1997, by operation of law, the rule did not take effect on July 9, 1997 as stated. After EPA discovered its error, the rule was submitted to both Houses of Congress and the GAO on December 11, 1997.

This document amends the effective date of the rule consistent with the provisions of the CRA.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, an agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA merely is correcting the effective date of the promulgated rule to be consistent with the congressional review requirements of the Congressional Review Act as a matter of law and has no discretion in this matter. Thus, notice and public procedure are unnecessary. The Agency finds that this constitutes good cause under 5 U.S.C. 553(b). Moreover, since today's action does not create any new regulatory requirements and affected parties have known of the underlying rule since June 9, 1997, EPA finds that good cause exists to provide for an immediate effective date pursuant to 5 U.S.C. 553(d)(3) and 808(2).

Because the delay in the effective date was caused by EPA's inadvertent failure to submit the rule under the CRA, EPA does not believe that affected entities that acted in good faith relying on the effective date stated in the July 9, 1997 **Federal Register** should be penalized if they were complying with the rule as promulgated.

B. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the June 9, 1997 **Federal Register** document.

Pursuant to 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office; however, in accordance with 5 U.S.C. 808(2), this rule became effective on December 30, 1997. This rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

This final rule only amends the effective date of the underlying rule; it does not amend any substantive requirements contained in the rule. Accordingly, to the extent it is available, judicial review is limited to the amended effective date. Pursuant to section 307(b)(1) of the Clean Air Act, challenges to this amendment must be brought by March 9, 1998.

Dated: December 30, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 98–252 Filed 1–2–98; 10:01 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA 099–4063; FRL–5945–4]

Technical Amendments to Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania: 15 Percent Plan and 1990 VOC Emission Inventory for the Philadelphia Area: Correction of Effective Date Under Congressional Review Act (CRA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction of effective date under CRA.

SUMMARY: On June 9, 1997 (62 FR 31343), the Environmental Protection Agency published in the **Federal Register** a final rule under the Clean Air Act concerning conditional interim approval of the state implementation plan revision for the Philadelphia ozone nonattainment area, which established an effective date of July 9, 1997. This document corrects the effective date of the rule to December 30, 1997 to be consistent with sections 801 and 808 of the Congressional Review Act (CRA), enacted as part of the Small Business Regulatory Enforcement Fairness Act.

EFFECTIVE DATE: December 30, 1997.

FOR FURTHER INFORMATION CONTACT: Tom Eagles at (202) 260–9766.

SUPPLEMENTARY INFORMATION:

A. Background

Section 801 of the CRA precludes a rule from taking effect until the agency promulgating the rule submits a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the General Accounting Office (GAO). EPA recently discovered that it had inadvertently failed to submit the above rule as required; thus, although the rule was promulgated June 9, 1997, by operation of law, the rule did not take effect on July 9, 1997 as stated. After EPA discovered its error, the rule was submitted to both Houses of Congress and the GAO on December 11, 1997. This document amends the effective date of the rule consistent with the provisions of the CRA.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, an agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA merely is correcting the effective date of the promulgated rule to be consistent with the congressional review requirements of the Congressional Review Act as a matter of law and has no discretion in this matter. Thus, notice and public procedure are unnecessary. The Agency finds that this constitutes good cause under 5 U.S.C. 553(b). Moreover, since today's action does not create any new regulatory requirements and affected parties have known of the underlying rule since June 9, 1997, EPA finds that good cause exists to provide for an immediate effective date pursuant to 5 U.S.C. 553(d)(3) and 808(2).

Because the delay in the effective date was caused by EPA's inadvertent failure to submit the rule under the CRA, EPA does not believe that affected entities that acted in good faith relying on the effective date stated in the June 9, 1997 **Federal Register** should be penalized if they were complying with the rule as promulgated.

B. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the

Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the June 9, 1997 **Federal Register** document.

Pursuant to 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office; however, in accordance with 5 U.S.C. 808(2), this rule became effective on December 30, 1997. This rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

This final rule only amends the effective date of the underlying rule; it does not amend any substantive requirements contained in the rule. Accordingly, to the extent it is available, judicial review is limited to the amended effective date. Pursuant to section 307(b)(1) of the Clean Air Act, challenges to this amendment must be brought by March 9, 1998.

Dated: December 30, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 98–259 Filed 1–2–98; 10:01 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[FRL–5944–4]

Technical Amendments to Zinc Phosphide; Pesticide Tolerances for Emergency Exemptions: Correction of Effective Date Under Congressional Review Act (CRA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction of effective date under CRA.

SUMMARY: On February 20, 1997 at (62 FR 7679) the Environmental Protection Agency published in the **Federal Register** a final rule under the Federal Food, Drug, and Cosmetic Act that established time-limited tolerances and maximum permissible levels for residues for phosphine resulting from the use of the rodenticide zinc phosphide in or on certain raw agricultural commodities. The rule established an effective date of February 20, 1997. This document corrects the effective date of the rule to January 6, 1998, to be consistent with sections 801 and 808 of the Congressional Review Act (CRA), enacted as part of the Small Business Regulatory Enforcement Fairness Act.

DATES: This rule is effective January 6, 1998. Objections and requests for hearings must be received by EPA on or before March 9, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300453], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Room M3708, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Angela Hofmann, Director, Regulatory Coordination Staff, Office of Prevention, Pesticides, and Toxics, Environmental Protection Agency, 401 M St., SW, Washington, DC 20460. Telephone: (202) 260–2922.

SUPPLEMENTARY INFORMATION:

A. Background

Section 801 of the CRA precludes a rule from taking effect until the agency promulgating the rule submits a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the General Accounting Office (GAO). The EPA recently discovered that it had inadvertently failed to submit the above rule as required; thus, although the rule was promulgated on February 20, 1997, by operation of law, the rule did not take effect on February 20, 1997 as stated. After EPA discovered its error, the rule was submitted to both Houses of Congress and the GAO on December 11, 1997. This document amends the effective date of the rule consistent with the provisions of the CRA.

Under section 408(l)(6) of FFDCA, 21 U.S.C. 346a(l)(6), if the Administrator grants an exemption under section 18 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Administrator must establish a tolerance or exemption from the requirement of a tolerance for the pesticide chemical residue. The Administrator may establish such a tolerance or exemption without providing notice or a period for public comment on the tolerance or exemption. In the underlying rulemaking here, EPA granted a time-limited tolerance under section 408(l)(6) on February 20, 1997, without notice and an opportunity for public comment. In addition, the tolerance was made effective upon publication on February 20, 1997. Because EPA made the original rule final without prior proposal and opportunity for comment and because EPA merely is correcting the effective date of the promulgated rule to be consistent with the congressional review requirements of the Congressional Review Act as a matter of law and has no discretion in this matter EPA has determined that there is good cause for making today's amendment final without notice and public comment opportunity. Moreover, since today's action does not create any new regulatory requirements and affected parties have known of the underlying rule since February 20, 1997, EPA finds that good cause exists to provide for an immediate effective date pursuant to 5 U.S.C. 808(2).

Because the delay in the effective date was caused by EPA's inadvertent failure to submit the rule under the CRA, EPA does not believe that affected entities that acted in good faith relying upon the effective date stated in the February 20, 1997 **Federal Register** should be penalized if they were complying with the rule as promulgated.

B. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issued as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). EPA's compliance with these statutes and Executive Orders for the underlying rule

is discussed in the February 20, 1997 **Federal Register** document.

Pursuant to 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office; however, in accordance with 5 U.S.C. 808(2), this rule became effective on January 6, 1998. This rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

This final rule only amends the effective date of the underlying rule; it does not amend any substantive requirements contained in the rule. Nor does it change the April 15, 1998 revocation date. Accordingly, objections, hearing requests and judicial review are limited to the amended effective date. Procedures for filing objections to and requests for hearings on this amendment are described in the February 20, 1997 **Federal Register** document.

Dated: December 30, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 98–257 Filed 1–2–98; 12:20 pm]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[FRL–5943–8]

Technical Amendments to Sodium Bicarbonate and Potassium Bicarbonate; Tolerance Exemptions: Correction of Effective Date Under Congressional Review Act (CRA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction of effective date under CRA.

SUMMARY: On December 23, 1996 (61 FR 67472), the Environmental Protection Agency published in the **Federal Register** a final rule under the Federal Food, Drug, and Cosmetic Act (FFDCA) that exempted from the requirement of a tolerance residues of the biochemical pesticides sodium bicarbonate and potassium bicarbonate in or on all raw agricultural commodities, when applied as fungicides or post-harvest fungicides. The rule established an effective date of December 23, 1996. This document corrects the effective date of that rule to January 6, 1998, to be consistent with sections 801 and 808 of the Congressional Review Act (CRA), enacted as part of the Small Business Regulatory Enforcement Fairness Act.

DATES: This rule is effective January 6, 1998. Objections and requests for hearings must be received by EPA on or before March 9, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket number, [OPP–300440A], may be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Room M3708, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Angela Hofmann, Director, Regulatory Coordination Staff, Office of Prevention, Pesticides, and Toxics, Environmental Protection Agency, 401 M St., SW, Washington, DC 20460. Telephone: (202) 260–2922.

SUPPLEMENTARY INFORMATION:

A. Background

Section 801 of the CRA precludes a rule from taking effect until the agency promulgating the rule submits a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the General Accounting Office (GAO). EPA recently discovered that it had inadvertently failed to submit the above rule as required; thus, although the rule was promulgated on December 23, 1996, by operation of law, the rule did not take effect on December 23, 1996 as stated. After EPA discovered its error, the rule was submitted to both Houses of Congress and the GAO on December 11, 1997. This document amends the effective date of the rule consistent with the provisions of the CRA.

Section 408(e)(2) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 346a(e)(2), provides that the Administrator, before issuing a final rule under subsection 408(e)(1), shall issue a proposed rule and allow 60 days for public comment unless the Administrator for good cause finds that it would be in the public interest to provide a shorter period. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA merely is correcting the effective date of the promulgated rule to be consistent with the congressional review requirements of the Congressional Review Act as a matter of law and has no discretion in this matter. Thus, notice and public procedure are unnecessary. The Agency finds that this constitutes good cause under section408(e)(2). Moreover, since today's action does not create any new regulatory requirements and affected parties have known of the underlying rule since December 23, 1996, EPA finds that good cause exists to provide for an immediate effective date pursuant to 5 U.S.C. 553(d)(3) and 808(2). Under section 408(g)(1) of FFDCA, today's rule is effective upon publication.

Because the delay in the effective date was caused by EPA's inadvertent failure to submit the rule under the CRA, EPA does not believe that affected entities that acted in good faith relying upon the effective date stated in the December 23, 1996 **Federal Register** should be penalized if they were complying with the rule as promulgated.

B. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the December 23, 1996, **Federal Register** document.

Pursuant to 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office; however, in accordance with 5 U.S.C. 808(2), this rule is effective on January 6, 1998. This rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

This final rule only amends the effective date of the underlying rule; it does not amend any substantive requirements contained in the rule. Accordingly, objections, hearing requests, and judicial review are limited to the amended effective date. Procedures for filing objections to and requests for hearings on this amendment are described in the December 23, 1996, **Federal Register** document.

Dated: December 30, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 98–258 Filed 1–2–98; 12:20 pm]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1535 and 1552

[FRL–5944–3]

Technical Amendments to Acquisition Regulation: Removal of Certification Requirements Regarding Collection, Use, Access, Treatment, and Disclosure of Confidential Business Information (CBI): Correction of Effective Date Under the Congressional Review Act (CRA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction of effective date under the CRA.

SUMMARY: On July 18, 1997 (62 FR 38476), the Environmental Protection Agency published in the **Federal Register** a final rule concerning the EPA Acquisition Regulation (EPAAR) to remove certification requirements regarding the collection, use, access, treatment, and disclosure of confidential business information (CBI) which are not specifically imposed by statute, and to amend CBI clauses to remove such certification requirements, which established an effective date of August 18, 1997. This document is to correct the effective date of the rule to December 30, 1997 to be consistent with sections 801 and 808 of the Congressional Review Act (CRA), enacted as part of the Small Business Regulatory Enforcement Fairness Act.

EFFECTIVE DATE: December 30, 1997.

FOR FURTHER INFORMATION CONTACT: Judith Koontz at (202) 260–8608.

SUPPLEMENTARY INFORMATION:

A. Background

Section 801 of the CRA precludes a rule from taking effect until the agency promulgating the rule submits a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the General Accounting Office (GAO). The EPA recently discovered that it had inadvertently failed to submit the above rule as required; thus, although the rule was promulgated July 18, 1997 by operation of law, the rule did not take effect on August 18, 1997 as stated. After EPA discovered its error, the rule was submitted to both Houses of Congress and the GAO on December 11, 1997. This document is to amend the effective date of the rule consistent with the provisions of the CRA.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, an agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA merely is correcting the effective date of the promulgated rule to be consistent with the congressional review requirements of the Congressional Review Act as a matter of law and has no discretion in this matter. Thus, notice and public procedure are unnecessary. The Agency finds that this constitutes good cause under 5 U.S.C. 553(b). Moreover, since today's action does not create any new regulatory requirements and affected parties have known of the underlying rule since July 18, 1997, EPA finds that good cause exists to provide for an immediate effective date pursuant to 5 U.S.C. 553(d)(3) and 808(2).

B. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the July 18, 1997 **Federal Register** document.

Pursuant to 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office; however, in accordance with 5 U.S.C. 808(2), this rule became effective on December 30, 1997. This rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

This final rule only amends the effective date of the underlying rule; it does not amend any substantive requirements contained in the rule. Accordingly, to the extent it is available, judicial review is limited to the amended effective date.

48 CFR Parts 1535 and 1552

Environmental protection, Government procurement.

Dated: December 30, 1997.

Carol M. Browner,

Administrator.

Therefore, 48 CFR Chapter 15 is amended as set forth below:

PARTS 1535 and 1552—[AMENDED]

1. The authority citations for Parts 1535 and 1552 continue to read as follows:

Authority: Sec. 205(c), 63 stat. 390, as amended, 40 U.S.C. 486(c).

2. Section 1552.235–77 is amended by revising the clause heading dates to read ''December 1997'' and revising the section heading to read as follows:

§ 1552.235–77 Data Security for Federal Insecticide, Fungicide and Rodenticide Act Confidential Business Information (December 1997).

* * * * *

3. Section 1552.235–78 is amended by revising the clause heading dates to read ''December 1997'' and revising the section heading to read as follows:

§ 1552.235–78 Data Security for Toxic Substances Control Act Confidential Business Information (December 1997).

* * * * *

[FR Doc. 98–260 Filed 1–2–98; 10:01 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 653 and 654

Prevention of Prohibited Drug Use in Transit Operations; Prevention of Alcohol Misuse in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of random drug and alcohol testing rate.

SUMMARY: This notice announces the random testing rates for employers

subject to the Federal Transit Administration's (FTA) drug and alcohol rules.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Judy Meade, Director of the Office of Safety and Security (202) 366–2896 (telephone) and (202) 366–7951 (fax). Electronic access to this and other documents concerning FTA's drug and alcohol testing rules may be obtained through FTA's Transit Safety and Security Bulletin Board at 1–800–231–2061 or through the FTA World Wide Web home page at http://www.fta.dot.gov; both services are available seven days a week.

SUPPLEMENTARY INFORMATION: The Federal Transit Administration (FTA) required large transit employers to begin drug and alcohol testing ''safety-sensitive'' employees on January 1, 1995, and to report, annually by March 15 of each year beginning in 1996, the number of ''safety-sensitive'' employees who had a verified positive for the use of prohibited drugs, and the number of safety-sensitive employees who tested positive for the misuse of alcohol. Small employers started testing their ''safety-sensitive'' employees on January 1, 1996, and began reporting the same information as the large employers beginning on March 15, 1997. Employers are required annually to submit other data, not relevant here, in the same report; these data are available from the FTA as discussed below.

The rules established a random testing rate for prohibited drugs and the misuse of alcohol; specifically, the rules require that employers conduct random drug tests at a rate equivalent to at least 50 percent of their total number of safety-sensitive employees for prohibited drug use and at least 25 percent for the misuse of alcohol. The rules provide that the drug random testing rate may be lowered to 25 percent if the ''positive rate'' for the entire transit industry is less than one percent for two consecutive years. Once lowered, it may be raised to 50 percent if the positive rate equals or exceeds one percent for any one year. (''Positive rate'' means the number of positive results for random drug tests conducted under part 653 plus the number of refusals of random tests required by part 653, divided by the total number of random drug tests, plus the number of refusals of random tests required by part 653.)

Likewise, the alcohol rule provides that the random rate may be lowered to 10 percent if the ''violation rate'' for the entire transit industry is less than .5 percent for two consecutive years. It will remain at 25 percent if the ''violation rate'' is equal to or greater than .5 percent but less than one percent, and it will be raised to 50 percent if the ''violation rate'' is one percent or greater for any one year. (''Violation rate'' means the number of covered employees found during random tests given under part 654 to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by part 654, divided by the total reported number of random alcohol tests conducted under part 654, plus the total number of refusals of random tests, required by part 654.)

FTA has received and analyzed the 1996 data from large and small transit employers. The ''positive rate'' for random drug tests was 1.5 percent and the ''violation rate'' for random alcohol tests was 0.21 percent; therefore, for 1998, transit employers will continue to be required to conduct random drug tests at a rate equivalent to at least 50 percent of the total number of their ''safety-sensitive'' employees for prohibited drugs. Because the random alcohol violation rate was lower than .5 percent for two consecutive years (0.24 percent for 1995 and 0.21 percent for 1996), the random alcohol testing rate will lowered to 10 percent for 1998.

FTA will be publishing in December a detailed report on the 1996 data collected from large and small employers. This report may be obtained from the Office of Safety and Security, Federal Transit Administration, 400 Seventh Street, SW, Room 9301, Washington, DC 20590, (202) 366–2896.

Issued: December 31, 1997.

Gordon J. Linton,

Administrator.

[FR Doc. 98–217 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–57–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 660

[Docket No. 971229312–7312–01; I.D. 12167C]

Magnuson Act Provisions; Foreign Fishing; Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Annual Specifications and Management Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: 1998 groundfish fishery specifications and management measures; tribal whiting allocation; announcement of exempted fishing permits; request for comments.

SUMMARY: NMFS announces the 1998 fishery specifications and management measures for groundfish taken in the U.S. exclusive economic zone (EEZ) and state waters off the coasts of Washington, Oregon, and California, as authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP). The specifications include the levels of the acceptable biological catch (ABC) and harvest guidelines (HGs), including the distribution between domestic and foreign fishing operations. The HGs are allocated between the limited entry and open access fisheries. The management measures for 1998 are designed to keep landings within the HGs, for those species for which there are HGs, and to achieve the goals and objectives of the FMP and its implementing regulations. The intended effect of these actions is to establish allowable harvest levels of Pacific Coast groundfish and to implement management measures designed to achieve but not exceed those harvest levels, while extending fishing and processing opportunities as long as possible during the year. This action also announces the approval of applications to renew two exempted fishing permits (EFPs)in 1998.

DATES: Effective 0001 hours (local time) January 1, 1998, until the 1999 annual specifications and management measures are effective, unless modified, superseded, or rescinded. The 1999 annual specifications and management measures will be published in the **Federal Register.** Comments on the 1998 annual specifications and management measures, tribal whiting allocation, and EFPs will be accepted until February 5, 1998.

ADDRESSES: Comments on these specifications and management measures, tribal whiting allocation, and EFPs should be sent to Mr. William Stelle, Jr., Administrator, Northwest Region (Regional Administrator), National Marine Fisheries Service, 7600 Sand Point Way N.E., BIN C15700, Bldg. 1, Seattle, WA 98115–0070; or Mr. William Hogarth, Acting Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. Information relevant to these specifications and management measures, including an environmental assessment (EA) and the stock

assessment and fishery evaluation (SAFE) report, has been compiled in aggregate form and is available for public review during business hours at the office of the Regional NMFS (Regional Administrator), or may be obtained from the Pacific Fishery Management Council (Council), by writing to the Council at 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: William L. Robinson (Northwest Region, NMFS) 206–526–6140; or Svein Fougner (Southwest Region, NMFS) 562–980–4034.

SUPPLEMENTARY INFORMATION: The FMP requires that fishery specifications for groundfish be evaluated each calendar year, that HGs or quotas be specified for species or species groups in need of additional protection, and that management measures designed to achieve the HGs or quotas be published in the **Federal Register** and made effective by January 1, the beginning of the fishing year. This action announces and makes effective the final 1998 fishery specifications and the management measures designed to achieve them. These specifications and measures were considered by the Council at two meetings and were recommended to NMFS by the Council at its November 1997 meeting in Portland, OR.

I. Final Specifications

The fishery specifications include ABCs, the designation of HGs or quotas for species that need individual management, the apportionment of the HGs or quotas between domestic and foreign fisheries, and allocation between the open access and limited entry segments of the domestic fishery. As in the past, the specifications include fish caught in state ocean water (0–3 nautical miles (nm) offshore) as well as fish caught in the EEZ (3–200 nm offshore). Only changes to the specifications between 1997 and 1998 are discussed herein, otherwise they are the same as announced in 1997 (62 FR 700, January 6, 1997).

BILLING CODE 3510–22–P

Table 1. 1998 Specifications of Acceptable Biological Catch (ABC), Harvest Guidelines (HGs), and Limited Entry and Open Access Allocations, by International North Pacific Fisheries Commission (INPFC) subareas

Species	ACCEPTABLE BIOLOGICAL CATCH (ABC) (x 1000 mt)						Harvest Guideline (1000 mt)	L or C b/	Commercial Harvest Guideline (1000 mt)	Allocations (x 1000 mt)			
										Limited Entry		Open Access	
	Vancouver a/	Columbia	Eureka	Monterey	Conception	Total Catch ABC				1000 mt	%	1000 mt	%
ROUNDFISH:													
Lingcod a/c/	0.450 U.S.		0.139	0.325	0.046	0.960	.838	C	0.400	0.324	80.9	0.076	19.1
Pacific cod	3.2		d/	d/	d/	3.2	--	L	--	--	--	--	--
Pacific whiting a/e/	232.0 U.S.					232.0	232.0	C	207.0	--	--	--	--
Sablefish f/g/	5.2				0.425	5.2 N	4.680 N	L	4.212 N	3.934	93.4	0.278	6.6
						0.425 S	0.425 S	L	0.425 S	--	--	--	--
Jack mackerel h/	52.6				--	52.6	52.6	C	--	--	--	--	--
FLATFISH:													
Dover sole f/i/	8.373				1.053	9.426	8.955	L	8.955	--	--	--	--
English sole	2.0		1.1			3.1	--		--	--	--	--	--
Petrale sole	1.2		0.5	0.8	0.2	2.7	--		--	--	--	--	--
Arrowtooth flounder	5.8					5.8	--		--	--	--	--	--
Other flatfish	0.7	3.0	1.7	1.8	0.5	7.7	--		--	--	--	--	--
ROCKFISH:													
POP j/	0.0	0.0	d/	d/	d/	0.0	0.650	L	0.650	--	--	--	--
Shortbelly	23.5					23.5	23.5	C	23.5	--	--	--	--
Widow k/	5.75					5.75	4.276	L	4.276	4.118	96.3	0.158	3.7
Thornyheads: f/l/									--	--	--	--	--
Shortspine f/m/	1.000 (Includes 175 mt in Conception area north of P. Conception)				-	1.000	1.082 N	L	1.082	1.079	99.75	0.003	0.25
							0.113 S	L	0.113	--	--	--	--
Longspine f/n/	4.102				.428 -	4.102 N	3.733 N	L	3.733	--	--	--	--
						0.428 S	0.390 S	L	0.390	--	--	--	--

(Table 1. continued)

Species	ACCEPTABLE BIOLOGICAL CATCH (ABC) (x 1,000 mt)						Harvest Guideline (1000 mt)	L or C b/	Commercial Harvest Guideline (1000 mt)	Allocations (x 1000 mt)			
	Vancouver a/	Columbia	Eureka	Monterey	Conception	Total Catch ABC				Limited Entry		Open Access	
										1000 mt	%	1000 mt	%
Sebastes complex: a/o/	8.647		8.999			8.647 N	7.057 N	C	6.778	6.128	90.4N	0.651	9.6N
						8.999 S	8.439 S	C	6.939	4.677	67.4S	2.262	32.6S
Bocaccio-S p/	t/		0.230 *			0.230	0.230	C	0.190	0.128	67.4	0.057	32.6
Canary-N q/	1.045 *		t/			1.045	1.045	C	1.045	0.953	91.2	0.090	8.80
Chilipepper r/	d/		3.400 *			3.400	--	C	--	--	--	--	--
Yellowtail-N a/s/	3.465 U.S. *		t/			3.465	3.118	C	3.118	2.819	90.4	0.299	9.6
REMAINING ROCKFISH t/:	2.295 *		1.401 *			--	--		--	--	--	--	--
bank	d/		0.081 ✓			0.08	--		--	--	--	--	--
bocaccio-N	0.424 ✓		u/			0.424	--		--	--	--	--	--
canary-S	u/		0.085 ✓			0.085	--		--	--	--	--	--
darkblotched	0.209 ✓		0.047 ✓			0.26	--		--	--	--	--	--
POP-S	u/		0.020 ✓			0.02	--		--	--	--	--	--
redstripe	0.768 ✓		d/			0.77	--		--	--	--	--	--
sharpchin	0.398 ✓		0.071 ✓			0.47	--		--	--	--	--	--
silvergrey	0.051 ✓		d/			0.05	--		--	--	--	--	--
splitnose	0.274 ✓		0.868 ✓			1.14	--		--	--	--	--	--
yelloweye	0.039 ✓		d/			0.04	--		--	--	--	--	--
yellowmouth	0.132 ✓		d/			0.13	--		--	--	--	--	--
yellowtail-S	u/		0.074 ✓	0.155 ✓		0.229	--		--	--	--	--	--
Other rockfish v/	1.842 *		3.968 *			--	--		--	--	--	--	--
OTHER FISH w/	2.5	7.0	1.2	2.0	2.0	14.7	--		--	--	--	--	--

a/ U.S. Vancouver only, even if stock assessments included parts of Canadian waters. Further explanations in footnotes for Pacific whiting, lingcod, yellowtail rockfish, and the Sebastes complex north of Cape Mendocino.

b/ "L or C" indicates whether a HG or commercial HG is based on landed catch (L, for landings only, without an estimate of discards) or total catch (C, landed catch plus estimated discards).

c/ Lingcod. The 1997 assessment addresses the entire Vancouver area, including Canada, and the Columbia area. The ABC for the U.S. portion of the Vancouver-Columbia area is 450 mt, based on the F35% harvest rate and biomass distribution determined by the NMFS surveys (44 percent in US waters). The coastwide ABC, including Canada, would be 1,532 mt, of which 960 mt represents total catch for U.S. only. The 838-mt HG (U.S. only) for total catch is more conservatively set at the sum of the individual F40% values for each area. An estimated 438 mt of recreational harvest in 1998 is subtracted from the HG to derive the 400-mt commercial HG.

d/ Other. These species are not common nor important in the areas footnoted. Accordingly, for convenience, Pacific cod is included in the "other fish" category for the areas footnoted, and rockfish species are included in the "other rockfish" category for the areas footnoted only.

e/ Pacific whiting. The U.S.-Canada ABC of 290,000 mt is prorated 80 percent for the U.S., or 232,000 mt in 1998, the

same as in 1997 (except in 1997 the ABC in the table included Canadian waters). Allocations to catcher/processor, mothership, and shore-based operations are based on the 207,000-mt commercial HG (the U.S. HG minus the tribal allocation of 25,000 mt for 1998).

f/ DTS complex. Dover sole, thornyheads, and trawl-caught sablefish are managed together as the "DTS complex." There is no HG for the DTS complex.

g/ Sablefish. The total catch ABC for sablefish is 5,200 mt north of 36° N. lat. (the Monterey-Conception area border). lat.). The 4,680-mt landed catch HG for that area is the 5,200 mt ABC reduced by 10 percent (520 mt) for estimated discards. Ten percent (468 mt) of the HG is set aside for the treaty tribes. The remaining 4,212 mt is the "commercial HG," which is divided between the limited entry (3,934 mt) and open-access (278 mt) fisheries. The limited entry allocation is further allocated 58 percent (2,282 mt) to the trawl fishery, and 42 percent (1,652 mt) to the nontrawl fishery. The allocations are HGs.

The ABC and HG for the Conception area are 425 mt, and are based on estimated landings in that area. There are no limited entry and open access allocations for the Conception area at this time.

h/ Jack mackerel. Only jack mackerel north of 39°00′ N. latitude are managed by the FMP. The ABC and HG include waters beyond 200 nm.

i/ Dover sole. The 1997 assessment evaluated the resource north of 36° N. lat. as a unit, and provided an ABC for landed catch based on the F35% harvest rate. The Conception area ABC is at the level established in the original FMP. The ABCs are converted to total catch in Table 1, for consistency with other ABCs, by estimating that 5 percent of the total catch is discarded. The coastwide 9,426 mt total catch ABC corresponds to the 8,955 mt landed catch HG.

j/ Pacific ocean perch. The total catch ABC remains at zero. The landed catch HG applies to the Vancouver/Columbia subareas combined, and is set near the level of 1997 landings. The HG is intended to represent only incidental catches.

k/ Widow rockfish. The 5,750-mt total catch ABC is based on the F40% harvest rate, which is the current MSY proxy for rockfish species. The landed catch HG of 4,276 mt is based on the more precautionary F45%. The total catch expected with this HG is 5,090 mt, estimating that 16 percent of the catch is discarded.

l/ Thornyheads. The treaty tribes estimate that 8,000-10,000 lb (about 3-4 mt) of thornyheads will be taken in 1998 under a tribal trip limit of 300 lb per trip. This small amount is not subtracted from either of the thornyhead HGs at this time. There is no combined HG for both species in 1998.

m/ Shortspine thornyheads. The 1,000 mt shortspine thornyhead ABC extends to Pt. Conception (34° 27′ N. lat.). The landed catch HG is 1,082 mt (revised from the Council's

recommendation of 1,177 mt) north of 36° N. lat. (the Vancouver-Columbia-Eureka-Monterey area), and 113 mt for the Conception area north of Pt. Conception (the north Conception area) (revised from the Council's recommendation of 123 mt). This is equivalent to a HG of 1,195 mt north of Pt. Conception (revised from the Council's recommendation of 1,300 mt). Both HGs assume that 30 percent of the total catch is discarded. Therefore, 1,707 mt is expected to be caught north of Pt. Conception (1,546 mt north of 36° N. lat., and 161 mt from the northern Conception area). For an explanation of the revisions to the Council's recommendations, see the section in the preamble regarding setting HGs greater than ABC.

n/ Longspine thornyheads. The 4,102 mt longspine thornyhead ABC extends only to 36° N. lat. (the northern boundary of the Conception area), not to Pt. Conception, and therefore is smaller than the area covered by the ABC for shortspine thornyheads. However, the HGs apply to the same areas for both species. The landed catch HG of 3,733 mt for the Vancouver-Columbia-Eureka-Monterey area assumes 9 percent of the 4,102 mt ABC is discarded north of the 36° N. lat. The 390-mt landed catch HG for the northern Conception area is the average 1995-1996 landings; the total catch associated with this HG is 428 mt, also assuming 9 percent is discarded.

o/ Sebastes complex. The Sebastes-north ABC of 8,647 mt is the sum of the ABCs for canary, yellowtail, "remaining rockfish," and "other rockfish" in the U.S. Vancouver and

Columbia areas (marked with *). All Sebastes HGs are for total catch. Species in "remaining rockfish" are marked with ✓.

The Sebastes-north HG of 7,057 mt (for the Vancouver-Columbia area) is the sum of the HGs for canary and yellowtail rockfish; plus the sum of the ABCs or recent catch, whichever is less, for the species in "remaining rockfish" and "other rockfish." The assessment for yellowtail rockfish includes Canadian waters and the Eureka area, but Table 1 lists only the U.S. portion of the yellowtail rockfish ABC, and 74 mt is prorated for the Eureka area. (For further derivation, see GMT Report B.3.(2), November 1997.)

Within the Sebastes-north HG are two small HGs for commercial harvest of black rockfish by the Makah, Quileute, Hoh, and Quinault Indian tribes: 20,000 lb (9,072 kg) for the EEZ north of Cape Alava (48°09′30" N. lat.) and 10,000 lb (4,536 kg) between Destruction Island (47°40′00" N. lat.) and Leadbetter Point (46°38′10" N. lat.), which totals 13.6 mt. The northern HG for the Sebastes complex is reduced by 13.6 mt for tribal fisheries and 265 mt for estimated recreational harvest to derive the 6,778 mt commercial HG.

The Sebastes-south ABC is the sum of the ABCs for bocaccio, chilipepper, "remaining rockfish," and "other rockfish" in the Eureka, Monterey, and Conception areas (marked with *).

The Sebastes-south HG, which applies to the Eureka/Monterey/Conception area, is the HG for bocaccio plus the sum of the ABCs or recent catch, whichever is less, for

"remaining rockfish" and "other rockfish." (For further derivation, see GMT Report B.3.(2), November 1997.)

The southern HG is reduced by 1,500 mt for estimated recreational harvest of remaining rockfish and bocaccio to derive the 6,939-mt commercial HG for the Eureka-Monterey-Conception area.

Because the HGs for the Sebastes complex, bocaccio, canary rockfish, and yellowtail rockfish are for total catch, estimates of discards will be added to landings during the season as data become available.

p/ Bocaccio. For bocaccio in the Eureka-Monterey-Conception area, the 230-mt ABC and HG for total catch are based on the estimated F40% level. Anticipated 1998 recreational landings are 40 mt, resulting in a commercial HG of 190 mt.

q/ Canary rockfish. The 1,045-mt ABC for the Vancouver-Columbia area is based on the F40% level. The total catch HG equals ABC and estimates 16 percent discards. The landed catch equivalent would be 878 mt.

r/ Chilipepper. The ABC has been reduced to approximate the F40% level in 1998; F35% was used in 1997.

s/ Yellowtail rockfish. The yellowtail rockfish assessment provided a yield of 4,657 mt for the Vancouver-Columbia-Eureka area, including Canada. The U.S. portion is estimated to be 3,539 mt, 76 percent of the U.S.-Canada yield, based on the survey biomass estimate for the portion of the assessment area in U.S. waters. The 3,465-mt ABC for the

Vancouver/Columbia area in the table was derived by subtracting 74 mt for the Eureka area. The 3,118-mt HG for the U.S. Vancouver-Columbia area represents total catch and is set at 90 percent of the ABC as a precautionary measure.

t/ Remaining rockfish. Prior to 1997, this category included all species in the Sebastes complex that did not have an individual ABC, and therefore included species that, starting in 1997, are designated as "other rockfish." Since 1997, "remaining rockfish" includes only those species and areas listed in Table 1. Species included in "remaining rockfish" are marked with ✓.

u/ There is a separate ABC for this species and area which is not included in "remaining rockfish" or "other rockfish."

v/ Other rockfish. "Other rockfish" includes offshore Sebastes species not identified in Table 1. It is based on the Sebastes complex assessment of commercial landings and includes estimates of recreational landings for those species without individual ABCs.

w/ Other fish. Includes sharks, skates, rays, ratfish, morids, grenadiers, and other groundfish species noted above in footnote d/.

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Changes to the ABCs and HGs

The ABCs, which are based on the best available scientific information, represent the total catch, including amounts that are discarded as well as retained. Stock assessment information considered in determining the ABCs is available from the Council and was made available to the public before the Council's November 1997 meeting in the Council's SAFE document (see **ADDRESSES**). Additional information is found in the EA prepared by the council for this action, the footnotes to Table 1, the SAFE document for the 1998 specifications, and documents available at the November 1997 Council meeting.

ABCs

The ABCs are changed from 1997 to 1998 as follows: lingcod (from 2,400 mt to 960 mt, excluding Canadian waters), sablefish (from 8,700 mt to 5,200 north of 36° N. lat., with no change to the 425 mt ABC south of 36° N. lat.), Dover sole (from a range of 10,880–12,830 mt to 9,426 mt coastwide), widow rockfish (from 7,700 mt to 5,740 mt), longspine thornyheads (from 7,000 mt north of Pt. Conception to 4,102 mt in the smaller area north of 36°N. lat.), the *Sebastes* complex (from 7,130 mt to 8,647 mt in the Vancouver-Columbia area, and from 9,664 mt to 8,999 mt in the Eureka-Monterey-Conception area), bocaccio (from 265 mt to 230 mt in the Eureka-Monterey-Conception Area), canary rockfish (from 1,200 mt to 1,045 mt), chilipepper (from 4,000 mt to 3,400 mt in the Eureka-Monterey-Conception area), yellowtail rockfish (from 1,773 mt to 3,465 mt in the Vancouver-Columbia area, excluding Canadian waters, and from 259 mt to 229 mt in the Eureka-Monterey-Conception area), and for ''remaining rockfish'' (from 1,431 mt to 1,401 mt, reflecting the change to yellowtail rockfish, in the Eureka-Monterey-Conception area). The *Sebastes* complex consists of all rockfish managed by the FMP except Pacific ocean perch (POP), widow rockfish, shortbelly rockfish, and thornyheads. The whiting ABC is changed only to reflect the amount in U.S. waters rather than the amount for the United States and Canada combined.

The sablefish ABC deserves additional discussion as the Council departed from the values recommended by its scientific and industry advisory bodies. In 1997, the assessment model was modified to include, for the first time, an index of abundance from fishery logbook data and to closely examine the slope trawl survey data, per the recommendations of an external review panel. Assessment results ranged from a biomass of 40,000 mt with an ABC of 2,500 mt if all survey and logbook indexes are included, to a biomass of 117,000 mt with an ABC of 7,300 mt if the pot survey and slope trawl survey data are excluded. The stock assessment review (STAR) panel commissioned by the Council's Scientific and Statistical Committee (SSC) to provide a technical review of the assessment ''endorses the model using both pot and slope surveys as being preferable to a sablefish model that excludes both of these sources of information,'' but also includes strong reservations regarding use of the early slope trawl data. The Council's Groundfish Management Team (GMT) accepted the STAR panel report and recommended an ABC of 2,500 to 3,400 mt. The NMFS assessment document identifies potential weaknesses and biases with each of the indices, but it was not possible for either the assessment document or the report of the STAR panel to quantity fully the uncertainty in the assessment results. With the STAR panel's rejection of the 7,300-mt scenario, the Council was faced with only the most conservative possible recommendation, and had no information on the degree to which intermediate options may be sufficiently conservative.

The Council's recommended ABC of 5,200 mt was based on a model scenario that discounted the 1988 slope survey observation and on the entire pot survey that had been discounted in previous years. The 1988 survey results were unusually high and not consistent with the slow decline observed in subsequent surveys. The results represents continuation of the Council's historical approach, which is to set a compromise harvest level for sablefish until greater assessment certainty can be achieved. A greater reduction would have established the 1998 harvest at a level that has been exceeded every year since 1972 and would have caused severe and unexpected economic dislocation. However, the Council's recommendation is not strictly precautionary, nor is it in accord with the technical process designed to produce and review stock assessments in 1997. The model scenario used by the Council was not endorsed by either the STAR panel or the GMT. It was presented as background material to the GMT to assist in understanding the uncertainty in the assessment results. It can be accepted and approved as a significant step towards a more precautionary approach to sablefish management for 1 year, while NMFS works to improve the assessment information for the longer term.

NMFS concurs with the Councils' recommendation that the assessment should be updated in 1998 to include new data. Exceeding a more precautionary harvest level in 1998 will slightly increase the current decline in sablefish abundance, but a 1-year harvest of 5,200 mt would not exceed the currently defined F20% overfishing level unless the current biomass is actually at the most conservative estimate of approximately 40,000 mt reported in the SAFE Decision Table for model scenario 1. A catch of 5,200 mt is not overfishing for any of the other model scenarios considered. (F20% means a fishing mortality rate that would, in the long-term, reduce the spawning biomass per recruit to 20 percent of what it would have been if the stock had never been exploited.)

The ABC for shortspine thornyheads remains the same as in 1997, but was also the subject of much discussion at the November 1997 Council meeting. In 1997, a new stock assessment was prepared for shortspine thornyheads and reviewed by the STAR panel. The STAR panel concluded that the assessment was the best that could be done with the stock synthesis approach. However, the new assessment was unable to sufficiently narrow the range of plausible ABC estimates. After the STAR panel had disbanded, the Council's GMT requested additional guidance, which was provided by three of the file original STAR panel members and an industry representative to the panel. This ''reduced'' STAR panel recommended a simpler analysis, consisting of a biomass estimated from the most recent slope surveys and using the F=M (fishing mortality equals natural mortality) model. This model requires many fewer assumptions and is based on direct measurement of stock abundance, although with some uncertainty in the catchability coefficient of trawl gear. This model has a documented basis and history of use; it was used extensively in the early 1980's when other data were not available to conduct a more rigorous assessment. Even with the ''reduced'' STAR panel's consensus regarding the model to be used, there are major concerns with the data, as it is very limited and is a major factor in the uncertainties arising from the assessment. Given these uncertainties, the Council recommended maintaining the ABC at its current level of 1,000 mt.

HGs

Those species or species groups managed with HGs in 1997 will

continue to be managed with HGs in 1998. However, some of the areas managed with HGs have changed. The sablefish ABC of 425 mt south of 36° N. lat. (the Monterey-Conception border) is set as an HG to be able to respond inseason to potential effort shifts into that area; separate HGs for longspine and shortspine thornyheads are set north of 36° N. lat. and from 36° N. lat. to Pt. Conception (34° 27′ N. lat.), whereas in 1997 the single HG for each thornyhead species extended to Pt. Conception; and the separate HG for Dover sole in the Columbia area is removed. The HGs are changed from 1997 to 1998, as follows: lingcod (from 2,400 mt to 838 mt, excluding Canadian waters), sablefish (from 7,800 mt to 4,680 mt north of 36° N. lat.), Dover sole (from 11,050 mt, of which 2,850 mt was in the Columbia area, to 8,955 mt coastwide), POP (from 750 mt and 650 mt), widow rockfish (from 6,500 mt to 4,276 mt), shortspine thornyheads (from 1,380 mt north of Pt. Conception to 1,082 mt north of 26° N. lat. and 113 mt from 36° N. lat to Pt. Conception), longspine thornyheads (from 6,000 mt north of PT. Conception to 3,733 mt north of 36° N. lat. and 390 mt for 36° N. lat. to Pt. Conception), the *Sebastes* complex (from 6,656 mt to 7,057 mt in the Vancouver-Columbia area, and from 9,284 to 8,439 mt in the Eureka-Monterey-Conception area), bocaccio (from 387 mt to 230 mt in the Eureka-Monterey-Conception area), canary rockfish (from 1,000 mt to 1,045 mt in the Vancouver-Columbia area), and yellowtail rockfish (from 2,762 mt to 3,118 mt in the Vancouver-Columbia area).

The Council's recommended HG for shortspine thornyheads has been changed to correct an arithmetic error, and conforms with the Council's intent to keep harvest of shortspine thornyheads below the overfishing threshold. This is explained in the next section regarding setting HGs above ABC.

Stock assessments and inseason catch monitoring are designed to account for all fishing mortality, including that resulting from fish discarded at sea. Discards of rockfish and sablefish in the fishery for whiting are well monitored and are accounted for inseason as they occur. In the other fisheries, discards caused by trip limits have not been monitored consistently, so discard estimates have been developed to account for this extra catch. A discard level of about 16 percent of the total catch, previously measured for widow rockfish in a scientific study, is assumed to be appropriate for the commercial fisheries for widow rockfish, yellowtail rockfish, canary rockfish, and POP. A discard estimate of 9 percent is used for longspine thornyheads, 30 percent for shortspine thornyheads, 5 percent for Dover sole, and 10 percent for sablefish.

In some cases (e.g., sablefish, widow rockfish, thornyheads, Dover sole), an estimated amount of discards has been subtracted from the ABC to determine the HG for the landed catch. In other cases (e.g., whiting, *Sebastes* complex, lingcod), a HG representing total catch is more appropriate. Discards in the whiting fishery have been well documented and, therefore, the HG for whiting represents total catch, and discards are accounted for during the season. In 1997, the HG for the *Sebastes* complex and its components was changed from landed to total catch for greater management flexibility during the season; estimates of discards are added to the landings during the season as data become available.

Setting HGs Greater than ABC

In most cases, HGs are less than or equal to the ABCs. However, the Council recommended HGs that exceed the ABCs for POP and shortspine thornyheads, as in 1996 and 1997. The FMP requires that the Council consider certain factors when setting and HG above an ABC. These factors were analyzed by the Council's GMT and are summarized in the Council's EA for the 1998 specifications.

Both species are caught in association with other species, and, although they can be targeted on to some degree, they also are caught unavoidably while fishing for other species in a mixed-stock complex. The Council believes that requiring closure, or severe cutbacks, of the fishery for the entire complex (the *Sebastes* fishery for POP, and the DTS complex for shortspine thornyheads) in order to protect these two stocks would not provide the overall maximum benefit to the Nation.

POP

POP was depleted off Washington, Oregon, and California by foreign fishing during the 1960's and early 1970's. In 1981, a rebuilding program was established for POP in the Vancouver and Columbia areas. POP are not common in the more southern areas. POP are part of multi-species groundfish catches and cannot be completely avoided when harvesting other groundfish species. POP are taken as bycatch in fisheries for other rockfish, arrowtooth flounder, and Dover sole. The ABC for POP has been set at ''zero'' for many years. Each year, however, a low level of landings has been allowed to avoid the waste of fish that would otherwise be discarded. The annual HGs are intended only to accommodate the catch of fish that would be discarded, and are not intended to encourage targeting. Even if retention of POP were prohibited, it would not substantially reduce fishing mortality because POP are caught in small amounts in other fisheries, particularly in fisheries for other rockfish species. The stock is estimated to be at about 50 percent of its maximum sustainable yield (MSY) level, and recent harvests have been near the overfishing threshold. Because strong year classes, which are necessary to rebuild the stock, occur infrequently, the lack of rebuilding to date is not unexpected. The Council has recommended annual trip limits that are intended to discourage targeting while allowing unavoidable incidental catches to be landed. Consequently, the HG exceeds the ''zero'' ABC.

The HG of 650 mt for POP is not intended to be a target but rather is intended to accommodate incidental catches that would otherwise be taken while fishing for other species and discarded. As in past years, trip limits will not be relaxed to enable the HG to be reached.

Shortspine Thornyheads

Shortspine thornyheads are part of the mutispecies DTC complex (consisting of Dover sole, shortspine and longspine thornyheads, and trawl-caught sablefish). In 1997, the HG for shortspine thornyheads was reduced to 1,380 mt to be consistent with the policy of using a landed-catch HG. The total catch associated with the 1997 HG was expected to be about 1,500 mt, of which 120 mt (8 percent) was estimated to be discarded. Therefore, the total catch expected to occur in 1997 was 500 mt higher than the 1,000-mt ABC, but well below the overfishing threshold of 1,757 mt. The HG was set above ABC in 1996–97 largely because of the uncertainty in the stock assessment. The HG was intended to result in catch at a level similar to the ABC level that would result from various stock assessment scenarios with higher levels of natural mortality or lower levels of survey catchability. Shortspine thornyheads are unavoidable in a number of fishing strategies, as discussed later. Retention above ABC was allowed to reduce discards of unavoidably caught thornyheads and to realize the benefits of harvesting the other species in the complex.

In 1998, the Council again recommended setting the HG above ABC to allow harvest of the more abundant species in the complex and to reduce discard of shortspine

thornyheads. The Council adopted one major change, however, that would affect the HG for landed catch and the estimate of total catch associated with that HG: The estimated discard rate in the fishery was increased from 8 percent to 30 percent. The Council thought their 1998 recommendation was slightly more conservative than the status quo: An ABC of 1,000 mt, and a landed catch HG of 1,300 mt (divided into 1,177 mt north of 36° N. lat. and 123 mt for the Conception area north of Pt. Conception; 80 mt lower than in 1997). The Council clearly stated its intent to keep catch below the overfishing level (1,757 mt at F20%). However, after the Council meeting, it was discovered that the wrong assumptions had been used in calculating the recommended HG, and that, although landings of 1,300 mt would not have resulted in overfishing based on the assumptions used in 1997, it would in 1998, due to the new estimate that 30 percent of the total catch is discarded, rather than 8 percent. In short, the total catch of 1,857 mt associated with the 1,300 mt landed catch HG recommended by the Council for 1998 would exceed the overfishing level in the current FMP by 100 mt, rather than being 50 mt below, as the Council had expected.

NMFS, Northwest Region, consulted with the Council Chairman and Executive Director, and the states of Washington, Oregon, and California to confirm the Council's intent to stay below the current overfishing level for shortspine thornyheads—all agreed. Therefore, the 1998 landed catch HG for shortspine thornyheads is set at 1,195 mt, which would result in total catch of 1,707 mt (prorated to 1,082 mt north of 36° N. lat. and 113 mt for the Conception area north of Pt. Conception), 50 mt below the 1,757-mt overfishing level. It should be noted that the same uncertainty that involves the data and estimates of ABC also applies to the estimated overfishing level.

Generally, the species in this complex are caught together as fishers target the entire DTS complex. In examining 1995–97 landings greater than 3,000 lb that are more than 95 percent DTS: 7–9 percent are shortspine thornyheads, 30–35 percent are longspine thornyheads, 16–19 percent are sablefish, and 40–44 percent are Dover sole (section 2.1.1 of the EA). These ratios are heavily influenced by the trip limits and other management measures in effect. The nearshore rockfish fishery also can have significant bycatch of shortspine thornyheads, Dover sole, and sablefish. The nearshore flatfish fishery consisting largely of petrale sole, sanddabs, and rex sole also encounters bycatch of the DTS species, although they can be avoided in certain areas. There also are nearshore Dover sole and sablefish target fisheries in which it is difficult to avoid shortspine thornyheads. Each ex-vessel dollar of shortspine thornyhead revenue in the DTS complex is associated with $7.82 of other DTS species (section 2.2.1 of the EA). Clearly, shortspine thornyheads make up a small proportion of a much larger and more valuable multispecies complex. Prohibiting retention of shortspine thornyheads does not prevent their harvest in the DTS complex. The value of the fishery for the entire complex justifies fishing shortspine thornyheads above the ABC because more harvest cannot be avoided without drastic reductions in the catch of the overall DTS complex as well as other trawl fisheries.

Foreign and Joint Venture Fisheries

For those species that will not be fully utilized by domestic processors or harvesters, and that can be caught without severely affecting species that are fully utilized by domestic processors or harvesters, foreign or joint venture operations may occur. A joint venture occurs when U.S. vessels deliver their catch to foreign processing vessels in the EEZ. A portion of the HGs or quotas for these species may be apportioned to domestic annual harvest (DAH), which in turn may be apportioned between domestic annual processing (DAP) and joint venture processing (JVP). The portion of a HG or quota not apportioned to DAH may be set aside as the total allowable level of foreign fishing (TALFF). In January 1998, no surplus groundfish are available for joint venture or foreign fishing operations. Consequently, all the HGs in 1998 are designed entirely for DAH and DAP (which are the same in this case); JVP and TALFF are set at zero.

II. The Limited Entry Program

The FMP established a limited entry program that, on January 1, 1994, divided the commercial groundfish fishery into two components: The limited entry fishery and the open access fishery, each of which has its own allocations and management measures. The limited entry and open access allocations are calculated according to a formula specified in the FMP, which takes into account the relative amounts of a species taken by each component of the fishery during the 1984–88 limited entry window period. At its November 1997 meeting, the Council recommended no new species and areas to be allocated between open access and limited entry fisheries in 1998, and the Regional Administrator calculated the amounts of the allocations that are presented in Table 1. Unless otherwise specified, the limited entry and open access allocations are treated as HGs in 1998.

Open Access Allocations

The open access fishery is composed of vessels that operate under the HGs, quotas, and other management measures governing the open access fishery, using (1) exempt gear, or (2) longline or pot (trap) gear fished from vessels that do not have permits endorsed for use of that gear. Exempt gear means all types of legal groundfish fishing gear except groundfish trawl, longline, and pots. (Exempt gear includes trawls used to harvest pink shrimp or spot or ridgeback prawns (shrimp trawls), and, south of Point Arena, CA (38°57′30″ N. lat.), California halibut or sea cucumbers.)

The open access allocation is derived by applying the open access allocation percentage to the HG, or if there is a set-aside for recreational or tribal fishing, this is first deducted and the percentage is applied to the commercial HG. (The commercial HG or quota is the annual HG or quota after subtracting any set-asides for recreational or tribal fishing.) For those species in which the open access share would have been less than 1 percent, no open access allocation is specified unless significant open access effort is expected.

Limited Entry Allocations

The limited entry fishery means the fishery composed of vessels using limited entry gear fished pursuant to the HGs, quotas, and other management measures governing the limited entry fishery. Limited entry gear means longline, pot, or groundfish trawl gear used under the authority of a valid limited entry permit issued under the FMP, affixed with an endorsement for that gear. (Groundfish trawl gear excludes shrimp trawls used to harvest pink shrimp, spot prawns, or ridgeback prawns, and other trawls used to fish for California halibut or sea cucumbers south of Point Area, CA.) Beginning in 1997, a sablefish endorsement also is required to operate in the limited entry regular or mop-up seasons for sablefish.

The limited entry allocation is the allowable catch (HG or quota) reduced by: (1) Set-asides, if any, for treaty Indian fisheries or recreational fisheries (which results in the commercial HG or quota); and (2) the open access allocation. Allocations for Washington coastal tribal fisheries are discussed in paragraph V.

III. 1998 Management Measures

Projections of landings in 1997 are based on the information available to the Council at its November 1997 meeting (Supplemental GMT Report B.6., November 1997), unless otherwise noted.

Limited Entry Fishery

The management measures for vessels operating in the 1998 limited entry fishery are designed to keep landings within the HGs or limited entry allocations. Cumulative trip limits continue to be used for most of the limited entry fishery, which allows fishers to accumulate fish over a period of time without a limit on the number of landings. Two-month cumulative limits will continue to be used for most of the limited entry fishery in 1998. As in 1997, no more than 60 percent of a 2-month limit may be taken in either calendar month, resulting in a variable monthly trip limit within the 2-month limit. This enables the limited entry fleet to maintain its current monthly fishing pattern, target on 50 percent of the 2-month cumulative limit in a month, and have the protection of a buffer equivalent to 10 percent of the 2-month cumulative limit to account for inaccuracies in weighing fish at sea or for small amounts caught above the target level. Unless otherwise announced later in the year, the 2-month periods are: January–February, March–April, May–June, July–August, September–October, and November–December. One-month periods may be used later in the year.

[**Note:** NMFS has published a proposed regulation in the **Federal Register** (62 FR 67610, December 29, 1997), with a request for public comments, in which limited entry permit transfers would take effect on the first day of a major cumulative landings limit period, which are the periods described in this paragraph.]

Platooning

An optional platooning system was initiated in 1997 which enables the limited entry trawl fleet to provide a more consistent supply of fish to processors. Whereas the cumulative limits normally begin on the first of a month (this is the ''A'' platoon), a vessel in the ''B'' platoon operates under limits out of phase by 2 weeks, from the 16th of a month to the 15th of a month. All limited entry trawl vessels are automatically in the ''A'' platoon, unless the permit owner indicated in the annual permit renewal that the permitted vessel will participate in the ''B'' platoon. Vessels operating in the ''B'' platoon will not be able to land any species of groundfish from January 1–15, 1998. The effective date of changes to the cumulative trip limits for the ''B'' platoon will occur on the 16th of the month unless otherwise specified. Special provisions will be made to accommodate ''B'' vessels at the end of the year so that the same amount of fish is made available to both ''A'' and ''B'' vessels. For example, a vessel in the ''B'' platoon could have the same cumulative trip limit for the final period as vessels in the ''A'' platoon, but the final period may be 2 weeks shorter, so that both the ''A'' and ''B'' fishing periods end on December 31, 1998. Alternatively, if the fishery is operating under 1-month cumulative trip limits, the ''B'' platoon may have 6 weeks to take the final two cumulative limits. The choice of platoon applies to the permit for the entire calendar year, even if the permit is sold, leased, or otherwise transferred. The platoon system is experimental and may not be continued in the future if the Council decides the benefit does not outweigh technical and administrative burdens.

Open Access Fishery

The trip limits for the open access fishery are designed to keep landings within the open access allocation, while allowing the fisheries to operate for as long as possible during the year. The overall open access limits for rockfish, sablefish, and ''all groundfish'' in 1998 are the same as at the end of 1997, with several exceptions: (1) 1998 limits for bocaccio are set at half the 1997 levels; (2) a new, open access trip limit is added for lingcod of 1,000 lb (454 kg) cumulative per 2-month period; and (3) the cumulative trip limit is reduced to 600 lb (272 kg) per 2-month period for sablefish taken under the daily trip limit north of 36° N. lat. with open access net or line gear (but not exempt trawl gear). The lingcod and bocaccio (set/trammel net) 2-month cumulative trip limits are unusual because cumulative trip limits in the open access fishery generally apply to 1-month periods. Also, the 60-percent monthly limits that apply within the 2-month cumulative trip limits for the limited entry fishery (see paragraph IV.A.(1)(c)(i)) do not apply to the open access fishery; the open access cumulative limits for lingcod and sablefish may be taken at any time during the 2-month period.

The thornyhead fishery remains closed to all open access gear north of 36° N. lat., and under a 50 lb (23 kg) daily trip limit south of 36° N. lat.

The groundfish trip limit for exempted trawl gear remains at 500 lb (227 mt) (which for pink shrimp trawls only may be multiplied by the number of days in a trip), and includes the daily trip limits for sablefish (300 lb (136 kg) coastwide) and thornyheads (the same as for the other open access gear, which may not be multiplied by the number of days in a trip.

As in past years, a vessel operating in the open access fishery, besides being constrained by specific open access limits, must not exceed in any calendar month 50 percent of any 2-month cumulative trip limit for the same area in the limited entry fishery, called the ''50-percent monthly limit.'' In some cases, the 50-percent monthly limit is larger than the open access limit, and so is not an additional constraint. The management measures in paragraph IV. have been reorganized so that the 50-percent monthly limits now appear in one place with all other open access limits.

Background and Council Recommendations

The following discussions apply to the limited entry fishery unless otherwise stated.

Widow Rockfish

Limited Entry. In 1997, the limited entry 2-month cumulative limit of 70,000 lb (31,742 kg) was in effect until May 1, at which time it was reduced to 60,000 lb (27,216 kg), where it remained to the end of the year. Landings were projected to be 6,155 mt in 1997, 1 percent below the HG. The HG is reduced substantially, from 6,500 mt in 1997 to 4,276 mt in 1998, and therefore the 2-month cumulative trip limit also is reduced substantially at the beginning of 1998, to 25,000 lb (11,340 kg). Even at this lower level, there is some concern that further reductions may be needed later in the year.

Open access. There is no open access allocation specifically for widow rockfish. Landings in the open access fishery are constrained by the 50-percent monthly limit, which applies toward the open access limit for rockfish.

The Sebastes Complex (Including Yellowtail Rockfish, Canary Rockfish, and Bocaccio)

Limited entry. On January 1, 1997 (62 FR 700, January 6, 1997), the limited entry fishery for the *Sebastes* complex was managed under a 2-month cumulative trip limit of 30,000 lb (13,608 kg) north of Cape Mendocino (40°30′ N. lat.) and 150,000 lb (68,039 kg) south of Cape Mendocino. Within these 2-month cumulative limits for the *Sebastes* complex, no more than 6,000 lb (2,722 kg) could be yellowfish rockfish north of Cape Mendocino, no more than 12,000 lb (5,443 kg) could be

bocaccio south of Cape Mendocino, and no more than 14,000 lb (6,350 kg) could be canary rockfish coastwide. On May 1, 1997 (62 FR 24845, May 7, 1997), the 2-month cumulative trip limit for bocaccio was reduced to 10,000 lb (4,536 kg), so that its HG would not be exceeded. However, landings of yellowtail rockfish and canary rockfish were lower than expected, and on October 1, 1997 (62 FR 51814, October 3, 1997), the 2-month cumulative trip limits were converted to 1-month limits and increased to 5,000 lb (2,268 kg) per month for yellowtail rockfish and 10,000 lb (4,534 kg) per month for canary rockfish. This increased the *Sebastes* complex limits to 20,000 lb (9,072 kg) per month north of Cape Mendocino and 75,000 lb (34,020 kg) per month south of Cape Mendocino. Poor October weather and low limits contributed to reduced effort in the fishery, such that, at the Council's November 1997 meeting, landings were projected to be 14 and 20 percent below the HGs for canary and yellowtail rockfish, respectively. On November 16, 1997 (62 FR 61700, November 19, 1997), in the middle of a cumulative trip limit period, the limits were increased for these two species, resulting in increases to the total *Sebastes* complex cumulative limits as well. The November and December 1997 1-month cumulative trip limits for the *Sebastes* complex were: 40,000 lb (18,144 kg) north of Cape Mendocino and 80,000 lb (36,287 kg) south of Cape Mendocino. Within these 1-month cumulative limits, no more than 20,000 lb (9,072 kg) could be yellowtail rockfish north of Cape Mendocino, no more than 5,000 lb (2,268 kg) could be bocaccio south of Cape Mendocino, and no more than 15,000 lb (6,804 kg) could be canary rockfish coastwide.

The yellowtail rockfish HG increased from 2,762 mt in 1997 to 3,118 mt in 1998, and the canary HG increased slightly, from 1,000 mt in 1997 to 1,045 mt in 1998. The bocaccio HG declined, from 387 mt to 230 mt. As a result, the following changes to the management measures are taken in January 1998, compared to the level in January 1997. The 2-month cumulative trip limit for yellowtail rockfish (north of Cape Mendocino) is increased from 6,000 lb (2,711 kg) to 11,000 lb (4,990 kg), canary rockfish is increased from 14,000 lb (6,350 kg) to 15,000 lb (6,804 kg), and bocaccio (south of Cape Mendocino) is reduced from 12,000 lb (5,443 kg) to 2,000 lb (907 kg). The overall 2-month cumulative trip limit for the *Sebastes* complex north of Cape Mendocino is increased from 30,000 lb (13,608 kg) to 40,000 lb (18,144 kg), but is larger than the increases to the cumulative limits for yellowtail and canary rockfish. If landings of other *Sebastes* species become too high, the trip limit for the complex may be reduced later in the year. South of Cape Mendocino, the *Sebastes* complex 2-month cumulative trip limit is the same as in January 1997, at 150,000 lb (68,039 kg).

Open access. Landings in the open access fishery of yellowtail, canary rockfish, bocaccio, and the Sebastes complex as a whole are constrained by the 50-percent monthly limit, which applies toward the open access limit for rockfish. However, restrictions, some of them new, are described below for the open access bocaccio fishery.

Both yellowtail rockfish and bocaccio are particularly difficult to manage because of the number of gear types and fishing strategies involved. A substantial portion of the yellowtail HG is taken as bycatch in the whiting and shrimp fisheries. The at-sea processing sector of the whiting fishery reduced its bycatch of yellowtail rockfish approximately in half in 1997 by fishing deeper and more cautiously and using daily satellite transmissions to alert fishers of areas of high bycatch, as has been done to monitor salmon bycatch since 1996. Bycatch of rockfish in the shrimp and prawn trawl fisheries was addressed in 1997 by reducing the groundfish trip limits from a third to a half of their former levels. Management of bocaccio is further complicated by significant recreational and open access harvest. In 1998, a new recreational bag limit (3 fish) is established for bocaccio off California, and the open access 1-month cumulative trip limits for bocaccio south of Cape Mendocino are reduced by half: for hook-and-line gear, from 2,000 lb (907 kg) in 1997 to 1,000 lb (454 kg) in 1998; and for set and trammel nets, from 4,000 lb (1,814 kg) to 2,000 lb (907 kg), of which no more than 250 lb (13 kg) may be taken per trip. The set/trammel net limit is higher than that which may be taken by the limited entry fishery. This limit maintains the historical proportions landed by open access net and hook-and-line gears while enabling the open access allocation for bocaccio to be achieved.

POP

Limited entry. The limited entry 2-month cumulative trip limit for POP remained the same throughout 1997, at 8,000 lb (3,629 kg) per 2-month period; it has been at this level since July 1, 1996. Landings of POP in 1997 were projected to be from 563 mt to over 600 mt, below its 750-mt HG. The 1998 HG is set at 650 mt to accommodate incidental catches without encouraging a target fishery on POP; interceptions of POP may increase as the HG for yellowtail rockfish increases in 1998. The 2-month cumulative trip limit remains the same as in 1997, and also is intended to accommodate only unavoidable incidental catches. POP is managed to achieve a rebuilding schedule, so trip limits will not be increased to achieve the HG.

Open access. Landings of POP in the open access fishery are constrained by the 50-percent monthly limit, which counts toward the open access cumulative limit for rockfish.

Sablefish. The sablefish HG is subdivided among several fisheries. The tribal fishery allocation is set aside prior to dividing the balance of the HG between the commercial limited entry and open access fisheries. These three fisheries are managed differently. The limited entry allocation is further subdivided into trawl (58 percent) and nontrawl (42 percent) allocations. Trawl-caught sablefish are managed together with Dover sole and thornyheads as the DTS complex because they often are caught together.

DTS Complex (Dover Sole, Thornyheads, and Trawl-Caught Sablefish)

Limited entry. In January 1997 (62 FR 700, January 6, 1997), the 2-month cumulative trip limit for the DTS complex was 70,000 lb (31,752 kg) north of Cape Mendocino and 100,000 lb (45,359 kg) south of Cape Mendocino. Within this 2-month cumulative limit, no more than 38,000 lb (17,236 kg) could be Dover sole north of Cape Mendocino, and coastwide, no more than 12,000 lb (5,443 kg) could be trawl-caught sablefish and no more than 20,000 lb (9,072 kg) could be thornyheads. No more than 4,000 lb (1,814 kg) of the thornyheads could be shortspine thornyheads. Throughout the year, no more than 500 lb (227 kg) per trip could be sablefish smaller than 22 inches (56 cm).

On May 1, 1997 (62 FR 24845, May 7, 1997), the 2-month cumulative trip limits were reduced for Dover sole north of Cape Mendocino to 30,000 lb (13,608 kg), and for thornyheads coastwide to 15,000 lb (6,804 kg), of which only 3,000 lb (1,361 kg) could be shortspine thornyheads. The 2-month cumulative limit for the DTS complex north of Cape Mendocino decreased by the same amount, to 57,000 lb (25,855 kg), while remaining at 100,000 lb (45,359 kg) south of Cape Mendocino. The coastwide 2-month cumulative trip limit

for sablefish remained at 12,000 lb (5,443 kg).

On September 1 (62 FR 36228, July 7, 1997), the 2-month cumulative trip limits for the DTS complex and its components were converted to 1-month cumulative limits: for the DTS complex, 28,500 lb (12,927 kg) north of Cape Mendocino and 50,000 lb (22,680 kg) south of Cape Mendocino; for sablefish coastwide, 6,000 lb (2,722 kg); for Dover sole north of Cape Mendocino, 15,000 lb (6,804 kg); and for thornyheads coastwide, 7,500 lb (3,402 kg), of which no more than 1,500 lb (680 kg) could be shortspine thornyheads.

On October 1, 1997 (62 FR 51814, October 3, 1997), the 1-month cumulative trip limits were reduced for sablefish coastwide (to 2,000 lb (907 kg)) and Dover sole north of Cape Mendocino (to 1,500 lb (680 kg)), and established for Dover sole south of Cape Mendocino (at 30,000 lb (13,608 kg)). Previously Dover sole could comprise the amount of DTS limit that was left over after taking sablefish and thornyheads. As a result, the 1-month cumulative trip limits for the DTS complex became the sum of the cumulative limits of its components, at 11,000 lb (4,990 kg) north of Cape Mendocino and 39,500 lb (17,917 kg) south of Cape Mendocino. The limits for thornyheads did not change in October.

Reduced effort in October, likely due to bad weather and extremely low cumulative trip limits, resulted in much lower landings than expected. On November 16, 1997 (62 FR 61700, November 19, 1997), the 1-month cumulative trip limits for all three species in the complex were increased to keep landings within the 1997 HGs and allocations without increasing discards. These increases were intended to enable fishers to land fish that otherwise would be caught and discarded. Therefore, on November 16, 1997 (62 FR November 19, 1997), the monthly limits for the DTS complex were raised to 16,000 lb (7,257 kg) north of Cape Mendocino, and 43,000 lb (19,504 kg) south of Cape Mendocino.

Within these limits, 3,000 lb (1,361 kg) could be Dover sole north of Cape Mendocino and 30,000 lb (13,608 kg) south of Cape Mendocino (no change to southern Dover sole); 3,000 lb (1,361 kg) coastwide could be trawl-caught sablefish; and 10,000 lb (4,536 kg) coastwide could be thornyheads. No more than 3,000 lb (1,361 kg) of the thornyheads could be shortspine thornyheads. Landings are intended to be close to the HGs for these species in 1997, although some changes were made so late in the year, final data will not be available until 1998.

The HG for sablefish north of 36° N. lat. is reduced from 7,800 mt 1997 to 4,680 mt in 1998, with proportional reductions in the allocations (see footnote g/ of Table 1). The 1998 trawl allocation was therefore reduced from 3,803 mt in 1997 to 2,282 mt in 1998, and the 2-month cumulative limit for trawl-caught sablefish in January 1998 is 5,000 lb (2,268 kg), less than half the 12,000 lb (5,443 kg) limit in January 1997. The 500-lb (227 kg) trip limit for sablefish smaller than 22 inches (56 cm) remains in effect. A new HG was set at 425 mt for sablefish south of 36° N. lat., equal to the ABC, which is based on historical landings in that area. The DTS limits apply coastwide, including waters south of 36° N. lat.

In 1998, the HG for Dover sole is applied coastwide only, without separate consideration of the Columbia area. The HG is reduced from 11,050 mt in 1997 to 8,995 mt in 1998. At certain times of year, particularly in winter months, it is possible to catch Dover sole in deep water more selectively, without large associations of sablefish and shortspine thornyheads. Therefore, in January-February 1998, the 2-month cumulative trip limit for Dover sole is 40,000 lb (18,144 kg). The 2-month cumulative trip limit is reduced to 18,000 lb (8,165 kg) beginning in March 1998. If adequate amounts remain, the limit may be raised for the more selective fishery at the end of the year. This is done to achieve full utilization of all four species in the complex, without exceeding any HG or allocation, while reducing the need to discard fish in excess of legal limits.

In 1998, the HG for longspine thornyheads is reduced from 6,000 mt north of Pt. Conception (34°27′ N. lat.) to 3,733 mt north of 36° N. lat., based on a new stock assessment, and 390 mt for that portion of the Conception area north of Pt. Conception (which is equivalent to 4,123 mt north of Pt. Conception, although there no longer is a single HG for these two areas combined). The 2-month cumulative limit in January 1998 is 10,000 lb (4,536 kg), which for the first time applies only to longspine thornyheads, separate from shortspine thornyheads. In 1997, the trip limit of 20,000 lb (9,072 kg) applied to both species of thornyheads combined, and could consist entirely of longspine thornyheads if no shortspine thornyheads were taken. The trip limits are not linked in 1998 in order to encourage a more selective harvest of each species.

In 1998, the HG for shortspine thornyheads is reduced from 1,500 mt north of 36° N. lat. to 1,082 mt north of the Conception area, and 113 mt for that portion of the Conception area north of Pt. Conception (which is equivalent to 1,195 mt north of Pt. Conception, although there is not a single HG for the two areas combined). There is no HG south of Pt. Conception. The 2-month cumulative trip limit for shortspine thornyheads in January 1998 is 4,000 lb (1,814 kg), the same as in January 1997.

Open access. The open access limits for thornyheads are the same as in 1997: the fishery is closed north of Pt. Conception, and a 50-lb (23 kg) daily trip limit applies south of Pt. Conception. Open access landings of Dover sole are constrained by the 50-percent monthly limit of 9,000 lb (4,082 kg) starting in March 1998, but not in January-February 1998 when the open access limits for exempted trawl gear are more restrictive. The 300-lb (136 kg) coastwide daily trip limit for exempted trawl gear remains in effect in 1998.

Nontrawl Sablefish

Limited entry north of 36° N. lat. A number of significant changes were made to management of the limited entry fishery in 1997: (1) A vessel was required to have an endorsement on its limited entry permit in order to participate in the regular or mop-up sablefish seasons (62 FR 34670, August 27, 1997); (2) the regular season was changed from a derby to an equal cumulative trip limit for all participants, which in 1997, was 34,100 lb (15,468 kg); (3) the cumulative trip limit during the regular season was attached to the limited entry permit as well as to the vessel to prevent multiple vessels from taking multiple cumulative trip limits within the same cumulative limit period by transferring a permit; (4) the fishery during the regular season ended at sea rather than dockside; (5) the preseason closure was shortened from 72 to 48 hours, and advance setting of pot gear was no loner allowed; and (6) the post-season closure also was shortened from 72 to 48 hours.

However, a number of provisions remained the same as in 1996. The trip limit for sablefish smaller than 22 inches (56 cm) of 1,500 lb (680 kg) or 3 percent of all legal sablefish on board, whichever is greater, remained in effect during the regular and mop-up seasons. Small daily trip limits were applied to the nontrawl fishery before and after the ''regular'' and ''mop-up'' seasons. A 300-lb (136-kg) daily trip limit was applied only north of 36°00′ N. lat., the same area covered by the HG. On May 1, a 5,100-lb (2,313 kg) per month cap was placed on the amount of sablefish that could be taken under the daily trip limit north of 36° N. lat. (62 FR 24845, May 7, 1997). This cap was lowered to

600 lb (272 kg) on July 1 (62 FR 36228, July 7, 1997), and increased to1,500 lb (680 kg) on October 22 after the end of the mop-up season (62 FR 53577, October 15, 1997). The 1997 daily trip limit was intended to result in landings of about 915,000 lb (425 mt) but it appeared they would be as high as 1.1 million lb (499 mt). Overall, limited entry landings of sablefish in 1997 are projected to be about 160 mt below the limited entry nontrawl allocation of 2,754 mt (based on information updated after the November Council meeting).

Due to the decline in the HG in 1998, the limited entry nontrawl allocation for sablefish north of 36° N. lat. is reduced from 2,754 mt in 1997 to 1,652 mt in 1998. In 1998, the same daily trip limits for the limited entry fishery will apply outside the regular and mop-up seasons and any closures, but the cumulative limit is reduced from 1,500 lb (680 kg) per month to 1,500 lb (680 kg) per 2-month period (excluding any harvest in the regular or mop-up seasons). The 60-percent monthly limits described in paragraph IV.A(1)(c)(i) do not apply here for the nontrawl sablefish fishery. The ''per trip'' limit for nontrawl sablefish smaller than 22 inches (56 cm) remains in effect during the regular and mop-up fisheries. The Council recommended a number of management changes for 1998, including a 3-tier system of assigning cumulative trip limits during the regular season, that has not yet been published for public comment or approved by NMFS.

1998 Regular Season. The Council recommended that the limited entry regular season begin on August 1, 1998, to reduce the probability of poor weather (as encountered in the 1997 mop-up season), to take advantage of favorable tidal conditions, to decrease competition with Alaska sablefish fisheries, and to accommodate alternate fishing opportunities. The regular season applies only north of 36° N. lat.

Limited entry south of 36° N. lat. In the Conception area, where there was no HG in 1997, and landings had been below the 425-mt ABC in 1996, the limited entry daily trip limit was set at 350 lb (159 kg) to accommodate most landings without encouraging excessive effort shifts into that area. There was no cap on the amount that could be landed under the daily trip limit in the Conception area. In September 1997, an option was provided that enabled a vessel to make one landing a week above 350 lb (159 kg) but less than 1,050 lb (476 kg) (62 FR 46920, September 6, 1997). The same daily trip limit remains in effect in 1998, but the option to make one landing above 350 lb (159 kg) is not available in January 1998. This option may be reconsidered later in the year.

Open access. Landings appear to be close to the open access sablefish allocation in 1997. Therefore, for the open access fishery, the same daily trip limits for sablefish apply in 1998 as in 1997: 300 lb (136 kg) north of 36° N. lat.; 350 lb (159 kg) south of 36° N. lat., except a 2-month cumulative limit of 600 lb (272 kg) also applies north of 36° N. lat.

Whiting. The entire whiting HG of 232,000 mt was harvested in 1997: 87,069 mt by the shore-based fleet; 69,947 mt by the catcher/processing sector; 50,395 mt by the motherships sector, and about 25,000 mt by the Makah tribal fishery. The 10,000-lb (4,536-kg) trip limit for whiting taken before and after the regular whiting season and inside the 100-fathom (183-m) contour in the Eureka subarea (40°30′–43°00′ N. lat.) continues in effect in 1998. Additional regulations, including the percentages used to allocate whiting among non-tribal sectors, are found at 50 CFR 660.323(a)(4).

Whiting seasons. The opening dates of the primary seasons for whiting also are announced herein (see paragraph IV.B.(5)(b)). They remain the same as in 1997, except for the shore-based fishery in the Eureka area (42°–40°30′ N. lat. off California), which will begin on April 1, 1998.

Nontribal whiting allocation. Because the U.S. HG and tribal allocation did not change, the 1998 allocations for the nontribal whiting fishery are the same as in 1997, and are listed at paragraph IV.B. (5)(a).

Lingcod

The 2-month cumulative trip limit for lingcod in 1997 was 40,000 lb (18,144 kg) until July 1, when it was reduced to 30,000 lb (13,608 kg) (62 FR 36228, July 7, 1997). Lingcod smaller than 22 inches (56 cm) could not be landed in the commercial or recreational fisheries except for 100-lb (45-kg) per trip for trawl-caught lingcod. Landings of lingcod in 1997 are projected at 2,162 mt (1,462 mt from the commercial fishery and 700 mt from the recreational fishery), 238 mt below the 2,400 mt HG. The trip limit was not increased however, in recognition of the reduced ABC in 1998, and the fear that an increase to trip limits in 1997 would attract additional target opportunities and excessive effort.

Lingcod involves two difficult management issues in 1998: Its transboundary occurrence in U.S. and Canadian waters, and within U.S. waters, relative harvest levels by commercial and recreational fishers.

The 1998 HG for lingcod is 35 percent of its 1997 level, reduced from 2,400 mt in 1997 to 838 mt in 1998, due primarily to the results of a new stock assessment. (The ABC is set at F35% but the HG is set at a more precautionary F40%) There is no agreement between U.S.. and Canadian scientists regarding the appropriate stock structure and distribution. U.S. scientists believe the lingcod population of the Columbia and Vancouver areas (including Canada) to be a single stock, but Canadian scientists believe the Canadian portion of this range is not part of the same stock as that found in northern U.S. waters. Landings in the Canadian portion of the Vancouver area were about 900 mt in 1996. If this level of landings were to continue in 1998, Canadian landings alone would exceed the F40% yield calculated (by U.S. scientists) for the entire assessment area (the Columbia and Vancouver areas, including Canadian waters).

The U.S. industry disagrees as to whether the reduction should or could fall equally on both commercial and recreational sectors. The 838-mt HG is for total U.S. catch, including the recreational sector. Coastwide recreational landings of lingcod in 1997 were estimated at about 700 mt. If that level continued in 1998, recreational harvest would comprise over 80 percent of the U.S. HG, leaving only 138 mt for the commercial fishery. If recreational catch were reduced by 65 percent, the same reduction in the U.S. ABC from 1997 to 1998, the recreational sector would be limited to 245 mt in 1998, leaving 593 mt for the commercial sector.

The Council considered the management options available and decided, after hearing considerable public testimony, to reduce both the commercial and recreational fisheries to absorb the impact of the reduced HG in 1998. The management measures recommended by the Council are intended to divide the HG almost equally between the commercial and recreational sectors, but this results in a proportionately larger decrease for the commercial fishery. The Council recommended increasing the size limit for all fisheries coastwide (commercial limited entry and open access, and recreational) from 22 inches (56 cm) to 24 inches (61 cm) and reducing the recreational bag limit off California from 5 to 3 lingcod, consistent with current bag limits off Washington and Oregon. This would lower the recreational harvest by about 153 mt, resulting in expected recreational harvest of about

430 mt of the 838 mt total in 1998, even with the recommended size and bag limit reductions. Approximately 408 mt would remain for the commercial fishery, a 72 percent decrease since 1997. The Council also recommended reducing the limited entry, 2-month cumulative trip limit to 1,000 lb (454 kg) in January 1998 (compared to 40,000 lb (18,144 kg) in January 1997), and established a new, 1,000-lb (454 kg) 2-month cumulative trip limit for the open access fishery. The new open access cumulative limit is the same as for the limited entry fishery, except the 60-percent monthly limits described in paragraph IV.A.(1)(c)(i) do not apply, and the entire open access cumulative limit may be taken at any time during the 2-month period. The commercial fishery absorbed a greater proportion of the harvest reduction in 1998 because the Council has not yet developed a plan for allocating lingcod between the two fisheries. The Council is expected to initiate discussions in the near future to address more formally the commercial and recreational allocation of lingcod.

Black Rockfish

Black rockfish off the State of Washington continue to be managed under the regulations at 50 CFR 660.323(a)(1) for nontribal limited entry and open access fisheries. The State of Oregon implements trip limits for black rockfish off the Oregon coast.

Operating in Both Limited Entry and Open Access Fisheries

Vessels using open access gear are subject to the management measures for the open access fishery, regardless of whether the vessel has a valid limited entry permit endorsed for any other gear. In addition, a vessel operating in the open access fishery must not exceeds any trip limit, frequency limit, and/or size limit (for the same area) in the limited entry fishery, unless otherwise authorized.

A vessel that operates in both the open access and limited entry fisheries is not entitled to two separate trip limits for the same species. Fish caught with open access gear will also be counted toward the limited entry trip limit. For example: In January, a trawl vessel catches 2,700 lb (1,225 kg) of sablefish in the limited entry fishery, and in the same month catches 500 lb (227 kg) of sablefish with shrimp trawl (open access) gear, for a total of 3,200 lb (1,451 kg) of sablefish. Because the open access landings are counted toward the limited entry limit, the vessel would have exceeded its limited entry, cumulative limit of 3,000 lb (1,361 kg) (60 percent of the 5,000-lb (2,268-kg) 2-month cumulative limit for the limited entry fishery).

Operating in Areas with Different Trip Limits.

Trip limits may differ for a species or species complex at different locations on the coast. Unless otherwise stated (as for black rockfish or for species with daily trip limits), the cross-over provisions at paragraph IV.A.(12) apply. In general, a vessel fishing for groundfish in a more restrictive area is subject to the more restrictive limit for the duration of that trip limit period.

Changes to Trip Limits; Closures

Unless otherwise stated (as for the nontrawl sablefish regular season; see 50 CFR 660.323(a)(2)), a vessel must have initiated offloading its catch before the fishery is closed or before a more restrictive trip limit becomes effective. As in the past, all fish on board the vessel when offloading begins are counted toward the landing limits (See 50 CFR 660.302 for the definition of ''landing'').

Designated Species B Permits

Desginated Species B permits may be issued if the limited entry fleet will not fully utilize the HG for Pacific whiting, shorbelly rockfish, or jack mackerel north of 39° N. lat. The limited entry fleet has requested the full use of these species in 1998. In addition, since no applications were received before the November 1 deadline, NMFS does not expect to issue Designated Species B permits in 1998.

Recreational Fishing

Bag limits for rockfish remain the same in 1998 as in 1997, with one exception; a new 3-fish bag limit is added for bocaccio off California. The bag and size limits for lingcod also are changed in 1998: the size limit is increased from 22 inches (56 cm) to 24 inches (61 cm) total length, and the bag limit is reduced from 5 to 3 fish off California, which is consistent with the 3-fish bag limits off Washington and Oregon.

IV. NMFS Actions

For the reasons stated above, the Assistant Administrator for Fisheries, NOAA (Assistant Administrator), concurs with the Council's recommendations and announces the following management actions for 1998, including those that are the same as in 1997.

A. General Definitions and Provisions

The following definitions and provisions apply to the 1998 management measures, unless otherwise specified in a subsequent notice:

(1) *Trip limits.* Trip limits are used in the commercial fishery to specify the amount of fish that may legally be taken and retained, possessed, or landed, per vessel, per fishing trip, or cumulatively per unit of time, or the number of landings that may be made from a vessel in a given period of time, as explained below.

(a) *A trip limit* is the total allowable amount of a groundfish species or species complex, by weight, or by percentage of weight of legal fish on board, that may be taken and retained, possessed, or landed per vessel from a single fishing trip.

(b) *A daily trip limit* is the maximum amount that may be taken and retained, possessed, or landed per vessel in 24 consecutive hours, starting at 0001 hours local time. Only one landing of groundfish may be made in that 24-hour period. Daily trip limits may not be accumulated during multiple day trips.

(c) *A cumulative trip limit* is the maximum amount that may be taken and retained, possessed, or landed per vessel in a specified period of time, without a limit on the number of landings or trips.

(i) *Limited entry fishery.* Unless otherwise specified, cumulative trip limits in the limited entry fishery apply to 2-month periods, and no more than 60 percent of the applicable 2-month cumulative limit may be taken and retained, possessed or landed in either month of a 2-month period (the ''60-percent monthly limit''). The 2-month periods are: January-February, March-April, May-June, July-August, September-October, and November-December. Different cumulative periods may be announced later in the year.

[Note: NMFS has published a proposed regulation in the **Federal Register** (62 FR 67010, December 29, 1997), with a request for public comments, in which limited entry permit transfers would take effect on the first day of a cumulative landings limit period, which are the periods described in this paragraph IV.A.(1)(c)(i).]

(ii) *Open access fishery.* Unless otherwise specified (as for sablefish north of 36° N. Lat. and lingcod), cumulative trip limits in the open access fishery apply to 1-month periods. Within these 1-month cumulative trip limits, in any calendar month, no more than 50 percent of the applicable 2-month cumulative limit for the limited entry fishery may be taken and retained, possessed, or landed from a vessel in

the open access fishery; this is called the ''50-percent monthly limit.''

(iii) *Platooning—limited entry trawl vessels.* Limited entry trawl vessels are automatically in the ''A'' platoon, unless the permit owner indicated in the annual limited entry permit renewal that the permitted vessel will participate in the ''B'' platoon. If a vessel is in the ''A'' platoon, its cumulative trip limit periods begin and end on the beginning and end of a calendar month as in the past. If a limited entry trawl permit is authorized for the ''B'' platoon, then cumulative trip limit periods will begin on the 16th of the month (generally 2 weeks later than for the ''A'' platoon), unless otherwise specified.

(A) For a vessel in the ''B'' platoon, cumulative trip limit periods begin on the 16th of the month and end on the 15th of the month. Therefore, the management measures announced herein that are effective on January 1, 1998, for the ''A'' platoon will be effective on January 16, 1998, for the ''B'' platoon. The effective date of any inseason changes to the cumulative trip limits also will be delayed for 2 weeks for the ''B'' platoon.

(B) A vessel authorized to operate in the ''B'' platoon may take and retain, but may not land, groundfish from January 1, 1998, through January 15, 1998.

(C) Special provisions will be made for ''B'' platoon vessels later in the year so that the amount of fish made available in 1998 to both ''A'' and ''B'' vessels is the same. (For example, a vessel in the ''B'' platoon could have the same cumulative trip limit for the final period as a vessel in the ''A'' platoon, but the final period may be 2 weeks shorter so that both fishing periods end on the same date.)

(2) Unless the fishery is closed, a vessel that has landed its cumulative or daily limit may continue to fish on the limit for the next legal period, so long as no fish (including, but not limited to, groundfish with no trip limits, shrimp, prawns, or other nongroundfish species or shellfish) are landed (offloaded) until the next legal period. As stated at 50 CFR 660.302 (in the definition of ''landing''), once offloading of any species begins, all fish aboard the vessel are counted as part of the landing.

(3) All weights are round weights or round-weight equivalents unless otherwise specified.

(4) Percentages are based on round weights, and, unless otherwise specified, apply only to legal fish on board.

(5) ''Legal fish'' means fish legally taken and retained, possessed, or landed in accordance with the provisions of 50 CFR part 660, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), any notice issued under part 660, and any other regulation promulgated or permit issued under the Magnuson-Stevens Act.

(6) *Size limits and length measurement.* Unless otherwise specified, size limits in the commercial and recreational groundfish fisheries apply to the longest measurement of the fish without mutilation of the fish or the use of force to extend the length of the fish. No fish with a size limit may be retained if it is in such condition that its length has been extended or cannot be determined by these methods.

(a) For a whole fish, total length is measured from the tip of the snout (mouth closed) to the tip of the tail in a natural, relaxed position.

(b) For a fish with the head removed (''headed''), the length is measured from the origin of the first dorsal fin (where the front dorsal fin meets the dorsal surface of the body closest to the head) to the tip of the upper lobe of the tail; the dorsal fin and tail must be left intact.

(7) ''Closure,'' when referring to closure of a fishery, means that taking and retaining, possessing, or landing the particular species or species group is prohibited. (See 50 CFR 660.302.) Unless otherwise announced in the **Federal Register,** offloading must begin before the time the fishery closes.

[**Note:** Special provisions are made for an at-sea closure at the end of the regular season for the sablefish limited entry fishery. See 50 CFR 660.323(a)(2).]

(8) The fishery management area for these species is the EEZ off the coasts of Washington, Oregon, and California between 3 and 200 nm offshore, bounded on the north by the Provisional International Boundary between the United States and Canada, and bounded on the south by the International Boundary between the United States and Mexico. All groundfish possessed between 0–200 nm offshore, or landed in, Washington, Oregon, or California are presumed to have been taken and retained from the EEZ, unless otherwise demonstrated by the person in possession of those fish.

(9) In season changes to trip limits are announced in the **Federal Register.** Most trip and bag limits in the groundfish fishery have been designated ''routine,'' which means they may be changed rapidly after a single Council meeting. Information concerning changes to trip limits is available from the NMFS Northwest and Southwest Regional Offices (see **ADDRESSES**). Changes to trip limits are effective at the times stated in the **Federal Register.** Once a change is effective, it is illegal to take and retain, possess, or land more fish than allowed under the new trip limit. This means, unless otherwise announced in the **Federal Register,** offloading must begin before the time a fishery closes or a more restrictive trip limit takes effect.

(10) It is unlawful for any person to take and retain, possess, or land groundfish in excess of the landing limit for the open access fishery without having a valid limited entry permit for the vessel affixed with a gear endorsement for the gear used to catch the fish (50 CFR 660.306(p)).

(11) *Operating in both limited entry and open access fisheries.*

The open access trip limit applies to any fishing conducted with open access gear, even if the vessel has a valid limited entry permit with an endorsement for another type of gear. A vessel that operates in both the open access and limited entry fisheries is not entitled to two separate trip limits for the same species. Fish caught with open access gear will also be counted toward the limited entry trip limit.

(12) *Operating in areas with different trip limits.* Trip limits for a species or species complex may differ in different geographic areas along the coast. The following ''crossover'' provisions apply to vessels operating in different geographical areas that have different cumulative or ''per trip'' trip limits for the same species or species complex. They do not apply to species that are only subject to daily trip limits, or to the trip limits for black rockfish off the State of Washington (see 50 CFR 660.323(a)(1)). In 1998, the trip limit period for cumulative trip limits is 2 months for the limited entry fishery and 1 month for the open access fishery, unless otherwise specified.

(a) *Going From A More Restrictive To A More Liberal Area:* If a vessel takes and retains any species of groundfish in an area where a more restrictive trip limit applies, before fishing in an area where a more liberal trip limit (or no trip limit) applies, then that vessel is subject to the more restrictive trip limit for the entire period to which that trip limit applies, no matter where the fish are taken and retained, possessed, or landed.

(b) *Going From A More Liberal To A More Restrictive Area:* If a vessel takes and retains a species (or species complex) in an area where a higher trip limit (or no trip limit) applies, and takes and retains, possesses or lands the same species (or special complex) in an area where a more restrictive trip limit applies, then that vessel is subject to the

more restrictive trip limit for that trip limit period.

(13) *Sorting.* 50 CFR 660.306(h) make it unlawful for any person to ''fail to sort, prior to the first weighing after off loading, those groundfish species or species groups for which there is a trip limit, if the weight of the total delivery exceeds 3,000 lb (1,361 kg) (round weight or round weight equivalent).'' This provision applies to both the limited entry and open access fisheries. A proposed rule was published in the **Federal Register** at 62 FR 67610, December 29, 1997, with a request for public comments, that would require all species or species groups with a trip limit, size limit, HG, or quota to be sorted. There would be no exception for landings under 3,000 lb (1,361 kg). The States of Washington and Oregon already have the same or similar requirements.

(14) *Exempted fisheries.* U.S. vessels operating under an exempted (formerly experimental) fishing permit issued under 50 CFR part 600 also are subject to these restrictions, unless otherwise provided in the permit.

(15) Paragraphs IV.B. through IV.C. pertain to the commercial groundfish fishery, but not to Washington coastal tribal fisheries which are described in paragraph V. The provisions in paragraphs IV.B through IV.C. that are not covered under the headings ''limited entry'' or ''open access'' apply to all vessels in the commercial fishery that take and retain groundfish, unless otherwise stated. Paragraph IV.D. pertains to the recreational fishery.

(16) *Commonly used geographical coordinates.*

(a) Cape Falcon, OR—45°46′ N. lat.

(b) Cape Lookout, OR—45°20′15″ N. lat.

(c) Cape Mendocino, CA—40°30′ N. lat.

(d) Point Arena, CA—38°57′30″ N. lat.

(e) Point Conception, CA—34°27′ N. lat.

(f) International North Pacific Fisheries Commission (INPFC) subareas (for more precise coordinates for the Canadian and Mexican boundaries, see 50 CFR 660.304):

(i) Vancouver—U.S.-Canada border to 47°30′ N. lat.

(ii) Columbia—47°30′ to 43°00′ N. lat.

(iii) Eureka—43°00′ to 40°30′ N. lat.

(iv) Monterey—40°30′ to 36°00′ N. lat.

(v) Conception—36°00′ N. lat. to the U.S.-Mexico border.

B. Limited Entry Fishery

(1) *Widow Rockfish* (commonly called brownies). The cumulative trip limit for widow rockfish is 25,000 lb (11,340 kg) per vessel per 2-month period. The 60-percent monthly limit is 15,000 lb (6,804 kg).

(2) *Sebastes Complex (including Bocaccio, Yellowtail, and Canary Rockfish).*

(a) *General. Sebastes* complex means all rockfish managed by the FMP except Pacific ocean perch (*Sebastes alutus*), widow rockfish (*S. entomelas*), shortbelly rockfish (*S. jordani*, and *Sebastolobus* spp. (also called thornyheads, idiots, or channel rockfish). Yellowtail rockfish (*S. flavidus*) are commonly called greenies. Bocaccio (*S. paucispinis*) are commonly called rock salmon. Canary rockfish (*S. pinniger*) are commonly called orange rockfish. This definition also applies the open access fishery.

(b) *Cumulative trip limits.* The cumulative trip limit for the *Sebastes* complex is 40,000 lb (18,144 kg) north of Cape Mendocino or 150,000 lb (68,039 kg) south of Cape Mendocino, per vessel per 2-month period. Within the cumulative trip limit for the *Sebastes* complex, no more than 11,000 lb (4,990 kg) may be yellowtail rockfish taken and retained north of Cape Mendocino, no more than 2,000 lb (907 kg) may be bocaccio taken and retained south of Cape Mendocino, and no more than 15,000 lb (6,804 kg) may be canary rockfish.

(c) The 60-percent monthly limits are: For the *Sebastes* complex, 24,000 lb (10,886 kg) north of Cape Mendocino, and 90,000 lb (40,823 kg) south of Cape Mendocino; for yellowtail rockfish, 6,600 lb (2,994 kg) north of Cape Mendocino; for bocaccio, 1,200 lb (5,443 kg) south of Cape Mendocino; and for canary rockfish coastwide, 9,000 lb (4,082 kg).

(d) For operating in areas with different trip limits for the same species, see paragraph IV.A. (12) above.

(3) *POP.* The cumulative trip limit for POP is 8,000 lb (3,629 kg) per vessel per 2-month period. The 60-percent monthly limit is 4,800 lb (2,177 kg).

(4) *Sablefish and the DTS Complex (Dover Sole, Thornyheads, and Trawl-Caught Sablefish.*

(a) *1998 Sablefish Management goal.* The limited entry sablefish fishery will be managed to achieve the 1998 commercial HGs of 4,680 mt north of 36° N. lat. and 425 mt south of 36° N. lat.

(b) *Gear allocations.* After subtracting the tribal-imposed catch limit and the open access allocation from the HG for sablefish north of 36° N. lat. the remainder is allocated 58 percent to the trawl fishery and 42 percent to the nontrawl fishery.

[**Note:** The 1998 ABC for sablefish north of 36° N. lat. is 5,200 mt. The trawl allocation is 2,282 mt and the nontrawl allocation is 1,652 mt. See footnote g/ of Table 1.]

(c) *Limited entry trip and size limits for the DTS complex.* ''DTS complex'' means Dover sole (*Microstomus pacificus*), thornyheads (*Sebastolobus* spp.), and trawl-caught sablefish (*Anoplopoma fimbria*). Sablefish are also called backcod. Thornyheads, also called idiots, channel rockfish, or hardheads, include two species: Shortspine thornyheads (*S. alascanus*) and longspine thornyheads (*S. altivelis*). These provisions apply to Dover sole and thornyheads caught with any limited entry gear and to sablefish caught with limited trawl gear. This definition aslo applies for the open access fishery.

(i) *January–February 1998.* In January–February 1998, the 2-month cumulative trip limit for the DTS complex is 59,000 lb (26,762 kg) per vessel. Within this cumulative trip limit, no more than 5,000 lb (2,268 kg) may be sablefish, no more than 40,000 lb (18,144 kg) may be Dover sole, no more than 10,000 lb (4,536 kg) may be longspine thronyheads, and no more than 4,000 lb (1,814 kg) may be shortspine thornyheads.

(ii) *March 1988.* Beginning in March 1998, the 2-month cumulative trip limit for the DTS complex is 37,999 lb (16,783 kg) per vessel. Within this cumulative trip limit, no more than 5,000 lb (2,268 kg) may be sablefish, no more than 18,000 lb (8,165 kg) may be Dover sole, no more than 10,000 lb (4,536 kg) may be longspine thornyheads, and no more than 4,000 lb (1,814 kg) may be shortspine thornyheads.

(iii) The 60-percent monthly limits are: For the DTS complex, 35,400 lb (16,057) in January–February and 22,200 lb (10,070 kg) per 2-month period starting in March; for trawl-caught sablefish, 3,000 lb (1,361 kg) for each 2-month period; for Dover sale, 24,000 lb (10,886 kg) in January–February, and 10,800 lb (4,899 kg) per 2-month period starting in March; for longspine thornyheads, 6,000 lb (2,722 kg) for each 2-month period; and for shortspine thornyheads, 2,400 lb (1,089 kg) for each 2-month period. (iii) In any trip, no more than 500 lb (227 kg) may be trawl-caught sablefish smaller than 22 inches (56 cm) total length. (See paragraph IV.A.(6) regarding length measurement.)

(d) *Nontrawl trip and size limits.* To participate in the regular, or mop-up season for the nontrawl limited entry sablefish fishery, the owner of a vessel must hold a limited entry permit for that vessel, affixed with both a gear

endorsement for longline or trap (or pot) gear, and a sablefish endorsement. See 50 CFR 663.23(a)(2)(i). A sablefish endorsement is not required to participate in the limited entry daily trip fishery.

(i) *Regular season.* The regular season will begin at 12 noon (local time) on August 1, 1998. The management structure of the regular season, including season duration, closed periods, and trip limits will be announced with the 1998 limited entry nontrawl sablefish season regulations.

(ii) *Daily trip limit.* The daily trip limit, which applies to sablefish of any size, is in effect north of 36° N. lat. until the closed periods before or after the regular season as specified at 50 CFR 660.323(a)(2), between the end of the regular season and the beginning of the mop-up season, and after the mop-up season. The daily trip limit is expected to be in effect throughout the year in Federal waters south of 36° N. lat.

(A) The daily trip limit for sablefish taken and retained with nontrawl gear north of 36° N. lat. is 300 lb (136 kg), which counts toward a cumulative trip limit of 1,500 lb (680 kg) per 2-month period. (Landings from the regular or mop-up seasons do not count toward this cumulative limit, and the 60-percent monthly limits described at paragraph (V.A.(1)(c)(i) do not apply.)

(B) The daily trip limit for sablefish taken and retained with nontrawl gear south of 36° N. lat is 350 lb (159 kg) with no cumulative limit on the amount of sablefish that may be retained in a month.

(iii) *Limit on small fish.* During the ''regular'' or ''mop-up'' season, there is a trip limit in effect for sablefish smaller than 22 inches (56 cm) total length, which may comprise no more than 1,500 lb (680 kg) or 3 percent of all legal sablefish 22 inches (56 cm) (total length) or larger, whichever is greater. (See paragraph IV.A.(6) regarding length measurement.) This trip limit counts toward any other cumulative trip limit that may be in effect.

(e) *Conversions.* The following conversions apply to both the limited entry and open access fisheries. For headed and gutted (eviscerated) sablefish:

(i) The minimum size limit for headed sablefish, which corresponds to 22 inches (56 cm) total length for whole fish, is 15.5 inches (39 cm).

(ii) The conversion factor established by the state where the fish is or will be landed will be used to convert the processed weight to round weight for purposes of applying the trip limit. (The conversion factor currently is 1.6 in Washington, Oregon, and California. However, the state conversion factors may differ; fisherman should contact fishery enforcement officials in the state where the fish will be landed to determine that state's official conversion factor.)

(5) *Whiting.* Additional regulations that apply to the whiting fishery are found at 50 CFR 660.306 and 50 CFR 660.323(a) (3) and (4).

(a) *Allocations.* The nontribal allocations are HGs, based on percentages that are applied to the commercial HG (see 50 CFR 660.323(a)(4)), as follows:

(i) *Catcher/processor sector*—70,400 mt (34 percent);

(ii) *Mothership sector*—49,700 mt (24 percent);

(iii) *Shore-based sector*—86,900 mt (42 percent). No more than 5 percent (4,345 mt) of the shore-based whiting allocation may be taken before the shore-based fishery begins north of 42° N. lat.

(iv) *Tribal allocation*—See paragraph V.

(b) *Seasons.* The 1998 primary seasons for the whiting fishery are as follows (see 50 CFR 660.323(a)(3)):

(i) *Catcher/processor sector*—May 15;

(ii) *Mothership sector*—May 15;

(iii) *Shore-based sector*—June 15 north of 42° N. lat.; April 1 between 42°–40°30′ N. lat. (the Eureka area); April 15 south of 40°30′ N. lat.

(c) *Trip limits.*

(i) *Before and after the regular season.* No more than 10,000 lb (4,536 kg) of whiting may be taken and retained, possessed, or landed, per vessel per fishing trip before and after the regular season for whiting, as specified at 50 CFR 660.323(a) (3) and (4). This trip limit includes any whiting caught shoreward of 100 fathoms (183 m) in the Eureka subarea.

(ii) *Inside the Eureka 100-fm contour.* No more than 10,000 lb (4,536 kg) of whiting may be taken and retained, possessed, or landed by a vessel that, at any time during a fishing trip, fished in the fishery management area shoreward of the 100-fathom (183-m) contour (as shown on NOAA Charts 18580, 18600, and 18620) in the Eureka subarea.

(6) *Lingcod.*

(a) *Trip limits.* The cumulative trip limit for lingcod is 1,000 lb (454 kg) per vessel per 2-month period. The 60-percent monthly limit is 600 lb (272 kg). No lingcod may be smaller than 24 inches (61 cm) total length, except for a 100-lb (45-kg) trip limit for trawl-caught lingcod smaller than 24 inches (61 cm). Length measurement is explained at paragraph IV.A.(6).

(b) *Conversions.* The following conversions apply in both limited entry and open access fisheries.

(i) *Size conversion.* For lingcod with the head removed, the minimum size limit, which corresponds to 24 inches (61 cm) total length for whole fish, is 19.5 inches (49.5 cm).

(ii) *Weight conversion.* The conversion factor established by the state where the fish is or will be landed will be used to convert the processed weight to round weight for purposes of applying the trip limit. (The states' conversion factors may differ and fishers should contact fishery enforcement officials in the state where the fish will be landed to determine that state's official conversion factor.) If a state does not have a conversion factor for lingcod that is headed and gutted, or only gutted, the following conversion factors will be used. To determine the round weight, multiply the processed weight times the conversion factor.

(A) *Headed and gutted.* The conversion factor for headed and gutted lingcod is 1.5. (The State of Washington currently uses a conversion factor of 1.5.)

(B) *Gutted, with the head on.* The conversion factor for lingcod that has only been gutted is 1.1.

(7) *Black rockfish.* The regulations at 50 CFR 660.323(a)(1) state: ''The trip limit for black rockfish (*Sebastes melanops*) for commercial fishing vessels using hook-and-line gear between the U.S.-Canada border and Cape Alava (48°09′30″ N. lat.), and between Destruction Island (47°40′00″ N. lat.) and Leadbetter Point (46°38′10″ N. lat.), is 100 lb (45 kg) or 30 percent, by weight of all fish on board, whichever is greater, per vessel per fishing trip.'' These limits apply to limited entry and open access fisheries. The crossover provisions at paragraphs IV.A.(12) do not apply.

C. Trip Limits in the Open Access Fishery

Open access gear is gear used to take and retain groundfish from a vessel that does not have a valid limited entry permit for the Pacific coast groundfish fishery with an endorsement for the gear used to harvest the groundfish. This includes longline, trap, pot, hook-and-line (fixed or mobile), set net (south of 38° N. lat. only), and exempted trawl gear (trawls used to target non-groundfish species: pink shrimp or prawns, and, south of Pt. Arena, CA (38°57′30″ N. lat.), California halibut or sea cucumbers). Unless otherwise specified, a vessel operating in the open access fishery is subject to, and must not exceed the lesser of: Any trip limit, frequency limit, and/or size limit for the open access fishery; or, in any calendar month, 50 percent of any 2-month

cumulative trip limit for the same area in the limited entry fishery, called the ''50-percent monthly limit.'' Fish harvested under the 50-percent monthly limits also count toward the open access limits for rockfish or groundfish, as applicable. For purposes of this paragraph, exempted trawl gear (trawl gear that is used to harvest shrimp, prawns, California halibut or sea cucumbers as provided in this paragraph C.) may not exceed any limit for the limited entry trawl fishery, or 50 percent of any 2-month cumulative limit that applies to limited entry trawl gear, unless otherwise specified. The crossover provisions at paragraph IV.A.(12) that apply to the limited entry fishery apply to the open access fishery as well. The conversions at paragraphs IV.B.(4)(e) for sablefish and IV.B.(6)(b) for lingcod also apply to the open access fishery.

(1) *Rockfish.* Rockfish means all rockfish as defined at 50 CFR 660.302, which includes the *Sebastes* complex (including yellowtail rockfish, bocaccio, and canary rockfish), shortbelly rockfish, widow rockfish, POP, and thornyheads.

(a) *All open access gear (includes exempted trawl gear).*

(i) *Thornyheads.* Thornyheads (shortspine and longspine) may not be taken and retained, possessed, or landed north of Pt. Conception. South of Pt. Conception, the daily trip limit for thornyheads is 50 lb (23 kg). (The 50-percent monthly limit is not relevant for thornyheads south of Pt. Conception because it is much larger than the amount that could be taken under the daily trip limits.)

(ii) *Widow rockfish.* The 50-percent monthly limit for widow rockfish is 12,500 lb (5,670 kg).

(iii) *POP.* The 50-percent monthly limit for POP is 4,000 lb (1,814 kg).

(iv) *Sebastes complex.* The 50-percent monthly limit for the *Sebastes* complex north of Cape Mendocino is 20,000 lb (9,072 kg). (The 50-percent monthly limit is not relevant for exempted trawl gear north of Cape Mendocino, or for any open access gear south of Cape Mendocino because it would be larger than the open access limits.) The 50-percent monthly limits for yellowtail rockfish, bocaccio, and canary rockfish are counted toward the 50-percent monthly limit for the *Sebastes* complex.

(A) *Yellowtail rockfish.* The 50-percent monthly limit for yellowtail rockfish is 5,500 lb (2,495 kg) north of Cape Mendocino;

(B) *Bocaccio.* The 50-percent monthly limit for bocaccio is 1,000 lb (454 kg) south of Cape Mendocino. (The 50-percent monthly limit does not apply to setnets and trammel nets which have a higher limit—see paragraph IV.C.(1)(b)(ii));

(C) *Canary rockfish.* The 50-percent monthly limit for canary rockfish is 7,500 lb (3,402 kg).

(b) *Hook-and-line, pot, setnet, trammel net.* The cumulative monthly trip limit for rockfish is 40,000 lb (18,144 kg) per vessel per month, and includes the daily trip limit for thornyheads and the other limits in paragraph IV.C. (1)(a) above. The following trip limits also apply, which count toward the cumulative monthly limit:

(i) *Hook-and-line or pot gear:* 10,000 lb (4,536 kg) of rockfish per vessel per fishing trip, of which no more than 250 lb (113 kg) may be bocaccio taken and retained south of Cape Mendocino. As stated in paragraph IV.C.(1)(iv)(B) above, no more than 1,000 lb (454 kg) cumulative per month may be bocaccio taken and retained south of Cape Mendocino. The trip limit at 50 CFR 660.323(a)(i) for black rockfish caught with hook-and-line gear also applies and is counted toward the cumulative *Sebastes* and rockfish limits (The black rockfish limit is also stated in paragraph IV.B.(7).)

(ii) *Setnet or trammel net gear* (legal only south of 38° N. lat.): 2,000 lb (907 kg) cumulative per month of bocaccio taken and retained south of Cape Mendocino. [Note: The open-access limit is intentionally larger than the limited entry limit of 1,000 lb (454 kg) per 2-month period.]

(2) *Sablefish.*

(a) *Hook-and-line, pot, setnet, trammel net.*

[**Note:** There is no 50-percent monthly limit for open access sablefish taken with nontrawl gear because the limited entry nontrawl fishery is not managed with 2-month cumulative trip limits.]

(i) *North of 36°00′ N. lat.* North of 36°00′ N. lat., the daily trip limit for sablefish is 300 lb (136 kg), which counts toward a cumulative trip limit of 600 lb (272 kg) per 2-month period.

[**Note:** In 1997, the open access cumulative trip limit applied to 1-month period.]

The 2-month cumulative limit may be taken at any time during the 2-month period; there is no 60-percent monthly limit for the open access fishery.

(ii) *South of 36°00′ N. lat.* The daily trip limit for sablefish taken and retained south of 36°00′ N. lat. is 350 lb (159 kg).

(b) *Exempted trawl gear.* The 50-percent monthly limit of 2,500 lb (1,134 kg) applies to sablefish taken and retained with exempted trawl gear.

(3) *Lingcod.* The 2-month cumulative trip limit for lingcod is 1,000 lb (454 kg) and applies to all open access gear, including exempted trawl gear. The 2-month cumulative limit may be taken at any time during that 2-month period; there is no 60-percent monthly limit for the open access fishery. The 50-percent monthly limit does not apply.

(4) *Dover sole.* The 50-percent monthly trip limit for Dover sole is 20,000 lb (9,072 kg) in January-February 1998 and 9,000 lb (4,082 kg) starting in March 1998. It applies to all open access gear, except it is not relevant for exempted trawl gear in January-February 1998 because then it is larger than the amount of groundfish that any legally be taken with exempted trawl gear.

(5) *Groundfish taken by shrimp or prawn trawl.* The daily trip limits, which count toward the trip limit for groundfish, are: for sablefish coastwide, 300 lb (136 kg); and for thornyheads south of Pt. Conception, 50 lb (23 kg). The limits in paragraphs IV.C.(1)(a), (2)(b), (3), and (4) also apply.

(a) *Pink shrimp.* The trip limit for a vessel engaged in fishing for pink shrimp is 500 lb (227 kg) of groundfish, multiplied by the number of days of the fishing trip. The daily trip limits for sablefish and thornyheads may not be multiplied by the number of days of the fishing trip.

(b) *Spot and ridgeback prawns.* The trip limit for a vessel engaged in fishing for spot or ridgeback prawns is 500 lb (227 kg) of groundfish species per fishing trip.

(c) *State law.* These trip limits are not intended to supersede any more restrictive state law relating to the retention of groundfish taken in shrimp or prawn pots or traps.

(6) *Groundfish taken by California halibut or sea cucumber trawl.* The trip limit for a vessel participating in the California halibut fishery or in the sea cucumber fishery south of Point Arena, CA (38°57′30″ N. lat.) is 500 lb (227 kg) of groundfish per vessel per fishing trip. The daily trip limits, which count toward the trip limit for groundfish, are: for sablefish, 300 lb (136 kg); and for thornyheads south of Pt. Conception, 50 lb (23 kg). The limits in paragraphs IV.C.(1)(a), (2)(b), (3), and (4) also apply.

(a) A trawl vessel will be considered participating in the California halibut fishery if:

(i) It is not fishing under a valid limited entry permit issued under 50 CFR part 660.333 for trawl gear;

(ii) All fishing on the trip takes place south of Point Arena; and

(iii) The landing includes California halibut of a size required by California Fish and Game Code section 8392(a), which states: ''No California halibut

may be taken, possessed or sold which measures less than 22 inches in total length, unless it weighs four pounds or more in the round, three and one-half pounds or more dressed with the head on, or three pounds or more dressed with the head off. Total length means the shortest distance between the tip of the jaw or snout, whichever extends farthest while the mouth is closed, and the tip of the longest lobe of the tail, measured while the halibut is lying flat in natural repose, without resort to any force other than the swinging or fanning of the tail.''

(b) A trawl vessel will be considered to be participating in the sea cucumber fishery if:

(i) It is not fishing under a valid limited entry permit issued under 50 CFR part 660.333 for trawl gear;

(ii) All fishing on the trip takes place south of Point Arena; and

(iii) The landing includes sea cucumbers taken in accordance with California Fish and Game Code section 8396, which requires a permit issued by the State of California.

D. *Recreational Fishery*

(1) *California.* The bag limits for each person engaged in recreational fishing seaward of the State of California are: 3 lingcod per day, which may be no smaller than 24 inches (61 cm) total length; and 15 rockfish per day, of which no more than may be bocaccio. Multi-day limits are authorized by a valid permit issued by the State of California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(2) *Oregon.* The bag limits for each person engaged in recreational fishing seaward of the State of Oregon are: 3 lingcod per day, which may be no smaller than 24 inches (61 cm) total length; and 15 rockfish per day, of which no more than 10 may be black rockfish (*Sebastes melanops).*

(3) *Washington.* The bag limits for each person engaged in recreational fishing seaward of the State of Washington are: 3 lingcod per day no smaller than 24 inches (61 cm) total length; and 10 rockfish per day.

V. Washington Coastal Tribal Fisheries

In late 1994, the U.S. government formally recognized the treaty right to fish for groundfish of the four Washington Coastal Treaty tribes (the Makah, Quileute, Hoh, and Quinault), and concluded that in general terms the quantification of the right is 50 percent of the harvestable surplus of groundfish available in the tribes' usual and accustomed fishing areas (described at 50 CFR 660.324).

A tribal allocation is subtracted from the species HG before limited entry and open access allocations are derived. The treaty Indian fisheries for sablefish, black rockfish, and whiting are separate fisheries, not governed by the limited entry or open access regulations or allocations. The tribes regulate their fisheries so as not to exceed their allocations. Tribal fishing for rockfish with fixed gear will operate under the same rules as the open access fishery, with one exception. The coastal tribes intend to implement a 300-lb (136-kg) trip limit for thornyheads taken with longline gear, which is expected to result in landings of 8,000–10,000 lb (3,629–4,536 kg). For other groundfish species, Makah tribal members may use midwater trawl gear to take and retain groundfish for which there is no tribal allocation; those who do so will be subject to the trip landing and frequency and size limits applicable to the limited entry fishery (50 CFR 660.324(k)). Additional background regarding the tribal allocations appears at 61 FR 28786, June 6, 1996 and 62 FR 700, January 7, 1997 and the EA and updated analysis for those actions.

The tribal allocations for black rockfish and whiting are the same in 1998 as in 1997, and are based on the same rationale. The whiting allocation remains in effect as discussions on quantification of the treaty right continue in 1998. The tribal allocation for salbefish remains at 10 percent of the HG, and therefore is reduced from 780 mt in 1997 to 468 mt in 1998, to reflect the reduction in the HG.

The tribal longline fishery has operated under the same restrictions as the open access fishery; therefore, no special provisions have been needed for this fishery. However, with the prohibition of retention of thornyheads in the open access fishery north of 36°N. lat., (while thoryheads are retained in the limited entry fishery), the tribal fishery operating under open access rules had no opportunity to retain even incidental amounts of thornyheads. Therefore, in order to allow tribal fishers at least an opportunity for the incidental harvest of species harvested by non-treaty fishers, a 300-lb (136 kg) ''per trip'' limit is established for the tribal longline fishery. NMFS Actions

For the reasons stated above, the Assistant Administrator (AA) announces the following tribal allocations for 1998, including those that are the same as in 1997:

Sablefish: 468 mt, 10 percent of the HG.

Rockfish: For the commercial harvest of black rockfish off Washington State an HG of: 20,000 lb (9,072 kg) north of Cape Alava (48°09′30″ N. lat.) and 10,000 lb (4,536 kg) between Destruction Island (47°40′00″ N. lat.) and Leadbetter Point (46°38′10″ N. lat.). this 30,000 lb (13.6 mt) is subtracted from the HG for the northern *Sebastes* complex. Thornyheads taken and retained with longline gear are subject to a 300 lb (136 kg) trip limit, which is expected to result in landings of 8,000–10,000 lb (3,629–4,536 kg).

Whiting: 25,000 mt for the Makah tribe in 1998, 10.8 percent of the HG.

VI. Issuance of Exempted Fishing Permits (EFPs) In 1997

In 1996, renewals were requested and approved for three different types of EFPs (formerly called ''experimental fishing permits''): (1) The first was from the State of Oregon (representing Washington and California as well) for the purpose of renewing the 1996 EFP to monitor the bycatch of salmon in the shore-based whiting fishery. Under this permit, 45 vessels were issued EFPs that required all salmon caught incidentally in the whiting fishery to be landed shore-side. A variation of the whiting EFP also was requested by the State of California so that a small number of fishers could be allowed to fish for whiting inside of the 100-fathom (183-m) contour in the Eureka Management Area, which currently is prohibited. The purpose was to see if the bycatch rate of salmon could be kept at acceptable levels by this small, shore-based sector of the fleet delivering to Eureka and Crescent City, CA. At-sea observers would be abroad all whiting trips. Even though this variation to the whiting EFP was approved, the industry declined to participate.

(2) The second EFP was for a new, enhanced data collection program that applied to the other groundfish fisheries. The application was submitted by the State of Oregon, but could include involvement by the States of Washington and California as well. This is a multi-year cooperative data collection program with the industry and state and Federal governments. Twenty-five EFPs were issued in 1997. The purpose of the experiment was to monitor trip-limit-induced discards and the bycatch of salmon and other non-target species in the groundfish trawl fishery. All participating vessels were required to land salmon caught incidentally in groundfish trawl gear and to keep enhanced logbooks required by the States. Some vessels were required to carry at-sea observers to monitor trip-limit induced discards, and some vessels could have been required to bring virtually their entire catch to shore for additional monitoring

although this occurred infrequently in 1997.

(3) The purpose of the third EFP was to collect reproductive samples for sablefish to test assumptions in the stock assessment for that species. An EFP was requested because a vessel would have been authorized to land 500 lb (227 kg) in excess of the cumulative trip limit for trawl-caught sablefish (for a total of 5 mt in 1996), and would have been able to sell the scientific samples. A state or Federal scientist would have been aboard every trip to gather the biological data. Although this permit was approved and issued, it had not been used at the time this notice was prepared in late 1997—fish were obtained directly from processors and the EFP was not needed.

VII. EFPS Requested for 1998

NMFS has approved requests to renew the whiting and enhanced data collection EFPs for 1998. The whiting EFP described in paragraph VI. will be continued, pending development and implementation of a regulation that would authorize salmon to be retained and landed in appropriate circumstances. Fishers are concerned that their practice of dumping codends directly into the hold would make monitoring of trip limits difficult, if not impossible, and wanted the EFP continued because it results in the forfeiture of overages but does not impose penalties for overages. The scope of the experiment and level of participation will be the same as in 1997.

Continuation of the enhanced data collection program described in paragraph VI. will also include several minor changes. The major change will enable data to be obtained on a vessel throughout its fishing activities in a month, even if the vessel is not fishing for groundfish. This will provide information on groundfish bycatch in other fisheries (particularly shrimp fisheries) and on a fisher's choice to pursue alternative fisheries or fishing strategies. The program also could be expanded to include whiting fisheries when the whiting EFP no longer is in effect.

Requests for these EFPs were presented at the Council's November 1997 meeting. Comments on the EFP programs were invited at the November 1997 Council meeting and the Council recommended approval. Now that NMFS has approved the renewal, the whiting EFPs could be issued as early as March 1 for vessels delivering in the State of California, and in the spring for vessels operating under the enhanced data collection EFP.

Classification

The final specifications and management measures for 1998 are issued under the authority of, and are in accordance with, the Magnuson-Stevens Act and 50 CFR parts 600 and 660 subpart G (the regulations implementing the FMP).

Much of the data necessary for these specifications and management measures came from the current fishing year. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 1998 fishing year, the AA has determined that there is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by which the interested public is notified, through **Federal Register** publication and Council mailings, of meetings and of the development of these measures and is provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, Scientific and Statistical Committee, and Council meetings in September and November 1997 where these recommendations were formulated. Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the **Federal Register.** The Assistant Administrator (AA) will consider all comments made during the public period and may make modifications as appropriate.

The harvest specifications and the management measures designed to achieve those specifications announced by this rule do not require any time to come into compliance with. As described above, the interested public has participated in the Council process where these regulations were formulated. The Council has provided information to the industry on the above management measures and specifications through the U.S. Coast Guard Notice to Mariners and the States of Washington, Oregon, and California will also deciminate information. Therefore, the AA finds, under 5 U.S.C. 553(d)(3), as applicable, that it would be unnecessary or contrary to the public interest to delay the effective date of the specifications and management measures.

NEPA: *For the Annual Specifications and Management Measures and Exempted Fishing Permits*—An Environmental Impact Statement (EIS) was prepared for the FMP in 1982 and Supplemental EISs was prepared for Amendments 4 and 6 in accordance with the National Environmental Policy Act (NEPA). The alternatives considered and environmental impacts of the actions in this notice are not significantly different than those considered in either the EIS or SEISs for the FMP, and the actions fall within the scope of these analyses. The Council prepared an environmental assessment (EA) which was the basis for this conclusion.

For the Makah Whiting Allocation: An EA also was prepared for the tribal groundfish rule at 61 FR 28786 which concluded that the proposed 1996 Makah allocation would have no significant impact on the human environment. NMFS updated the EA for 1997 and concluded, as it did in 1996, that the 1997 Makah allocation would have no significant impact on the human environment. The 1998 whiting HG and allocation are the same as in 1997 and are within the scope previously analyzed; therefore an additional EA was not prepared. Therefore this action is categorically excluded from the NEPA requirements to prepare an environmental assessment in accordance with paragraph 6.02b3(a) of the NOAA Administrative Order 216–6.

Dated: December 30, 1997.

Hilda Diaz-Soltero,

Acting Assistant Administrator, for Fisheries, National Marine Fisheries Service.

[FR Doc. 97–34234 Filed 12–31–97; 10:15 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 971205289–7313–02; I.D. 120497C]

RIN 0648–AK28

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Red Snapper Minimum Size Limit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement the provisions of a regulatory amendment prepared by the Gulf of Mexico Fishery Management Council (Council) in accordance with framework procedures for adjusting management measures of the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The regulatory amendment and this final rule maintain the current minimum size limit for red snapper of 15 inches (38.1 cm), total length (TL). The minimum size limit had been scheduled to increase to 16 inches (40.6 cm), TL, on January 1, 1998. The intended effect of this action is to maximize the economic benefits from the red snapper resource within the constraints of the rebuilding program for this overfished resource.

DATES: This rule is effective January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Robert A. Sadler, 813-570-5305.

SUPPLEMENTARY INFORMATION: The reef fish fishery in the exclusive economic zone of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act by regulations at 50 CFR part 622.

The Council proposed an adjusted management measure (a regulatory amendment) for the Gulf red snapper fishery for NMFS' review, approval, and implementation. This measure was developed and submitted to NMFS under the terms of the FMP's framework procedure for annual adjustments in total allowable catch and related measures for the red snapper fishery (framework procedure). Additional background for this measure was published in the proposed rule (62 FR 65056, December 10, 1997) and is not repeated here.

Comments and Responses

One comment was received that supported leaving the minimum size limit for Gulf red snapper at 15 inches (38.1 cm), TL, and one comment was received that supported increasing the minimum size limit to 16 inches (40.6 cm), TL.

Comment 1: A commenter stated that it was difficult for fishermen with small vessels to go far enough offshore to catch legal-sized 15-inch (38.1–cm) red snapper. A size increase to 16 inches (40.6 cm) would pose even a greater burden on such fishermen to find legal-sized fish. He also stated that a size limit change to 16 inches (40.6 cm) would increase the number of released undersized fish killed by dolphins and sharks. Thus, he supported leaving the size limit at 15 inches (38.1 cm).

Response: NMFS concurs.

Comment 2: A commenter stated that the minimum size length should be increased to 16 inches (40.6 cm). He did not offer any reason for his conclusion.

Response: The rationale for maintaining the red snapper minimum size limit at 15 inches (38.1 cm) is contained in the proposed rule and is not repeated here.

The final rule is being issued to implement the regulatory amendment as proposed and submitted by the Council.

Classification

This final rule has been determined to be not significant for purposes of E.O. 12866.

When the proposed rule was published, the Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that, if adopted, it would not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis was not prepared. No comments were received regarding this certification.

This final rule maintains the minimum size limit for red snapper at 15 inches (38.1 cm), TL, in lieu of allowing the scheduled regulatory increase to 16 inches (40.6 cm), TL. Thus, this final rule relieves a restriction and, pursuant to 5 U.S.C. 553(d)(1), is not subject to a 30-day delay in the effective date.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: December 30, 1997.

Hilda Diaz-Soltero,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 622.37, paragraph (d)(3) is revised to read as follows:

§ 622.37 Minimum sizes.

* * * * *

(d) * * *

(3) Red snapper—15 inches (38.1 cm), TL.

* * * * *

[FR Doc. 97–34233 Filed 12-30-97; 4:12 pm]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 122997B]

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries: Summer Flounder Commercial Quota Transfer from New Jersey to Connecticut

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, (NOAA), Commerce.

ACTION: Commercial quota transfer.

SUMMARY: NMFS announces that the State of New Jersey is transferring 24,118 lb (10,940 kg) of summer flounder commercial quota to the State of Connecticut. NMFS adjusted the quotas and announces the revised commercial quota for each state involved.

DATES: December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Regina Spallone (978) 281–9221.

SUPPLEMENTARY INFORMATION: Regulations for the summer flounder fishery are found at 50 CFR part 648, subparts A and G. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through North Carolina. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.100.

Final specifications for the 1997 summer flounder fishery and adjustments to state commercial quotas were published March 7, 1997 (62 FR 10473). At that time, the State of New Jersey was allocated a 1997 quota of 1,371,266 lb (621,996 kg) and the State of Connecticut was allocated a 1997 quota of 222,806 lb (101,063 kg). These annual quotas for New Jersey and Connecticut were set after deducting for 1996 overages.

A readjustment to the 1997 quotas, based upon additional 1996 landings information contained in late and/or additional reports was published July

15, 1997 (62 FR 37741). As a result of this action, the quota for the State of New Jersey was set equal to 1,347,592 lb (611,257 kg). The quota for the State of Connecticut was unchanged.

The final rule implementing Amendment 5 to the Fishery Management Plan for the Summer Flounder Fishery (FMP) published on December 17, 1993 (58 FR 65936), allows two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), to transfer or combine summer flounder commercial quota. The Regional Administrator is required to consider the criteria set forth in § 648.100(e)(1) in the evaluation of requests for quota transfers or combinations.

The State of New Jersey has agreed to transfer 24,118 lb (10,940 kg) of commercial quota to the State of Connecticut. The Regional Administrator having determined that the criteria set forth in § 648.100(e)(1) have been met, publishes this notification of quota transfers. The revised quotas for the calendar year 1997 are as follows: New Jersey, 1,323,474 lb (600,318 kg); and Connecticut, 246,924 lb (112,003 kg).

This action does not affect a notification concerning the commercial quota harvest that prohibited further landings of summer flounder by federally permitted vessels in Connecticut made effective September 11, 1997 (62 FR 47767).

This action does not alter any of the conclusions reached in the environmental impact statement prepared for Amendment 2 to the FMP regarding the effects of summer flounder fishing activity on the human environment. Amendment 2 established procedures for setting an annual coastwide commercial quota for summer flounder and a formula for determining commercial quotas for each state. The quota transfer provision was established by Amendment 5 to the FMP and the environmental assessment prepared for Amendment 5 found that the action had no significant impact on the environment. Under section 6.02b.3(b)(i)(aa) of NOAA Administrative Order 216–6, this action is categorically excluded from the requirement to prepare additional environmental analyses. This is a routine administrative action that reallocates commercial quota within the scope of previously published environmental analyses.

Classification

This action is taken under 50 CFR part 648 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 30, 1997.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–34241 Filed 12-31-97; 1:00 pm]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 63, No. 3
Tuesday, January 6, 1998

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206–AI05

Federal Employees Health Benefits Program: Removal of Minimum Salary Requirement

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a proposed rule. This rule removes an obsolete provision that prohibits an employee whose annual salary is $350 or less from enrolling in the Federal Employees Health Benefits (FEHB) Program.

DATES: Comments must be received on or before February 5, 1998.

ADDRESSES: Send comments to Abby L. Block, Chief, Insurance Policy and Information Division, Office of Insurance Programs, Retirement and Insurance Service, Office of Personnel Management, P.O. Box 707, Washington, DC 20044; or deliver to OPM, Room 3425, 1900 E Street, NW, Washington, DC 20415; or FAX to 202–606–0633.

FOR FURTHER INFORMATION CONTACT: Kenneth A. Lease, 202–606–0004.

SUPPLEMENTARY INFORMATION: Since the FEHB Program began in 1960, FEHB regulations have prohibited an employee earning $350 or less per year from enrolling in the Program. This provision was based on the fact that employee contributions to premiums could only be made by salary withholding while an employee was in a pay status. ($350 is the amount which in 1960 was sufficient to cover the appropriate employee contributions for the least costly FEHB plan.) As amended in August 1982, however, the regulations now require enrollee contributions, by direct payment if necessary, for all periods during which coverage continues, even periods during which an employee does not receive pay (such as a leave without pay situation). Since the previous rationale for the minimum earnings level for FEHB enrollment no longer exists, OPM is proposing to remove this obsolete requirement.

We also propose to amend the reference in the definition of *letter of credit* under § 890.101 to conform to a recent reference change in Chapter 16 of title 48, Code of Federal Regulations (FEHBAR).

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal employees.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, OPM proposes to amend 5 CFR part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; § 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c-1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended, § 890.102 also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251.

2. In § 890.101, paragraph (a), the definition of *Letter of Credit* is revised to read as follows:

§ 890.101 Definitions; time computations.

(a) * * *

Letter of credit is defined in 48 CFR subpart 1602.1.

* * * * *

§ 890.102 [Amended]

3. In § 890.102, paragraph (c)(4) is removed and paragraphs (c)(5), (c)(6), (c)(7), and (c)(8) are redesignated as paragraphs (c)(4), (c)(5), (c)(6), and (c)(7) respectively.

4. In § 890.303, paragraph (b) is revised to read as follows:

§ 890.303 Continuation of enrollment.

* * * * *

(b) *Change of enrolled employees to certain excluded positions.* Employees and annuitants enrolled under this part who move, without a break in service or after a separation of 3 days or less, to an employment in which they are excluded by § 890.102(c), continue to be enrolled unless excluded by paragraphs (c) (4), (5), (6), or (7) of § 890.102.

* * * * *

[FR Doc. 98–102 Filed 1–5–98; 8:45 am]

BILLING CODE 6325–01–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 610

RIN 0578–AA22

Technical Assistance

AGENCY: Natural Resources Conservation Service.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This document extends the comment period of a proposed rule published in the **Federal Register** on December 4, 1997. This rule sets forth policies and procedures for the use of State Technical Committees by the USDA, and also the responsibilities assigned to the Natural Resources Conservation Service (NRCS) beyond that of soil conservation. This proposed rule is located at 62 FR 64174–64177.

DATES: Comments must be received by January 23, 1997.

ADDRESSES: All comments concerning this proposed rule should be addressed to: Gary Nordstrom, Director, Conservation Operations Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013–2890; Attention: State Technical Committee. Fax (202) 720–1838. This rule may also be accessed, and comments submitted, via Internet. Users can access the NRCS **Federal Register** homepage and submit comments at: http://astro.itc.nrcs.usda.gov:6500.

FOR FURTHER INFORMATION CONTACT: Denise Coleman, Conservation Operations Division, Natural Resources Conservation Service; phone: (202) 720–9476; Fax: (202) 720–4265; E-mail:

denise__c.coleman@usda.gov, Attention: State Technical Committee.

Signed in Washington, D.C. on December 30, 1997.

Thomas A. Weber,

Acting Chief, Natural Resources Conservation Service.

[FR Doc. 98–222 Filed 1–5–98; 8:45 am]

BILLING CODE 3410–16–P

FEDERAL TRADE COMMISSION

16 CFR Part 303

Rule and Regulations Under the Textile Fiber Products Identification Act

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (''Commission'') solicits comments as to whether to amend Rule 7 of the Rules and Regulations Under the Textile Fiber Products Identification Act (16 CFR 303.7) to designate a new generic fiber name and establish a new generic fiber definition for a fiber manufactured by DuPont Advanced Fiber Systems (''DuPont''), of Wilmington, Delaware. The Commission is proposing the name ''fluoropolymer'' for the fiber, which DuPont designates by the registered name ''Teflon.''

DATES: Comments will be accepted through March 23, 1998.

ADDRESSES: Comments should be submitted to: Office of the Secretary, Federal Trade Commission, Room 159, Sixth St. & Pennsylvania Ave., NW., Washington, DC, 20580. Comments should be identified as ''16 CFR Part 303—Textile Rule 7 Comment—P974227.''

FOR FURTHER INFORMATION CONTACT: James G. Mills, Attorney, Division of Enforcement, Federal Trade Commission, Washington, DC, 20580; (202) 326–3035, FAX: (202) 326–3259.

SUPPLEMENTARY INFORMATION:

I. Background

Rule 6 of the Rules and Regulations under the Textile Fiber Products Identification Act (''Textile Rules,'' 16 CFR 303.6) requires manufacturers to use the generic names of the fibers contained in their textile fiber products in making disclosures of the fiber content of the products. Rule 7 (16 CFR 303.7) sets forth the generic names and definitions that the Commission has established for synthetic fibers. Rule 8 (16 CFR 303.8) sets forth the procedures for establishing new generic names.

DuPont submitted its application in this matter to the Commission on March 22, 1996, and has provided the Commission with additional information, which has been placed on the rulemaking record. DuPont stated that it has manufactured a fiber known as ''Teflon PTFE fluorocarbon fiber'' or ''Teflon fiber'' since the 1950's for industrial applications, but that it expected to begin commercial sales of the fiber in socks beginning in late April, 1996. DuPont explained that it was petitioning the Commission to establish a new name and definition for its fiber in its new use because none of the current generic fiber definitions in Rule 7 of the Textile Rules is appropriate for Teflon fiber.

After an initial analysis, on June 25, 1996, the Commission announced that it has issued DuPont the designation ''DP 0001'' for temporary use in identifying Teflon PTFE fluorocarbon fiber pending a final determinations as to the merits of the application for a new generic name and definition.

II. Chemical Composition and Physical and Chemical Properties of Teflon PTFE Fluorocarbon Fiber

DuPont states that the name Teflon PTFE fluorocarbon fiber can be used to describe fibers made from the following materials:

PTFE $(CF_2–CF_2)n$ where ''n'' is the degree of polymerization, usually around 50,000

FEP $(CF_2–CF_2)n(CF\{CF_3\}–CF_2)m$

PFA $(CF_2–CF_2)n(CF\{ORf\}–CF_2)m$ in this case, Rf represents a perfluorinated alkyl group bonded to an ether oxygen, which hangs off the chain.

DuPont described Teflon PTFE fluorocarbon fiber generally as inherently low friction, water-resistant, flame-resistant, and low modulus (i.e., highly resistant to deformation). DuPont expects the initial market for the fiber to be sports apparel where fabrics from Teflon fiber and blends containing it may reduce the chance of skin irritation and may have other desirable characteristics, such as permanent water- and stain-resistance, softer hand, and improved comfort.

DuPont described the chemical characteristics of Teflon PTFE fluorocarbon fibers and the base resins used to make the fibers as follows:

> Teflon PTFE fluorocarbon resins and fibers developed by DuPont have unusually high thermo-chemical resistance and display exceptionally low coefficients of friction. The molecular structure of Teflon PTFE fluorocarbon consists of long chains of carbon atoms fully saturated by fluorine atoms. The carbon-fluorine bonds are extremely strong and the carbon-carbon bonds are well-shielded by the fluorine atoms * * *. Molecules of Teflon PTFE fluorocarbon are electrically neutral and therefore lack the strong polar forces that bind together the molecules of other fibers such as nylon or cellulose. However, the extreme regularity of the molecules permits very close packing.
>
> Fibers of Teflon are processed to a higher degree of molecular orientation than their resin counterpart. Thus the stress-strain properties and resistance to cold flow of the fiber are markedly different from those of the resin * * *. Other properties of the fibers and resins are essentially identical.

DuPont summarized the stress-strain and gross properties for unbleached Teflon PTFE fluorocarbon fiber as follows:

Yarn denier: filaments (dtex: filaments)	400–60 (440–60)
Stress-Strain Properties*	
Straight Test:	
Tensile strength, psi (MPa)	52,500 (359).
Breaking strength, lbs (N)	1.7 (7.6),
Breaking tenacity, g/den. (cN/tex)	2.0 (18).
Elongation at break, %	19.
Initial modulus, g/den. (cN/tex)	13.0 (115).
Loop Test:	
Tensile strength, psi (Mpa)	31,000 (214).
Breaking strength, lbs (N)	1.8 (8.0).
Elongation at break, %	8.5.

Yarn denier: filaments (dtex: filaments)	400–60 (440–60)
Thermal Properties	
Shrinkage after 30 minutes, %:	
In water at 212°F (100°C)	2.5.
In air at 350°F (177°C)	6.0.
Specific heat, cal/g.°C(J/kg.K)	0.25 (1.050).
Thermal conductivity, BTU/h.ft.^{2}.°F for 1″ of thickness (W/m^2.K for 1 cm of thickness)	1.7 (3.8).
Zero strength temperature**, °F (°C)	590 (310).
Gel temperature, °F (°C)	621 (327).
Sublimation rate, % weight loss/hour:	
At 554°F (290°C)	0.0002.
At 806°F (430°C)	1.5.
General Properties	
Specific gravity	2.1
Moisture regain, %	0.0

*Stress-strain properties were determined on an ''Instron'' tensile tester at 70°F (21°C), 65% R.H.
**Temperature at which the yarn breaks under a load of 0.1 g/den. (0.883 cN/tex).

DuPont stated that the coefficient of friction of Teflon PTFE fluorocarbon fiber is the lowest of all known fibers, and that, because the static coefficient of friction is only slightly higher than the dynamic value, the fiber does not exhibit ''stick-slip'' behavior, which means that the fiber feels very smooth and slippery when rubbed between the fingers, rather than periodically catching and slipping. DuPont also asserted that its fiber is the most chemically resistant fiber known, being inert to such reagents as boiling sulfuric acid, fuming nitric acid, boiling aqua regia (mixed sulfuric and nitric acids), and boiling (saturated) sodium hydroxide. In this connection, DuPont added that the only known solvents for Teflon fiber or resin are selected perfluorinated organic liquids at temperatures above 570°F (299°C).

DuPont also stated that the maximum temperature to which Teflon PTFE fluorocarbon fiber can be exposed for long periods is 550°F (288°C), but that the fiber can tolerate brief exposures to temperatures as high as 600°F (316°C). DuPont asserted that continuous exposure to temperatures below 400°F (204°C) ordinarily does not degrade the fiber, and that the fiber is stable over a wide range of temperatures. According to DuPont, the fiber becomes less ductile at extremely low temperatures and softens at extremely high temperatures, and that adequate toughness and strength are available for selected uses at temperatures as low as −450°F (−268°C) and as high as 550°F (288°C).

DuPont asserted that Teflon PTFE fluorocarbon fiber has significant sunlight and weather resistance, reporting that continuous exposure of the fiber to direct sunlight and weather for three years in Florida resulted in only a 2% measured loss in yarn-breaking strength.

III. Invitation To Comment

The Commission is soliciting comment on DuPont's application generally, and on whether the application meets the criteria first announced by the Commission as grounds for granting applications for new generic names on Dec. 11, 1973, at 38 FR 34112, and later clarified and reaffirmed on Dec. 6, 1995, 60 FR 62353, and again on May 23, 1997, 62 FR 28343:

First Criterion: The fiber for which a generic name is requested must have a chemical composition radically different from other fibers, and that distinctive chemical composition must result in distinctive physical properties of significance to the general public.

Second Criterion: The fiber must be in active commercial use or such use must be immediately foreseen.

Third Criterion: The granting of the generic name must be of importance to the consuming public at large, rather than to a small group of knowledgeable professionals such as purchasing officers for large Government agencies.

The Commission also requests comments on the appropriateness of the fiber name and definition proposed below. The Commission is proposing the generic name ''fluoropolymer'' for DuPont's fiber. DuPont suggested ''fluoropolymer'' so the fiber's name would be consistent with all other products it sells under the brand name ''Teflon,'' and because the name ''fluoropolymer'' is already well-established in association with its Teflon PTFE fluorocarbon fiber.

The Commission notes, however, that a name has already been established for this type of fiber by the International Organization for Standardization (''ISO''). The name—''fluorofibre''—is for fibers composed of linear macromolecules made from aliphatic fluorocarbon monomers. The Commission solicits comment, therefore, on whether, in the interests of international standardization of fiber terminology, the ISO generic name would be more appropriate than DuPont's suggested name (''fluoropolymer'') to describe fibers similar to DuPont's Teflon PTFE fluorocarbon fiber. Because the ISO name—''fluorofibre''—is spelled with the European spelling (''-fibre''), rather than the U.S. spelling (''-fiber''), the Commission solicits comment specifically on the appropriateness of a generic fiber name in Rule 7 that would allow for the use of both versions: ''fluorofiber or fluorofibre.''

The Commission also is proposing the following definition for the fiber, with which DuPont is in agreement:

A manufactured fiber containing at least 95% of a long-chain polymer synthesized from aliphatic fluorocarbon monomers.

Before deciding whether to amend Rule 7, the Commission will consider any comments submitted to the Secretary of the Commission within the above-mentioned comment period. Comments that are submitted will be available for public inspection, in accordance with the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations, 16 CFR 4, on normal business days between the hours of 8:30 a.m. and 5:00 p.m. at the Public Reference Room, Room 130, Federal Trade Commission, 6th St. & Pennsylvania Ave. NW, Washington, D.C. 20580.

IV. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial

regulatory analysis (5 U.S.C. 603–604) are not applicable to this proposal because the Commission believes that the amendment, if promulgated, will not have a significant economic impact on a substantial number of small entities. The Commission has tentatively reached this conclusion with respect to the proposed amendment because the amendment would impose no additional obligations, penalties or costs. The amendment simply would allow covered companies to use a new generic name for a new fiber that may not appropriately fit within current generic names and definitions. The amendment would impose no additional labeling requirements.

To ensure that no substantial economic impact is being overlooked, however, the Commission requests public comment on the effect of the proposed amendment on costs, profits, and competitiveness of, and employment in, small entities. After receiving public comment, the Commission will decide whether preparation of a final regulatory flexibility analysis is warranted. Accordingly, based on available information, the Commission certifies, pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the proposed amendment, if promulgated, would not have a significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act

This proposed amendment does not constitute a ''collection of information'' under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 109 Stat. 163) and its implementing regulations. (5 CFR 1320 *et seq.*) The collection of information imposed by the procedures for establishing generic names (16 CFR 303.8) has been submitted to OMB and has been assigned control number 3084–0101.

List of Subjects in 16 CFR Part 303

Labeling, Textile, Trade practices.

VI. Proposed Amendments

Accordingly, the Commission proposes that 16 CFR Part 303 be amended as follows:

PART 303—RULES AND REGULATIONS UNDER THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

1. The authority citation for part 303 continues to read as follows:

Authority: 15 U.S.C. 70 et seq.

2. It is proposed that a new paragraph (x) be added to § 303.7, to read as follows:

§ 303.7 Generic names and definitions for manufactured fibers.

(x) Fluoropolymer. A manufactured fiber containing at least 95% of a long-chain polymer synthesized from aliphatic fluorocarbon monomers.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 98–101 Filed 1–5–98; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

16 CFR Part 303

Rules and Regulations Under the Textile Fiber Products Identification Act

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (''Commission'') solicits comments as to whether to amend Rule 7 of the Rules and Regulations Under the Textile Fiber Products Identification Act (16 CFR 303.7) to designate a new generic fiber name and establish a new generic fiber definition for a fiber manufactured by BASF Corporation (''BASF''), of Mt. Olive, New Jersey. BASF requested that the Commission establish the name ''melamine'' for the fiber, which it designates by the registered name ''Basofil.''

DATES: Comments will be accepted through March 23, 1998.

ADDRESSES: Comments should be submitted to: Office of the Secretary, Federal Trade Commission, Room 159, Sixth St. & Pennsylvania Ave., NW, Washington DC, 20580. Comments should be identified as ''16 CFR Part 303—Textile Rule 7 Comment—P974228.''

FOR FURTHER INFORMATION CONTACT: James G. Mills, Attorney, Division of Enforcement, Federal Trade Commission, Washington, DC, 20580; (202) 326–3035, FAX: (202) 326–3259.

SUPPLEMENTARY INFORMATION:

I. Background

Rule 6 of the Rules and Regulations under the Textile Fiber Products Identification Act (''Textile Rules,'' 16 CFR 303.6) requires manufacturers to use the generic names of the fibers contained in their textile fiber products in making required disclosures of the fiber content of the products. Rule 7 (16 CFR 303.7) sets forth the generic names and definitions that the Commission has established for synthetic fibers. Rule 8 (16 CFR 303.8) sets forth the procedures for establishing new generic names.

BASF submitted its application in this matter to the Commission on March 22, 1996. Since then, BASF has submitted additional information at the request of the Commission's staff. The application and related materials have been placed on the rulemaking record. BASF stated that Basofil fiber, which is mostly used in combination with other heat- and flame-resistant fibers, is intended for use in applications where heat and flame resistance and low flammability are vital, including fire-blocking fabrics, protective apparel and heat-insulating fabrics. BASF stated that, because the unique chemistry of Basofil fiber is inadequately described under the existing generic names listed in the Textile Rules, a new generic name and definition should be established.

After an initial analysis, on June 25, 1996, the Commission issued BASF the designation ''BC 0001'' for temporary use in identifying Basofil, pending a final determination as to the merits of the application for a new generic name.

II. Chemical composition and Physical and Chemical Properties of BASF's Fiber

In its petition and other materials, BASF described Basofil as a fiber that, because of its unique melamine-formaldehyde chemistry, is especially suited for applications in which heat and flame resistance are needed. BASF intends the fiber to be used in the manufacture of heat- and flame-resistant textile products, like fire-blocking fabrics, gloves and aprons and other protective apparel, and filters for use in high-temperature applications. BASF described Basofil chemically as follows:

> The product is a fiber made from a condensation polymer of melamine derivatives and formaldehyde * * *. In the condensation reaction, methylol compounds are formed which then react with one another to form a three-dimensional structure of methylene ether and methylene bridges.
>
> The chemical composition of Basofil fiber is based upon a three-dimensional cross linked structure containing methylene links, such as (Melamine–NH–CH_2–NH–Melamine) and dimethylene ether links such as (Melamine–NH–CH_2–O–CH_2NH–Melamine). The melamine can also be modified to contain hydroxyl groups.
>
> The network structure of Basofil fiber provides the characteristics found in melamine-based resins—heat stability, solvent resistance, and low flammability.

BASF stated that Basofil combines fire protection and heat stability with good chemical, hydrolysis and ultraviolet resistance, and that the fiber, which is white and dyeable, can be processed on standard textile manufacturing

equipment for the production of woven, knitted, and nonwoven fabrics.

BASF asserted that Basofil's most outstanding physical properties are its high Limiting Oxygen Index (LOI), low thermal conductivity, heat dimensional stability, and the fact that it does not shrink, melt or drip when exposed to a flame. BASF provided the following table to describe the most important physical properties of Basofil:

Fiber Denier, nominal	2.5, variable.
Staple Length, nominal.	2 inch, variable.
Density	1.4 g/cm³.
Tenacity, nominal	1.8 g/denier.
Elongation at Break, nominal.	12%.
Moisture Regain, @23°C & 65% RH.	5%.
Limiting Oxygen Index (LOI).	32.
Continuous Use Temperature.	200°C (392°F)
Maximum Use Temperature.	260°C–370°C (500°F–698°F).
Hot Air Shrinkage, 1 hr @ 200°C(392°F).	<1%.

BASF tested an 18 oz/yd² woven Basofil fabric sample for tensile strength and elongation at break, after a 12-hour exposure in water at room temperature and reconditioned in dry air, in accordance with European test method DIN 53 857 using samples 50 mm wide and an extension rate of 100 mm/min. The results indicated that there was little effect on tensile properties (breaking strength @ 225 lbs. dry and 214 lbs. after immersion: breaking elongation @ 20% for both).

BASF evaluated the chemical resistance of the same Basofil fabric in various solvents, acides and basis. The fabric was exposed to the test medium for 28 days at room temperature and then washed and tested wet to measure tensile strength loss after exposure. The results showed that Basofil fiber is resistant to many solvents and to hydrolysis, is extremely resistant to alkalis and has some resistance to acids.

BASF exposed fabric samples to elevated temperatures and then tested them at room temperature for breaking strength. The results indicated minimal change in tensile properties. BASF also directly measured the tensile strength at temperatures up to 200°C. The fabric was treated for one hour at the test temperature and measured for tensile strength. Again, the results showed little change in tensile strength.

BASF conducted several tests of Basofil fabric samples to evaluate flammability, ignitability, flame spread, the secondary effects of fire and heat release, and smoke toxicity. BASF tested a sample of 18 oz/yd² woven Basofil fabric in accordance with ASTM E662-79/BSS 7239 and analyzed smoke and gas samples taken four minutes after the onset of smoldering. The results showed that Basofil fiber was well under Federal Aviation Administration requirements (important because an early use of Basofil was as a fire-retardant material in airplanes). The specific optical density of the smoke, according to the test, was 25 (D_S) after 4 minutes flaming. A D_S value less than 200 is required to pass FAA standards. BASF's results of a 12-second vertical flame test (according to Federal Aviation Regulation 25.853/FTM 191–5903) showed that Basofil fabric also meets FAA requirements in this regard. BASF measured the Thermal Protective Performance (TPP) of the same Basofill fabric, according to NFPA 1971. The results were a single fabric layer TPP of 27 at a heat flux of 2 cal/cm²-sec.

In additional materials, BASF provided the Commission with infrared spectrum information, x-ray diffraction results, and fiber and fabric samples.

III. Invitation To Comment

The Commission is soliciting comment on BASF's application generally, and on whether the application meets the criteria (discussed below) that the Commission first announced at 38 FR 34112 (Dec. 11, 1973) as grounds for the granting of petitions for new generic names, and later clarified and reaffirmed on December 6, 1995, 60 FR 62353, and again on May 23, 1997, 62 FR 28343. BASF has contended that its petition meets these criteria.

First Criterion: The fiber for which a generic name is requested must have a chemical composition radically different from other fibers, and that distinctive chemical composition must result in distinctive physical properties of significance to the general public.

According to BASF, the Basofil fiber is based upon unique melamine chemistry that tresults in a fiber with significant heat and flame resistance. BASF asserted that the granting of a generic name and definition for Basofil is necessary to enable consumers seeking high heat and flame resistance to identify those textile fiber products containing Basofil.

Second Criterion: The fiber must be in active commercial use or such use must be immediately foreseen.

BASF stated that it has begun to import Basofil fiber and to market the fiber to potential end users. At the time of its petition, BASF was in the process of building a plant in Enka, North Carolina, capable of producing approximately 3.6 million pounds of Basofil. Counsel for BASF has informed the Commission that the plant is currently operational.

Third Criterion: The granting of the generic name must be of importance to the consuming public at large, rather than a small group of knowledgeable professionals such as purchasing officers for large Government agencies.

BASF argued that, because of the importance of heat and flame resistance to many fiber products, both industrial and consumer, the Commission's granting of the generic name is of importance to the general public.

The Commission also requests comments on the appropriateness of the fiber name definition proposed by BASF. Maintaining that the key to Basofil chemistry is the melamine-aldehyde cross-linkage, BASF proposed the generic name ''melamine,'' with the following corresponding definition:

A manufactured fiber in which the fiber forming substance is a synthetic polymer composed of at least 50% by weight of a cross-linked melamine polymer.

BASF explained that the unusually low (50%) threshold for the principal element of the fiber (the cross-linked melamine polymer) in the definition is based on the possibility that Basofil may be modified in the future to contain other components typically found in fiber formulations, such as dispersing aids, fillers, flame retardants, heat or light stabilizers, optical modifiers, etc. BASF provided an example of such a formulation:

50% melamine fiber
5% pigment
5% pigment dispersing aid
15% flame retardant
5% light or heat stabilizer
20% organic filler

BASF continued:

Original fiber properties could change in some cases. For example, initial tenacity and elongation may drop. In other cases, original properties may not change, but fastness properties may improve, as, for example, with the addition of a stabilizer. In other instances, the change may only be in appearance, as with the addition of a pigment.

Before deciding whether to amend Rule 7, the Commission will consider any comments submitted to the Secretary of the Commission within the above-mentioned comment period. Comments that are submitted will be available for public inspection, in accordance with the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations, 16 CFR 4, on

normal business days between the hours of 8:30 a.m. and 5:00 p.m. at the Public Reference Room, Room 130, Federal Trade Commission, 6th St. & Pennsylvania Ave., NW, Washington, D.C. 20580.

IV. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial regulatory analysis (5 U.S.C. 603–604) are not applicable to this proposal because the Commission believes that the amendment, if promulgated, will not have a significant economic impact on a substantial number of small entities. The Commission has tentatively reached this conclusion with respect to the proposed amendment because the amendment would impose no additional obligations, penalties or costs. The amendment simply would allow covered companies to use a new generic name for a new fiber that may not appropriately fit within current generic names and definitions. The amendment would impose no additional labeling requirements.

To ensure that no substantial economic impact is being overlooked, however, the Commission requests public comment on the effect of the proposed amendment on costs, profits, and competitiveness of, and employment in, small entities. After receiving public comment, the Commission will decide whether preparation of a final regulatory flexibility analysis is warranted. Accordingly, based on available information, the Commission certifies, pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the proposed amendment, if promulgated, would not have a significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act

This proposed amendment does not constitute a ''collection of information'' under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 109 Stat. 163) and its implementing regulations. (5 CFR 1320 et seq.) The collection of information imposed by the procedures for establishing generic names (16 CFR 303.8) has been submitted to OMB and has been assigned control number 3084–0101.

List of Subjects in 16 CFR Part 303

Labeling, Textile, Trade practices.

VI. Proposed Amendments

Accordingly, the Commission proposed that 16 CFR Part 303 be amended as follows:

PART 303—RULES AND REGULATIONS UNDER THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

1. The authority citation for part 303 continues to read as follows:

Authority: 15 U.S.C. 70e(c) et seq.

2. It is proposed that a new paragraph (w) be added to § 303.7, to read as follows:

§ 303.7 Generic names and definitions for manufactured fibers.

* * * * *

(w) Melamine. A manufactured fiber in which the fiber-forming substance is a synthetic polymer composed of at least 50% by weight of a cross-linked melamine polymer.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 98–100 Filed 2–5–98; 8:45 am]

BILLING CODE 6750–01–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

[Release Nos. 33–7491, 34–39496, 35–26806, 39–2360, IC–22978, IA–1690; File No. S7–34–97]

List of Rules To Be Reviewed Pursuant to the Regulatory Flexibility Act

AGENCY: Securities and Exchange Commission.

ACTION: Publication of list of rules scheduled for review.

SUMMARY: The Securities and Exchange Commission is today publishing a list of rules to be reviewed pursuant to Section 610 of the Regulatory Flexibility Act. The list is published to provide the public with notice that these rules are scheduled for review by the agency and to invite public comment on them.

DATES: Public comments are due by January 31, 1998.

ADDRESSES: Persons wishing to submit written comments should file three copies with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Room 6184, Stop 6–9, Washington, D.C. 20549. All submissions should refer to File No. S7–34–97, and will be available for public inspection and copying at the Commission's Public Reference Room, Room 1026, at the same address.

FOR FURTHER INFORMATION CONTACT: Anne H. Sullivan, Office of the General Counsel, Securities and Exchange Commission 202–942–0954.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (''RFA'') codified at 5 U.S.C. 600–611 requires agencies to review rules which have a significant economic impact upon a substantial number of small entities every ten years. The purpose of the review is ''to determine whether such rules should be continued without change, or should be amended or rescinded * * * to minimize any significant economic impact of the rules upon a substantial number of such small entities'' (5 U.S.C. 610(a)).

The RFA sets forth specific considerations that must be addressed in the review of each rule:

- the continued need for the rule;
- the nature of complaints or comments received concerning the rule from the public;
- the complexity of the rule;
- the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule (5 U.S.C. 610(c)).

The Securities and Exchange Commission, as a matter of policy, reviews all rules which it publishes notice and comment for compliance with the RFA. Pursuant to the RFA, the rules and forms listed below are scheduled for review by staff of the Commission during the next twelve months. The rules are grouped according to which Division or Office of the Commission will review each rule:

Rule To Be Reviewed by the Office of the Chief Accountant

Title: Article 10 of Regulation S–X (Interim Financial Statements).

Citation: 17 CFR 210.10.

Authority: 15 U.S.C. 77f, 77g, 77s(a), 77aa(25), 77a(26), 78*l*, 78m, 78*o*(d), 78w(a), 79e(b), 79n, 79t(a), 80a–8, and 80a–29.

Rule To Be Reviewed by the Division of Corporation Finance

Title: Rule 701 (Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation).

Citation: 17 CFR 230.701.

Authority: 15 U.S.C. 77a *et seq.*

Rule To Be Reviewed by the Division of Market Regulation

Title: Rule 10b–21(T) (Short sales in connection with a public offering).

Citation: 17 CFR 240.10b–21(T).

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss,

77tt, 78c, 78d, 78i, 78*l*, 78m, 78n, 78*o*, 78p, 78s, 78w, 78x, 78*l*(d), 79q, 80e–20, 80e–23, 80e–29, 80b–3, 80b–4 and 80b–11.

Rules and Forms to be Reviewed by the Division of Investment Management

Title: Rule 482 (Advertising by an investment company as satisfying requirements of section 10).
Citation: 17 CFR 230.482.
Authority: 15 U.S.C. 77j(b) and 77s(a).

Title: Rule 601 (Definitions of terms used in §§ 230.601 to 230.610a).
Citation: 17 CFR 230.601.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 602 (Securities exempted).
Citation: 17 CFR 230.602.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 603 (Amount of securities exempted).
Citation: 17 CFR 230.603.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 604 (Filing of notification on Form 1–E).
Citation: 17 CFR 230.604.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 605 (Filing and use of the offering circular).
Citation: 17 CFR 230.605.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 606 (Offering not in excess of $100,000).
Citation: 17 CFR 230.606.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 607 (Sales material to be filed).
Citation: 17 CFR 230.607.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 608 (Prohibition of certain statements).
Citation: 17 CFR 230.608.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 609 (Reports of sales hereunder).
Citation: 17 CFR 230.609.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 610 (Suspension of exemption).
Citation: 17 CFR 230.610.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 610a (Schedule A: Contents of offering circular for small business investment companies; Schedule B: Contents of offering circular for business development companies).
Citation: 17 CFR 230.610a.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Form 1–E (Notification under Regulation E).
Citation: 17 CFR 239.200.
Authority: 15 U.S.C. 77c(b) and 77c(c) and 15 U.S.C. 80a–37.

Title: Form 2–E (Report of sales pursuant to rule 609 of Regulation E).
Citation: 17 CFR 239.201.
Authority: 15 U.S.C. 77c(c) and 77s(a).

Title: Rule 34b–1 (Sales literature deemed to be misleading).
Citation: 17 CFR 270.34b–1.
Authority: 15 U.S.C. 80a–24(b).

Title: Rule 0–5 (Procedure with respect to applications and other matters) *Formerly designated rule N–5; renamed rule 0–5 on August 29, 1973.*
Citation: 17 CFR 270.0–5.
Authority: 15 U.S.C. 80a–6(c) and 80a–37(a).

Title: Rule 2a41–1 (Valuation of standby commitments by registered investment companies).
Citation: 17 CFR 270.2a41–1.
Authority: 15 U.S.C. 80a–6(c), 80a–22(c), and 80a–37(a).

Title: Form N–23C–1 (Statement by registered closed-end investment company with respect to purchases of its own securities pursuant to Rule 23c–1 during the last calendar month).
Citation: 17 CFR 274.201.
Authority: 15 U.S.C. 80a–23(c)(3) and 80a–37(a).

Title: Form N–18F–1 (Notification of election pursuant to Rule 18f–1 under the Investment Company Act).
Citation: 17 CFR 274.51.
Authority: 15 U.S.C. 80a–6(c) and 80a–37(a).

Title: Form N–17D–1 (Report filed by small business investment company (SBIC) registered under the Investment Company Act of 1940 and an affiliated bank, with respect to investments by the SBIC and the bank, submitted pursuant to paragraph (d)(3) of § 270.17d–1 of this chapter).
Citation: 17 CFR 274.200.
Authority: 15 U.S.C. 80a–17(d) and 80a–37(a).

Title: Form N–27D–1 (Accounting of segregated trust account).
Citation: 17 CFR 274.127d–1.
Authority: 15 U.S.C. 80a–27(d), 80a–27(f), 80a–38(a) and 15 U.S.C. 6(c).

Title: U–3A–2 (Annual reports pursuant to Rule 2 for exempt holding companies which are intrastate or predominantly operating companies).
Citation: 17 CFR 259.402.
Authority: 15 U.S.C. 79e, 79f, 79g, 79j, 79l, 79m, 79n and 79t.

Title: U–5–S (Annual reports filed under section 5(c) of the Act).
Citation: 17 CFR 259.5s.
Authority: 15 U.S.C. 79e, 79f, 79g, 79j, 79l, 79m, 79n and 79t.

Title: U–5–A (Notification or registration filed under section 5(a) of the Act).
Citation: 17 CFR 259.5a.
Authority: 15 U.S.C. 79e, 79f, 79g, 79j, 79l, 79m, 79n and 79t.

Title: U–5–B (Registration statement filed under section 5(b) of the Act).
Citation: 17 CFR 259.5b.
Authority: 15 U.S.C. 79e, 79f, 79g, 79j, 79l, 79m, 79n and 79t.

Title: U–1 (Application or declaration under the Public Utility Holding Company Act of 1935).
Citation: 17 CFR 259.101.
Authority: 15 U.S.C. 79f and 79g.

Title: Rule 1 (Registration).
Citation: 17 CFR 250.1.
Authority: 15 U.S.C. 79c, 79f(b), 79i(c)(3) and 79t.

Title: Rule 2 (Exemption of holding companies which are intrastate or predominantly operating companies).
Citation: 17 CFR 250.2.
Authority: 15 U.S.C. 79i.

Title: Rule 3 (Exemption of certain banks).
Citation: 17 CFR 250.3.
Authority: 15 U.S.C. 79i.

Title: Rule 4 (Exemption of certain brokers, dealers and underwriters).
Citation: 17 CFR 250.4.
Authority: 15 U.S.C. 79i.

Title: Rule 5 (Exemption of certain foreign holding companies).
Citation: 17 CFR 250.5
Authority: 15 U.S.C. 79c.

Title: Rule 6 (Termination of exemptions).
Citation: 17 CFR 250.6.
Authority: 15 U.S.C. 79c.

Title: Rule 8 (Exemption of subsidiaries subject to jurisdiction of Interstate Commerce Commission).
Citation: 17 CFR 250.8.
Authority: 15 U.S.C. 79i.

Title: Rule 10 (Effect of certain exemptions).
Citation: 17 CFR 250.10.
Authority: 15 U.S.C. 79b, 79d, 79e and 79c.

Title: Rule 11 (Certain acquisitions by affiliates exempted from section 9(a)(2)).
Citation: 17 CFR 250.11.
Authority: 15 U.S.C. 79d, 79e, 79i and 77b.

Title: Rule 12 (Exemption of certain public utility companies from the definition of subsidiary companies of holding companies).
Citation: 17 CFR 250.12.
Authority: 15 U.S.C. 79i.

Title: Rule 23 (Procedure applicable to certain applications and declarations).
Citation: 17 CFR 250.23.
Authority: 15 U.S.C. 79f, 79i, 79j, 79g and 79l.

Title: Rule 24 (Terms and conditions applicable to declaration and orders granting applications).
Citation: 17 CFR 250.24.
Authority: 15 U.S.C. 79f and 79i.

Title: Rule 25 (Answers).
Citation: 17 CFR 250.25.

Authority: 15 U.S.C. 79t.

Title: Rule 26 (Financial statement and recordkeeping requirements for registered holding companies and subsidiaries).

Citation: 17 CFR 250.26.

Authority: 15 U.S.C. 79e, 79f, 79j, 79l, 79m, 79n, 79q and 79t.

Title: Rule 27 (Classification accounts prescribed for utility companies not already subject thereto).

Citation: 17 CFR 250.27.

Authority: 15 U.S.C. 79e, 79f, 79j, 79l, 79m, 79n, 79q and 79t.

Title: Rule 28 (Inconsistent financial statements).

Citation: 17 CFR 250.28.

Authority: 15 U.S.C. 79n.

Title: Rule 47 (Exemption of public utility subsidiaries as to certain securities issued to the Rural Electrification Administration).

Citation: 17 CFR 250.47.

Authority: 15 U.S.C. 79m.

Title: Rule 48 (Certain exemptions in connection with appliance sales and loans to officers or employees).

Citation: 17 CFR 250.48.

Authority: 15 U.S.C. 79i, 79f, 79e(b), 79i(c) and 79m.

Title: Rule 49 (Certain exemptions granted to non-utility subsidiaries).

Citation: 17 CFR 250.49.

Authority: 15 U.S.C. 79f, 79b and 79i.

Title: Rule 51 (Acquisitions pursuant to preliminary agreements and invitation for tenders).

Citation: 17 CFR 250.51.

Authority: 15 U.S.C. 79i.

Title: Rule 60 (Meaning of word ''authorization'').

Citation: 17 CFR 250.60.

Authority: 15 U.S.C. 79k and 791.

Title: Rule 61 (Solicitations other than in connection with a reorganization or transaction which is the subject of an application or declaration).

Citation: 17 CFR 250.61.

Authority: 15 U.S.C. 78n.

Title: Rule 62 (Solicitations in connection with reorganization of transaction which is the subject of an application or declaration).

Citation: 17 CFR 250.62.

Authority: 15 U.S.C. 79b.

Title: Rule 70 (Exemptions from section 17(c) of the Public Utility Holding Company Act).

Citation: 17 CFR 250.70.

Authority: 15 U.S.C. 79q(c), 79t(a), 79f(c), 79g, 79d and 79t.

Title: Rule 0–2 (Consent to service of process to be furnished by non-resident investment advisers and by non-resident investment general partners or managing agents of investment advisers).

Citation: 17 CFR 275.0–2.

Authority: 15 U.S.C. 80b–11.

Title: Form 4–R (Irrevocable appointment of agent for service of process, pleadings and other papers by individual non-resident investment adviser).

Citation: 17 CFR 279.4.

Authority: 15 U.S.C. 80b–11.

Title: Form 5–R (Irrevocable appointment of agent for service of process, pleadings and other papers by corporation non-resident investment adviser).

Citation: 17 CFR 279.5.

Authority: 15 U.S.C. 80b–11.

Title: Form 6–R (Irrevocable appointment of agent for service of process, pleadings and other papers by partnership non-resident investment adviser).

Citation: 17 CFR 279.6.

Authority: 15 U.S.C. 80b–11.

Title: Form 7–R (Irrevocable appointment of agent for service of process, pleadings and other papers by non-resident general partner of an investment adviser).

Citation 17 CFR 279.7.

Authority: 15 U.S.C. 80b–11.

The Commission invites public comment on both the list and the rules to be reviewed.

Dated: December 29, 1997.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–157 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–121755–97]

RIN 1545–AV86

Reorganizations; Nonqualified Preferred Stock

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS and Treasury Department are issuing a temporary regulation under section 356(e) of the Internal Revenue Code (Code) relating to the receipt of nonqualified preferred stock in certain exchanges. The temporary regulation provides guidance on when nonqualified preferred stock (as defined in section 351(g)(2)) will not be treated as stock or securities for purposes of sections 354, 355, and 356. The guidance also addresses the treatment of the receipt of a right to acquire nonqualified preferred stock. The temporary regulation provides that in certain circumstances the terms *stock* and *securities* will not include nonqualified preferred stock, or a right to acquire such stock, when received in exchange for stock or rights to acquire stock. The text of the temporary regulation also serves as the text of this proposed regulation. This document also provides notice of a public hearing on this proposed regulation.

DATES: Written comments must be received by April 6, 1998. Requests to appear and outlines of topics to be discussed at the public hearing scheduled for May 5, 1998, at 10 a.m. must be received by April 14, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R [REG–121755–97], room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R [REG–121755–97], Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. Alternatively, taxapayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page or by submitting comments directly to the IRS Internet site at: http://www.irs.ustreas.gov/prod/tax__regs/comments.html. The public hearing will be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulation, Michael J. Danbury, (202) 622–7750; concerning submissions and the public hearing, LaNita Van Dyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

A temporary regulation in the Rules and Regulations section of this issue of the **Federal Register** amends the Income Tax Regulations (26 CFR part 1) relating to section 356 by adding § 1.356–6T. The text of that temporary regulation also serves as the text of this proposed regulation. The preamble to the temporary regulation explains the reason for the addition.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. Because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for May 5, 1998, at 10 a.m. in room 2615, Internal Revenue Building, 1111 Constitution Ave., NW, Washington, DC. Because of access restrictions, visitors will not be admitted beyond the building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments by April 6, 1998 and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by April 14, 1998.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information: The principal author of this regulation is Michael J. Danbury of the Office of Assistant Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par 2. Section 1.356–6 is added to read as follows:

§ 1.356–6 Rules for treatment of nonqualified preferred stock as ''other property.''

[The text of this proposed section is the same as the text of § 1.356–6T published elsewhere in this issue of the **Federal Register**.]

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

[FR Doc. 98–18 Filed 1–5–98; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

[SPATS No. OK–024–FOR]

Oklahoma Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: OSM is announcing receipt of a proposed amendment to the Oklahoma regulatory program (hereinafter the ''Oklahoma program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of revisions to and/or additions of regulations pertaining to definitions; reclamation plan: siltation structures, impoundments, banks, dams, and embankments; permit variances from approximate original contour restoration requirements; small operator assistance; bond release applications; hydrologic balance: siltation structures; disposal of excess spoil: preexisting benches; coal mine waste: general requirements; state inspections and monitoring; and request for hearing. The amendment is intended to revise the Oklahoma program to be consistent with the corresponding Federal regulations.

This document set forth the times and locations that the Oklahoma program and proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received by 4:00 p.m., c.s.t., February 5, 1998. If requested, a public hearing on the proposed amendment will be held on February 2, 1998. Requests to speck at the hearing must be received by 4:00 p.m., c.s.t., on January 21, 1998.

ADDRESSES: Written comments and requests to speak at the hearing should be mailed or hand delivered to Michael C. Wolfrom, Director, Tulsa Field Office, at the address listed below.

Copies of the Oklahoma program, the proposed amendment, a listing of any scheduled public hearings, and all written comments received in response to this document will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free copy of the proposed amendment by contacting OSM's Tulsa Field Office.

Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547, Telephone: (918) 581–6430.

Oklahoma Department of Mines, 4040 N. Lincoln Blvd., Suite 107, Oklahoma City, Oklahoma 73105, Telephone: (405) 521–3859.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office, Telephone: (918) 581–6430.

SUPPLEMENTARY INFORMATION:

I. Background on the Oklahoma Program

On January 19, 1981, the Secretary of the Interior conditionally approved the Oklahoma program. Background information on the Oklahoma program, including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in the January 19, 1981, **Federal Register** (46 FR 4902). Subsequent actions concerning the conditions of approval and program amendments can be found at 30 CFR 936.15 and 936.16.

II. Description of the Proposed Amendment

By letter dated December 18, 1997 (Administrative Record No. OK–981), Oklahoma submitted a proposed

amendment to its program pursuant to SMCRA. Oklahoma submitted the proposed amendment in response to a June 17, 1997, letter (Administrative Record No. 979) that OSM sent to Oklahoma in accordance with 30 CFR 732.17(c). Oklahoma proposes to amend the Oklahoma rules. The full text of the proposed program amendment submitted by Oklahoma is available for public inspection at the locations listed above under **ADDRESSES**. A brief discussion of the proposed amendment is presented below.

A. 460:20–3–5. Definitions

1. Oklahoma proposes to add a definition for ''other treatment facilities.''

2. Oklahoma proposes to revise its definition for ''previously mined area.''

3. Oklahoma proposes to add a definition for ''siltation structure.''

B. 460:20–27–14. and 460:20–31–9. Reclamation Plan; Ponds, Impoundments, Banks, Dams, and Embankments

1. In the titles to these sections, Oklahoma proposes to replace the word ''ponds'' with the words ''siltation structure.''

2. At paragraphs (a), Oklahoma proposes to replace the words ''sedimentation ponds'' with the words ''siltation structure.''

3. At paragraphs (a)(2), Oklahoma proposes to add language that makes specific references to the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 criteria for dam classification and requires compliance with this technical release if structures meet or exceed the size or other criteria of the Mine Safety and Health Administration.

4. At paragraphs (b), Oklahoma proposes to change the term ''Sedimentation ponds'' to ''Siltation structures'' throughout these paragraphs. The State also proposes to make a minor wording changes to these paragraphs.

C. 460:20–27–14. Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments

Oklahoma proposes to revise paragraph (f) by deleting the phrase, ''If the structure is 20 feet or higher or impounds more than 20 acre-feet,'' and replacing it with the phrase, ''If the structure meets the Class B or C criteria for dams in TR–60 or meets the size or other criteria of 77.216(a) of this Chapter.''

D. 460:20–31–9. Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments

Oklahoma proposes to revise paragraph (f) by deleting the phrase, ''If the structure is 20 feet or higher or impounds more than 20 acre-feet,.''

E. 460:20–33–6. Permits Incorporating Variances from Approximate Original Contour Restoration Requirements

Oklahoma proposes to revise paragraph (a) to clearly define that the State may issue a permit for nonmountaintop removal ''steep slope'' mining and that this type of permit includes a variance from the requirements of certain sections in its regulations.

F. 460:20–35–6. Program Services and Data Requirements

Oklahoma proposes to revise paragraph (a) to read as follows:

(a) To the extent possible with available funds, the program administrator shall select and pay a qualified laboratory to make the determination and statement and provide other services referenced in Subsection (b) of this Section for eligible operators who request assistance.

G. 460:20–37–15. Requirement to Release Performance Bonds

Oklahoma proposes to add paragraph (a)(3) to read as follows:

(3) The permittee shall include in the application for bond release a notarized statement which certifies that all applicable reclamation activities have been accomplished in accordance with the requirements of the Act, the Department, and the approved reclamation plan. Such certification shall be submitted for each application or phase of bond release.

H. 460:20–43–12. and 460:20–45–12. Hydrologic Balance: Siltation Structures

Oklahoma proposes to delete paragraphs (a)(1) which are definitions of ''siltation structure'' and to redesignate paragraphs (a)(2) as paragraphs (a)(1). Oklahoma also proposes to delete paragraphs (a)(3) which are definitions of ''other treatment facilities.''

I. 460:20–43–27. and 460:20–45–27. Disposal of Excess Spoil: Preexisting Benches

Oklahoma proposes to revise paragraphs (c) to require the designs to be certified by a registered professional engineer. The spoil shall also be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long-term static safety factor of 1.3 for all portions of the fill. Any spoil deposited on any fill of the bench will be treated as excess spoil fill under 20:43–24.

J. 460:20–43–29. and 460:20–45–29. Coal Mine Waste: General Requirements

Oklahoma proposes to revise paragraphs (a) by adding the phrase ''disposed of in an area other than the mine workings or excavations.''

K. 460:20–57–2. State Inspections and Monitoring

1. Oklahoma proposes to revise paragraph (g)(2) by deleting the words, ''or the Office.''

2. Oklahoma proposes to revise paragraph (g)(4) by deleting the phrase, ''or permit revocation proceedings have been initiated and are being pursued diligently;.''

3. Oklahoma proposes to revise paragraph (h)(1) to require that the State inspect each abandoned coal mine site on a set frequency commensurate with the public health and safety and environmental considerations present at each specific site.

In no case shall the inspection frequency be set at less than one complete inspection per calendar year. Oklahoma also proposes procedures for selecting the inspection frequency for each site.

L. 460:20–61–11. Request for Hearing

Oklahoma proposes to revise paragraph (a) by changing from 15 days to 30 days the amount of time a person has to submit a petition for requesting a hearing after the date of service of the conference officer's action.

M. Regulations With Editorial Changes

Oklahoma proposes to make citation corrections at 460:20–27–7 and 460:20–31–16, Operation plan: Maps and plans.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Oklahoma program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations to support of the commenter's recommendations. Comments received after the time indicated under **DATES** or at locations other than the Tulsa Field Office will not necessarily be considered in the

final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to speak at the public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., c.s.t. on January 21, 1998. The location and time of the hearing will be arranged will be arranged with those persons requesting the hearing. Any disabled individual who has need for a special accommodation to attend a public hearing should contact the individual listed under **FOR FURTHER INFORMATION CONTACT.** If no one requests an opportunity to speak at the public hearing the hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to speak have been heard. Persons in the audience who have not been scheduled to speak, and who wish to do so, will be heard following those who have been scheduled. The hearing will end after all persons scheduled to speak and persons present in the audience who wish to speak have been heard.

Public Meeting

If only one person requests an opportunity to speak at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendment may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the location listed under **ADDRESSES**. A written summary of each meeting will be made a part of the Administrative Record.

IV. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Unfunded Mandates

OSM has determined and certifies pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 29, 1997.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

[FR Doc. 98–177 Filed 1–05–97; 8:45 am]

BILLING CODE 4310–05–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IN76–1; FRL–5945–9]

Approval and Promulgation of Implementation Plan; Indiana

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve Indiana's request to grant an exemption for the northwest Indiana (Lake and Porter Counties) severe ozone nonattainment area from the otherwise applicable Oxides of Nitrogen (NO_X) transportation conformity requirements. On May 24, 1996, the Indiana Department of Environmental Management (IDEM) submitted to the EPA a State Implementation Plan (SIP) revision request for an exemption under section 182(b)(1) of the Clean Air Act (Act) from the transportation conformity requirements for NO_X for the northwest Indiana (Lake and Porter Counties) severe ozone nonattainment area. On November 26, 1996, IDEM submitted additional materials, including Public Hearing documentation to complete the submittal. The request is based on the urban airshed modeling (UAM) conducted for the attainment demonstration for the Lake Michigan Ozone Study (LMOS) modeling domain. The rationale for this proposed approval is set forth below; additional information is available at the address indicated below.

DATES: Written comments on this proposed action must be received by February 5, 1998.

ADDRESSES: Written comments should be sent to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR–18J), EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604–3590. Copies of the SIP revision and supporting documentation,

are available for inspection at the following address: United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (It is recommended that you telephone Patricia Morris at (312) 353–8656 before visiting the Region 5 Office.)

FOR FURTHER INFORMATION CONTACT: Patricia A. Morris, Regulation Development Section (AR–18J), Air Programs Branch, Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, Telephone Number (312) 353–6680.

SUPPLEMENTARY INFORMATION:

I. Background

Clean Air Act section 176(c)(3)(A)(iii) requires, in order to demonstrate conformity with the applicable SIP, that transportation plans and Transportation Improvement Programs (TIPs) contribute to emissions reductions in ozone and carbon monoxide nonattainment areas that do not have motor vehicle emissions budgets. This requirement is implemented in 40 CFR § 93.119, which establishes the so-called ''build/no-build test.'' This test requires a demonstration that the ''Action'' scenario (representing the implementation of the proposed transportation plan/TIP) will result in lower motor vehicle emissions than the ''Baseline'' scenario (representing the implementation of the current transportation plan/TIP). In addition, the ''Action'' scenario must result in emissions lower than 1990 levels.

The November 24, 1993 transportation conformity rule [1] and the August 15, 1997, final transportation conformity rule amendments: Flexibility and Streamlining,[2] do not require the build/no-build test and less-than-1990 test for NO_X as an ozone precursor in ozone nonattainment areas, where the Administrator determines that additional reductions of NO_X would not contribute to attainment of the National Ambient Air Quality Standard (NAAQS) for ozone.

Clean Air Act section 176(c)(3)(A)(iii), which is the conformity provision requiring contributions to emission reductions before SIPs with emissions budgets have been submitted, specifically references Clean Air Act section 182(b)(1). That section requires submission of State plans that, among other things, provide for specific annual reductions of volatile organic compounds (VOCs) and NO_X emissions ''as necessary'' to attain the ozone standard by the applicable attainment date. Section 182(b)(1) further states that its requirements do not apply in the case of NO_X for those ozone nonattainment areas for which EPA determines that additional reductions of NO_X would not contribute to ozone attainment.

For ozone nonattainment areas, the process for submitting waiver requests and the criteria used to evaluate them are explained in the December 1993 EPA document ''Guidelines for Determining the Applicability of Nitrogen Oxides Requirements Under Section 182(f),'' and the May 27, 1994, and February 8, 1995, memoranda from John S. Seitz, Director of the Office of Air Quality Planning and Standards, to Regional Air Division Directors, titled ''Section 182(f) NO_X Exemptions—Revised Process and Criteria.''

On July 13, 1994, the States of Illinois, Indiana, Michigan, and Wisconsin (the States) submitted to the EPA a petition for an exemption from the requirements of section 182(f) of the Clean Air Act (Act). The States, acting through the Lake Michigan Air Directors Consortium (LADCo), petitioned for an exemption from the Reasonably Available Control Technology (RACT) and New Source Review (NSR) requirements for major stationary sources of NO_X. The petition also asked for an exemption from the transportation and general conformity requirements for NO_X in all ozone nonattainment areas in the Region.

On March 6, 1995, the EPA published a rulemaking proposing approval of the NO_X exemption petition for the RACT, NSR and transportation and general conformity requirements. A number of comments were received on the proposal. Several commenters argued that NO_X exemptions are provided for in two separate parts of the Act, in sections 182(b)(1) and 182(f), but that the Act's transportation conformity provisions in section 176(c)(3) explicitly reference section 182(b)(1). In April 1995, the EPA entered into an agreement to change the procedural mechanism through which a NO_X exemption from transportation conformity would be granted (*EDF et al.* v. *EPA*, No. 94–1044, U.S. Court of Appeals, D.C. Circuit). As a result, instead of a petition under 182(f), transportation conformity NO_X exemptions for ozone nonattainment areas that are subject to section 182(b)(1) are to be submitted as a SIP revision request. The northwest Indiana (Lake and Porter Counties) ozone nonattainment area is classified as severe (part of the Chicago severe nonattainment area) and, thus, is subject to section 182(b)(1). The EPA approved the NO_X exemption for the States of Illinois, Indiana, Wisconsin and Michigan for RACT, NSR and general conformity on January 26, 1996, (61 FR 2428).

The transportation conformity requirements are found at sections 176(c)(2), (3), and (4) of the Act. The conformity requirements apply on an area-wide basis in all nonattainment and maintenance areas. The EPA's transportation conformity rule was amended on August 29, 1995 (60 FR 44762) to reference section 182(b)(1) rather than 182(f) as the means for exempting areas subject to section 182(b)(1) from the transportation conformity NO_X requirements.

The May 24, 1996, SIP revision request from Indiana was submitted to meet the requirements of 182(b)(1). A public hearing on this SIP revision request was held on June 11, 1996.

In evaluating the 182(b) SIP revision request, the EPA considered whether additional NO_X reductions would contribute to attainment of the standard in the Lake and Porter Counties ozone nonattainment area and also in the downwind areas of the LMOS modeling domain.

The role that NO_X emissions play in producing ozone at any given place and time is complex. In the presence of sunlight, nitrogen dioxide (NO_2) photo-dissociates into nitrogen oxide (NO) and a single oxygen atom. The oxygen atom reacts with molecular oxygen (O_2) to form ozone (O_3). NO, on the other hand, near its source area readily reacts with ozone to form O_2 and NO_2. The generated NO_2 is then free to photo-dissociate and lead to ozone formation further downwind. The reaction of NO with ozone, which locally reduces ozone concentrations, is referred to as ozone scavenging and is one of the primary local sinks for ozone in the lower atmosphere in and near NO source areas. Since emissions of NO_X from fuel combustion sources, whether internal combustion engines or stationary combustion sources, such as industrial boilers, contain significant amounts of NO, it is expected that ozone concentrations immediately downwind of such NO_X sources will be reduced through ozone scavenging. Therefore, reducing NO_X emissions can lead to increased ozone concentrations in the vicinity of the controlled NO_X emission sources, whereas reducing NO_X

[1] ''Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved under Title 23 U.S.C. of the Federal Transit Act,'' November 24, 1993 (58 FR 62188).

[2] ''Transportation Conformity Rule Amendments: Flexibili8ty and Streamlining; Final Rule'' August 15, 1997 (62 FR 43780).

emissions may lead to reduction in ozone concentrations further downwind. Reducing NO_X emissions in VOC-limited areas (areas with low VOC emissions relative to NO_X emissions) may produce minimal ozone reductions or even ozone increases.

As outlined in relevant EPA guidance, the use of photochemical grid modeling is the recommended approach for testing the contribution of NO_X emission reductions to attainment of the ozone standard. This approach simulates conditions over the modeling domain that may be expected at the attainment deadline for three emission reduction scenarios: (1) Substantial VOC reductions, (2) substantial NO_X reductions, and (3) both VOC and NO_X reductions. If the area wide predicted maximum one-hour ozone concentration for each day modeled under scenario (1) is less than or equal to those from scenarios (2) and (3) for the corresponding days, the test is passed and the section 182(f) NO_X emissions reduction requirements would not apply.

In making this determination under section 182(b)(1) that the NO_X requirements do not apply, or may be limited in the Lake Michigan area, the EPA has considered the national study of ozone precursors completed pursuant to section 185B of the Act. The EPA has based its decision on the demonstration and the supporting information provided in the SIP revision request.

II. Summary of Submittal

On May 24, 1996, the State of Indiana submitted as a revision to the SIP, a request for a waiver from the transportation conformity NO_X requirements for northwest Indiana (Lake and Porter Counties). The submittal included the LMOS UAM modeling for the attainment demonstration for 3 ozone episodes during 1991. The modeling supported the request by documenting that NO_X reductions in the LMOS modeling domain would not contribute to attainment and, in fact, would be detrimental to the goal of reaching attainment. The IDEM held a public hearing on the submittal on June 11, 1996.

Pursuant to 40 CFR Part 93, Subpart A, 40 CFR Part 51, Subpart T, the SIP revision request seeks an exemption from the transportation conformity requirements for NO_X in the northwest Indiana (Lake and Porter Counties) severe ozone nonattainment area. The States have utilized the UAM to demonstrate that reductions in NO_X in the LMOS modeling domain will not contribute to attainment of the ozone standard. To conduct the modeling analysis, the following steps were followed: (a) emissions were projected to 1996 (the deadline for implementation of the 15 percent reasonable further progress reduction) and 2007 (the attainment deadline for the severe nonattainment areas) from the 1990 base year, (b) it was assumed that a 40 percent VOC emission reduction beyond that achieved as a result of emission controls mandated by the Act would be necessary to attain the ozone standard in the LMOS modeling domain, (c) a 40 percent NO_X emission reduction in grid B (that portion of the LMOS modeling domain that is essentially composed of the ozone nonattainment areas within the modeling domain) beyond the projected emission levels was assumed for all anthropogenic NO_X emissions, (d) a 40 percent VOC emission reduction and a 40 percent NO_X reduction in grid B beyond projected emission levels were assumed for all anthropogenic VOC and NO_X emissions and (e) the ozone modeling results for (b), (c), and (d) were compared considering the modeled domain-wide peak ozone concentrations and temporal and spatial extent of modeled ozone concentrations above 120 parts per billion (ppb).

For all modeled days using 1996 and 2007 conditions, domain-wide peak ozone concentrations for ''VOC-only'' controls were found to be lower than or equal to those for ''NO_X-only'' controls or those for ''VOC plus NO_X'' controls. In addition, consideration of daily peak ozone isopleth maps (these maps are included in the documentation of the section 182(b) SIP revision request) shows that the ''VOC-only'' control scenario leads to the smallest areas with predicted peak ozone concentrations exceeding 120 ppb.

Additional sensitivity tests were conducted for a 40 percent NO_X emission reduction that was applied only to point sources in Grid B for episode 2 and 1996 conditions for both an assumed NO_X reduction alone and a 40 percent reduction in both VOCs and NO_X. These sensitivity tests compared to the scenarios with across the board anthropogenic NO_X reductions demonstrated that control of ground level NO_X sources (such as transportation sources) did not contribute to attainment of the standard and in fact increased the domain wide peak ozone concentrations exceeding 120 ppb and the number of hours that exceeded 120 ppb. This result was more pronounced than with the point source only NO_X control.

III. Analysis of the Submittal

Review of the modeling results shows a very definite directional signal indicating that application of NO_X controls in the northwest Indiana (Lake and Porter Counties) severe ozone nonattainment area would exacerbate peak ozone concentrations in the LMOS modeling domain. The LMOS modeling domain includes Chicago, Northwest Indiana, Western Michigan and Eastern Wisconsin. The States and LADCo have completed the validation process for the UAM modeling system used in the demonstration of attainment for the LMOS modeling domain and EPA has approved the validation. Documentation of the modeling validation is included in the SIP revision request materials.

Although ozone concentrations modeled further downwind from the urban source areas increase as a result of increased NO_X point source emissions, this is not the case with the ground level NO_X sources. Modeling results with low level NO_X source reductions are included in the documentation and show a disbenefit when NO_X emissions are reduced. LADCo and the States view the potential increase in outflow ozone concentrations with increasing NO_X point source emissions to be marginal. More importantly, the SIP revision request demonstrates that additional reductions in NO_X would not contribute to attainment of the ozone standard in the LMOS domain. These results are believed to be consistent with EPA's section 185B report to Congress. Therefore, based on the report's conformance with EPA guidance, the EPA believes the State of Indiana's demonstration is adequate, and thus is proposing to approve the transportation conformity waiver request. It is noted by LADCo, however, that subsequent modeling analyses may lead to an ozone attainment plan which includes, for specified portions of the LMOS domain only, both NO_X and VOC emission controls. Indiana and the other LADCO states have indicated their intent to review the need for NO_X reduction in the nonattainment area.

Monitoring data, such as concentrations of non-methane hydrocarbons and NO_X and derived/monitored ozone production potentials of air parcels, collected for the urban source areas during the 1991 field study, generally support the approval of the NO_X waiver. However, the primary basis for approval of the NO_X waiver is the modeling results submitted in support of the waiver. The 1991 field data by themselves do not provide adequate support for the waiver, since these data

are limited in nature and do not assess the impacts of post-1991 NO_X controls on LMOS modeling domain peak ozone concentrations.

VOC and NO_X emission reductions were found to produce different impacts spatially. In and downwind of major urban areas, within the ozone nonattainment areas, VOC reductions were effective in lowering peak ozone concentrations, while NO_X emission reductions resulted in increased peak ozone concentrations. Farther downwind, within attainment areas, VOC emissions reductions became less effective for reducing ozone concentrations, while NO_X emission reductions were effective in lowering ozone concentrations. The magnitude of ozone decreases farther downwind due to NO_X emission reductions was less than the magnitude of ozone increases in the ozone nonattainment areas as a result of the same NO_X emission reductions.

Analyses of ambient data by LMOS contractors provided results which corroborated the modeling results. These analyses identified areas of VOC NO_X limited conditions (VOC-limited conditions would imply a greater sensitivity of ozone concentrations to changes to VOC emissions; the reverse would be true for NO_X limited conditions) and tracked the ozone and ozone precursor concentrations in the urban plumes as they moved downwind. The analyses indicated VOC-limited conditions in the Chicago/Northwest Indiana and Milwaukee areas and NO_X-limited conditions further downwind. These results imply that VOC controls in the Chicago/Northwest Indiana, Milwaukee, and Western Michigan areas would be more effective at reducing peak ozone concentrations within the Lake Michigan ozone nonattainment areas.

The consistency between the modeling results and the ambient data analysis results for all episodes with joint data supports the view that the UAM modeling system developed in the LMOS may be used to investigate the relative merits of VOC versus NO_X emission controls. The UAM–V results for all modeled episodes point to the benefits of VOC controls versus NO_X controls in reducing the modeled domain peak ozone concentrations.

For a more detailed analysis of the modeling analysis results, please see the August 22, 1994 memorandum entitled ''Technical Review of a Four State Request for a Section 182(f) Exemption from Oxides of Nitrogen (NO_X) Reasonably Available Control Technology (RACT) and New Source Review (NSR) Requirements'', which is contained in the docket for this action.

The EPA believes LADCo's UAM application has adequately met the requirement to demonstrate that NO_X controls within the Northwest Indiana (Lake and Porter Counties) severe ozone nonattainment area and through out the LMOS domain will not contribute, but instead will interfere with attainment of the ozone standard. The modeling demonstration has been used to support the approval of a NO_X exemption for the States of Illinois, Indiana, Wisconsin and Michigan for Ract, NSR and general conformity (see 61 FR 5291). The modeling has also been used to support transportation conformity NO_X waivers under 182(b) for the Chicago ozone nonattainment area in Illinois (see 61 FR 5291), and, Muskegon County in Michigan (see 62 FR 50512).

In considering the importance of the Ozone Transport Assessment Group (OTAG) process and attainment plan modeling efforts, the results of OTAG technical work are now available. The EPA published on November 7, 1997, a notice of proposed rulemaking which proposes to set State wide NO_X budgets for 22 states including the State of Indiana. The proposed rulemaking would require appropriate States (including Indiana) to submit SIP measures to ensure emissions reductions of NO_X needed to prevent significant transport of ozone. The States have the flexibility to determine which sources are the most appropriate from which to require reductions of NO_X. The EPA, however, has based the proposed NO_X budgets primarily on reductions from stationary sources such as utilities and industrial boilers. The EPA explains in the notice of proposed rulemaking the basis for the proposal and rationale.

IV. EPA Action

The EPA is proposing approval of the transportation conformity NO_X waiver SIP revision for the State of Indiana.

The EPA reserves the right to require NO_X emission controls for transportation sources under section 110(a)(2)(D) of the Act if future ozone modeling demonstrates that such controls are needed to achieve the ozone standard in downwind areas.

V. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

B. Regulatory Flexibility

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Administrator certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of the State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *EPA.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must undertake various actions in association with any proposed or final rule that includes a Federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. This Federal action approves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or the private sector, result from this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ozone, Oxides of Nitrogen, Transportation conformity, Transportation-air quality planning, Volatile organic compounds.

Authority: 42 U.S.C. 7401–7671q.

Dated: December 19, 1997.

David A. Ullrich,

Acting Regional Administrator.

[FR Doc. 98–241 Filed 1–5–98; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MM Docket No. 97–247; FCC 97–414]

Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This Notice of Proposed Rule Making implements Section 336 of the Telecommunications Act of 1996 (''1996 Act'') which requires the Commission to establish a program to assess and collect fees for digital television (DTV) licensees' use of DTV capacity for the provision of ancillary or supplementary services. The statute requires the imposition of a fee where DTV licensees use their capacity for services for which the payment of a subscription fee is required or where the licensee receives revenues from a third party other than advertising revenues in return for transmitting material furnished by the third party. With this Notice of Proposed Rule Making, the Commission seeks comment on various methods by which such fees might be assessed including a fee assessed as a percentage of gross revenues received from the ancillary or supplementary use of DTV capacity, a fee based on net revenues or incremental profits received from the ancillary or supplementary services provided, or a fee based upon a combination of a flat rate and a percentage of revenues.

DATES: Comments are due on or before March 3, 1998 and Reply Comments are due on or before April 2, 1998.

ADDRESSES: Comments should be sent to the Office of Secretary, Federal Communications Commission, 1919 M St., N.W., suite 222, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jerry Duvall, Chief Economist, Mass Media Bureau (202) 418–2600, Susanna Zwerling, Policy and Rules Division, Mass Media Bureau (202) 418–2140, or Jonathan Levy, Office of Plans and Policy (202) 418–2030.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, FCC 97–414 adopted December 18, 1997 and released December 19, 1997. The full text of this Commission Notice is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 239), 1919 M Street N.W., Washington, D.C. The complete text of this Notice may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857–3800 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Synopsis of Notice

I. Introduction

In April, 1997, the Federal Communications Commission (''Commission'') adopted rules implementing a transition to digital television (''DTV'') for all existing television broadcasters. In accordance with 1996 Act, established standards for license eligibility, a transition and construction schedule, and a requirement that broadcasters continue to provide one free, over-the-air television service. As required by the 1996 Act, the Commission adopted rules permitting DTV licensees to use this spectrum to provide ancillary or supplementary services, provided such services do not derogate the free television service. The 1996 Act further requires the Commission to assess and collect a fee for the ancillary or supplementary use of the spectrum when the licensee receives for these services either subscription fees or other compensation from third parties. With this Notice of Proposed Rule Making, the Commission identifies various programs by which such fees may be assessed.

II. Background

The 1996 Act set up the framework for licensing DTV spectrum to existing broadcasters and, in an earlier proceeding, the Commission established rules by which those licenses are assigned and adopted regulations regarding DTV licensees' provision of ancillary or supplementary services. Specifically, Congress directed the Commission to require that the broadcast of any ancillary or supplementary services on frequencies designated for advanced television services: (1) Must be consistent with the advanced television technology designated by the Commission; (2) must not derogate any advanced television services (including high definition television (''HDTV'')) that the Commission may require; and (3) may be subject to Commission regulations applicable to analogous services. Moreover, Congress directed the Commission to establish a fee program for any ancillary or supplementary services for which a licensee receives any compensation other than commercial advertisements used to support non-subscription broadcasting.

The Commission adopted a technical standard that supports the transmission of HDTV as well as the transmission of multiple programs of standard definition television (''SDTV'') and non-video services. This standard permits the provision of other services including the transmission of CD quality audio signals or large amounts of data. The standard allows broadcasters to send video, voice and data simultaneously and to provide a range of services, switching easily and quickly from one type of service to another.

The Commission's rules permit broadcasters to use their DTV capacity to provide ancillary and supplementary services which do not interfere with the required free service. Broadcasters ability to provide ancillary or supplementary services will allow the broadcasters flexibility to respond to the demands of their audience for such services.

The 1996 Act required DTV licensees receiving fees or certain other compensation for ancillary or supplementary services provided on the DTV spectrum to return a portion of that revenue to the public. The Commission was charged with establishing a means of assessing and collecting fees for those ancillary or supplementary services specified in the statute (''feeable ancillary or supplementary services''). These services are described more fully below.

To implement this provision of the 1996 Act, the Commission seeks comment on various methods of assessing a fee. The Commission sets forth possible fee assessment programs, including a fee related to the amount that would have been realized at auction, a fee based upon net revenues or incremental profits received from the provision of feeable ancillary or supplementary services, a fee assessed as a percentage of gross revenues, and a fee based upon a hybrid of a flat rate and a percentage of revenues. The Commission invites public comment on these fee assessment programs.

III. Discussion

Goals and General Criteria for Assessing Fees

The 1996 Act first directs that any fee established should ''recover for the public a portion of the value of the public spectrum'' made available for ancillary or supplementary use by DTV licensees. This requirement echoes the competitive bidding provisions of the Communications Act of 1934 (''Communications Act''). Second, the

1996 Act requires that the fee be designed ''to avoid unjust enrichment'' of broadcast licensees by their use of the spectrum for ancillary or supplementary services for which they collect fees or certain other compensation. DTV licensees could be placed at an unfair advantage if they paid no fee when using their DTV capacity to provide certain ancillary or supplementary services, given that nonbroadcast licensees providing analogous services may have acquired their spectrum through an auction process. Third, the 1996 Act requires that the fee recover ''for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered'' in an auction.

Section 336(e)(1) of the 1996 Act requires a fee to be assessed upon any services ''for which the payment of a subscription fee is required in order to receive such services'' or ''for which the licensee directly or indirectly receives compensation from a third party in return for transmitting materials furnished by such third party.'' The Act specifically exempts from the fee any service which relies upon ''commercial advertisements used to support broadcasting for which a subscription fee is not required.'' Further, the Conference Report states that the Commission must ''establish a fee program for any ancillary or supplementary services if subscription fees or any other compensation apart from commercial advertisements are required in order to receive such services.'' Thus, a fee must be assessed on any ancillary or supplementary services that are not supported entirely by commercial advertisements. The Commission recognizes that feeable ancillary or supplementary services may be offered simultaneously with other services, including HDTV, SDTV, or other video programming supported entirely by commercial advertisements, or other non-feeable ancillary or supplementary services. The mere fact that a feeable ancillary or supplementary service is being transmitted does not mean that all simultaneously transmitted ancillary or supplementary services are feeable.

In establishing a fee for the feeable ancillary or supplementary use of DTV capacity, the Commission is cognizant of the administrative burden which such a fee could entail. In order to minimize this burden both for broadcasters and for the Commission, the fee should be simple to understand and be calculable with readily available information. An overly complex fee program could be difficult to calculate and enforce and could create uncertainty that might undermine a DTV licensee's business planning.

The Commission intends to establish a fee program consistent with the criteria set forth in the 1996 Act. The 1996 Act evidences the intent of Congress that broadcasters be allowed the flexibility to provide such services. In implementing the statutorily mandated fee program, it is not the Commission's intention to dissuade broadcasters from using the DTV capacity to provide feeable ancillary or supplementary services.

The Commission recognizes that there may be some tension among our goals. The means of assessing the fee may affect whether ancillary or supplementary services are offered at all and which services are offered. A fee set too high would serve as a disincentive for broadcasters to provide feeable ancillary or supplementary services. It could reduce the benefits that consumers receive from services provided on the DTV capacity. On the other hand, a fee that is set too low might not prevent the unjust enrichment of DTV licensees as required by the 1996 Act and might not recover an amount approximating the amount that would have been recovered at auction, although it could recover for the public a ''portion of the value'' of the spectrum. Commenters are asked to address how the proposals and options set forth below strike the appropriate balance among the goals outlined.

Proposals for Establishing Fees for Feeable Ancillary or Supplementary Services

Among the fee options consistent with the guidelines of the 1996 Act are first, a fee akin to the amount that would have been received in an auction of the spectrum; second, a fee based upon the net revenues or incremental profits from the ancillary or supplementary use of a licensee's DTV capacity; third, a fee assessed as a percentage of the gross revenues received for the ancillary or supplementary use of this capacity; and fourth, a fee based upon a hybrid of a flat rate and a percentage of revenues.

Revenue-based fees can affect the mix of ancillary or supplementary services provided, and also raise issues of accounting, auditing, and cost allocation. The choice of a fee structure may affect the choices made by consumers of feeable ancillary and supplementary services. A fee based on gross revenues does not require any cost allocation, but does require auditing of revenues to ensure that licensees do not attribute revenues from feeable ancillary or supplementary services to non-feeable services in order to reduce their fee liability. Because a fee based upon gross revenues ignores variations in the cost of providing different feeable ancillary or supplementary services, it will affect consumer choices among feeable ancillary or supplementary services. The magnitude of this effect depends on how much variation there is in the unit cost of different feeable ancillary or supplementary services. If the costs are quite similar, the effects will be minor. Notwithstanding any differences in cost, a smaller fee on gross revenues will reduce the impact on consumer choice. A variant on the gross revenue fee is a hybrid fee, consisting of a flat fee combined with a percentage of gross revenues. This structure would not further affect consumers' choices among feeable ancillary or supplementary services and would place a fixed floor under the amount recovered in return for use of the public spectrum. A fee based on net revenues or incremental profits presents additional accounting challenges, because it requires assigning costs to each feeable ancillary or supplementary service. Apportioning common costs among services may be quite difficult, but determining service-specific incremental costs could be less difficult. A fee based on net revenues or incremental profits could make consumers' choices among feeable ancillary or supplementary services more efficient. The paragraphs below describe each of these options, and explain the Commission's inclination to favor a formula that incorporates gross revenues as an element.

Auction-Related Fee

The statute requires that the fee ''to the extent feasible'' equal but not exceed, over the term of the license, the amount that would have been realized at auction. There are significant obstacles, however, to basing the fee directly on such a spectrum-auction model. Were it possible to construct, an auction model would provide some guidance in valuing the DTV spectrum. However, spectrum auctions that have been held to date, such as those conducted for licenses to provide personal communications services, took place in circumstances so different from those in which a fee is to be assessed for the ancillary or supplementary use of DTV capacity that they are not necessarily applicable. Depending upon a variety of technological and regulatory factors including what services are authorized, auctioned spectrum may be usable either for more or fewer kinds of services than those authorized on the

DTV spectrum. Moreover, the process of assessing a fee for feeable ancillary or supplementary use of DTV capacity involves setting a fee for the use of the assigned spectrum for any number of services at different times. The relative market demand among services may change month-to-month, day-to-day, or hour-by-hour. In addition, different types of services may require different amounts of capacity. For example, at any given instant HDTV may require the entire 20 Mbps payload capacity while standard definition television programming requires far less capacity. Moreover, a licensee providing free, advertiser-supported programming on its DTV channel, whether in the form of HDTV or multiple SDTV streams, is exempt from the statute's fee requirement. Thus, it is difficult to identify market transactions that involve the transfer of spectrum usage rights equivalent to that capacity which DTV licensees may use to provide feeable ancillary or supplementary services. A fee directly tied to the auction-model estimate of the value of the capacity used for particular feeable ancillary or supplementary services would necessarily be a moving target, would involve innumerable unknown variables, and would be difficult if not impossible to assess. Given these problems, the Commission is initially disinclined to base the fees on a model that would seek to simulate the revenue that would be generated from an auction. The language of the 1996 Act provides flexibility in this regard, stating that the Commission should use the auction value ''to the extent feasible.''

Relationship Between the Value of the DTV Spectrum and Revenues

The Commission believes that a fee program can be constructed that satisfies the statutory directive through the imposition of a fee based upon revenues received from the feeable ancillary or supplementary use of the DTV capacity. The relationship between the value of the DTV capacity used in the provision of feeable ancillary or supplementary services and the revenue produced from the provision of those services can be demonstrated using microeconomic theory. It may, therefore, be possible to establish a fee program as required by the 1996 Act based upon some measure of revenues received from these services.

More specifically, where DTV capacity is viewed in economic terms as an input of production used to produce a given ancillary or supplementary service, and the capacity can be combined with other inputs of production, such as equipment, programming, and labor in variable proportions to produce the service, it is possible to postulate a relationship between variable quantities of DTV capacity and the quantity of the service actually produced, holding constant all other inputs of production. Whatever the nature of the actual empirical input-output relationship, it will reflect the economic principle of diminishing returns to DTV capacity as a variable input of production, if the other inputs of production are held constant. In other words, all other things remaining the same, an increase in the quantity of digital capacity used to produce a given feeable ancillary or supplementary service will result in the production of increasing quantities of the ancillary or supplementary service although the rate of increase will diminish as the increasing quantity of capacity is forced to work with fixed quantities of all other inputs of production. The relationship between the quantity of DTV capacity used in production and the diminishing rate of increase in total output is called, in graphical terms, a marginal product curve.

Microeconomic theory demonstrates that the marginal product curve represents a firm's demand curve for a single variable input of production, or, here, a broadcaster's demand for digital capacity for producing feeable ancillary or supplementary services. Theory also shows that a profit-maximizing firm will use an amount of the variable input of production (DTV capacity) that equates the marginal product (or incremental change in total output produced resulting from an incremental change in the amount of DTV capacity used in production) of the variable input or DTV capacity, multiplied by the unit market price of the specific ancillary or supplementary service, with the unit price of the input (DTV capacity) itself. In the case of DTV capacity as a variable input of production, there is no market-determined price established by auction which can be equated with the value of marginal product (''VMP''), i.e., marginal product multiplied by the unit market price of a specific ancillary or supplementary service. Within the range of efficient production described by the empirical input-output relationship, the value of marginal product curve represents the implicit value to the broadcaster of DTV capacity used to produce feeable ancillary or supplementary services. Moreover, it can be shown that VMP may be interpreted as a measure of incremental revenue attributable to a one unit increase in the quantity of DTV capacity used to produce a given ancillary or supplementary service. Multiplying the implicit unit value of DTV capacity by the corresponding quantity of capacity actually used in providing a given service provides an estimate of the implicit market value of that particular quantity of capacity for that particular broadcaster providing that specific service. The ratio of this implicit value of DTV capacity to some measure of revenues generated by the sale of the specific feeable ancillary or supplementary service provides a conceptual basis for relating the value of the capacity to service revenues.

This conceptual approach can only approximate the implicit value of DTV spectrum over a range of possible quantities of the DTV capacity actually used to produce specific ancillary or supplementary services, since market-determined unit prices of DTV spectrum are unavailable. The Commission believes that the VMP curve provides some evidence of the implicit value of DTV capacity used to provide each specific feeable ancillary or supplementary service and, therefore, provides a conceptual basis for estimating the market value of such spectrum within the range of efficient production of feeable ancillary or supplementary services.

Fee Based Upon Net Revenues

The value of the DTV capacity used for feeable ancillary or supplementary services may be estimated through the net revenues from each such service provided. Net revenue is defined as revenue from a service less incremental costs and a portion of joint and common costs. The Commission believes that this revenue proxy for the auction value is one means of satisfying the criteria of the 1996 Act. A fee could be computed as a percentage of net revenues derived from each feeable ancillary or supplementary service. Such fee has the additional effect of allowing broadcasters to build their feeable ancillary or supplementary services to the break-even point without the assessment of a fee, fostering the development of these new services. Ascertaining the costs involved in calculation of net revenues may, however, be problematic. Such a determination would necessitate the apportionment of common expenses between and among free television services offered on a licensee's DTV capacity and each feeable ancillary or supplementary use of its DTV capacity. The Commission has concerns as to whether this information will be readily and reliably available. The Commission seeks comment on the burden such a fee

program would impose on broadcasters and on Commission staff in the audit and review process.

Fee Based Upon Incremental Profits From Specific Services

An alternative to such a cost accounting approach that would avoid the problem of the allocation of costs shared by multiple broadcasting and ancillary or supplementary services is assessing the fee on the difference between the incremental gross revenues for a given feeable ancillary or supplementary service and the incremental economic costs associated with the production of the service. The service-specific incremental cost would include the costs of all directly-attributable inputs of production, such as labor and equipment, and the economic depreciation and rate of return on any specific capital assets that are used exclusively in the production of a given feeable ancillary or supplementary service. Any costs, either variable or fixed, that are shared in the production of the advertiser-supported television service and an ancillary or supplementary service would be omitted in the calculation of profit. This approach has an advantage over the net revenue approach of reduced auditing requirements since joint and common costs do not have to be allocated. Nevertheless, due to the accounting and enforcement difficulties, especially the potential need to conduct audits, the Commission remains concerned about the feasibility of the incremental profits fee. The Commission seeks comment on the costs to broadcasters and the Commission of the specific proposal that DTV spectrum fees be based on the calculated profit for each feeable ancillary or supplementary service. In particular, what type of studies or recordkeeping will be required to estimate service-specific incremental cost? Will the Commission need to prescribe specific cost accounting rules to insure consistent and uniform calculations of incremental cost for purposes of calculating service-specific profit? Will the costs to broadcasters and the Commission of calculating and auditing the computation of service-specific profit exceed the benefit of avoiding whatever inefficiency in consumption may be induced by a fee based on gross revenues?

Fee Based Upon Gross Revenues

A fee assessed as a percentage of a licensee's gross revenues from the provision of feeable ancillary or supplementary services would be consistent with the 1996 Act and would avoid some of the infirmities of the fee based upon net revenues described above. Moreover, the Commission believes a fee based upon a percentage of gross revenues could foster our goal of creating a fee structure which does not dissuade broadcasters from offering feeable ancillary and supplementary services. Such a fee would be straightforward to assess and calculate; the licensee would be required to report its gross revenues from feeable ancillary or supplementary services and to calculate a fee based upon a percentage of these revenues. In addition, a fee set at a percentage of gross revenues provides broadcasters a more certain fee amount to use in their long term planning and decisions.

Hybrid Fees

Another possible fee structure is a two-part, tariff-like fee, in which the fee is comprised of a combination of a flat dollar amount and a percentage of gross revenues. Compared to a fee based purely on a percentage of gross revenues, a hybrid fee would include an element—the flat fee—that would provide a uniform means of preventing unjust enrichment and recover a portion of the value of the spectrum consistent with the statute. Moreover, a flat fee component would permit us to set the percentage rate of gross revenues at a lower level, thus avoiding a fee program that dissuades broadcasters from offering feeable ancillary and supplementary services. A flat amount, however, would be an up-front cost, which could serve as a disincentive to broadcasters to provide ancillary or supplementary services. Given the statutory requirement that a fee be imposed on feeable ancillary and supplementary uses, a flat fee may be appropriate even if it does discourage some such uses. The addition of a percentage of gross revenues to the flat rate could prevent the unjust enrichment that might result from a flat fee, by recovering some percentage of gross revenues in excess of the up-front payment. The Commission invites comment on the two-part fee proposal. The Commission is especially interested in comments that recommend what the initial flat rate should be and explain the basis of the recommendation. Would the initial flat rate discourage broadcasters' institution of feeable ancillary or supplementary services or serve as an incentive to broadcasters to further develop feeable ancillary or supplementary services once established?

Percentage Rate of Fee

If the fee is assessed as a percentage of revenues or incremental profits, the percentage rate of the fee, more than the process by which it is derived will determine the degree to which the fee affects broadcasters' decisions. The 1996 Act exempts free broadcasting services from any such fees, thus to some extent creating an incentive for DTV licensees to use this capacity for free broadcasting services in addition to the one FCC-mandated free television service. This is consistent with the Commission's previous statement that ''the fundamental use of the 6 MHz DTV license will be for the provision of free over-the-air television service.'' The greater the fee, the greater the incentive created by the fee for a broadcaster to use its assigned spectrum to provide free, over-the-air broadcast programming instead of subscription programming or other feeable ancillary or supplementary services. The lower the fee, the more flexible the broadcaster may be in serving audience demand for services and in choosing the mix of services it provides. The Commission seeks comment as to the types of services broadcasters may provide using DTV capacity. The Commission is particularly interested in DTV licensees' plans for the provision of feeable ancillary or supplementary services. To the extent that commenters can estimate revenues at this time, the Commission seeks information as to the revenues anticipated from the use of the DTV capacity for feeable ancillary or supplementary services.

The percentage rate of the fee must reflect the statutory requirements that the fee recover a portion of the value of the spectrum used for these services, avoid unjust enrichment, and approximate the revenue that would have been achieved had these services been licensed through an auction. The Commission asks commenters to take the statutory requirements and policy goals into account in proposing particular percentage rates. The Commission seeks comment on how to factor in permitting broadcasters flexibility to provide feeable ancillary or supplementary services in establishing an appropriate percentage rate for the fee. The Commission is reluctant to set the percentage rate so high that it would dissuade broadcasters from providing feeable ancillary or supplementary services. The Commission asks commenters to explain how the percentages they propose implicate this consideration. The Commission seeks comment on what percentage would be appropriate for the fee, taking into account the various proposals for assessing a fee. Clearly, a fee based upon gross revenues will be set at a lower

percentage rate than a fee based upon net revenues or incremental profits. Similarly, the percentage rate of a fee incorporated into a hybrid approach will be lower than the percentage rate of a fee that is not additional to an up-front payment. Commenters are encouraged to make specific recommendations as to the level of the fee and type of fee assessment program to which the fee is to be tied and to provide evidence to build a record supporting those recommendations. For example, should the fee be set at one percent or less of gross revenues generated from feeable ancillary and supplementary services, or up to a more substantial ten percent of gross revenues?

An additional consideration is whether different feeable ancillary or supplementary services should be subject to fees set at different percentage rates. A varying percentage rate could have a number of disparate effects. Different rates for different services might create incentives for broadcasters to offer services with lower fees over services with higher fees and could affect broadcasters' choice from among alternative feeable ancillary or supplementary uses. On the other hand, a varying percentage rate fee could be used to adjust the costs to broadcasters of providing feeable ancillary or supplementary services to reflect the different costs to competitors offering analogous services on spectrum purchased at auction or on spectrum not obtained at auction or through technologies that are not spectrum-based. Another consideration is whether the percentage rate of the fee should vary based upon the time of day during which the service is being provided or other factors. The Commission seeks comment on the imposition of a varying percentage rate fee.

The statute provides for the periodic adjustment of the fee, requiring that the fee ''be adjusted by the Commission from time to time in order to continue to comply'' with the 1996 Act. While this provision generally gives us the authority to recalculate the fee once DTV is established and feeable ancillary or supplementary services are being offered, it also raises the possibility that the fee be set at a lower percentage rate at the outset. The assessment of a lower initial percentage rate would allow broadcasters a greater percentage of gross revenues during the build-out of DTV service and would also provide the Commission the opportunity to adjust the percentage rate after gaining more information concerning the nature of the services offered by licensees. The periodic adjustment of the fee allows the Commission to ensure that the fee program continues to meet the requirements of the statute, including the prevention of unjust enrichment and the recovery of a portion of the value of the spectrum. For example, the fee program could be adjusted where it is shown that it has given DTV licensees an unfair advantage in the provision of their feeable ancillary or supplementary services as compared with their nonbroadcast competitors providing analogous services on spectrum licensed through a competitive bidding process.

Noncommercial Television Licensees

In their Petition for Reconsideration of the Fifth Report and Order, the Association of America's Public Television Stations and the Public Broadcasting Service (''APTS/PBS'') requested that the Commission exempt public television licensees from any obligation to pay fees when they offer feeable ancillary or supplementary services on their DTV capacity as a source of funding for their public television operation. APTS/PBS argue that the revenues from the remunerative provision of feeable ancillary or supplementary services on their DTV capacity may provide a revenue stream to support their noncommercial broadcasting activities.

To the extent public television licensees ultimately offer feeable ancillary and supplementary services, the Commission must determine whether and in what circumstances they are subject to fees for these services. The Commission seeks comment on the argument that noncommercial television licensees should be exempt from fees or subject to lower fees. Is such relief consistent with the 1996 Act's requirement that a fee be collected where the DTV spectrum is used for feeable ancillary or supplementary services for which a subscription fee is charged or compensation is received other than advertising revenues? If so, what form should such an exemption take? Should noncommercial DTV licensees be exempt from the fee where they offer revenue producing feeable ancillary or supplementary services as a source of funding for public television? If noncommercial licensees are subject to a fee for the feeable ancillary or supplementary use of the DTV capacity, should the fee be assessed at the same percentage as the fee for commercial licensees or at a lower rate? If noncommercial broadcasters are exempt from the fee, or assessed a reduced fee what effect would this have on competing providers of these services?

Implementation

The Commission proposes to employ similar procedures to those it currently uses for the administration of its filing fees, regulatory fees, and auction revenue programs. Further, it proposes to generally follow the same reporting and filing requirements as currently exist for other programs. The Commission seeks comment on the proposed means of implementing and collecting the fee and on any special circumstances that merit an exception to current processes.

IV. Conclusion

The 1996 Act required the Commission to assess fees on the provision of feeable ancillary or supplementary services over the DTV spectrum. The Commission issues this Notice of Proposed Rule Making to seek comment on the fee assessment programs proposed herein.

V. Administrative Matters

Initial Paperwork Reduction Act of 1995

This Notice proposes a new fee assessment program which may contain an information collection requirement. As part of our continuing effort to reduce paperwork burdens, the Commission invites the general public and the Office of Management and Budget (''OMB'') to take this opportunity to comment on the information collection contained in this Notice, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13. Public and agency comments are due at the same time as other comments on this Notice; OMB comments are due 60 days from the date of publication of this Notice in the **Federal Register**. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236

NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

Ex Parte Rules

This proceeding will be treated as a ''permit-but-disclose'' proceeding subject to the ''permit-but-disclose'' requirements under section 1.1206(b) of the rules. 47 CFR 1.1206(b), as revised. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 CFR 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

Initial Regulatory Flexibility Analysis

With respect to this Notice, an Initial Regulatory Flexibility Analysis (''IRFA'') is contained in Appendix A and summarized below. As required by the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected significant economic impact on small entities by the policies and rules proposed in this Notice. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, the Commission asks a number of questions in our IRFA regarding the prevalence of small businesses in the industries covered by this Notice. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Notice, but they must have a distinct heading designating them as responses to the IRFA.

VI. Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this Notice. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

Reasons Why Agency Action Is Being Considered

The 1996 Act directed the Commission to adopt regulations allowing licensees to use a portion of the DTV spectrum to provide feeable ancillary or supplementary services and to establish a program to assess and collect a fee for these services. In the Fifth Report and Order the Commission established rules permitting broadcasters to offer feeable ancillary or supplementary services on the DTV spectrum. As directed by Congress, in this proceeding the Commission proposes a means of assessing and collecting a fee for the feeable ancillary or supplementary use of the DTV spectrum.

Need For and Objectives of the Proposed Rule Changes

The 1996 Act specified that the Commission shall establish a program to assess and collect fees for the feeable ancillary or supplementary use of the DTV capacity. Congress set forth the following objectives to be achieved by the assessment of the fee: First, that the fee recover a portion of the value of the DTV capacity; second, that the fee prevent the unjust enrichment of broadcast licensees using the DTV capacity to provide services for which they receive revenues other than advertising revenues; third, that the fee recover ''for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered'' in an auction of the spectrum; and finally, that any free broadcasting service which relies upon commercial advertisements rather than subscription fees or other compensation for its revenues be exempt from the fee requirement. In the Fifth Report and Order the Commission expressed its objective that broadcasters develop innovative uses of the DTV spectrum and be free to respond to market demand for feeable ancillary or supplementary services provided over this spectrum. This proceeding should achieve the objectives set forth in the 1996 Act and in the Fifth Report and Order.

Legal Basis

Authority for the actions proposed in this Notice may be found in sections 4(i), 303(r), 336 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 336 and 403.

Recording, Recordkeeping, and Other Compliance Requirements

The Notice proposes a new fee assessment program which may contain an information collection requirement. In general, the proposed fee assessment programs which would assess a fee for feeable ancillary or supplementary services based upon revenues derived from these services would require broadcasters to report their revenues derived from these services. Certain alternative fee assessment proposals may require more information from broadcasters than would other proposals. In the Notice, the Commission has proposed a fee assessment program that seeks to minimize the administrative and reporting burdens on broadcast licensees.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. The RFA generally defines the term ''small organization'' to mean ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' In addition, the RFA, generally defines the term ''small business'' as having the same meaning as the term ''small business concern'' under the Small Business Act, 15 U.S.C. 632. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA''). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

The proposed rules and policies will apply to television broadcasting licensees. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.

Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. There were 1,509 television stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,563 operating television broadcasting stations in the nation as of October 31, 1997. For 1992 the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.

Thus, the proposed rules will affect many of the approximately 1,563 television stations; approximately 1,200 of those stations are considered small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

In addition to owners of operating television stations, any entity who seeks or desires to obtain a television broadcast license may be affected by the proposals contained in this item. The number of entities that may seek to obtain a television broadcast license is unknown.

Federal Rules That Overlap, Duplicate, or Conflict With the Proposed Rules

The initiatives and proposed rules raised in this proceeding do not overlap, duplicate or conflict with any other rules.

Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives

This Notice solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. The proposed rules and policies are required to implement provisions of the 1996 Act. These proposed rules and policies may affect broadcast television licensees, some of which are small businesses. The Commission believes that the proposed rules and policies may be necessary to the recovery of a portion of the value of the public spectrum and to promote the development of innovative uses of the DTV capacity. The Commission seeks comment on the alternatives proposed in the *Notice* and on whether there is a significant economic impact on any class of small licensee or permittee as a result of any of the proposed approaches.

List of Subjects in 47 CFR Part 1

Television, Television broadcasting.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–144 Filed 1–5–98; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 122397D]

New England Fishery Management Council; Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a 2-day public meeting on January 14 and 15, 1998, to consider actions affecting New England fisheries in the exclusive economic zone.

DATES: The meeting is scheduled for Wednesday, January 14, 1998, at 10 a.m., and Thursday, January 15, 1998, at 8:30 a.m.

ADDRESSES: The meeting will be held at the Colonial Hilton Resort, 427 Walnut Street, Wakefield, MA; telephone (617) 245-9300. Requests for special accommodations should be addressed to the New England Fishery Management Council, 5 Broadway, Saugus, MA 01906-1097; telephone: (781) 231-0422.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council (781) 231-0422.

SUPPLEMENTARY INFORMATION:

Wednesday, January 14, 1998

After introductions the Council meeting will begin with a Stock Assessment Workshop advisory report on the status of spiny dogfish, surf clams, weakfish, and striped bass. Following the report, the Monkfish Committee will provide information on recent changes to the management measures proposed for inclusion in Amendment 9 to the Northeast Multispecies Fishery Management Plan (Multispecies FMP) and review the concerns of the Mid-Atlantic Fishery Management Council.

During the afternoon session, the Interspecies Committee will outline its priorities for the upcoming year: Long-term objectives and a Council strategic plan; approaches to easing management restrictions; consistency of Multispecies FMP objectives; the Multispecies FMP exempted fisheries program; concerns over latent effort in some fisheries; inconsistencies in vessel upgrading, replacement, and permit-splitting restrictions; policy statement on the introduction of harvesting innovations, and new fisheries technology; NMFS's proposed list of authorized gear/fisheries; area management of fisheries; and the Atlantic Coastal Cooperative Statistics Program fishing vessel logbook form.

The Overfishing Definition Review Panel will discuss new overfishing definitions developed to comply with the Sustainable Fisheries Act (SFA); species will include Atlantic sea scallops, sea herring, silver hake, and possibly other groundfish species. The Sea Scallop Committee will review its discussions on alternatives to reach the new SFA-mandated overfishing targets, mechanisms for opening and closing management areas, and the inclusion of days-at-sea (DAS) leasing as a measure to be implemented through a framework adjustment to the Atlantic Sea Scallop Fishery Management Plan (Scallop FMP). The Council also will discuss further the recommendation to close mid-Atlantic areas to protect small scallops and the development of a framework adjustment to allow scalloping in areas where it is currently prohibited because of groundfish conservation concerns. Finally, the Council will consider additional management measures for implementation in 1998, such as other reductions in DAS to meet the Scallop FMP fishing mortality objectives.

Thursday, January 15, 1998

Thursday's meeting will begin with reports from the Council Chairman, Executive Director, NMFS Regional Administrator, Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, and representatives of the Coast Guard and the Atlantic States Marine Fisheries Commission. The Council will discuss and seek approval of final action on Framework Adjustment 25 to the Multispecies FMP. The adjustment will include the following measures to meet the 1998 fishing year rebuilding plan objectives: One or a combination of three options for area closures in the Gulf of Maine (sequential one or two month closures that progress from the Cape Cod to Penobscot Bay areas during March through September, with additional areas closed seasonally or, in one option, year-round); 400-1,000 lb/day (181.4–453.6 kg/day) trip limit for

Gulf of Maine cod; an increase in the haddock trip limit; a raised footrope trawl requirement in the Small Mesh Areas 1 and 2; and a one-year postponement of the mandatory use of vessel monitoring systems on vessels fishing under individual DAS in the Gulf of Maine (north of the cod trip limit exemption line). Following the groundfish discussions, the Whiting Committee will provide an update on its scoping process and review the issues discussed at the joint oversight committee/advisory panel meeting held to discuss and identify issues to be considered during development of a fishery management plan. The Council meeting will adjourn after the conclusion of any other outstanding Council business.

Although other issues not contained in this agenda may come before this Council for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 30, 1997.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 98–175 Filed 1–5–98; 8:45 am]

BILLING CODE 3510–22–F

Notices

Federal Register

Vol. 63, No. 3

Tuesday, January 6, 1998

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service (RHS), USDA.

ACTION: Proposed collection: comments request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's intention to request an extension for a currently approved information collection in support of the program for Management and Supervision of Multiple Family Housing Borrowers and Grant Recipients.

DATES: Comments on this notice must be received by March 9, 1998 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Laurence R. Anderson, Senior Loan Specialist, Multi-Family Housing Portfolio Management Division, RHS, United States Department of Agriculture, Mail Stop 0782, 1400 Independence Ave., SW, Washington, DC 20250–0782, Telephone (202) 720-1611.

SUPPLEMENTARY INFORMATION:

Title: Management and Supervision of Multiple Family Housing Borrowers and Grant Recipients.

OMB Number: 0575–0033.

Expiration Date of Approval: March 31, 1998.

Type of Request: Extension of a currently approved information collection.

Abstract: The Rural Housing Service (RHS) is authorized under Section 514, 515, 516, and 521 of Title V of the Housing Act of 1949, as amended, to provide loans and grants to eligible recipients for the development of rental housing in rural areas. Such multi-family housing (MFH) projects are intended to meet the housing needs of persons or families having very low to moderate incomes, senior citizens, the handicapped or disabled, and domestic farm laborers.

RHS has the responsibility of assuring the public that MFH projects financed are managed and operated as mandated by Congress. 7 CFR Part 1930, Subpart C was first issued October 27, 1980, to insure consistent and proper management and operation of projects financed with MFH loan and grant funds. Minimal requirements have been established as deemed necessary to assure that applicable laws and authorities are carried out as intended.

With the provisions of this regulation, RHS will be able to provide the necessary guidance and supervision to new and existing borrowers to assist in the economical operation of their projects. RHS must be able to assure Congress and the general public that all MFH projects will be operated as economically as possible, for the purposes for which they are intended, and for the benefit of those they are mandated to serve.

The required information is collected on a project-by-project basis and is done so in accordance with the amended Housing Act of 1949, so that RHS can provide guidance and be assured of compliance with the terms and conditions of loan, grant, and/or subsidy agreements.

RHS will use the information collected to identify financially detrimental trends, poor management practices, and potential problems before they manifest themselves in the form of loan delinquencies, unpaid operation expenses, improper discriminatory practices, or high vacancy rates. With this information, RHS can assist the borrower through consultation (supervision) to improve the efficiency of the project and its operation. RHS supervision is especially critical during the first year of operation. In addition, the information provided is intended to verify whether or not the borrower is complying with the terms and conditions of loan, grant, or subsidy agreements. After the first year of operation, the information is requested of the borrower to assure continued compliance with the loan and grant agreements.

Failure by RHS to monitor progress of borrower operation through review of collected information and consultation would reasonably lead to noncompliance with statutory intent in some instances and financial default in others. Corrective action to remove such noncompliance or default would be costly to RHS and the public in terms of program integrity, public confidence, dollars, and staff time.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .64 hours per response.

Respondents: Individuals or households.

Estimated Number of Respondents: 538,200.

Estimated Number of Responses per Respondent: 4.61.

Estimated Total Annual Burden on Respondents: 2,218,740 hours.

Copies of this information collection can be obtained from Barbara Williams, Regulations and Paperwork Management Branch, Support Services Division, at (202) 720–9734.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of RHS, including whether the information will have practical utility; (b) the accuracy of RHS's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Barbara Williams, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, Ag Box 0743, 1400 Independence Ave., SW, Washington, DC 20250–0743. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: December 19, 1997.

Jan E. Shadburn,

Administrator, Rural Housing Service.

[FR Doc. 98–174 Filed 1–5–98; 8:45 am]

BILLING CODE 3410–XV–U

DEPARTMENT OF COMMERCE

Submission For OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: United States Census 2000 Dress Rehearsal Large Household Follow-up.

Form Number(s): DX–1(HF), –2(HF), 19A(L), –19B(L), –19C(L), and Spanish translations.

Agency Approval Number: None.

Type of Request: New collection.

Burden: 3,629 hours.

Number of Respondents: 23,500.

Avg Hours Per Response: Short form—6 minutes; Long form—25 minutes.

Needs and Uses: The Census Bureau has made the development of user-friendly forms a key strategy to reduce respondent burden. The Census 2000 Dress Rehearsal questionnaire (a five-person questionnaire with a continuation roster to list up to seven additional individuals) is shorter than a comparable seven-person detailed version. This strategy is expected to lessen the public perception that responding to the census is an arduous task. The objective of the Census 2000 Dress Rehearsal Large Household Follow-up is to acquire detailed characteristic data for households with more than five members.

We will mail a customized questionnaire package to those specific households which listed six or more individuals on the original dress rehearsal census questionnaire. The customized mailing package will consist of the following items: (1) An outgoing envelope addressed to either the respondent name reported on the original returned questionnaire or the Person 1 name; (2) A letter listing the names of all persons on the original questionnaire for whom detailed characteristics were provided and the names of all persons listed on the roster. The letter will request the respondent provide detailed characteristics for the additional individuals listed on the roster; (3) A continuation questionnaire(s) designed for Person 6 through Person 12; and (4) a Business Reply Mail return envelope for the respondent to return the continuation questionnaire.

Only one follow-up mailing will be conducted for each identified large household. No personal visit or telephone follow-up is planned.

Affected Public: Individuals or households.

Frequency: One-time.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 USC, Sections 141 and 193.

OMB Desk Officer: Nancy Kirkendall, (202) 395–7313.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482–3272, Department of Commerce, room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Nancy Kirkendall, OMB Desk Officer, room 10201, New Executive Office Building, 725 17th Street, NW, Washington, DC 20503.

Dated: December 30, 1997.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 98–220 Filed 1–5–98; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket No. 971230316–7316–01]

Annual Retail Trade Survey

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of Determination.

SUMMARY: In accordance with Title 13, United States Code, Sections 182, 224, and 225, I have determined that the Census Bureau needs to collect data covering annual sales, purchases, year-end inventories, and accounts receivables to provide a sound statistical basis for the formation of policy by various Government agencies. These data also apply to a variety of public and business needs. This annual survey is a continuation of similar retail trade surveys conducted each year since 1951 (except 1954). It provides on a comparable classification basis annual sales, purchases, and accounts receivables for 1997 and year-end inventories for 1996 and 1997. These data are not available publicly on a timely basis from nongovernmental or other governmental sources.

FOR FURTHER INFORMATION CONTACT: Ronald Piencykoski or Dorothy Engleking on (301) 457–2713.

SUPPLEMENTARY INFORMATION: The Census Bureau is authorized to take surveys necessary to furnish current data on the subjects covered by the major censuses authorized by Title 13, United States Code. This survey will provide continuing and timely national statistical data on retail trade for the period between economic censuses. The data collected in this survey will be within the general scope and nature of those inquiries covered in the economic census.

The Census Bureau will require a selected sample of firms operating retail establishments in the United States (with sales size determining the probability of selection) to report in the 1997 Annual Retail Trade Survey. We will furnish report forms to the firms covered by this survey and will require their submissions within thirty days after receipt. The sample will provide, with measurable reliability, statistics on the subjects specified above.

This survey was submitted to the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act, Public Law 96–511, as amended, and approved under OMB Control No. 0607–0013. We will provide copies of the form upon written request to the Director, Bureau of the Census, Washington, DC 20233–0001.

Based upon the foregoing, I have directed that an annual survey be conducted for the purpose of collecting these data.

Dated: December 23, 1997.

Martha Farnsworth Riche,

Director, Bureau of the Census.

[FR Doc. 98–215 Filed 1–5–98; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket No. 971230314–7314–01]

Annual Trade Survey

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of determination.

SUMMARY: In accordance with Title 13, United States Code, Sections 182, 224, and 225, I have determined that the Census Bureau needs to collect data covering year-end inventories, annual sales, and purchases to provide a sound

statistical basis for the formation of policy by various Government agencies. These data also apply to a variety of public and business needs. This annual survey is a continuation of similar wholesale trade surveys conducted each year since 1978. It provides on a comparable classification basis annual sales and purchases for 1997 and year-end inventories for 1996 and 1997. These data are not available publicly on a timely basis from nongovernmental or other governmental sources.

FOR FURTHER INFORMATION CONTACT: Ronald Piencykoski or Dorothy Engleking on (301) 457–2713.

SUPPLEMENTARY INFORMATION: The Census Bureau is authorized to take surveys necessary to furnish current data on the subjects covered by the major censuses authorized by Title 13, United States Code. This survey will provide continuing and timely national statistical data on wholesale trade for the period between economic censuses. The data collected in this survey will be within the general scope and nature of those inquiries covered in the economic census.

The Census Bureau will require a selected sample of firms operating merchant wholesale establishments in the United States (with sales size determining the probability of selection) to report in the 1997 Annual Trade Survey. We will furnish report forms to the firms covered by this survey and will require their submissions within thirty days after receipt. The sample will provide, with measurable reliability, statistics on the subjects specified above.

This survey was submitted to the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act, Public Law 96–511, as amended, and approved under OMB Control No. 0607–0195. We will provide copies of the form upon written request to the Director, Bureau of the Census, Washington, DC 20233–0001.

Based upon the foregoing, I have directed that an annual survey be conducted for the purpose of collecting these data.

Dated: December 28, 1997.

Martha Farnsworth Riche,

Director, Bureau of the Census.

[FR Doc. 98–216 Filed 1–5–98; 8:45 am]

BILLING CODE 3510–17–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Atlantic Bluefin Tuna Mandatory Catch Reporting; Proposed Collection; Comment Request

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 9, 1998.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Christopher Rogers, F/SF1, Station 14709, 1315 East-west Highway, Silver Spring, MD 20910–3282 (301–713–2347).

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine and Fisheries Service in cooperation with the North Carolina Division of Marine Fisheries is implementing a pilot mandatory reporting program to conduct a census of the Recreational Winter Bluefin Tuna Harvest in North Carolina. Information on catch levels will be reported to the International Commission for the Conservation of Atlantic Tunas and will be used for stock assessment and in developing international catch sharing agreements. Anglers that currently report through an automated phone system will be exempted from this requirement during this pilot program. This collection was initially approved under emergency clearance procedures; this notice invites comments on plans to submit a regular clearance request to extend that approval for three years.

II. Method of Collection

Anglers will fill out catch cards and be given harvest tags that allow the angler to remove the fish from the vessel.

III. Data

OMB Number: 0648–0339.

Form Number: None.

Type of Review: Regular Submission.

Affected Public: Individuals.

Estimated Number of Respondents: 700.

Estimated Time Per Response: 10 minutes.

Estimated Total Annual Burden Hours: 117.

Estimated Total Annual Cost to Public: None.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 31, 1997.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 98–221 Filed 1–5–98; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

NOAA Generic Customer Surveys

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 9, 1998.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental

Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Richard Roberts, OFA1x1, Station 8118, NOAA, 1305 East-West Highway, Silver Spring, MD 20910 (301–713–3525, ext. 115).

SUPPLEMENTARY INFORMATION:

I. Abstract

NOAA intends to conduct a number of voluntary surveys of users of selected NOAA products, services, or programs in order to determine customer satisfaction and to solicit suggestions for improving those NOAA products, services, and programs. The information obtained will be used in NOAA's program planning efforts.

II. Method of Collection

Individual NOAA offices will develop questionnaires based upon the generic forms to be approved by OMB. The generic questions will be edited by those offices to solicit information specific to the program involved. These adaptations will be submitted to OMB for informal review prior to their use to ensure that they conform with objectives and nature of the generic questions that have been approved. Distribution of the questionnaires may be by mailings to customers, as attachments to products sent to customers, and on the World Wide Web (usually associated with order forms).

III. Data

OMB Number: None.

Form Number: None.

Type of Review: Regular Submission.

Affected Public: Individuals; businesses or other for-profit; not-for-profit institutions; and State, Local, or Tribal Governments.

Estimated Number of Respondents: 13,739.

Estimated Time Per Response: Varies from 1–20 minutes (depending upon the questionnaire used).

Estimated Total Annual Burden Hours: 705 hours.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 31, 1997.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 98–223 Filed 1–5–98; 8:45 am]

BILLING CODE 3510–12–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122397C]

Marine Mammals; Permit No. 974, File No. P368F

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Receipt of application for amendment.

SUMMARY: Notice is hereby given that Dr. James T. Harvey, Moss Landing Marine Laboratories, P.O. Box 450, Moss Landing, CA 95039, has requested an amendment to Permit No. 974.

DATES: Written or telefaxed comments must be received on or before February 5, 1998.

ADDRESSES: The amendment request and related documents are available for review upon written request or by appointment in the following office(s):

Permits and Documentation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713–2289); and

William Hogarth, Regional Director, Southwest Region (SW), National Marine Fisheries Service, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213

Written comments or requests for a public hearing on this request should be submitted to the Chief, Permits and Documentation Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular amendment request would be appropriate.

Comments may also be submitted by facsimile at (301) 713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period. Please note that comments will not be accepted by email or other electronic media.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

SUPPLEMENTARY INFORMATION: The subject amendment to permit no. 974, issued on September 7, 1995 (60 FR 46577), is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered fish and wildlife (50 CFR 222.23), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

Permit no. 974 authorizes the permit holder to conduct research on low frequency sound and its effect on the physiology and diving behavior of harbor seals (*Phoca vitulina*), provide local and regional movement data, hematological variability of the stock, and harbor seal feeding habits. The permit holder requests authorization to: determine body fat; handle 20 harbor seal pups up to eight times annually to track changes in health, physiological condition, and diving behavior; handle 20 adults and 20 juveniles annually to determine seasonal shifts in health, physiological condition, and diving behavior; and harass 200 additional harbor seals as a result of the above activities.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: December 23, 1997.

Ann D. Terbush,

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 98–154 Filed 1–5–98; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121897A]

Marine Mammals; Scientific Research Permit No. 875–1401

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Scientific research permit amendment.

SUMMARY: Notice is hereby given that a request for amendment of scientific research permit no. 875–1401 submitted by Dr. Christopher W. Clark, Cornell University, Ithaca, New York 14850, has been granted .

ADDRESSES: The amendment and related documents are available for review upon written request or by appointment in the following office(s):

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910 (301/713–2289); and

Director, Southwest Region, NMFS, 501 West Ocean Blvd., Long Beach, CA 90802–4213 (562/980–4001).

SUPPLEMENTARY INFORMATION: On November 14, 1997, notice was published in the **Federal Register** (62 FR 61093) that an amendment of permit no. 875–1401, issued September 8, 1997 (62 FR 48611) had been requested by the above-name individual. The requested amended permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216); the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), the Regulations Governing the Taking, Importing, and Exporting of Endangered Fish and Wildlife (50 CFR part 222); and the Fur Seal Act of 1966 (16 U.S.C. 1151–1175). Issuance of this permit, as required by the ESA, was based on a finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which is the subject of this permit; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA. The requested amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

Permit No. 875–1401 currently authorizes the harassment of several species of marine mammals during the conduct of research to study the effects of low-frequency sound produced by the Navy's Surface Towed Array Surveillance System Low Frequency Active (SURTASS LFA) system on the behavior of blue whales (*Balaenoptera musculus*) and fin whales (*Balaenoptera physalus*) feeding in the Southern California Bight during September/October of 1997 and/or 1998. The permit has been amended to provide for: 1) the conduct of playback experiments using a SURTASS LFA sound source to study behavioral responses of gray whales (*Eschrichtius robustus*) to SURTASS LFA signals and related stimuli; and 2) radio tagging via suction cup attachment of up to 14 gray whales. Individuals of several other species of cetaceans, pinnipeds, and possibly sea turtles, may be taken (*i.e.*, by harassment or auditory temporary threshold shift) during during the proposed experiments.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an EA examining the environmental consequences of issuing the requested amended permit has been prepared. Based upon this EA, NMFS has concluded that issuance of the requested permit will not have a significant effect on the human environment.

Dated: December 30, 1997.

Ann D. Terbush

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 98–214 Filed 1-5-98:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0134]

Submission for OMB Review; Comment Request Entitled Environmentally Sound Products

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Environmentally Sound Products. A request for public comments was published at 62 FR 55788, October 28, 1997. No comments were received.

DATES: Comments may be submitted on or before February 5, 1998.

FOR FURTHER INFORMATION CONTACT: Ralph DeStefano, Federal Acquisition Policy Division, GSA (202) 501–1758.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4037, Washington, DC 20405. Please cite OMB Control No. 9000–0134, Environmentally Sound Products, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

This information collection complies with Section 6002 of the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6962). RCRA requires the Environmental Protection Agency (EPA) to designate items which are or can be produced with recovered materials. RCRA further requires agencies to develop affirmative procurement programs to ensure that items composed of recovered materials will be purchased to the maximum extent practicable. Affirmative procurement programs required under RCRA must contain, as a minimum (1) a recovered materials preference program and an agency promotion program for the preference program; (2) a program for requiring estimates of the total percentage of recovered materials used in the performance of a contract, certification of minimum recovered material content actually used, where appropriate, and reasonable verification procedures for estimates and certifications; and (3) annual review and monitoring of the effectiveness of an agency's affirmative procurement program.

In accordance with RCRA, the information collection applies to acquisitions requiring minimum percentages of recovered materials, when the price of the item exceeds $10,000 or when the aggregate amount paid for the item or functionally equivalent items in the preceding fiscal year was $10,000 or more.

Contracting officers use the information to verify offeror/contractor compliance with solicitation and contract requirements regarding the use of recovered materials. Additionally, agencies use the information in the annual review and monitoring of the effectiveness of the affirmative procurement programs required by RCRA.

B. Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average *30* minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows: Respondents, *64,350;* responses per respondent, *1;* total annual responses, *64,350;* preparation hours per response, *.5;* and total response burden hours, *32,175.*

Obtaining Copies of Proposals: Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (MVRS), Room 4037, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB control No. 9000–0134, Environmentally Sound Products, in all correspondence.

Dated: December 31, 1997.

Sharon A. Kiser,

FAR Secretariat.

[FR Doc. 98–187 Filed 1–5–98; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0014]

Proposed Collection; Comment Request Entitled Statement and Acknowledgment (Standard Form 1413)

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension of an existing OMB clearance (9000–0014).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Statement and Acknowledgment (Standard Form 1413). The clearance currently expires on April 30, 1998.

DATES: Comments may be submitted on or before March 9, 1998.

FOR FURTHER INFORMATION CONTACT: Jack O'Neill, Federal Acquisition Policy Division, GSA (202) 501–3856.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4037, Washington, DC 20405. Please cite OMB Control No. 9000–0014, Statement and Acknowledgment (Standard Form 1413), in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

Standard Form 1413, Statement and Acknowledgment, is used by all Executive Agencies, including the Department of Defense, to obtain a statement from contractors that the proper clauses have been included in subcontracts. The form includes a signed contractor acknowledgment of the inclusion of those clause in the subcontract.

Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average *.15* hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows: Respondents, *14,000;* responses per respondent, *1.5;* total annual responses, *21,000;* preparation hours per response. *.15;* and total response burden hours, *3,150.*

Obtaining Copies of Proposals: Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4037, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0014, Statement and Acknowledgment, Standard Form 1413, in all correspondence.

Dated: December 31, 1997.

Sharon A. Kiser,

FAR Secretariat.

[FR Doc. 98–188 Filed 1–5–98; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF EDUCATION

President's Advisory Commission on Educational Excellence for Hispanic Americans; Meeting

AGENCY: President's Advisory Commission on Educational Excellence for Hispanic Americans, ED.

ACTION: Notice of meeting of executive board.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Executive Board of the President's Advisory Commission on Educational Excellence for Hispanic Americans (Commission). Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend. Less than fifteen-day notice is given because of administrative misunderstandings regarding the Executive Board's meeting guidelines.

DATES AND TIMES: Friday, January 9, 1997, 9:00 a.m.–5:45 p.m. (est) and Saturday, January 10, 1997, 9:00 a.m.–4:00 p.m. (est).

ADDRESSES: U.S. Department of Education, 600 Independence Ave., SW., Room 2145, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Edmundo DeLeon, Special Assistant, White House Initiative on Educational Excellence for Hispanic Americans (Initiative) at 202–401–1411 (telephone), 202–401–8377 (FAX), ed__DeLeon@ed.gov (e-mail) or mail: U.S. Department of Education, 600 Independence Ave. SW., room 2115; Washington, DC 20202–3601.

SUPPLEMENTARY INFORMATION: The Commission was established under Executive Order 12900 (February 22, 1994) to provide the President and the Secretary of Education with advice on: (1) The progress of Hispanic Americans toward achievement of the National Goals and other standards of educational accomplishment; (2) the development, monitoring, and education for Hispanic Americans; (3)

ways to increase, State, county, private sector and community involvement in improving education; and (4) ways to expand and complement Federal education initiatives.

The meeting is not a full Commission session. As an open meeting to the public, the two-day session will explore finalizing the Initiative workplan; begin to develop the agenda for the Spring Commission meeting; discuss the Inter-Departmental Council for Hispanic Educational Improvement; and develop the strategy for the Hispanic-Serving Institution Information Campaign for the Federal Arena.

Records are kept of all Commission proceedings and are available for public inspection at the Initiative, room 2115, 600 Independence Ave., SW., from 9:00 a.m. to 5:00 p.m. (est).

Dated: December 30, 1997.

W. Wilson Goode,

Acting Assistant Secretary.

[FR Doc. 98–210 Filed 1–5–98; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

[Docket Nos. EA–167, EA–168, EA–169, EA–170 and EA–171]

Applications to Export Electric Energy; USGen Power Services, Commonwealth Edison Company, Energetix, and British Columbia Power Exchange Corporation

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of applications.

SUMMARY: USGen, a power marketer, has submitted applications to export electric energy to Mexico and Canada pursuant to section 202(e) of the Federal Power Act. Commonwealth Edison, a FERC regulated public utility, Energetix, a power marketer, and British Columbia Power Exchange, a power marketer, have submitted applications to export electric energy to Canada.

DATES: Comments, protests or requests to intervene must be submitted on or before February 5, 1998.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Im/Ex (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202–586–9624 or Michael Skinker (Program Attorney) 202–586–6667.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

The Office of Fossil Energy (FE) of the Department of Energy (DOE) has received an application from the following company for authorization to export electric energy to Mexico, pursuant to section 202(e) of the FPA:

Applicant	Application date	Docket No.
USGen Power Services, L.P. (USGen).	12/15/97	EA–167

FE has also received applications from the following companies for authorization to export electric energy to Canada, pursuant to section 202(e) of the FPA:

Applicant	Application date	Docket No.
USGen	12/15/97	EA–168
Commonwealth Edison Company (ComEd).	12/18/97	EA–169
Energetix, Inc. (Energetix).	12/19/97	EA–170
British Columbia Power Exchange Corporation (Powerex).	12/23/97	EA–171

In Docket EA–167, USGen, a power marketer that does not own, operate or control any electric power generation, transmission or distribution facilities, proposes to transmit to Mexico electric energy that is surplus to the needs of the entity selling the power. USGen would arrange for the exported energy to be transmitted to Mexico over the international facilities owned by the San Diego Gas and Electric Company, El Paso Electric Company, Central Power and Light Company, and Comision Federal de Electricidad, the national electric utility of Mexico.

In Dockets EA–168, EA–169, EA–170, and EA–171, USGen, ComEd, Energetix, and Powerex, each propose to transmit to Canada electric energy that is surplus to its system or the entity selling the power.

Each of the exporters would arrange for the exported energy to be transmitted to Canada over the international facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Citizens Utilities, Detroit Edison Company, Eastern Maine Electric Cooperative, Joint Owners of the Highgate Project, Maine Electric Power Company, Maine Public Service Company, Minnesota Power and Light Company, Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company. Each of the transmission facilities, as more fully described in the applications, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

Procedural Matters

Any persons desiring to become a party to these proceedings or to be heard by filing comments or protests to these applications should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of such petitions and protests should be filed with the DOE on or before the date listed above.

Comments on USGen's request to export to Mexico should be clearly marked with Docket EA–167. Comments on USGen's request to export to Canada should be clearly marked with Docket EA–168. Additional copies are to be filed directly with Sanford L. Hartman, Esq., Assistant General Counsel, U.S. Generating Company, 7500 Old Georgetown Road, Suite 1300, Bethesda, MD 20814–6161.

Comments on ComEd's request to export to Canada should be clearly marked with Docket EA–169. Additional copies are to be filed with Peter Thornton, Esq., Senior Counsel, Commonwealth Edison Company, 125 South Clark Street, Room 1535, Chicago, IL 60603 and Thomas L. Blackburn, Esq., Bruder, Gentile & Marcoux, L.L.P., 1100 New York Avenue, NW, Suite 510 East, Washington, DC 20005–3934.

Comments on Energetix's application to export to Canada should be clearly marked with Docket EA–170. Additional copies are to be filed directly with Karen E. Georgenson, Esq., Nixon, Hargrave, Devans & Doyle LLP, Suite 700, One Thomas Circle, Washington, DC 20005–5802 and Byron Fransworth, Jr., Director of Electric Operations, Energetix, Inc., 89 East Avenue, Rochester, NY 14649.

Comments on Powerex's application to export to Canada should be clearly marked with Docket EA–171. Additional copies are to be filed directly with Douglas Little, Manager, Trade Policy & Regulation, British Columbia Power Exchange Corporation, 666 Burrard Street, Suite 2210, Vancouver, British Columbia, Canada V6C 2X8 and Paul W. Fox, Esq., Bracewell & Patterson, L.L.P., 111 Congress Avenue, Suite 2300, Austin, TX 78701.

A final decision will be made on these applications after the environmental

impacts have been evaluated pursuant to the National Environmental Policy Act of 1969 (NEPA), and a determination is made by the DOE that the proposed actions will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of these applications will be made available, upon request, for public inspection and copying at the address provided above.

Issued in Washington, DC on December 31, 1997.

Anthony J. Como,

Manager, Electric Power Regulation, Office of Coal and Power Im/Ex, Office of Coal and Power Systems, Office of Fossil Energy.

[FR Doc. 98–231 Filed 1–5–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. FE–R–79–43B]

Electric And Gas Utilities Covered in 1998 by Titles I and III of the Public Utility Regulatory Policies Act of 1978 And Requirements for State Regulatory Authorities to Notify the Department of Energy

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice.

SUMMARY: Sections 102(c) and 301(d) of the Public Utility Regulatory Policies Act of 1978 (PURPA) require the Secretary of Energy (Secretary) to publish a list, before the beginning of each calendar year, identifying each electric utility and gas utility to which Titles I and III of PURPA apply during such calendar year. In addition, sections 102(c) and 301(d) of PURPA require each State regulatory authority to notify the Secretary of each electric utility and gas utility on the list for which such State regulatory authority has ratemaking authority. This Notice is to announce the availability of the 1998 list of electric and gas utilities and to request written comments on the accuracy of the list.

The list is available both in hard copy and electronically. The hard copy version of the 1998 list is being provided by mail to all state regulatory authorities. Other parties interested in receiving the hard copy of the list may contact the **FOR FURTHER INFORMATION CONTACT** identified below. In addition, the Office of Coal & Power Import and Export operates a web site as a service to commercial and government users, as well as the general public. The 1998 list is available by accessing the web site at: http://www.fe.doe.gov/coal__power/elec__reg/elec__reg.htm

DATES: Notifications by State regulatory authorities and written comments must be received no later than 4:30 p.m. on February 16, 1998.

ADDRESSES: Notifications and written comments should be forwarded to: U.S. Department of Energy, Office of Coal & Power Import and Export, FE–27, 1000 Independence Avenue, SW, Room 3F–070, Docket No. FE–R–79–43B, Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Steven Mintz, (202) 586–9506.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to sections 102(c) and 301(d) of PURPA, Public Law 95–617, 92 Stat. 3117 *et seq.* (16 U.S.C. 260l *et seq.*, hereinafter referred to as the Act) the Department of Energy (DOE) is required to publish a list of utilities to which Titles I and III of PURPA apply in 1998.

State regulatory authorities are required by the Act to notify the Secretary as to their ratemaking authority over the listed utilities. The inclusion or exclusion of any utility on or from the list does not affect the legal obligations of such utility or the responsible authority under the Act.

The term ''State regulatory authority'' means any State, including the District of Columbia and Puerto Rico, or a political subdivision thereof, and any agency or instrumentality, which has authority to fix, modify, approve, or disapprove rates with respect to the sale of electric energy or natural gas by any utility (other than such State agency). In the case of a utility for which the Tennessee Valley Authority (TVA) has ratemaking authority, the term ''State regulatory authority'' means the TVA.

Title I of PURPA sets forth ratemaking and regulatory policy standards with respect to electric utilities. Section 102(c) of Title I requires the Secretary to publish a list, before the beginning of each calendar year, identifying each electric utility to which Title I applies during such calendar year. An electric utility is defined as any person, State agency, or Federal agency that sells electric energy. An electric utility is covered by Title I for any calendar year if it had total sales of electric energy, for purposes other than resale, in excess of 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year. An electric utility is covered in 1998 if it exceeded the threshold in any year from 1976 through 1996.

Title III of PURPA addresses ratemaking and other regulatory policy standards with respect to natural gas utilities. Section 301(d) of Title III requires the Secretary to publish a list, before the beginning of each calendar year, identifying each gas utility to which Title III applies during such calendar year. A gas utility is defined as any person, State agency, or Federal agency, engaged in the local distribution of natural gas and the sale of natural gas to any ultimate consumer of natural gas. A gas utility is covered by Title III if it had total sales of natural gas, for purposes other than resale, in excess of 10 billion cubic feet during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year. A gas utility is covered in 1998 if it exceeded the threshold in any year from 1976 through 1996.

In compiling the list published today, the DOE revised the 1997 list (62 FR 12625, March 17, 1997) upon the assumption that all entities included on the 1997 list are properly included on the 1998 list unless the DOE has information to the contrary. In doing this, the DOE took into account information included in public documents regarding entities which exceeded the PURPA thresholds for the first time in 1996. The DOE believes that it will become aware of any errors or omissions in the list published today by means of the comment process called for by this Notice. The DOE will, after consideration of any comment and other information available to the DOE, provide written notice of any further additions or deletions to the list.

II. Notification and Comment Procedures

No later than 4:30 p.m. on February 16, 1998, each State regulatory authority must notify the DOE in writing of each utility on the list over which it has ratemaking authority. Two copies of such notification should be submitted to the address indicated in the **ADDRESSES** section of this Notice and should be identified on the outside of the envelope and on the document with the designation ''Docket No. FE–R–79–43B.'' Such notification should include:

1. A complete list of electric utilities and gas utilities over which the State regulatory authority has ratemaking authority;
2. Legal citations pertaining to the ratemaking authority of the State regulatory authority; and
3. For any listed utility known to be subject to other ratemaking authorities within the State for portions of its service area, a precise description of the portion to which such notification applies.

All interested persons, including State regulatory authorities, are invited to

comment in writing, no later than 4:30 p.m. on February 16, 1998, on any errors or omissions with respect to the list. Two copies of such comments should be sent to the address indicated in the **ADDRESSES** section of this Notice and should be identified on the outside of the envelope and on the document with the designation ''Docket No. FE–R–79–43B.'' Written comments should include the commenter's name, address, and telephone number.

All notifications and comments received by the DOE will be made available, upon request, for public inspection and copying in the Freedom of Information Reading Room, Room 1E–190, 1000 Independence Avenue, SW, Washington, D.C. 20585, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

III. List of Electric Utilities and Gas Utilities

The 1998 list consists of two parts (Appendices A and B). Each displays a different tabulation of the utilities that meet PURPA coverage requirements. As stated above, the inclusion or exclusion of any utility on or from the lists does not affect that utility's legal obligations or those of the responsible State regulatory authority under PURPA.

Appendix A contains a list of utilities which are covered by PURPA. These utilities are grouped by State and by the regulatory authority within each State. Also included in this list are utilities which are covered by PURPA but which are not regulated by the State regulatory authority. This tabulation, including explanatory notes, is based on information provided to the DOE by State regulatory authorities in response to the March 17, 1997 **Federal Register** notice (62 FR 12625) requiring each State regulatory authority to notify the DOE of each utility on the list over which it has ratemaking authority, public comments received with respect to that notice, and information subsequently made available to the DOE.

The utilities classified in Appendix A as not regulated by the State regulatory authority, in fact, may be regulated by local municipal authorities. These municipal authorities would be State agencies as defined by PURPA and thus have responsibilities under PURPA identical to those of the State regulatory authority. Therefore, each such municipality is to notify the DOE of each utility on the list over which it has ratemaking authority.

In Appendix B, the utilities are listed alphabetically, subdivided into electric utilities and gas utilities, and further subdivided by type of ownership: investor-owned utilities, publicly-owned utilities, and rural cooperatives.

Those parties interested in accessing the list electronically through our web site may do so by contacting http://www.fe.doe.gov/coal__power/elec__reg/elec__reg.htm. Once you have accessed our web site just follow the directions to the 1998 list.

The changes to the 1997 list of electric and gas utilities are as follows:

Additions:

Caney Fork Electric Cooperative (TN)
Central Electric Power Association (MS)
Deep East Texas Electric Cooperative, Inc. (TX)
Denton County Electric Cooperative, Inc. (TX)
Johnson County Electric Cooperative, Inc. (TX)
Lea County Electric Cooperative, Inc. (TX)
Magic Valley Electric Cooperative, Inc. (TX)
Maine Public Service Company (ME)
Northern Utilities, Inc. (ME)
Rayburn County Electric Cooperative, Inc. (TX)
Shenandoah Valley Electric Cooperative (VA)
Southside Electric Cooperative (VA)
United Cities Gas Company (TN)
Upshur-Rural Electric Cooperative, Inc. (TX)
West Texas Gas, Inc. (TX)

(Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117 *et seq.* (16 U.S.C. 2601) *et seq.*))

Issued in Washington, D.C. on December 31, 1997.

Anthony J. Como,

Manager, Electric Power Regulation, Office of Coal and Power Im/Ex, Office of Coal and Power Systems Office of Fossil Energy.

[FR Doc. 98–224 Filed 1–5–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–153–000]

High Island Offshore System; Notice of Application for a Blanket Certificate

December 30, 1997.

Take notice that on December 22, 1997, High Island Offshore System (HIOS), 500 Renaissance Center, Detroit, MI 48243, filed in Docket No. CP98–153–000 an application for a Blanket Certificate of Public Convenience and Necessity under Subpart F Part 157 of the Commission's Regulations requesting authority to engage in the activity described in Section 157.203 of the Commission's Regulations, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said motion should on or before January 20, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 384.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Lois D. Cashell,

Secretary.

[FR Doc. 98–168 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–142–000]

National Fuel Gas Supply Corporation; Notice of Application

December 30, 1997.

Take notice that on December 17, 1997, National Fuel Gas Supply Corporation (National Fuel), 10 Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP98–142–000 an application pursuant to Sections 7(b) and 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the replacement of a portion of an existing pipeline and permission and approval to abandon certain facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

National Fuel proposes to replace and relocate 2,735 feet of its existing 20-inch Line K in the Town of Orchard Park, Erie County, New York, with 3,210 feet of 20-inch pipeline located in a new right-of-way. In its application, National Fuel states that leak history and development that has encroached upon the pipeline right-of-way necessitates the relocation and replacement of Line K. National Fuel states that the peak

capacity of Line K is approximately 45,000 Mcf per day. National Fuel estimates the cost of the project to be $784,800. In connection with this replacement project, National Fuel proposes to abandon approximately 2,735 feet of the existing pipeline. National Fuel explains that 1,529 feet of pipe will be removed with an additional 1,206 feet of pipe being abandoned in place. National Fuel states that removal of these facilities will not affect service to existing markets. National Fuel estimates the cost of abandoning the line to be $10,000. National Fuel states that the facilities will be financed with internally-generated funds and/or interim short-term bank loans.

Any person desiring to participate in the hearing process or to make any protest with reference to said application should on or before January 20, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. The Commission's rules require that protestors provide copies of their protests to the party or parties directly involved. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

A person obtaining intervenor status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by every one of the intervenors. An intervenor can file for rehearing of any Commission order and can petition for court review of any such order. However, an intervenor must submit copies of comments or any other filing it makes with the Commission to every other intervenor in the proceeding, as well as 14 copies with the Commission.

A person does not have to intervene, however, in order to have comments considered. A person, instead, may submit two copies of comments to the Secretary of the Commission. Commenters will be placed on the Commission's environmental mailing list, will receive copies of environmental documents and will be able to participate in meetings associated with the Commission's environmental review process. Commenters will not be required to serve copies of filed documents on all other parties. However, commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek rehearing or appeal the Commission's final order to a federal court.

The Commission will consider all comments and concerns equally, whether filed by commenters or those requesting intervenor status.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for National Fuel to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 98–165 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–901–000]

Sierra Pacific Power Company; Notice of Filing

December 30, 1997.

Take notice that on November 26, 1997, Sierra Pacific Power Company (Sierra), filed an amendment to the unexecuted Network Service Agreement with the Truckee Donner Public Utility District that Sierra Pacific previously filed in the above-referenced docket on July 2, 1997.

Any person desiring to be heard or to protest said filing should file a motion to intervence or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests must be filed on or before January 9, 1998. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of the filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 98–169 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2017–011]

Southern California Edison Company; Notice of Extension of Time

December 30, 1997.

At the scoping meeting for the Big Creek No. 4 Project, P–2017, held on December 16, 1997, the U.S. Forest Service (USFS) requested an extension of time to file written comments regarding Scoping Document 1 (SD1), issued November 13, 1997, in the above-docketed proceeding. Several other parties at the meeting, including the California Department of Fish and Game (CDFG), concurred that additional time is required to complete their review of SD1 and prepare their written comments.

Upon consideration, notice is hereby given that all interested parties, including the USFS and the CDFG, are granted an extension of time to February 20, 1998, to file comments.

Lois D. Cashell,

Secretary.

[FR Doc. 98–170 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–152–000]

U–T Offshore System; Notice of Application for a Blanket Certificate

December 30, 1997.

Take notice that on December 22, 1997, U–T Offshore System (UTOS), 500 Renaissance Center, Detroit, MI 48243, filed in Docket No. CP98–152–000 an

application for a Blanket Certificate of Public Convenience and Necessity under Subpart F Part 157 of the Commission's Regulations requesting authority to engage in the activity described in Section 157.203 of the Commission's Regulations, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said motion should on or before January 20, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 384.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Lois D. Cashell,

Secretary.

[FR Doc. 98–167 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–148–000]

Williams Natural Gas Company; Notice of Request Under Blanket Authorization

December 30, 1997.

Take notice that on December 19, 1997, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP98–148–000 a request pursuant to Sections 157.205, 157.212 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212 and 157.216) for authorization to abandon in place by sale to Western Resources, Inc. (WRI), approximately 3,246 feet of 2-inch lateral pipeline and to relocate and replace the WRI Richmond town border meter setting and appurtenant facilities, located in Franklin County, Kansas, under WNG's blanket certificate issued in Docket Nos. CP82–479–000, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Specifically, WNG seeks authorization to: (1) Abandon in place by sale to WRI approximately 3,246 feet of the Richmond 2-inch lateral pipeline beginning in Section 7, Township 19 South, Range 20 East, Franklin County, Kansas and ending in Section 13, Township 19 South, Range 19 East, Franklin County, Kansas, (2) reclaim the WRI Richmond town border meter setting and appurtenant facilities from Section 13, Township 19 South, Range 19 East, Franklin County, Kansas, and (3) install a new rotary meter setting and high pressure regulator setting at the site of the existing regulator setting in Section 7, Township 19 South, Range 20 East, Franklin County, Kansas.

WNG states that selling the pipeline, replacing and relocating the town border meter setting will allow WRI to receive gas that this location at a higher delivery pressure in order to accommodate a proposed housing subdivision in the area. WNG states that the most recent annual volume through the Richmond town border setting was 27,222 Dth with a peak day volume of 259 Dth and that no significant change in volume is expected immediately. WNG states that the cost to replace and relocate the Richmond town border meter setting is estimated to be $127,435.

WNG states that the four domestic customers located on the pipeline to be sold to WRI that are currently billed and served by WRI will continue to served by WRI after the abandonment.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 98–166 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2100–083]

California Department of Water Resources; Notice of Availability of Environmental Assessment

December 30, 1997.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) Regulations, 18 CFR Part 380 (Order 486, 52 F.R. 47897), the Commission's Office of Hydropower Licensing has reviewed an application for a temporary modification in the minimum flow requirement at the Themalito Afterbay Outlet (Outlet) of the Feather River Hydroelectric Project, Project No. 2100–083. The project is located on the Feather River, Butte County, California. Based on an agreement with state and federal resource agencies, the licensee wishes to temporarily reduce flows at the Outlet to 1,500 cfs for a maximum of 75 days, from January 1 through March 15, 1998, to help recover water supply lost due to actions taken in spring 1997 to help fish. The agreement also calls for the licensee to increase flows to the low flow channel of the Feather River from 600 to 900 cfs from October 15, 1997 through February 28, 1998. An Environmental Assessment (EA) was prepared for the application. The EA finds that approving the application would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 2–A, of the Commission's offices at 888 First Street, N.E., Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 98–195 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of New Docket Prefix IC

December 30, 1997.

Notice is hereby given that a new docket prefix IC has been established for notices issued by the Commission on its information collection requirements. These notices announce the Commission's efforts to have public

involvement on the development of its information collection requirements prior to obtaining approval with the Office of Management and Budget (OMB).

On October 1, 1995, the Paperwork Reduction Act (44 U.S.C. Chapter 35) went into effect and expanded the provisions of the Paperwork Reduction Act of 1980. Among the additional agency responsibilities enumerated in the Act were the requirements to plan for the development of new collections of information and the extension of existing collections of information far in advance of sending them forward to OMB for approval. This additional advanced planning is necessary because agencies must develop greater public participation in the development of information collection requirements imposed on the public. To achieve this public participation, the Commission must ''provide 60-day notice in the **Federal Register**, and otherwise consult with members of the public and affected agencies'' [44 U.S.C. 3506(c)(2)(A)]. In these notices, the Commission must solicit comments on the need for the information, its practical utility, the accuracy of the Commission's burden estimate, and on ways to minimize the burden, including through ''the use of automated collection techniques or other forms of information technology.''

In addition, the Act continued the requirement that agencies publish a notice in the **Federal Register** stating that the proposed collection of information has been submitted for OMB review. This is the second notice to appear in the **Federal Register** and provides the public with a second opportunity to comment. OMB must provide at least 30 days for public comment after receipt of the Commission's submission and prior to making a decision. In order for the Commission to obtain public comment and routine OMB review and approval, for both new collections of information and also to extend ongoing collections of information, it has to allow an additional 90 days in the approval process.

In order to properly account for any comments it receives in response to a **Federal Register** notice, it is necessary to establish a new docket prefix for notices concerning the Commission's collections of information. The new docket prefix will help the Commission to manage this type of work and assess its resources applicable to it. The new docket prefix will be ICFY–NNN–NNN, where the FY stands for the fiscal year in which the notice was issued, the first NNN is an identifier for the Commission's collection of information requirement and the second NNN represents either the first or second notice, with 000 to designate a 60 day notice and 001 to designate a 30-day notice. For example, IC98–592–000 would represent the 60-day notice for the Commission information collection FERC–592 during fiscal year 1998.

When an information collection requirement is also the subject of a proposed or final rule, the RM docket number would be used instead of an IC docket number.

Lois D. Cashell,

Secretary.

[FR Doc. 98–194 Filed 1–5–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Notice of Cases Filed During the Week of November 24 Through November 28, 1997

During the Week of November 24 through November 28, 1997, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585–0107.

Dated: December 23, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

SUBMISSION OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY

[Week of November 24 through November 28, 1997]

Date	Name and location of applicant	Case No.	Type of submission
November 25, 1997.	Rural Alliance for Military Accountability, Questa, NM.	VFA–0357	Appeal of an Information Request Denial. If Granted: The Freedom of Information Request Denial issued by Rocky Flats Field Office would be rescinded, and the Rural Alliance for Military Accountability would receive access to certain DOE information.
November 26, 1997.	Dykema Gossett, Washington, D.C.	VFA–0358	Appeal of an Information Request Denial. If Granted: The November 3, 1997 Freedom of Information Request Denial issued by the Oak Ridge Operations Office would be rescinded, and Dykema Gossett would receive access to certain DOE information.
November 25, 1997.	K&M Plastics, Elk Grove Village, IL	VFA–0356	Appeal of an Information Request Denial. If Granted: The Freedom of Information Request Denial issued by Rocky Flats Field Office would be rescinded, and K&M Plastics would receive access to certain DOE information.

[FR Doc. 98–225 Filed 1–5–98; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Notice of Cases Filed During the Week of October 20 Through October 24, 1997

During the Week of October 20 through October 24, 1997, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585–0107.

Dated: December 23, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of October 20 through October 24, 1997]

Date	Name and Location of applicant	Case No.	Type of Submission
10/21/97	Glen M. Jameson, Lakewood, CO	VFA–0345	Appeal of an Information Request Denial. IF GRANTED: The September 17, 1997 Freedom of Information Request Denial issued by the Rocky Flats Field Office would be rescinded, and Glen M. Jameson would receive access to certain DOE information.
10/21/97	Kona (LDM, Inc.), Coppell, TX	RR350–1	Request for Modification/ Rescission in the Permian Refund Proceeding IF GRANTED: The August 13, 1997 Decision and Order (Case No. RF350–1) issued to Kona (LDM, Inc.) would be modified regarding the firm's Application for Refund submitted in the Permian refund proceeding.
10/21/97	Los Alamos Study Group, Santa Fe, NM	VFA–0346	Appeal of an Information Request Denial IF GRANTED: The October 7, 1997 Freedom of Information Request Denial issued by the Albuquerque Operations Office would be rescinded, and Los Alamos Study Group would receive access to certain DOE information.
10/21/97	Personnel Security Review	VSA–0154	Request for Review of Opinion Under 10 CFR Part 710 IF GRANTED: The September 22, 1997 Opinion of an Office of Hearings and Appeals Hearing Officer, Case No VSO–0154, would be reviewed at the request of an individual employed by the Department of Energy.

[FR Doc. 98–226 Filed 1–5–98; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Notice of Cases Filed During the Week of October 13 Through October 17, 1997

During the Week of October 13 through October 17, 1997, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585–0107.

Dated: December 23, 1997

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of October 13 through October 17, 1997]

Date	Name and location of applicant	Case No.	Type of submission
10/14/97	ChemData, Inc., Littleton, CO	VFA–0342	Appeal of an Information Request Denial. IF GRANTED: The September 9, 1997 Freedom of Information Request Denial issued by the Rocky Flats Field Office would be rescinded and ChemData, Inc. would receive access to certain DOE information.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS—Continued

[Week of October 13 through October 17, 1997]

Date	Name and location of applicant	Case No.	Type of submission
10/14/97	James R. Hutton, Kingston, TN	VFA–0341	Appeal of an Information Request Denial. IF GRANTED: The September 23, 1997 Freedom of Information Request Denial issued by the Oak Ridge Operations Office would be rescinded, and James R. Hutton would receive access to certain DOE information.
10/15/97	Patricia L. Baade, Charlottesville, VA	VFA–0344	Appeal of an Information Request Denial. IF GRANTED: The August 5, 1997 Freedom of Information Request Denial issued by the Office of General Counsel would be rescinded, and Patricia L. Baade would receive access to certain DOE information.

[FR Doc. 98–227 Filed 1–5–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Notice of Cases Filed During the Week of October 6 Through October 10, 1997

During the Week of October 6 through October 10, 1997, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585–0107.

Dated: December 23, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

SUBMISSION OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY

[Week of October 6 through October 10, 1997]

Date	Name and location of applicant	Case No.	Type of submission
October 6, 1997.	Convergence Research Seattle, Washington.	VFA–0340	Appeal of an Information Request Denial. If Granted: The August 18, 1997 Freedom of Information Request Denial issued by Bonneville Power Administration would be rescinded, and Convergence Research would receive access to certain DOE information.
October 9, 1997.	Personnel Security Hearing	VSO–0181	Request for Hearing under 10 CFR Part 710. If Granted: An individual employed by the Department of Energy would receive a hearing under 10 CFR Part 710.
10/10/97	F.A.C.T.S., Buffalo, New York	VFA–0343	Appeal of an Information Request Denial. If Granted: The September 9, 1997 Freedom of Information Request Denial issued by Oak Ridge Operations Office would be rescinded, and F.A.C.T.S. would receive access to certain DOE information.

[FR Doc. 98–228 Filed 1–5–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Notice of Cases Filed During Week of September 29 Through October 3, 1997

During the Week of September 29 through October 3, 1997, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585–0107.

Dated: December 23, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

SUBMISSION OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of September 29 through October 3, 1997]

Date	Name and Location of Applicant	Case No.	Type of Submission
Sept. 29, 1997	Rural Alliance for Military Accountability, Questa, New Mexico.	VFA–0335	Appeal of an Information Request Denial. If Granted: The September 3, 1997 Freedom of Information Request Denial issued by Albuquerque Operations Office would be rescinded, and Rural Alliance for Military Accountability would receive access to certain DOE information.
Sept. 29, 1997	The Oregonian, Portland, Oregon	VFA–0336	Appeal of an Information Request Denial. If Granted: The September 10, 1997 Freedom of Information Request Denial issued by Bonneville Power Administration would be rescinded, and The Oregonian would receive access to certain DOE information.
Oct. 1, 1997	Patricia C. McCracken, Augusta, Georgia	VFA–0337	Appeal of an Information Request Denial. If Granted: The September 17, 1997 Freedom of Information Request Denial issued by Savannah River Operations would be rescinded, and Patricia C. McCracken would receive access to certain DOE information.
Oct. 2, 1997	F.A.C.T.S., Buffalo, New York	VFA–0339	Appeal of an Information Request Denial. If Granted: The September 2, 1997 Freedom of Information Request Denial issued by the Office of the Executive Secretariat would be rescinded, and F.A.C.T.S. would receive access to certain DOE information.
Do	Natural Resources Defense Council, Washington, D.C.	VFA–0338	Appeal of an Information Request Denial. If Granted: The September 4, 1997 Freedom of Information Request Denial issued by Albuquerque Operations Office would be rescinded, and Natural Resources Defense Council would receive access to certain DOE information.
Oct. 3, 1997	Personnel Security Hearing	VSO–0179	Request for Hearing under 10 CFR Part 710. If Granted: An individual employed by the Department of Energy would receive a hearing under 10 CFR Part 710.
Do	Personnel Security Hearing	VSO–0180	Request for Hearing under 10 CFR Part 710. If Granted: An individual employed by the Department of Energy would receive a hearing under 10 CFR Part 710.

[FR Doc. 98–229 Filed 1–5–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Notice of Cases Filed During the Week of September 22 Through September 26, 1997

During the Week of September 22 through September 26, 1997, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585–0107.

Dated: December 23, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of September 22 Through September 26, 1997]

Date	Name and Location of Applicant	Case No.	Type of submission
Sept. 24, 1997	Crysen Corporation	VFX–0013	Supplemental order. If Granted: The crude oil overcharge funds remaining in the Crysen Corporation consent order account will be distributed under the terms of the Stripper Well Settlement Agreement.
Do	Personnel Security Hearing	VSO–0178	Request for Hearing under 10 CFR. Part 710. If granted: An individual employed by the Department of Energy would receive a hearing under 10 CFR Part 710.

[FR Doc. 98–230 Filed 1–5–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Southwestern Power Administration

Open Access Transmission Service Tariff

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of final tariff.

SUMMARY: The Southwestern Power Administration (Southwestern) is adopting this final Open Access Transmission Service Tariff (Final Tariff) in accordance with the Federal Energy Regulatory Commission (FERC) Orders 888 and 888–A, to the extent consistent with laws and regulations applicable to Southwestern's activities.

DATES: The Final Tariff will become effective February 5, 1998. The Final Tariff will remain in effect until superseded.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Procedures
II. Background
III. Comments Raised During the Development of this Final Tariff
IV. Summary of Significant Changes from the Southwestern's Proposed Tariff
V. Coordination with Adoption of Open Access Transmission Rates

I. Procedures

Southwestern will submit the Final Tariff to the FERC under a non-jurisdictional docket and will request a declaratory order that this Final Tariff meets FERC comparability standards as forth in FERC Order Nos. 888 and 888–A. Southwestern will make necessary changes, if any, in response to the FERC declaratory order and will publish the revised Final Tariff in the **Federal Register**.

II. Background

Southwestern Power Administration (Southwestern) was created by Secretarial Order No. 1865, dated August 31, 1943, as an agency of the Department of the Interior, to carry out the power marketing responsibilities assigned to the Secretary of the Interior by Executive Order 9366, dated July 30, 1943, and Executive Order 9373, dated August 30, 1943. Section 5 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 890; 16 U.S.C. 825s) broadened the power marketing responsibilities of the Secretary of the Interior by placing in him the responsibility for marketing the electric power and energy generated at reservoir projects built by and under the control of the Department of the Army. The U.S. Department of Energy was created by an Act of the U.S. Congress under the Department of Energy Organization Act, Public Law 95–91, dated August 4, 1977. Pursuant to Sections 302(a) and 301(b) of such Act, the functions of the Secretary of the Interior and the Federal Power Commission under Section 5 of the Flood Control Act of 1944 which relate to Southwestern were transferred to and vested in the Secretary of Energy effective October 1, 1977.

Under the said Section 5, Southwestern is enjoined to market power and energy generated at U.S. Army Corps of Engineers dams with preference to public bodies and cooperatives, in such manner as to encourage the most widespread use of the resource, at the lowest possible rates to consumers consistent with sound business principles. The hydroelectric projects from which Southwestern currently markets power and energy are located in the States of Arkansas, Missouri, Oklahoma, and Texas. Southwestern is a partial requirements supplier by the nature of its hydroelectric power resource to 93 municipal, cooperative, and military electric systems in the States of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas. Southwestern is not a public utility under Sections 205 and 206 of the Federal Power Act. Southwestern is a transmitting utility subject to Section 211 of the Federal Power Act as amended by the Energy Policy Act of 1992.

The Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) for Open Access Transmission Service, published at 60 FR 17662, on April 7, 1995. On October 4, 1995, the Secretary, Department of Energy (DOE), adopted a ''Power Marketing Administration Open Transmission Access Policy'' (DOE Policy) in which the Secretary states that DOE supports the spirit and intent of the NOPR and directs the Power Marketing Administrations to prepare tariffs which conform to the principles set forth in the FERC's final rule. FERC issued its final rule, Order No. 888, published at 61 FR 21540, on May 10, 1996, and followed with supplementary Order No. 888–A, published at 62 FR 12273, on March 14, 1997.

Southwestern began its formal process of developing this Final Tariff when it issued a Notice of Proposed Tariff published at 62 FR 50307 on September 25, 1997 (proposed Tariff). Southwestern's Final Tariff is based on the suggested open access transmission tariff published as Appendix B to FERC Order No. 888–A (*pro forma* tariff). On October 9, 1997, Southwestern held a public information meeting at its Tulsa, Oklahoma offices. The formal comment period for the proposed Tariff lasted 45 days. Comments received during this formal period were considered in the development of the Final Tariff. Southwestern will submit the Final Tariff to FERC under a non-jurisdictional docket and request a declaratory order from FERC that the Final Tariff meets or exceeds the FERC comparability standards set forth in FERC Orders No. 888 and 888–A.

The transmission facilities which Southwestern owns and operates are committed to the delivery of Federal hydroelectric capacity and energy under

the terms and conditions of electric service contracts which implement Southwestern's statutory obligations to market Federal power. Fulfillment of such obligations is complementary with the provisions of the Final Tariff. Transmission service provided by Southwestern under the Final Tariff is available for the transmission capacity in Southwestern's system in excess of that required by Southwestern for the integration of its resources for the long-term reliable delivery of Federal power allocated to customers under contract to Southwestern. Nothing in the Final Tariff alters, amends, or abridges the statutory or contractual obligations of Southwestern to market and deliver Federal power resources and to repay the Nation's investment in the generation and transmission facilities from which Southwestern markets hydropower and energy.

Southwestern has prepared this Final Tariff and service agreements to provide transmission service comparable to that required of public utilities by FERC Orders No. 888 and 888–A, and to implement those Orders consistent with DOE Policy. Southwestern intends to provide Firm and Non-Firm Point-to-Point Transmission Service and Network Integration Transmission Service under the terms and conditions of the Final Tariff. The Final Tariff does not include any rates or charges for services, as Southwestern's rates are developed under a separate public process pursuant to applicable Federal law and regulations. However, Southwestern's rate schedule for non-Federal transmission service has been developed in coordination with the provisions of the *pro forma* Tariff and conforms in all respects to the Final Tariff. Service agreements which incorporate the Final Tariff will also include Southwestern's rate schedule for non-Federal transmission service.

Based on a reasonable level of risk, Southwestern has historically marketed the maximum practical power from its resources, leaving little or no flexibility for provision of additional power services. Changes in water conditions frequently affect the ability of hydroelectric projects to meet obligations on a short-term basis. The unique characteristics of the hydro resource and its inherent limitations due to changing water conditions may limit Southwestern's ability to provide generation-related services such as ancillary services and redispatching under the Final Tariff.

III. Comments Raised During the Development of This Final Tariff

The formal public comment period produced a number of comments about the proposed Tariff. The following discussion highlights the more significant comments and Southwestern's responses.

Comment. Commentors expressed concern that Southwestern did not specify power loss factors and rates in the proposed Tariff.

Response. Southwestern chose not to duplicate matters in the Tariff which are covered in its rate schedules. The rate schedules are developed under a separate process dictated by Federal regulations which includes a significant public participation process. Four percent losses, based on a recent loss study, are included in the proposed rate schedules which are expected to go into effect January 1, 1998.

Comment. Commentors were concerned about Southwestern's statement in the proposed Tariff that Network Service may not be provided. A commentor finds Attachments F, G, and H, having to do with Network Service, inadequate.

Response. Southwestern has determined that Network Integration Transmission Service will be provided, and is addressed in its proposed rate schedule for non-Federal transmission service. Southwestern is publishing a network service agreement in Attachment F to the Final Tariff. Attachment G, on the Network Operating Agreement, has not been changed from the proposed Tariff because Southwestern expects that, in the event that network service is requested, the operating agreements will be unique to each arrangement and will be individually negotiated. Attachment H does not specify Southwestern's annual revenue requirement, but refers to Southwestern's rate schedule for non-Federal transmission service which has that information. This reference is consistent with Southwestern's decision to place all matters related directly to rates in the rate schedules rather than in the Final Tariff.

Comment. Commentors objected to the changes Southwestern proposes to make in the *pro forma* tariff provisions related to stranded costs (Sections 26 and 34.5) and related to payment for direct assignment facilities, ancillary services, and study costs (Section 34). The objection was that citing applicable Federal law and regulations as the guidance for such actions is more vague than the original language which cites FERC Order No. 888 and FERC policy, respectively, as the guidance for such recovery.

Response. Southwestern originally made the changes to the proposed Tariff because Southwestern is not under the jurisdiction of the FERC. However, upon a closer reading of these sections, Southwestern has determined that acknowledging the guidance of the FERC in these matters does not impair Southwestern's non-jurisdictional status. Accordingly, Southwestern has returned, in part, to the *pro forma* tariff language in Sections 26 and 34.5. In Section 34, Southwestern changed the phrase ''Federal policy'' in the proposed Tariff to ''Federal practice'' in the Final Tariff, which effectively makes the cited guideline more limited and specific.

Comment. A commentor was concerned that Southwestern has not deleted language in some sections, such as 20.2 and 21.2, which may suggest that the FERC has jurisdiction over Southwestern greater than it does indeed have. The commentor requested additional deletions in these and other sections or recommended that references to FERC policy or rules be amended to refer instead to Federal laws, regulations, and policies.

Response. The DOE Policy issued October 4, 1995, directs Southwestern to offer transmission service in a manner comparable to the FERC's final rule on open access transmission service ''to the extent not otherwise prohibited by law.'' Upon examination, Southwestern judges that the specific recommended changes are not necessary to preserve Southwestern's non-jurisdictional status, so the suggested changes were not incorporated into the Final Tariff.

Comment. A commentor objects to any provisions which would permit Southwestern to provide service without an executed agreement.

Response. Southwestern prefers to provide service only when an executed Service Agreement exists, and intends to avoid providing service without the protection of an executed agreement if at all possible. However, in the present utility environment, Southwestern believes it must be able to initiate transmission service without an executed agreement, if necessary. Accordingly, Southwestern did not change the provisions of its proposed Tariff which address this matter.

Comment. A commentor made several suggestions for additions to the *pro forma* tariff language which would state, in various forms, that Southwestern is limited to actions which are consistent with its authorities granted under Federal law, regulations, or policies.

Response. Southwestern is indeed limited in its actions due to its status as

a Federal agency. However, in all but one of the cases where such additions were suggested, Southwestern determined that necessary limitations were implicit in the *pro forma* tariff language and did not require an explicit statement. While such additions could be proper, Southwestern has adhered to the principle of avoiding making changes, either of omission or addition, to the *pro forma* tariff language unless such changes are necessary to preserve Southwestern's authorities and obligations under Federal law, regulations, and policies. Except for an addition to Section 13.5, the proposed changes were not considered necessary for such preservation.

Comment. Commentors found the language in Attachment J stating that Federal Customers are considered to be the equivalent to Native Load Customers insufficient to protect the rights of Federal power customers. One commentor recommended that Southwestern insert a ''binding provision'' in the body of the Final Tariff to the effect that the Tariff applies only to transmission capacity in excess of the requirements of Southwestern's primary mission. Others suggested that the *pro forma* tariff definition of Native Load Customer be amended to reflect Southwestern's statutory obligations to market and deliver Federal power and energy, or recommended other changes to Attachment J.

Response. Southwestern edited Attachment J to strengthen and clarify its authority and obligations and inserted the new language as a Preamble to the Final Tariff. Southwestern removed the language which stated that its Federal power customers are the equivalent of Native Load Customers, and did not alter the *pro forma* tariff definition the Final Tariff. Placing this language in the body of the Final Tariff should alleviate the concerns of the commentor.

Comment. One commentor objects to the process in Section 7.3 for customers who are in default due to non-payment of bills. The commentor believes that Southwestern's proposed language is inferior to the *pro forma* tariff language because it does not provide the same level of recourse as the *pro forma* tariff.

Response. Southwestern believes that its provision for handling customer defaults is appropriate, as referring disputes to the FERC (*pro forma* tariff provision) is not consistent with Southwestern's non-jurisdictional status. Southwestern believes that a specific reference to the disputes resolution procedures of the Final Tariff is unnecessary in this Section.

Comment. A commentor requests that Southwestern amend Section 9 of the proposed Tariff to preserve customers' rights to participate in any public process to amend the Tariff.

Response. Southwestern is committed to providing a public process for any future changes it may make to the Final Tariff in accordance with the Administrative Procedures Act. However, Southwestern does not consider the Tariff itself as an appropriate place to state this commitment. In addition, FERC's normal filing processes provide for intervention by any interested party, which gives customers an additional opportunity for input into the process.

Comment. A commentor made extensive comments on Southwestern's intent to require in advance any funds needed for studies or construction. The concerns were two-fold. First was a recommendation that Southwestern include language in construction contracts to delineate ownership rights for any facilities which use a customer's advance funds, including circumstances where such facilities are not completed. Secondly, the customer objected to Southwestern's deleting all references in the *pro forma* tariff language to the return of deposits with interest.

Response. Under the *pro forma* tariff, all studies and construction are provided for under separately negotiated agreements between the Transmission Provider and the Transmission Customer. Southwestern has long had a practice of addressing ownership of facilities in its construction agreements, and will continue to do so. While this matter is not directly related to the tariff, per se, Southwestern will endeavor to take these comments into account during any future negotiations for study and construction agreements.

It has never been Southwestern's practice to pay interest on funds deposited in advance for facilities studies or construction, principally because Southwestern has no way of accruing interest on such funds, which are directly deposited into the U.S. Treasury. If interest were to be paid on refunded amounts, the expense would necessarily become part of the rate base and would therefore be borne by all customers. Therefore, Southwestern will continue to delete language in the *pro forma* tariff which would require Southwestern to pay interest on refunded amounts.

Comment. Commentors objected to Southwestern's proposal to replace the *pro forma* tariff's provisions for a deposit which could be returned with interest with a nonrefundable processing fee. The primary concern seemed to be that the fee, which was not specified in the proposed Tariff, might be unduly burdensome.

Response. Southwestern specifies the amounts of such fees in its Final Tariff, based on estimated staff costs for evaluating a customer request. Southwestern believes that the specified fees are reasonable and should not be unduly burdensome to potential customers of these services.

Comment. One commentor is concerned that Southwestern may wish to charge an agency fee if Southwestern has to purchase some ancillary services. Another commentor was concerned that Southwestern's hydroelectric resources might be compromised by providing generation-related ancillary services at all, and suggests that Southwestern confine itself to brokering such ancillary services, rather than to providing them directly. Still another suggested that further limitations on the provision of ancillary service be inserted into the Final Tariff, and objects to an implication that Southwestern would set the level of some ancillary services unilaterally in service agreements.

Response. The Final Tariff provides that, in the event that Southwestern purchases ancillary services on behalf of a customer, the costs are passed through to the customer. Southwestern has no intent to charge an agency fee or other markup. Southwestern believes that the limitations on its ability to use Federal power resources to provide ancillary services are sufficiently set forth in its revisions to Section 3. Language in Schedules 1 through 6 which previously indicated that the level of some ancillary services would be set in the service agreement has been removed. Southwestern believes that brokering ancillary services, except when hydropower resources are severely limited, is not a practical way to provide such services.

Comment. A commentor pointed out that the provision in Section 13.8 for submitting schedules for firm transmission service by 10:00 a.m. of the previous day is not consistent with regional practice.

Response. Southwestern agrees, and has changed the references to 10:00 a.m. to 2:00 p.m.

Comment. A commentor was concerned about the requirement that Energy Imbalances be corrected within 30 days and recommended a longer period before the Transmission Customer is assessed a charge for such service.

Response. Southwestern does not foresee this issue being a problem based on historical interactions with those of

its customers which are located within Southwestern's Control Area, which are the only customers to whom this ancillary service would apply. Again, Southwestern desires to avoid making changes to the *pro forma* tariff where possible.

Comment. A commentor requests that Southwestern state for the record that it ''intends to abide by its existing contracts, including rates set forth in those contracts.''

Response. Southwestern will indeed abide by its existing contracts. However, all such contracts provide that rates may be changed, as needed, in conformity with Southwestern's rate process, which is subject to Federal regulations and which is driven by Southwestern's legal requirement to recover its costs and to repay the Nation for its investment in the generation and transmission facilities from which Southwestern markets Federal power and energy. Existing contracts provide for terms and conditions of service, but specify that rates for services under such contracts change when Southwestern's rates change. Such customers have the right to terminate these contracts if they find changed rates unsatisfactory.

Comment. A commentor expressed concern that Southwestern's decision to not publish its standard contracts as part of the proposed Tariff could lead to inequity for future transmission customers.

Response. Southwestern is publishing its standard Service Agreements in the Final Tariff.

Comment. Commentors found Attachments C and D to the Tariff, on Southwestern's methodology for assessing Available Transfer Capability (ATC) or for doing System Impact Studies, respectively, inadequate.

Response. Southwestern changed its Attachment C to cite the specific Southwest Power Pool (SPP) methodology for assessing ATC. Southwestern's ATC is computed as part of the SPP, from data supplied by Southwestern, and is not an independent Southwestern process. As this methodology is lengthy and is publicly available, Southwestern sees no reason to include it in greater detail in the Final Tariff. Southwestern amends Attachment D to indicate that Southwestern is in the process of developing and standardizing its criteria for evaluating facilities. The new standards, when available, may be requested by any current or potential customer.

Comment. Commentors expressed a concern about the rate calculation process, and expressed a desire for Southwestern to develop an ''adjustment method'' for correcting over- or under-collection of revenues for transmission services.

Response The process of rate design and calculation is not pertinent to the Tariff. All rates for non-Federal transmission service, and the process of their development, are handled under a separate regulatory process. Southwestern's annual Power Repayment Study automatically factors in any over- or under-collection of revenues and makes necessary adjustments to the rates as warranted.

IV. Summary of Significant Changes from the Southwestern's Proposed Tariff

Attachment J, ''Authorities and Obligations,'' of the proposed Tariff was deleted in the Final Tariff, and an edited portion of the original text was inserted as the Preamble to the Final Tariff.

The language added by Southwestern to the *pro forma* tariff in Section 3, ''Ancillary Services'' was edited for clarity.

Southwestern amended Section 7, ''Billing and Payment,'' of the proposed Tariff by changing the due date for invoices (7.1), by clarifying the section (7.3) on customer default, and by adding two new sections (7.4 and 7.5) on billing to the body of the Final Tariff, from these provisions' previous position in the proposed service agreements. These changes place all language on billing in one section and change the due date provision to conform to Southwestern's invoicing practice.

Southwestern restored Section 10.1, ''Force Majeure,'' to the language of the *pro forma* tariff.

Southwestern amended Section 12, ''Dispute Resolution Procedures, by restoring most of the last sentence in 12.1 of the *pro forma* tariff language, adding a new subsection, ''External Dispute Resolution Procedures,'' and renumbering the old Section 12.2 to 12.3.

Southwestern added the phrase, ''and subject to the Transmission Provider's authority under Federal law to complete the expansion or upgrade'' to the end of the first sentence in Section 13.5, ''Transmission Customer Obligations for Facility Additions or Redispatch Costs.''

Southwestern changed the scheduling deadline in Section 13.8, ''Scheduling of Firm Point-to-Point Transmission Service,'' from 10:00 a.m. to 2:00 p.m.

Southwestern changed the language in Sections 15.7 and 28.5, ''Real Power Losses,'' from referring to service agreements for loss factors and rates, to referring to Southwestern's rate schedules.

Southwestern changed the mailing address given in Section 17.1, ''Application,'' from Southwestern's post office box address to its street address, to reflect a decision to phase out the post office box address in the future.

Sections 17.3, ''Processing Fee,'' and 29.2, ''Application Procedures,'' were amended to insert specific application processing fees.

Sections 19.4 and 32.4, ''Facilities Study Procedures,'' were edited to correct minor inconsistencies in language related to payment of funds.

Section 24.3, ''Power Factor,'' was edited to reflect the fact that Southwestern's power factor requirements are stated in its rate schedules rather than in service agreements.

Section 25, ''Compensation for Transmission Service,'' was edited to reflect the fact that the rates for service under the Final Tariff are in Southwestern's rate schedule rather than in the Schedules 7 and 8 attached to the Final Tariff.

Sections 26 and 34.5, ''Stranded Cost Recovery,'' were changed by restoring part of the original *pro forma* tariff language.

Section 34, ''Rates and Charges,'' was edited to change the phrase ''Federal policy'' to ''Federal practice.''

Schedules 1 through 8 were simplified and restored more nearly to the *pro forma* tariff.

Southwestern deleted its Attachments A, B, and F of the proposed Tariff, and replaced them with standard service agreements for long-term firm transmission service, for short-term firm and non-firm transmission service, and for network integration transmission service, respectively.

Minor editing in Attachments C and D provide additional clarity and specificity.

A list of transmission customers was added to Attachment E.

Attachment H was edited to remove language in the proposed Tariff and to refer to Southwestern's rate schedule for transmission service as the source for Southwestern's annual revenue requirement in regard to network integration transmission service.

V. Coordination With Adoption of Open Access Transmission Rates

Southwestern's rate process, which is distinct from the rate process used by public utilities, includes mandatory public participation procedures, as described in 10 CFR 903. Additionally, Southwestern's rates are reviewed by the FERC under different parameters

than those used for review of public utility rates.

Southwestern is presently in the process of filing new rates and rate schedules, and expects to implement such new rates on January 1, 1998. The proposed rates for transmission service are structured in accordance with the Final Tariff. The new rate schedules will be attached to service agreements executed under the Tariff.

Review Under Executive Order 12866

Southwestern has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget (OMB) is required.

Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires Federal agencies to perform a regulatory flexibility analysis if a proposed regulation is likely to have a significant economic impact on a substantial number of small entities. Pursuant to the execution of this **Federal Register** notice, the Administrator, Southwestern, certifies that no significant economic impact on a substantial number of small entities will occur.

A redline/strikeout comparison of Southwestern's Final Tariff to the FERC *pro forma* tariff is available on the Internet at http://www.swpa.gov.

Dated: December 18, 1997.

Michael A. Deihl,

Administrator.

Open Access Transmission Service Tariff

Table of Contents

Preamble: Authorities and Obligations

Part I. Common Service Provisions

1 Definitions
1.1 Ancillary Services.
1.2 Annual Transmission Costs.
1.3 Application.
1.4 Commission.
1.5 Completed Application.
1.6 Control Area.
1.7 Curtailment.
1.8 Delivering Party.
1.9 Designated Agent.
1.10 Direct Assignment Facilities.
1.11 Eligible Customer.
1.12 Facilities Study.
1.13 Firm Point-To-Point Transmission Service.
1.14 Good Utility Practice.
1.15 Interruption.
1.16 Load Ratio Share.
1.17 Load Shedding.
1.18 Long-Term Firm Point-To-Point Transmission Service.
1.19 Native Load Customers.
1.20 Network Customer.
1.21 Network Integration Transmission Service.
1.22 Network Load.
1.23 Network Operating Agreement.
1.24 Network Operating Committee.
1.25 Network Resource.
1.26 Network Upgrades.
1.27 Non-Firm Point-To-Point Transmission Service.
1.28 Open Access Same-Time Information System (OASIS).
1.29 Part I.
1.30 Part II.
1.31 Part III.
1.32 Parties
1.33 Point(s) of Delivery
1.34 Point(s) of Receipt
1.35 Point-To-Point Transmission Service.
1.36 Power Purchaser.
1.37 Receiving Party.
1.38 Regional Transmission Group (RTG).
1.39 Reserved Capacity.
1.40 Service Agreement.
1.41 Service Commencement Date.
1.42 Short-Term Firm Point-To-Point Transmission Service.
1.43 System Impact Study.
1.44 Third-Party Sale.
1.45 Transmission Customer.
1.46 Transmission Provider.
1.47 Transmission Provider's Monthly Transmission System Peak.
1.48 Transmission Service.
1.49 Transmission System:
2 26Initial Allocation and Renewal Procedures
2.1 Initial Allocation of Available Transmission Capability.
2.2 Reservation Priority For Existing Firm Service Customers.
3 Ancillary Services
3.1 Scheduling, System Control and Dispatch Service.
3.2 Reactive Supply and Voltage Control from Generation Sources Service.
3.3 Regulation and Frequency Response Service.
3.4 Energy Imbalance Service.
3.5 Operating Reserve—Spinning Reserve Service.
3.6 Operating Reserve—Supplemental Reserve Service.
4 Open Access Same-Time Information System (OASIS)
5 Local Furnishing Bonds
5.1 Transmission Providers That Own Facilities Financed by Local Furnishing Bonds.
5.2 Alternative Procedures for Requesting Transmission Service.
6 Reciprocity
7 Billing and Payment
7.1 Billing Procedures.
7.2 Interest on Unpaid Balances.
7.3 Customer Default.
7.4 Payment Processes.
7.5 Net Billing
8 Accounting for the Transmission Provider's Use of the Tariff
8.1 Transmission Revenues.
8.2 Study Costs and Revenues.
9 Regulatory Filings
10 Force Majeure and Indemnification
10.1 Force Majeure.
10.2 Indemnification.
11 Creditworthiness
12 Dispute Resolution Procedures
12.1 Internal Dispute Resolution Procedures.
12.2 External Dispute Resolution Procedures.
12.3 Administrative Disputes Resolution Act.
12.4 Rights Under The Federal Power Act.

Part II. Point-to-Point Transmission Service

Preamble

13 Nature of Firm Point-To-Point Transmission Service
13.1 Term.
13.2 Reservation Priority.
13.3 Use of Firm Transmission Service by the Transmission Provider.
13.4 Service Agreements.
13.5 Transmission Customer Obligations for Facility Additions or Redispatch Costs.
13.6 Curtailment of Firm Transmission Service.
13.7 Classification of Firm Transmission Service.
13.8 Scheduling of Firm Point-To-Point Transmission Service.
14 Nature of Non-Firm Point-To-Point Transmission Service
14.1 Term.
14.2 Reservation Priority.
14.3 Use of Non-Firm Point-To-Point Transmission Service by the Transmission Provider.
14.4 Service Agreements.
14.5 Classification of Non-Firm Point-To-Point Transmission Service.
14.6 Scheduling of Non-Firm Point-To-Point Transmission Service.
14.7 Curtailment or Interruption of Service.
15 Service Availability
15.1 General Conditions.
15.2 Determination of Available Transmission Capability.
15.3 Initiating Service in the Absence of an Executed Service Agreement.
15.4 Obligation to Provide Transmission Service that Requires Expansion or Modification of the Transmission System.
15.5 Deferral of Service.
15.6 Other Transmission Service Schedules.
15.7 Real Power Losses.
16 Transmission Customer Responsibilities
16.1 Conditions Required of Transmission Customers.
16.2 Transmission Customer Responsibility for Third-Party Arrangements.
17 Procedures for Arranging Firm Point-To-Point Transmission Service
17.1 Application.
17.2 Completed Application.
17.3 Processing Fee.
17.4 Notice of Deficient Application.
17.5 Response to a Completed Application.
17.6 Execution of a Service Agreement.
17.7 Extensions for Commencement of Service.
18 Procedures for Arranging Non-Firm Point-To-Point Transmission Service

18.1 Application.
18.2 Completed Application.
18.3 Reservation of Non-Firm Point-To-Point Transmission Service.
18.4 Determination of Available Transmission Capability.
19 Additional Study Procedures For Firm Point-To-Point Transmission Service Requests
19.1 Notice of Need for System Impact Study.
19.2 System Impact Study Agreement and Compensation.
19.3 System Impact Study Procedures.
19.4 Facilities Study Procedures.
19.5 Facilities Study Modifications.
19.6 Due Diligence in Completing New Facilities.
19.7 Partial Interim Service.
19.8 Expedited Procedures for New Facilities.
20 Procedures if The Transmission Provider is Unable to Complete New Transmission Facilities for Firm Point-To-Point Transmission Service
20.1 Delays in Construction of New Facilities.
20.2 Alternatives to the Original Facility Additions.
20.3 Refund Obligation for Unfinished Facility Additions.
21 Provisions Relating to Transmission Construction and Services on the Systems of Other Utilities
21.1 Responsibility for Third-Party System Additions.
21.2 Coordination of Third-Party System Additions.
22 Changes in Service Specifications
22.1 Modifications On a Non-Firm Basis.
22.2 Modifications On a Firm Basis.
23 Sale or Assignment of Transmission Service
23.1 Procedures for Assignment or Transfer of Service.
23.2 Limitations on Assignment or Transfer of Service.
23.3 Information on Assignment or Transfer of Service.
24 Metering and Power Factor Correction at Receipt and Delivery Point(s)
24.1 Transmission Customer Obligations.
24.2 Transmission Provider Access to Metering Data.
24.3 Power Factor.
25 Compensation for Transmission Service
26 Stranded Cost Recovery
27 Compensation for New Facilities and Redispatch Costs

Part III. Network Integation Transmission Service

Preamble

28 Nature of Network Integration Transmission Service
28.1 Scope of Service.
28.2 Transmission Provider Responsibilities.
28.3 Network Integration Transmission Service.
28.4 Secondary Service.
28.5 Real Power Losses.
28.6 Restrictions on Use of Service.
29 Initiating Service
29.1 Condition Precedent for Receiving Service.
29.2 Application Procedures.
29.3 Technical Arrangements to be Completed Prior to Commencement of Service.
29.4 Network Customer Facilities.
29.5 *This section is intentionally left blank.*
30 Network Resources
30.1 Designation of Network Resources.
30.2 Designation of New Network Resources.
30.3 Termination of Network Resources.
30.4 Operation of Network Resources.
30.5 Network Customer Redispatch Obligation.
30.6 Transmission Arrangements for Network Resources Not Physically Interconnected With The Transmission Provider.
30.7 Limitation on Designation of Network Resources.
30.8 Use of Interface Capacity by the Network Customer.
30.9 Network Customer Owned Transmission Facilities.
31 Designation of Network Load
31.1 Network Load.
31.2 New Network Loads Connected With the Transmission Provider.
31.3 Network Load Not Physically Interconnected with the Transmission Provider.
31.4 New Interconnection Points.
31.5 Changes in Service Requests.
31.6 Annual Load and Resource Information Updates.
32 Additional Study Procedures For Network Integration TransmissionService Requests
32.1 Notice of Need for System Impact Study.
32.2 System Impact Study Agreement and Compensation.
32.3 System Impact Study Procedures.
32.4 Facilities Study Procedures.
33 Load Shedding and Curtailments
33.1 Procedures.
33.2 Transmission Constraints.
33.3 Cost Responsibility for Relieving Transmission Constraints.
33.4 Curtailments of Scheduled Deliveries.
33.5 Allocation of Curtailments.
33.6 Load Shedding.
33.7 System Reliability.
34 Rates and Charges
34.1 Monthly Demand Charge.
34.2 Determination of Network Customer's Monthly Network Load.
34.3 Determination of Transmission Provider's Monthly Transmission System Load.
34.4 Redispatch Charge.
34.5 Stranded Cost Recovery.
35 Operating Arrangements
35.1 Operation under The Network Operating Agreement.
35.2 Network Operating Agreement.
35.3 Network Operating Committee.
Schedule 1
Scheduling, System Control and Dispatch Service
Schedule 2
Reactive Supply and Voltage Control from Generation Sources Service
Schedule 3
Regulation and Frequency Response Service
Schedule 4
Energy Imbalance Service
Schedule 5
Operating Reserve—Spinning Reserve Service
Schedule 6
Operating Reserve—Supplemental Reserve Service
Schedule 7
Long-Term Firm and Short-Term Firm Point-to-Point Transmission Service
Schedule 8
Non-Firm Point-to-Point Transmission Service
Attachment A
Form of Service Agreement For Firm Point-to-Point Transmission Service
Attachment B
Form of Service Agreement For Non-Firm Point-to-Point Transmission Service
Attachment C
Methodology to Assess Available Transmission Capability
Attachment D
Methodology for Completing a System Impact Study
Attachment E
Index of Point-to-Point Transmission Service Customers
Attachment F
Form of Service Agreement For Network Integration Transmission Service
Attachment G
Network Operating Agreement
Attachment H
Annual Transmission Revenue Requirement For Network Integration Transmission Service
Attachment I
Index of Network Integration Transmission Service Customers

Open Access Transmission Service Tariff

Preamble: Authorities and Obligations

Southwestern Power Administration (Southwestern) was created by Secretarial Order No. 1865, dated August 31, 1943, as an agency of the Department of the Interior, to carry out the power marketing responsibilities assigned to the Secretary of the Interior by Executive Orders 9366, dated July 30, 1943, and 9373, dated August 30, 1943. Section 5 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 890; 16 U.S.C. 825s) broadened the power marketing responsibilities of the Secretary of the Interior by placing in him the responsibility for marketing the electric power and energy generated at reservoir projects built by and under the control of the Department of the Army. Under Public Law 95–456 (92 Stat. 1230; 16 U.S.C. 825s–3), Southwestern became part of the Department of Energy pursuant to Section 302 of the Department of Energy Organization Act (91 Stat. 578; 42 U.S.C. 7152) in 1977.

Pursuant to the Flood Control Act of 1944, Southwestern markets

hydroelectric power and energy which is generated at U.S. Army Corps of Engineers (Corps) Dams in excess of project needs ''to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles * * *. Preference in the sale of such power and energy shall be given to public bodies and cooperatives.'' Further, ''only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at such projects available in wholesale quantities for sale * * *'' may be constructed or acquired to fulfill this mission.

Southwestern markets power and associated energy from Corps hydroelectric generation projects in the States of Arkansas, Missouri, Oklahoma, and Texas, primarily to customers which have received formal allocations of specified quantities of Federal power and associated energy (Federal Power Customers) in those states as well as in the States of Kansas and Louisiana. By statute, Southwestern's Transmission System was constructed to enable the integration of Southwestern's hydroelectric power resources to satisfy Southwestern's contractual obligations to its Federal Power customers. Southwestern sells transmission service from federally owned or controlled facilities only to the extent that transmission capacity is available in excess of that necessary to reliably deliver Federal power.

Southwestern is not a jurisdictional public utility under Sections 205 and 206 of the Federal Power Act and is not specifically subject to the requirements of the Federal Energy Regulatory Commission's (FERC) Final Orders Nos. 888 and 888–A. However, Southwestern is a transmitting utility subject to Section 211 of the Federal Power Act as amended by the Energy Policy Act of 1992. Southwestern is also subject to the reciprocity provisions of FERC Order Nos. 888 and 888–A. Additionally, the Department of Energy has issued a Power Marketing Administration Open Access Transmission Policy that supports the intent of the FERC Final Rule in Order No. 888. Southwestern submits this version of the FERC's Open Access Transmission Tariff (Tariff) as comparable to the *pro forma* tariff published in FERC Order No. 888–A with the proviso that nothing in this Tariff alters, amends, or abridges the statutory or contractual obligations of Southwestern to market and deliver Federal power resources and to repay the Federal investment in the facilities from which Southwestern markets such resources.

Part I. Common Service Provisions

1 Definitions

1.1 *Ancillary Services:* Those services that are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the Transmission Provider's Transmission System in accordance with Good Utility Practice.

1.2 *Annual Transmission Costs:* The total annual cost of the Transmission System for purposes of Network Integration Transmission Service shall be the amount specified in Attachment H until amended by the Transmission Provider or modified by the Commission, pursuant to Federal law.

1.3 *Application:* A request by an Eligible Customer for transmission service pursuant to the provisions of the Tariff.

1.4 *Commission:* The Federal Energy Regulatory Commission.

1.5 *Completed Application:* An Application that satisfies all of the information and other requirements of the Tariff, including any required application processing fee.

1.6 *Control Area:* An electric power system or combination of electric power systems to which a common automatic generation control scheme is applied in order to:

(1) Match, at all times, the power output of the generators within the electric power system(s) and capacity and energy purchased from entities outside the electric power system(s), with the load within the electric power system(s);

(2) Maintain scheduled interchange with other Control Areas, within the limits of Good Utility Practice;

(3) Maintain the frequency of the electric power system(s) within reasonable limits in accordance with Good Utility Practice; and

(4) Provide sufficient generating capacity to maintain operating reserves in accordance with Good Utility Practice.

1.7 *Curtailment:* A reduction in firm or non-firm transmission service in response to a transmission capacity shortage as a result of system reliability conditions.

1.8 *Delivering Party:* The entity supplying capacity and energy to be transmitted at Point(s) of Receipt.

1.9 *Designated Agent:* Any entity that performs actions or functions on behalf of the Transmission Provider, an Eligible Customer, or the Transmission Customer required under the Tariff.

1.10 *Direct Assignment Facilities:* Facilities or portions of facilities that are constructed by the Transmission Provider for the sole use/benefit of a particular Transmission Customer requesting service under the Tariff. Direct Assignment Facilities shall be specified in the Service Agreement that governs service to the Transmission Customer.

1.11 *Eligible Customer:* (i) Any electric utility (including the Transmission Provider and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an Eligible Customer under the Tariff. Electric energy sold or produced by such entity may be electric energy produced in the United States, Canada or Mexico. However, with respect to transmission service that the Commission is prohibited from ordering by Section 212(h) of the Federal Power Act, such entity is eligible only if the service is provided pursuant to a state requirement that the Transmission Provider offer the unbundled transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider. (ii) Any retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider offer the transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider is an Eligible Customer under the Tariff.

1.12 *Facilities Study:* An engineering study conducted by the Transmission Provider to determine the required modifications to the Transmission Provider's Transmission System, including the cost and scheduled completion date for such modifications, that will be required to provide the requested transmission service.

1.13 *Firm Point-To-Point Transmission Service:* Transmission Service under this Tariff that is reserved and/or scheduled between specified Points of Receipt and Delivery pursuant to Part II of this Tariff.

1.14 *Good Utility Practice:* Any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

1.15 *Interruption:* A reduction in non-firm transmission service due to economic reasons pursuant to Section 14.7.

1.16 *Load Ratio Share:* Ratio of a Transmission Customer's Network Load to the Transmission Provider's total load computed in accordance with Sections 34.2 and 34.3 of the Network Integration Transmission Service under Part III of the Tariff and calculated on a rolling twelve month basis.

1.17 *Load Shedding:* The systematic reduction of system demand by temporarily decreasing load in response to transmission system or area capacity shortages, system instability, or voltage control considerations under Part III of the Tariff.

1.18 *Long-Term Firm Point-To-Point Transmission Service:* Firm Point-To-Point Transmission Service under Part II of the Tariff with a term of one year or more.

1.19 *Native Load Customers:* The wholesale and retail power customers of the Transmission Provider on whose behalf the Transmission Provider, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate the Transmission Provider's system to meet the reliable electric needs of such customers.

1.20 *Network Customer:* An entity receiving transmission service pursuant to the terms of the Transmission Provider's Network Integration Transmission Service under Part III of the Tariff.

1.21 *Network Integration Transmission Service:* The transmission service provided under Part III of the Tariff.

1.22 *Network Load:* The load that a Network Customer designates for Network Integration Transmission Service under Part III of the Tariff. The Network Customer's Network Load shall include all load served by the output of any Network Resources designated by the Network Customer. A Network Customer may elect to designate less than its total load as Network Load but may not designate only part of the load at a discrete Point of Delivery. Where an Eligible Customer has elected not to designate a particular load at discrete points of delivery as Network Load, the Eligible Customer is responsible for making separate arrangements under Part II of the Tariff for any Point-To-Point Transmission Service that may be necessary for such non-designated load.

1.23 *Network Operating Agreement:* An executed agreement that contains the terms and conditions under which the Network Customer shall operate its facilities and the technical and operational matters associated with the implementation of Network Integration Transmission Service under Part III of the Tariff.

1.24 *Network Operating Committee:* A group made up of representatives from the Network Customer(s) and the Transmission Provider established to coordinate operating criteria and other technical considerations required for implementation of Network Integration Transmission Service under Part III of this Tariff.

1.25 *Network Resource:* Any designated generating resource owned, purchased, or leased by a Network Customer under the Network Integration Transmission Service Tariff. Network Resources do not include any resource, or any portion thereof, that is committed for sale to third parties or otherwise cannot be called upon to meet the Network Customer's Network Load on a non-interruptible basis.

1.26 *Network Upgrades:* Modifications or additions to transmission-related facilities that are integrated with and support the Transmission Provider's overall Transmission System for the general benefit of all users of such Transmission System.

1.27 *Non-Firm Point-To-Point Transmission Service:* Point-To-Point Transmission Service under the Tariff that is reserved and scheduled on an as-available basis and is subject to Curtailment or Interruption as set forth in Section 14.7 under Part II of the Tariff. Non-Firm Point-To-Point Transmission Service is available on a stand-alone basis for periods ranging from one hour to one month.

1.28 *Open Access Same-Time Information System (OASIS):* The information system and standards of conduct contained in Part 37 of the Commission's regulations and all additional requirements implemented by subsequent Commission orders dealing with OASIS.

1.29 *Part I:* Tariff Definitions and Common Service Provisions contained in Sections 2 through 12.

1.30 *Part II:* Tariff Sections 13 through 27 pertaining to Point-To-Point Transmission Service in conjunction with the applicable Common Service Provisions of Part I and appropriate Schedules and Attachments.

1.31 *Part III:* Tariff Sections 28 through 35 pertaining to Network Integration Transmission Service in conjunction with the applicable Common Service Provisions of Part I and appropriate Schedules and Attachments.

1.32 *Parties:* The Transmission Provider and the Transmission Customer receiving service under the Tariff.

1.33 *Point(s) of Delivery:* Point(s) on the Transmission Provider's Transmission System where capacity and energy transmitted by the Transmission Provider will be made available to the Receiving Party under Part II of the Tariff. The Point(s) of Delivery shall be specified in the Service Agreement for Long-Term Firm Point-to-Point Transmission Service.

1.34 *Point(s) of Receipt:* Point(s) of interconnection on the Transmission Provider's Transmission System where capacity and energy will be made available to the Transmission Provider by the Delivering Party under Part II of the Tariff. The Point(s) of Receipt shall be specified in the Service Agreement for Long-Term Firm Point-to-Point Transmission Service.

1.35 *Point-To-Point Transmission Service:* The reservation and transmission of capacity and energy on either a firm or non-firm basis from the Point(s) of Receipt to the Point(s) of Delivery under Part II of the Tariff.

1.36 *Power Purchaser:* The entity that is purchasing the capacity and energy to be transmitted under the Tariff.

1.37 *Receiving Party:* The entity receiving the capacity and energy transmitted by the Transmission Provider to Point(s) of Delivery.

1.38 *Regional Transmission Group (RTG):* A voluntary organization of transmission owners, transmission users and other entities approved by the Commission to efficiently coordinate transmission planning (and expansion), operation and use on a regional (and interregional) basis.

1.39 *Reserved Capacity:* The maximum amount of capacity and energy that the Transmission Provider agrees to transmit for the Transmission Customer over the Transmission Provider's Transmission System between the Point(s) of Receipt and the Point(s) of Delivery under Part II of the Tariff. Reserved Capacity shall be expressed in terms of whole megawatts on a sixty (60) minute interval (commencing on the clock hour) basis.

1.40 *Service Agreement:* The initial agreement and any amendments or supplements thereto entered into by the Transmission Customer and the Transmission Provider for service under the Tariff.

1.41 *Service Commencement Date:* The date the Transmission Provider begins to provide service pursuant to the terms of an executed Service Agreement, or the date the Transmission Provider begins to provide service in

accordance with Section 15.3 or Section 29.1 under the Tariff.

1.42 *Short-Term Firm Point-To-Point Transmission Service:* Firm Point-To-Point Transmission Service under Part II of the Tariff with a term of less than one year.

1.43 *System Impact Study:* An assessment by the Transmission Provider of (i) the adequacy of the Transmission System to accommodate a request for either Firm Point-To-Point Transmission Service or Network Integration Transmission Service and (ii) whether any additional costs may be incurred in order to provide transmission service.

1.44 *Third-Party Sale:* Any sale for resale in interstate commerce to a Power Purchaser that is not designated as part of Network Load under the Network Integration Transmission Service.

1.45 *Transmission Customer:* Any Eligible Customer (or its Designated Agent) that (i) executes a Service Agreement or (ii) requests in writing that the Transmission Provider provide transmission service without a Service Agreement, pursuant to Section 15.3 or 29.1 of the Tariff. This term is used in the Part I Common Service Provisions to include customers receiving transmission service under Part II and Part III of this Tariff.

1.46 *Transmission Provider:* Southwestern Power Administration, which owns, controls, or operates the facilities used for the transmission of electric energy in interstate commerce and provides transmission service under the Tariff.

1.47 *Transmission Provider's Monthly Transmission System Peak:* The maximum firm usage of the Transmission Provider's Transmission System in a calendar month.

1.48 *Transmission Service:* Point-To-Point Transmission Service provided under Part II of the Tariff on a firm and non-firm basis.

1.49 *Transmission System:* The facilities owned, controlled or operated by the Transmission Provider that are used to provide transmission service under Part II and Part III of the Tariff.

2 Initial Allocation and Renewal Procedures

2.1 *Initial Allocation of Available Transmission Capability:* For purposes of determining whether existing capability on the Transmission Provider's Transmission System is adequate to accommodate a request for firm service under this Tariff, all Completed Applications for new firm transmission service received during the initial sixty (60) day period commencing with the effective date of the Tariff will be deemed to have been filed simultaneously. A lottery system conducted by an independent party shall be used to assign priorities for Completed Applications filed simultaneously. All Completed Applications for firm transmission service received after the initial sixty (60) day period shall be assigned a priority pursuant to Section 13.2.

2.2 *Reservation Priority For Existing Firm Service Customers:* Existing firm service customers (wholesale requirements and transmission-only, with a contract term of one-year or more), have the right to continue to take transmission service from the Transmission Provider when the contract expires, rolls over or is renewed. This transmission reservation priority is independent of whether the existing customer continues to purchase capacity and energy from the Transmission Provider or elects to purchase capacity and energy from another supplier. If at the end of the contract term, the Transmission Provider's Transmission System cannot accommodate all of the requests for transmission service, the existing firm service customer must agree to accept a contract term at least equal to a competing request by any new Eligible Customer and to pay the current rate for such service. This transmission reservation priority for existing firm service customers is an ongoing right that may be exercised at the end of all firm contract terms of one-year or longer.

3 Ancillary Services

Ancillary Services are needed with transmission service to maintain reliability within and among the Control Areas affected by the transmission service. The Transmission Provider is required to provide (or offer to arrange with the local Control Area operator as discussed below), and the Transmission Customer is required to purchase, the following Ancillary Services (i) Scheduling, System Control and Dispatch, and (ii) Reactive Supply and Voltage Control from Generation Sources.

The Transmission Provider is required to offer to provide (or offer to arrange with the local Control Area operator as discussed below) the following Ancillary Services only to the Transmission Customer serving load within the Transmission Provider's Control Area (i) Regulation and Frequency Response, (ii) Energy Imbalance, (iii) Operating Reserve—Spinning, and (iv) Operating Reserve—Supplemental. The Transmission Customer serving load within the Transmission Provider's Control Area is required to acquire these Ancillary Services, whether from the Transmission Provider, from a third party, or by self-supply. The Transmission Customer may not decline the Transmission Provider's offer of Ancillary Services unless it demonstrates that it has acquired the Ancillary Services from another source. However, when sufficient Federal generation is not available to provide the required Ancillary Services, the Transmission Provider will offer to make every effort to purchase Ancillary Services from others, as available. The costs of such purchases on behalf of a Transmission Customer will be passed directly through to that Transmission Customer. The Transmission Customer must list in its Application which Ancillary Services it will purchase from the Transmission Provider.

If the Transmission Provider is a utility providing transmission service, but is not a Control Area operator, it may be unable to provide some or all of the Ancillary Services. In this case, the Transmission Provider can fulfill its obligation to provide Ancillary Services by acting as the Transmission Customer's agent to secure these Ancillary Services from the Control Area operator. The Transmission Customer may elect to (i) have the Transmission Provider act as its agent, (ii) secure the Ancillary Services directly from the Control Area operator, or (iii) secure the Ancillary Services (discussed in Schedules 3, 4, 5, and 6) from a third party or by self-supply when technically feasible.

The Transmission Provider shall specify the rate treatment and all related terms and conditions in the event of an unauthorized use of Ancillary Services by the Transmission Customer.

The specific Ancillary Services, prices and/or compensation methods are described on the Schedules that are attached to and made a part of the Tariff. Three principal requirements apply to discounts for Ancillary Services provided by the Transmission Provider in conjunction with its provision of transmission service as follows: (1) Any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers solely by posting on the OASIS, (2) any customer-initiated requests for discounts (including requests for use by one's wholesale merchant or an affiliate's use) must occur solely by posting on the OASIS, and (3) once a discount is negotiated, details must be immediately posted on the OASIS. A discount agreed upon for an Ancillary Service must be offered for

the same period to all Eligible Customers on the Transmission Provider's system. Sections 3.1 through 3.6 below list the six Ancillary Services.

3.1 *Scheduling, System Control and Dispatch Service:* The rates and/or methodology are described in Schedule 1.

3.2 *Reactive Supply and Voltage Control from Generation Sources Service:* The rates and/or methodology are described in Schedule 2.

3.3 *Regulation and Frequency Response Service:* Where applicable the rates and/or methodology are described in Schedule 3.

3.4 *Energy Imbalance Service:* Where applicable the rates and/or methodology are described in Schedule 4.

3.5 *Operating Reserve—Spinning Reserve Service:* Where applicable the rates and/or methodology are described in Schedule 5.

3.6 *Operating Reserve—Supplemental Reserve Service:* Where applicable the rates and/or methodology are described in Schedule 6.

4 Open Access Same-Time Information System (OASIS)

Terms and conditions regarding Open Access Same-Time Information System and standards of conduct are set forth in 18 CFR 37 of the Commission's regulations (Open Access Same-Time Information System and Standards of Conduct for Public Utilities). In the event available transmission capability as posted on the OASIS is insufficient to accommodate a request for firm transmission service, additional studies may be required as provided by this Tariff pursuant to Sections 19 and 32.

5 Local Furnishing Bonds

5.1 *Transmission Providers That Own Facilities Financed by Local Furnishing Bonds:* This provision is applicable only to Transmission Providers that have financed facilities for the local furnishing of electric energy with tax-exempt bonds, as described in Section 142(f) of the Internal Revenue Code (''local furnishing bonds''). Notwithstanding any other provision of this Tariff, the Transmission Provider shall not be required to provide transmission service to any Eligible Customer pursuant to this Tariff if the provision of such transmission service would jeopardize the tax-exempt status of any local furnishing bond(s) used to finance the Transmission Provider's facilities that would be used in providing such transmission service.

5.2 *Alternative Procedures for Requesting Transmission Service:*

(i) If the Transmission Provider determines that the provision of transmission service requested by an Eligible Customer would jeopardize the tax-exempt status of any local furnishing bond(s) used to finance its facilities that would be used in providing such transmission service, it shall advise the Eligible Customer within thirty (30) days of receipt of the Completed Application.

(ii) If the Eligible Customer thereafter renews its request for the same transmission service referred to in (I) by tendering an application under Section 211 of the Federal Power Act, the Transmission Provider, within ten (10) days of receiving a copy of the Section 211 application, will waive its rights to a request for service under Section 213(a) of the Federal Power Act and to the issuance of a proposed order under Section 212(c) of the Federal Power Act. The Commission, upon receipt of the Transmission Provider's waiver of its rights to a request for service under Section 213(a) of the Federal Power Act and to the issuance of a proposed order under Section 212(c) of the Federal Power Act, shall issue an order under Section 211 of the Federal Power Act. Upon issuance of the order under Section 211 of the Federal Power Act, the Transmission Provider shall be required to provide the requested transmission service in accordance with the terms and conditions of this Tariff.

6 Reciprocity

A Transmission Customer receiving transmission service under this Tariff agrees to provide comparable transmission service that it is capable of providing to the Transmission Provider on similar terms and conditions over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer and over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer's corporate affiliates. A Transmission Customer that is a member of a power pool or Regional Transmission Group also agrees to provide comparable transmission service to the members of such power pool and Regional Transmission Group on similar terms and conditions over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer and over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer's corporate affiliates.

This reciprocity requirement applies not only to the Transmission Customer that obtains transmission service under the Tariff, but also to all parties to a transaction that involves the use of transmission service under the Tariff, including the power seller, buyer and any intermediary, such as a power marketer. This reciprocity requirement also applies to any Eligible Customer that owns, controls or operates transmission facilities that uses an intermediary, such as a power marketer, to request transmission service under the Tariff. If the Transmission Customer does not own, control or operate transmission facilities, it must include in its Application a sworn statement of one of its duly authorized officers or other representatives that the purpose of its Application is not to assist an Eligible Customer to avoid the requirements of this provision.

7 Billing and Payment

7.1 *Billing Procedure:* Within a reasonable time after the first day of each month, the Transmission Provider shall submit an invoice to the Transmission Customer for the charges for all services furnished under the Tariff during the preceding month. The invoice shall be paid by the Transmission Customer within twenty (20) days of receipt. All payments shall be made in immediately available funds payable to the Transmission Provider, or by wire transfer to a bank named by the Transmission Provider.

7.2 *Interest on Unpaid Balances:* Interest on any unpaid amounts (including amounts placed in escrow) shall be calculated in accordance with the methodology specified for interest on refunds in the Commission's regulations at 18 CFR 35.19a(a)(2)(iii). Interest on delinquent amounts shall be calculated from the due date of the bill to the date of payment. When payments are made by mail, bills shall be considered as having been paid on the date of receipt by the Transmission Provider.

7.3 *Customer Default:* In the event the Transmission Customer fails, for any reason other than a billing dispute as described below, to make payment to the Transmission Provider on or before the due date as described above, and such failure of payment is not corrected within thirty (30) calendar days after the Transmission Provider notifies the Transmission Customer to cure such failure, a default by the Transmission Customer shall be deemed to exist. Within the same 30 calendar days after notice of failure to make payment, the Transmission Customer shall have the right of appeal to the Administrator, Southwestern Power Administration. The Transmission Provider shall

continue service until the Administrator makes a determination on the Transmission Customer's appeal. Service may be terminated without further notice if Transmission Customer's appeal is denied. In the event of a billing dispute between the Transmission Provider and the Transmission Customer, the Transmission Provider will continue to provide service under the Service Agreement as long as the Transmission Customer (i) continues to make all payments not in dispute, and (ii) pays into an independent escrow account the portion of the invoice in dispute, pending resolution of such dispute. If the Transmission Customer fails to meet these two requirements for continuation of service, then the Transmission Provider may provide notice to the Transmission Customer of its intention to suspend service in sixty (60) days, in accordance with Commission policy.

7.4 *Payment Process:* Payment of amounts due to the Transmission Provider may be made through electronic funds transfer (EFT) or may be submitted as checks and mailed to:

Southwestern Power Administration
P.O. Box 845994
Dallas, Texas 75284–5994

EFT payments shall conform to the Transmission Provider's protocols for electronic transfer of funds in effect at the time of the payment. The designation of the address where payment is to be submitted may be changed by the Transmission Provider upon 30 days' written notice to the Transmission Customer. The Parties shall exchange such reports and information as either Party requires for billing purposes.

7.5 *Net Billing:* By agreement of the Parties, payments due the Transmission Provider by the Transmission Customer may be offset against payments due the Transmission Customer by the Transmission Provider for the sale or exchange of electric power, energy, and other services. For services included in net billing procedures, payments due the Transmission Customer in any month shall be offset against payments due the Transmission Provider in such month, and the resulting net balance shall be paid by the Transmission Customer when the balance exists in favor of the Transmission Provider, and shall be applied against future payments due the Transmission Provider when the balance exists in favor of the Transmission Customer. Net billing procedures shall not be used for any amounts which the Transmission Provider determines, in its sole judgment, to be in dispute.

8 Accounting for the Transmission Provider's Use of the Tariff

The Transmission Provider shall record the following amounts, as outlined below.

8.1 *Transmission Revenues:* Include in a separate operating revenue account or subaccount the revenues it receives from Transmission Service when making Third-Party Sales under Part II of the Tariff.

8.2 *Study Costs and Revenues:* Include in a separate transmission operating expense account or subaccount, costs properly chargeable to expense that are incurred to perform any System Impact Studies or Facilities Studies which the Transmission Provider conducts to determine if it must construct new transmission facilities or upgrades necessary for its own uses, including making Third-Party Sales under the Tariff; and include in a separate operating revenue account or subaccount the revenues received for System Impact Studies or Facilities Studies performed when such amounts are separately stated and identified in the Transmission Customer's billing under the Tariff.

9 Regulatory Filings

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder.

10 Force Majeure and Indemnification

10.1 *Force Majeure:* An event of Force Majeure means any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any Curtailment, order, regulation or restriction imposed by governmental military or lawfully established civilian authorities, or any other cause beyond a Party's control. A Force Majeure event does not include an act of negligence or intentional wrongdoing. Neither the Transmission Provider nor the Transmission Customer will be considered in default as to any obligation under this Tariff if prevented from fulfilling the obligation due to an event of Force Majeure. However, a Party whose performance under this Tariff is hindered by an event of Force Majeure shall make all reasonable efforts to perform its obligations under this Tariff.

10.2 *Indemnification:* The Transmission Customer shall at all times indemnify, defend, and save the Transmission Provider harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider's performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of negligence or intentional wrongdoing by the Transmission Provider. The liability of the Transmission Provider shall be determined in accordance with the provisions of the Federal Tort Claims Act, as amended.

11 Creditworthiness

For the purpose of determining the ability of the Transmission Customer to meet its obligations related to service hereunder, the Transmission Provider may require reasonable credit review procedures. This review shall be made in accordance with standard commercial practices. In addition, the Transmission Provider may require the Transmission Customer to provide and maintain in effect during the term of the Service Agreement, an unconditional and irrevocable letter of credit as security to meet its responsibilities and obligations under the Tariff, or an alternative form of security proposed by the Transmission Customer and acceptable to the Transmission Provider and consistent with commercial practices established by the Uniform Commercial Code that protects the Transmission Provider against the risk of non-payment.

12 Dispute Resolution Procedures

12.1 *Internal Dispute Resolution Procedures:* Any dispute between a Transmission Customer and the Transmission Provider involving transmission service under the Tariff shall be referred to a designated senior representative of the Transmission Provider and a senior representative of the Transmission Customer for resolution on an informal basis as promptly as practicable. In the event the designated representatives are unable to resolve the dispute within thirty (30) days (or such other period as the Parties may agree upon) by mutual agreement, such dispute may be resolved in accordance with the procedures set forth below.

12.2 *External Dispute Resolution Procedures:* Any complaint arising concerning implementation of this Tariff shall be resolved as follows:

(A) Through a dispute resolution process, pursuant to the terms of a regional transmission association governing agreement of which both Parties are members; or

(B) If both Parties are not members of the same regional transmission association, through a dispute resolution process agreed to by the Parties, or through a transmission complaint filed with the Commission, to the extent the Commission has jurisdiction over such dispute.

12.3 *Alternative Disputes Resolution Act:* Any dispute regarding service provided under the Service Agreement will be resolved in a manner consistent with the Administrative Disputes Resolution Act, as amended, subject to statutory and regulatory limits on the Transmission Provider's authority to submit disputes to arbitration.

12.4 *Rights Under The Federal Power Act:* Nothing in this section shall restrict the rights of any party to file a Complaint with the Commission under relevant provisions of the Federal Power Act.

Part II. Point-to-Point Transmission Service

Preamble

The Transmission Provider will provide Firm and Non-Firm Point-To-Point Transmission Service pursuant to the applicable terms and conditions of this Tariff. Point-To-Point Transmission Service is for the receipt of capacity and energy at designated Point(s) of Receipt and the transmission of such capacity and energy to designated Point(s) of Delivery.

13 Nature of Firm Point-To-Point Transmission Service

13.1 *Term:* The minimum term of Firm Point-To-Point Transmission Service shall be one day and the maximum term shall be specified in the Service Agreement.

13.2 *Reservation Priority:* Long-Term Firm Point-To-Point Transmission Service shall be available on a first-come, first-served basis *i.e.*, in the chronological sequence in which each Transmission Customer reserved service. Reservations for Short-Term Firm Point-To-Point Transmission Service will be conditional based upon the length of the requested transaction. If the Transmission System becomes oversubscribed, requests for longer term service may preempt requests for shorter term service up to the following deadlines; one day before the commencement of daily service, one week before the commencement of weekly service, and one month before the commencement of monthly service. Before the conditional reservation deadline, if available transmission capability is insufficient to satisfy all Applications, an Eligible Customer with a reservation for shorter term service has the right of first refusal to match any longer term reservation before losing its reservation priority. A longer term competing request for Short-Term Firm Point-To-Point Transmission Service will be granted if the Eligible Customer with the right of first refusal does not agree to match the competing request within 24 hours (or earlier if necessary to comply with the scheduling deadlines provided in Section 13.8) from being notified by the Transmission Provider of a longer-term competing request for Short-Term Firm Point-To-Point Transmission Service. After the conditional reservation deadline, service will commence pursuant to the terms of Part II of the Tariff. Firm Point-To-Point Transmission Service will always have a reservation priority over Non-Firm Point-To-Point Transmission Service under the Tariff. All Long-Term Firm Point-To-Point Transmission Service will have equal reservation priority with Native Load Customers and Network Customers. Reservation priorities for existing firm service customers are provided in Section 2.2.

13.3 *Use of Firm Transmission Service by the Transmission Provider:* The Transmission Provider will be subject to the rates, terms and conditions of Part II of the Tariff when making Third-Party Sales under agreements executed on or after March 9, 1998. The Transmission Provider will maintain separate accounting, pursuant to Section 8, for any use of the Point-To-Point Transmission Service to make Third-Party Sales.

13.4 *Service Agreements:* The Transmission Provider shall offer a standard form Firm Point-To-Point Transmission Service Agreement (Attachment A) to an Eligible Customer when it submits a Completed Application for Long-Term Firm Point-To-Point Transmission Service. The Transmission Provider shall offer a standard form Firm Point-to-Point Transmission Service Agreement (Attachment B) to an Eligible Customer when it first submits a Completed Application for Short-Term Firm Point-To-Point Transmission Service pursuant to the Tariff.

13.5 *Transmission Customer Obligations for Facility Additions or Redispatch Costs:* In cases where the Transmission Provider determines that the Transmission System is not capable of providing Firm Point-To-Point Transmission Service without (1) degrading or impairing the reliability of service to Native Load Customers, Network Customers, and other Transmission Customers taking Firm Point-To-Point Transmission Service, or (2) interfering with the Transmission Provider's ability to meet prior firm contractual commitments to others, the Transmission Provider will be obligated to expand or upgrade its Transmission System pursuant to the terms of Section 15.4, and subject to the Transmission Provider's authority under Federal law to complete the expansion or upgrade. The Transmission Customer must agree to compensate the Transmission Provider in advance for any necessary transmission facility additions pursuant to the terms of Section 27. To the extent the Transmission Provider can relieve any system constraint more economically by redispatching the Transmission Provider's resources than through constructing Network Upgrades, it shall do so, provided that the Eligible Customer agrees to compensate the Transmission Provider pursuant to the terms of Section 27. Any redispatch, Network Upgrade or Direct Assignment Facilities costs to be charged to the Transmission Customer on an incremental basis under the Tariff will be specified in the Service Agreement or a separate agreement, as appropriate, prior to initiating service.

13.6 *Curtailment of Firm Transmission Service:* In the event that a Curtailment on the Transmission Provider's Transmission System, or a portion thereof, is required to maintain reliable operation of such system, Curtailments will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail service to Network Customers and Transmission Customers taking Firm Point-To-Point Transmission Service on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers. All Curtailments will be made on a non-discriminatory basis; however, Non-Firm Point-To-Point Transmission Service shall be subordinate to Firm Transmission Service. When the Transmission Provider determines that an electrical emergency exists on its Transmission System and implements emergency procedures to Curtail Firm Transmission Service, the Transmission Customer shall make the required reductions upon request of the Transmission Provider. However, the

Transmission Provider reserves the right to Curtail, in whole or in part, any Firm Transmission Service provided under the Tariff when, in the Transmission Provider's sole discretion, an emergency or other unforeseen condition impairs or degrades the reliability of its Transmission System. The Transmission Provider will notify all affected Transmission Customers in a timely manner of any scheduled Curtailments.

13.7 *Classification of Firm Transmission Service:* (a) The Transmission Customer taking Firm Point-To-Point Transmission Service may (1) change its Receipt and Delivery Points to obtain service on a non-firm basis consistent with the terms of Section 22.1 or (2) request a modification of the Points of Receipt or Delivery on a firm basis pursuant to the terms of Section 22.2.

(b) The Transmission Customer may purchase transmission service to make sales of capacity and energy from multiple generating units that are on the Transmission Provider's Transmission System. For such a purchase of transmission service, the resources will be designated as multiple Points of Receipt, unless the multiple generating units are at the same generating plant in which case the units would be treated as a single Point of Receipt.

(c) The Transmission Provider shall provide firm deliveries of capacity and energy from the Point(s) of Receipt to the Point(s) of Delivery. Each Point of Receipt at which firm transmission capacity is reserved by the Transmission Customer shall be set forth in the Firm Point-To-Point Service Agreement for Long-Term Firm Transmission Service along with a corresponding capacity reservation associated with each Point of Receipt. Points of Receipt and corresponding capacity reservations shall be as mutually agreed upon by the Parties for Short-Term Firm Transmission. Each Point of Delivery at which firm transmission capacity is reserved by the Transmission Customer shall be set forth in the Firm Point-To-Point Service Agreement for Long-Term Firm Transmission Service along with a corresponding capacity reservation associated with each Point of Delivery. Points of Delivery and corresponding capacity reservations shall be as mutually agreed upon by the Parties for Short-Term Firm Transmission. The greater of either (1) the sum of the capacity reservations at the Point(s) of Receipt, or (2) the sum of the capacity reservations at the Point(s) of Delivery shall be the Transmission Customer's Reserved Capacity. The Transmission Customer will be billed for its Reserved Capacity under the terms of Schedule 7. The Transmission Customer may not exceed its firm capacity reserved at each Point of Receipt and each Point of Delivery except as otherwise specified in Section 22. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that a Transmission Customer, (including Third-Party Sales by the Transmission Provider) exceeds its firm reserved capacity at any Point of Receipt or Point of Delivery.

13.8 *Scheduling of Firm Point-To-Point Transmission Service:* Schedules for the Transmission Customer's Firm Point-To-Point Transmission Service must be submitted to the Transmission Provider no later than 2:00 p.m. of the day prior to commencement of such service. Schedules submitted after 2:00 p.m. will be accommodated, if practicable. Hour-to-hour schedules of any capacity and energy that is to be delivered must be stated in increments of 1,000 kW per hour. Transmission Customers within the Transmission Provider's service area with multiple requests for Transmission Service at a Point of Receipt, each of which is under 1,000 kW per hour, may consolidate their service requests at a common point of receipt into units of 1,000 kW per hour for scheduling and billing purposes.

Scheduling changes will be permitted up to twenty (20) minutes before the start of the next clock hour provided that the Delivering Party and Receiving Party also agree to the schedule modification. The Transmission Provider will furnish to the Delivering Party's system operator, hour-to-hour schedules equal to those furnished by the Receiving Party (unless reduced for losses) and shall deliver the capacity and energy provided by such schedules. Should the Transmission Customer, Delivering Party or Receiving Party revise or terminate any schedule, such party shall immediately notify the Transmission Provider, and the Transmission Provider shall have the right to adjust accordingly the schedule for capacity and energy to be received and to be delivered.

14 Nature of Non-Firm Point-To-Point Transmission Service

14.1 *Term:* Non-Firm Point-To-Point Transmission Service will be available for periods ranging from one (1) hour to one (1) month. However, a Purchaser of Non-Firm Point-To-Point Transmission Service will be entitled to reserve a sequential term of service (such as a sequential monthly term without having to wait for the initial term to expire before requesting another monthly term) so that the total time period for which the reservation applies is greater than one month, subject to the requirements of Section 18.3.

14.2 *Reservation Priority:* Non-Firm Point-To-Point Transmission Service shall be available from transmission capability in excess of that needed for reliable service to Native Load Customers, Network Customers, and other Transmission Customers taking Long-Term and Short-Term Firm Point-To-Point Transmission Service. A higher priority will be assigned to reservations with a longer duration of service. In the event the Transmission System is constrained, competing requests of equal duration will be prioritized based on the highest price offered by the Eligible Customer for the Transmission Service. Eligible Customers that have already reserved shorter term service have the right of first refusal to match any longer term reservation before being preempted. A longer term competing request for Non-Firm Point-To-Point Transmission Service will be granted if the Eligible Customer with the right of first refusal does not agree to match the competing request: (a) Immediately for hourly Non-Firm Point-To-Point Transmission Service after notification by the Transmission Provider; and, (b) within 24 hours (or earlier if necessary to comply with the scheduling deadlines provided in Section 14.6) for Non-Firm Point-To-Point Transmission Service other than hourly transactions after notification by the Transmission Provider. Transmission service for Network Customers from resources other than designated Network Resources will have a higher priority than any Non-Firm Point-To-Point Transmission Service. Non-Firm Point-To-Point Transmission Service over secondary Point(s) of Receipt and Point(s) of Delivery will have the lowest reservation priority under the Tariff.

14.3 *Use of Non-Firm Point-To-Point Transmission Service by the Transmission Provider:* The Transmission Provider will be subject to the rates, terms and conditions of Part II of the Tariff when making Third-Party Sales under agreements executed on or after March 9, 1998. The Transmission Provider will maintain separate accounting, pursuant to Section 8, for any use of Non-Firm Point-To-Point Transmission Service to make Third-Party Sales.

14.4 *Service Agreements:* The Transmission Provider shall offer a standard form Non-Firm Point-To-Point Transmission Service Agreement (Attachment B) to an Eligible Customer when it first submits a Completed

Application for Non-Firm Point-To-Point Transmission Service pursuant to the Tariff.

14.5 *Classification of Non-Firm Point-To-Point Transmission Service:* Non-Firm Point-To-Point Transmission Service shall be offered under terms and conditions contained in Part II of the Tariff. The Transmission Provider undertakes no obligation under the Tariff to plan its Transmission System in order to have sufficient capacity for Non-Firm Point-To-Point Transmission Service. Parties requesting Non-Firm Point-To-Point Transmission Service for the transmission of firm power do so with the full realization that such service is subject to availability and to Curtailment or Interruption under the terms of the Tariff. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that a Transmission Customer (including Third-Party Sales by the Transmission Provider) exceeds its non-firm capacity reservation. Non-Firm Point-To-Point Transmission Service shall include transmission of energy on an hourly basis and transmission of scheduled short-term capacity and energy on a daily, weekly or monthly basis, but not to exceed one month's reservation for any one Application under Schedule 8.

14.6 *Scheduling of Non-Firm Point-To-Point Transmission Service:* Schedules for Non-Firm Point-To-Point Transmission Service must be submitted to the Transmission Provider no later than 2:00 p.m. of the day prior to commencement of such service. Schedules submitted after 2:00 p.m. will be accommodated, if practicable. Hour-to-hour schedules of energy that are to be delivered must be stated in increments of 1,000 kW per hour. Transmission Customers within the Transmission Provider's service area with multiple requests for Transmission Service at a Point of Receipt, each of which is under 1,000 kW per hour, may consolidate their schedules at a common Point of Receipt into units of 1,000 kW per hour. Scheduling changes will be permitted up to twenty (20) minutes before the start of the next clock hour provided that the Delivering Party and Receiving Party also agree to the schedule modification. The Transmission Provider will furnish to the Delivering Party's system operator, hour-to-hour schedules equal to those furnished by the Receiving Party (unless reduced for losses) and shall deliver the capacity and energy provided by such schedules. Should the Transmission Customer, Delivering Party or Receiving Party revise or terminate any schedule, such party shall immediately notify the Transmission Provider, and the Transmission Provider shall have the right to adjust accordingly the schedule for capacity and energy to be received and to be delivered.

14.7 *Curtailment or Interruption of Service:* The Transmission Provider reserves the right to Curtail, in whole or in part, Non-Firm Point-To-Point Transmission Service provided under the Tariff for reliability reasons when an emergency or other unforeseen condition threatens to impair or degrade the reliability of its Transmission System. The Transmission Provider reserves the right to Interrupt, in whole or in part, Non-Firm Point-To-Point Transmission Service provided under the Tariff for economic reasons in order to accommodate (1) a request for Firm Transmission Service, (2) a request for Non-Firm Point-To-Point Transmission Service of greater duration, (3) a request for Non-Firm Point-To-Point Transmission Service of equal duration with a higher price, or (4) transmission service for Network Customers from non-designated resources. The Transmission Provider also will discontinue or reduce service to the Transmission Customer to the extent that deliveries for transmission are discontinued or reduced at the Point(s) of Receipt. Where required, Curtailments or Interruptions will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint; however, Non-Firm Point-To-Point Transmission Service shall be subordinate to Firm Transmission Service. If multiple transactions require Curtailment or Interruption, to the extent practicable and consistent with Good Utility Practice, Curtailments or Interruptions will be made to transactions of the shortest term (e.g., hourly non-firm transactions will be Curtailed or Interrupted before daily non-firm transactions and daily non-firm transactions will be Curtailed or Interrupted before weekly non-firm transactions). Transmission service for Network Customers from resources other than designated Network Resources will have a higher priority than any Non-Firm Point-To-Point Transmission Service under the Tariff. Non-Firm Point-To-Point Transmission Service over secondary Point(s) of Receipt and Point(s) of Delivery will have a lower priority than any Non-Firm Point-To-Point Transmission Service under the Tariff. The Transmission Provider will provide advance notice of Curtailment or Interruption where such notice can be provided consistent with Good Utility Practice.

15 Service Availability

15.1 *General Conditions:* The Transmission Provider will provide Firm and Non-Firm Point-To-Point Transmission Service over, on or across its Transmission System to any Transmission Customer that has met the requirements of Section 16.

15.2 *Determination of Available Transmission Capability:* A description of the Transmission Provider's specific methodology for assessing available transmission capability posted on the Transmission Provider's OASIS (Section 4) is contained in Attachment C of the Tariff. In the event sufficient transmission capability may not exist to accommodate a service request, the Transmission Provider will respond by performing a System Impact Study.

15.3 *Initiating Service in the Absence of an Executed Service Agreement:* If the Transmission Provider and the Transmission Customer requesting Firm or Non-Firm Point-To-Point Transmission Service cannot agree on all the terms and conditions of the Point-To-Point Service Agreement, the Transmission Provider shall commence providing Transmission Service subject to the Transmission Customer agreeing to (i) compensate the Transmission Provider at the existing rate placed in effect pursuant to Federal law, regulations, and policies, and (ii) comply with the terms and conditions of the Tariff including paying the appropriate processing fees in accordance with the terms of Section 17.3. If the Transmission Customer cannot accept all of the terms and conditions of the offered Service Agreement, the Transmission Customer may request resolution of the unacceptable terms and conditions under Section 12, Dispute Resolution Procedures, of the Tariff. Any changes resulting from the dispute resolution procedures will be effective upon the date of initial service.

15.4 *Obligation to Provide Transmission Service that Requires Expansion or Modification of the Transmission System:* If the Transmission Provider determines that it cannot accommodate a Completed Application for Firm Point-To-Point Transmission Service because of insufficient capability on its Transmission System, the Transmission Provider will use due diligence to expand or modify its Transmission System to provide the requested Firm Transmission Service, provided the Transmission Customer agrees to compensate the Transmission Provider in advance for such costs pursuant to the terms of Section 27. The

Transmission Provider will conform to Good Utility Practice in determining the need for new facilities and in the design and construction of such facilities. The obligation applies only to those facilities that the Transmission Provider has the right to expand or modify.

15.5 *Deferral of Service:* The Transmission Provider may defer providing service until it completes construction of new transmission facilities or upgrades needed to provide Firm Point-To-Point Transmission Service whenever the Transmission Provider determines that providing the requested service would, without such new facilities or upgrades, impair or degrade reliability to any existing firm services.

15.6 *Other Transmission Service Schedules:* Eligible Customers receiving transmission service under other agreements on file with the Commission may continue to receive transmission service under those agreements until such time as those agreements may be modified by the Commission.

15.7 *Real Power Losses:* Real Power Losses are associated with all transmission service. The Transmission Provider is not obligated to provide Real Power Losses. The Transmission Customer is responsible for replacing losses associated with all transmission service as calculated by the Transmission Provider. The applicable Real Power Loss factors are specified in the Transmission Provider's rate schedule for transmission service, and may be adjusted, from time to time, in accordance with the results of periodic studies.

16 Transmission Customer Responsibilities

16.1 *Conditions Required of Transmission Customers:* Point-To-Point Transmission Service shall be provided by the Transmission Provider only if the following conditions are satisfied by the Transmission Customer:

a. The Transmission Customer has pending a Completed Application for service;

b. The Transmission Customer meets the creditworthiness criteria set forth in Section 11;

c. The Transmission Customer will have arrangements in place for any other transmission service necessary to effect the delivery from the generating source to the Transmission Provider prior to the time service under Part II of the Tariff commences;

d. The Transmission Customer agrees to pay for any facilities constructed and chargeable to such Transmission Customer under Part II of the Tariff, whether or not the Transmission Customer takes service for the full term of its reservation; and

e. The Transmission Customer has executed a Point-To-Point Service Agreement or has agreed to receive service pursuant to Section 15.3.

16.2 *Transmission Customer Responsibility for Third-Party Arrangements:* Any scheduling arrangements that may be required by other electric systems shall be the responsibility of the Transmission Customer requesting service. The Transmission Customer shall provide, unless waived by the Transmission Provider, notification to the Transmission Provider identifying such systems and authorizing them to schedule the capacity and energy to be transmitted by the Transmission Provider pursuant to Part II of the Tariff on behalf of the Receiving Party at the Point of Delivery or the Delivering Party at the Point of Receipt. However, the Transmission Provider will undertake reasonable efforts to assist the Transmission Customer in making such arrangements, including, without limitation, providing any information or data required by such other electric system pursuant to Good Utility Practice.

17 Procedures for Arranging Firm Point-To-Point Transmission Service

17.1 *Application:* A request for Firm Point-To-Point Transmission Service for periods of one year or longer must contain a written Application to Administrator, Southwestern Power Administration, One West Third Street, Suite 1400, Tulsa, Oklahoma 74103, at least sixty (60) days in advance of the calendar month in which service is to commence. The Transmission Provider will consider requests for such firm service on shorter notice when feasible. Requests for firm service for periods of less than one year shall be subject to expedited procedures that shall be negotiated between the Parties within the time constraints provided in Section 17.5. All Firm Point-To-Point Transmission Service requests should be submitted by entering the information listed below on the Transmission Provider's OASIS. Prior to implementation of the Transmission Provider's OASIS, a Completed Application may be submitted by (i) transmitting the required information to the Transmission Provider by telefax, or (ii) providing the information by telephone over the Transmission Provider's time-recorded telephone line. Each of these methods will provide a time-stamped record for establishing the priority of the Application.

17.2*Completed Application:* A Completed Application shall provide all of the information included in 18 CFR 2.20 including but not limited to the following:

(i) The identity, address, telephone number and facsimile number of the entity requesting service;

(ii) A statement that the entity requesting service is, or will be upon commencement of service, an Eligible Customer under the Tariff;

(iii) The location of the Point(s) of Receipt and Point(s) of Delivery and the identities of the Delivering Parties and the Receiving Parties;

(iv) The location of the generating facility(ies) supplying the capacity and energy and the location of the load ultimately served by the capacity and energy transmitted. The Transmission Provider will treat this information as confidential except to the extent that disclosure of this information is required by the Tariff, by Federal law, by regulatory or judicial order, for reliability purposes pursuant to Good Utility Practice or pursuant to RTG transmission information sharing agreements. The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations;

(v) A description of the supply characteristics of the capacity and energy to be delivered;

(vi) An estimate of the capacity and energy expected to be delivered to the Receiving Party;

(vii) The Service Commencement Date and the term of the requested Transmission Service; and

(viii) The transmission capacity requested for each Point of Receipt and each Point of Delivery on the Transmission Provider's Transmission System; customers may combine their requests for service in order to satisfy the minimum transmission capacity requirement.

The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations.

17.3 *Processing Fee:* A Completed Application for Firm Point-To-Point Transmission Service also shall include a nonrefundable processing fee of $300 for all requests for Firm Transmission Service of one year or longer. This fee does not apply to costs to complete System Impact Studies or Facility Studies or to add new facilities.

17.4 *Notice of Deficient Application:* If an Application fails to meet the requirements of the Tariff, the Transmission Provider shall notify the entity requesting service within fifteen

(15) days of receipt of the reasons for such failure. The Transmission Provider will attempt to remedy minor deficiencies in the Application through informal communications with the Eligible Customer. If such efforts are unsuccessful, the Transmission Provider shall return the Application. Upon receipt of a new or revised Application that fully complies with the requirements of Part II of the Tariff, the Eligible Customer shall be assigned a new priority consistent with the date of the new or revised Application.

17.5 *Response to a Completed Application:* Following receipt of a Completed Application for Firm Point-To-Point Transmission Service, the Transmission Provider shall make a determination of available transmission capability as required in Section 15.2. The Transmission Provider shall notify the Eligible Customer as soon as practicable, but not later than thirty (30) days after the date of receipt of a Completed Application either (i) if it will be able to provide service without performing a System Impact Study or (ii) if such a study is needed to evaluate the impact of the Application pursuant to Section 19.1. Responses by the Transmission Provider must be made as soon as practicable to all completed applications (including applications by its own merchant function) and the timing of such responses must be made on a non-discriminatory basis.

17.6 *Execution of a Service Agreement:* Whenever the Transmission Provider determines that a System Impact Study is not required and that the service can be provided, it shall notify the Eligible Customer as soon as practicable but no later than thirty (30) days after receipt of the Completed Application. Where a System Impact Study is required, the provisions of Section 19 will govern the execution of a Service Agreement. Failure of an Eligible Customer to execute and return the Service Agreement or request service without an executed service agreement pursuant to Section 15.3 within fifteen (15) days after it is tendered by the Transmission Provider will be deemed a withdrawal and termination of the Application. Nothing herein limits the right of an Eligible Customer to file another Application after such withdrawal and termination.

17.7 *Extensions for Commencement of Service:* The Transmission Customer can obtain up to five (5) one-year extensions for the commencement of service. The Transmission Customer may postpone service by paying a non-refundable annual reservation fee equal to one-month's charge for Firm Transmission Service for each year or fraction thereof. If during any extension for the commencement of service an Eligible Customer submits a Completed Application for Firm Transmission Service, and such request can be satisfied only by releasing all or part of the Transmission Customer's Reserved Capacity, the original Reserved Capacity will be released unless the following condition is satisfied. Within thirty (30) days, the original Transmission Customer agrees to pay the Firm Point-To-Point transmission rate for its Reserved Capacity concurrent with the new Service Commencement Date. In the event the Transmission Customer elects to release the Reserved Capacity, the reservation fees or portions thereof previously paid will be forfeited.

18 Procedures for Arranging Non-Firm Point-To-Point Transmission Service

18.1 *Application:* Eligible Customers seeking Non-Firm Point-To-Point Transmission Service must submit a Completed Application to the Transmission Provider. Applications should be submitted by entering the information listed below on the Transmission Provider's OASIS. Prior to implementation of the Transmission Provider's OASIS, a Completed Application may be submitted by (i) transmitting the required information to the Transmission Provider by telefax, or (ii) providing the information by telephone over the Transmission Provider's time-recorded telephone line. Each of these methods will provide a time-stamped record for establishing the service priority of the Application.

18.2 *Completed Application:* A Completed Application shall provide all of the information included in 18 CFR 2.20 including but not limited to the following:

(i) The identity, address, telephone number and facsimile number of the entity requesting service;

(ii) A statement that the entity requesting service is, or will be upon commencement of service, an Eligible Customer under the Tariff;

(iii) The Point(s) of Receipt and the Point(s) of Delivery;

(iv) The maximum amount of capacity requested at each Point of Receipt and Point of Delivery; and

(v) The proposed dates and hours for initiating and terminating transmission service hereunder.

In addition to the information specified above, when required to properly evaluate system conditions, the Transmission Provider also may ask the Transmission Customer to provide the following:

(vi) The electrical location of the initial source of the power to be transmitted pursuant to the Transmission Customer's request for service;

(vii) The electrical location of the ultimate load.

The Transmission Provider will treat this information in (vi) and (vii) as confidential at the request of the Transmission Customer except to the extent that disclosure of this information is required by this Tariff, by Federal law, by regulatory or judicial order, for reliability purposes pursuant to Good Utility Practice, or pursuant to RTG transmission information sharing agreements. The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations.

18.3 *Reservation of Non-Firm Point-To-Point Transmission Service:* Requests for monthly service shall be submitted no earlier than sixty (60) days before service is to commence; requests for weekly service shall be submitted no earlier than fourteen (14) days before service is to commence; requests for daily service shall be submitted no earlier than two (2) days before service is to commence; and requests for hourly service shall be submitted no earlier than noon the day before service is to commence. Requests for service received later than 2:00 p.m. prior to the day service is scheduled to commence will be accommodated if practicable.

18.4 *Determination of Available Transmission Capability:* Following receipt of a tendered schedule the Transmission Provider will make a determination on a non-discriminatory basis of available transmission capability pursuant to Section 15.2. Such determination shall be made as soon as reasonably practicable after receipt, but not later than the following time periods for the following terms of service: (i) thirty (30) minutes for hourly service, (ii) thirty (30) minutes for daily service, (iii) four (4) hours for weekly service, and (iv) two (2) days for monthly service.

19 Additional Study Procedures for Firm Point-to-Point Transmission Service Requests

19.1 *Notice of Need for System Impact Study:* After receiving a request for service, the Transmission Provider shall determine on a non-discriminatory basis whether a System Impact Study is needed. A description of the Transmission Provider's methodology for completing a System Impact Study is provided in Attachment D. If the Transmission Provider determines that a System Impact Study is necessary to accommodate the requested service, it

shall so inform the Eligible Customer, as soon as practicable. In such cases, the Transmission Provider shall within thirty (30) days of receipt of a Completed Application, tender a System Impact Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required System Impact Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the System Impact Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the System Impact Study Agreement, its application shall be deemed withdrawn.

19.2 *System Impact Study Agreement and Compensation:* (i) The System Impact Study Agreement will clearly specify the Transmission Provider's estimate of the actual cost, and time for completion of the System Impact Study. The charge will not exceed the actual cost of the study. In performing the System Impact Study, the Transmission Provider shall rely, to the extent reasonably practicable, on existing transmission planning studies. The Eligible Customer will not be assessed a charge for such existing studies; however, the Eligible Customer will be responsible for charges associated with any modifications to existing planning studies that are reasonably necessary to evaluate the impact of the Eligible Customer's request for service on the Transmission System.

(ii) If, in response to multiple Eligible Customers requesting service in relation to the same competitive solicitation, a single System Impact Study is sufficient for the Transmission Provider to accommodate the requests for service, the costs of that study shall be pro-rated among the Eligible Customers.

(iii) For System Impact Studies that the Transmission Provider conducts on its own behalf, the Transmission Provider shall record the cost of the System Impact Studies pursuant to Section 8.

19.3 *System Impact Study Procedures:* Upon receipt of an executed System Impact Study Agreement, the Transmission Provider will use due diligence to complete the required System Impact Study within a sixty (60) day period. The System Impact Study shall identify any system constraints and redispatch options, additional Direct Assignment Facilities or Network Upgrades required to provide the requested service. In the event that the Transmission Provider is unable to complete the required System Impact Study within such time period, it shall so notify the Eligible Customer and provide an estimated completion date along with an explanation of the reasons why additional time is required to complete the required studies. A copy of the completed System Impact Study and related work papers shall be made available to the Eligible Customer. The Transmission Provider will use the same due diligence in completing the System Impact Study for an Eligible Customer as it uses when completing studies for itself. The Transmission Provider shall notify the Eligible Customer immediately upon completion of the System Impact Study if the Transmission System will be adequate to accommodate all or part of a request for service or that no costs are likely to be incurred for new transmission facilities or upgrades. In order for a request to remain a Completed Application, within fifteen (15) days of completion of the System Impact Study the Eligible Customer must execute a Service Agreement or request service without an executed Service Agreement pursuant to Section 15.3, or the Application shall be deemed terminated and withdrawn.

19.4 *Facilities Study Procedures.* If a System Impact Study indicates that additions or upgrades to the Transmission System are needed to supply the Eligible Customer's service request, the Transmission Provider, within thirty (30) days of the completion of the System Impact Study, shall tender to the Eligible Customer a Facilities Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required Facilities Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the Facilities Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the Facilities Study Agreement, its application shall be deemed withdrawn. Upon receipt of an executed Facilities Study Agreement, the Transmission Provider will use due diligence to complete the required Facilities Study within a sixty (60) day period. If the Transmission Provider is unable to complete the Facilities Study in the allotted time period, the Transmission Provider shall notify the Transmission Customer and provide an estimate of the time needed to reach a final determination along with an explanation of the reasons that additional time is required to complete the study. When completed, the Facilities Study will include a good faith estimate of (i) the cost of Direct Assignment Facilities to be charged to the Transmission Customer, (ii) the Transmission Customer's appropriate share of the cost of any required Network Upgrades as determined pursuant to the provisions of Part II of the Tariff, and (iii) the time required to complete such construction and initiate the requested service. The Transmission Customer shall pay the Transmission Provider, in advance, the Transmission Customer's share of the costs of new facilities or upgrades. The Transmission Customer shall have thirty (30) days to execute a construction agreement and a Service Agreement and to provide the advance payment or request service without an executed Service Agreement pursuant to Section 15.3, and pay the Transmission Customer's share of the costs, or the request will no longer be a Completed Application and shall be deemed terminated and withdrawn. Any advance payment made by the Transmission Customer which is in excess of the costs incurred by the Transmission Provider shall be refunded.

19.5 *Facilities Study Modifications.* Any change in design arising from inability to site or construct facilities as proposed will require development of a revised good faith estimate. New good faith estimates also will be required in the event of new statutory or regulatory requirements that are effective before the completion of construction or other circumstances beyond the control of the Transmission Provider that significantly affect the final cost of new facilities or upgrades to be charged to the Transmission Customer pursuant to the provisions of Part II of the Tariff.

19.6 *Due Diligence in Completing New Facilities.* The Transmission Provider shall use due diligence to add necessary facilities or upgrade its Transmission System within a reasonable time. The Transmission Provider will not upgrade its existing or planned Transmission System in order to provide the requested Firm Point-To-Point Transmission Service if doing so would impair system reliability or otherwise impair or degrade existing firm service.

19.7 *Partial Interim Service.* If the Transmission Provider determines that it will not have adequate transmission capability to satisfy the full amount of a Completed Application for Firm Point-To-Point Transmission Service, the Transmission Provider nonetheless shall be obligated to offer and provide the portion of the requested Firm Point-To-Point Transmission Service that can be accommodated without addition of any

facilities and through redispatch. However, the Transmission Provider shall not be obligated to provide the incremental amount of requested Firm Point-To-Point Transmission Service that requires the addition of facilities or upgrades to the Transmission System until such facilities or upgrades have been placed in service.

19.8 *Expedited Procedures for New Facilities.* In lieu of the procedures set forth above, the Eligible Customer shall have the option to expedite the process by requesting the Transmission Provider to tender at one time, together with the results of required studies, an ''Expedited Service Agreement'' pursuant to which the Eligible Customer would agree to compensate the Transmission Provider in advance for all costs incurred pursuant to the terms of the Tariff. In order to exercise this option, the Eligible Customer shall request in writing an expedited Service Agreement covering all of the above-specified items within thirty (30) days of receiving the results of the System Impact Study identifying needed facility additions or upgrades or costs incurred in providing the requested service. While the Transmission Provider agrees to provide the Eligible Customer with its best estimate of the new facility costs and other charges that may be incurred, such estimate shall not be binding and the Eligible Customer must agree in writing to compensate the Transmission Provider in advance for all costs incurred pursuant to the provisions of the Tariff. The Eligible Customer shall execute and return such an Expedited Service Agreement within fifteen (15) days of its receipt or the Eligible Customer's request for service will cease to be a Completed Application and will be deemed terminated and withdrawn.

20 Procedures if the Transmission Provider is Unable to Complete New Transmission Facilities for Firm Point-To-Point Transmission Service

20.1 *Delays in Construction of New Facilities:* If any event occurs that will materially affect the time for completion of new facilities, or the ability to complete them, the Transmission Provider shall promptly notify the Transmission Customer. In such circumstances, the Transmission Provider shall, within thirty (30) days of notifying the Transmission Customer of such delays, convene a technical meeting with the Transmission Customer to evaluate the alternatives available to the Transmission Customer. The Transmission Provider also shall make available to the Transmission Customer studies and work papers related to the delay, including all information that is in the possession of the Transmission Provider that is reasonably needed by the Transmission Customer to evaluate any alternatives.

20.2 *Alternatives to the Original Facility Additions:* When the review process of Section 20.1 determines that one or more alternatives exist to the originally planned construction project, the Transmission Provider shall present such alternatives for consideration by the Transmission Customer. If, upon review of any alternatives, the Transmission Customer desires to maintain its Completed Application subject to construction of the alternative facilities, it may request the Transmission Provider to submit a revised Service Agreement for Firm Point-To-Point Transmission Service. If the alternative approach solely involves Non-Firm Point-To-Point Transmission Service, the Transmission Provider shall promptly tender a Service Agreement for Non-Firm Point-To-Point Transmission Service providing for the service. In the event the Transmission Provider concludes that no reasonable alternative exists and the Transmission Customer disagrees, the Transmission Customer may seek relief under the dispute resolution procedures pursuant to Section 12 or it may refer the dispute to the Commission for resolution.

20.3 *Refund Obligation for Unfinished Facility Additions:* If the Transmission Provider and the Transmission Customer mutually agree that no other reasonable alternatives exist and the requested service cannot be provided out of existing capability under the conditions of Part II of the Tariff, the obligation to provide the requested Firm Point-To-Point Transmission Service shall terminate and any advance payment made by the Transmission Customer that is in excess of the costs incurred by the Transmission Provider through the time construction was suspended shall be returned. However, the Transmission Customer shall be responsible for all prudently incurred costs by the Transmission Provider through the time construction was suspended.

21 Provisions Relating to Transmission Construction and Services on the Systems of Other Utilities

21.1 *Responsibility for Third-Party System Additions:* The Transmission Provider shall not be responsible for making arrangements for any necessary engineering, permitting, and construction of transmission or distribution facilities on the system(s) of any other entity or for obtaining any regulatory approval for such facilities. The Transmission Provider will undertake reasonable efforts to assist the Transmission Customer in obtaining such arrangements, including, without limitation, providing any information or data required by such other electric system pursuant to Good Utility Practice.

21.2 *Coordination of Third-Party System Additions:* In circumstances where the need for transmission facilities or upgrades is identified pursuant to the provisions of Part II of the Tariff, and if such upgrades further require the addition of transmission facilities on other systems, the Transmission Provider shall have the right to coordinate construction on its own system with the construction required by others. The Transmission Provider, after consultation with the Transmission Customer and representatives of such other systems, may defer construction of its new transmission facilities if the new transmission facilities on another system cannot be completed in a timely manner. The Transmission Provider shall notify the Transmission Customer in writing of the basis for any decision to defer construction and the specific problems which must be resolved before it will initiate or resume construction of new facilities.

Within sixty (60) days of receiving written notification by the Transmission Provider of its intent to defer construction pursuant to this section, the Transmission Customer may challenge the decision in accordance with the dispute resolution procedures pursuant to Section 12 or it may refer the dispute to the Commission for resolution.

22 Changes in Service Specifications

22.1 *Modifications On a Non-Firm Basis:* The Transmission Customer taking Firm Point-To-Point Transmission Service may request the Transmission Provider to provide transmission service on a non-firm basis over Receipt and Delivery Points other than those specified in the Service Agreement (''Secondary Receipt and Delivery Points''), in amounts not to exceed its firm capacity reservation, without incurring an additional Non-Firm Point-To-Point Transmission Service charge or executing a new Service Agreement, subject to the following conditions.

(a) Service provided over Secondary Receipt and Delivery Points will be non-firm only, on an as-available basis, and will not displace any firm or non-firm service reserved or scheduled by third-parties under the Tariff or by the Transmission Provider on behalf of its Native Load Customers.

(b) The sum of all Firm and non-firm Point-To-Point Transmission Service provided to the Transmission Customer at any time pursuant to this section shall not exceed the Reserved Capacity in the relevant Service Agreement under which such services are provided.

(c) The Transmission Customer shall retain its right to schedule Firm Point-To-Point Transmission Service at the Receipt and Delivery Points specified in the relevant Service Agreement in the amount of its original capacity reservation.

(d) Service over Secondary Receipt and Delivery Points on a non-firm basis shall not require the filing of an Application for Non-Firm Point-To-Point Transmission Service under the Tariff. However, all other requirements of Part II of the Tariff (except as to transmission rates) shall apply to transmission service on a non-firm basis over Secondary Receipt and Delivery Points.

22.2 *Modifications on a Firm Basis:* Any request by a Transmission Customer to modify Receipt and Delivery Points on a firm basis shall be treated as a new request for service in accordance with Section 17 hereof except that such Transmission Customer shall not be obligated to pay any additional application processing fee if the capacity reservation does not exceed the amount reserved in the existing Service Agreement. While such new request is pending, the Transmission Customer shall retain its priority for service at the existing firm Receipt and Delivery Points specified in its Service Agreement.

23 Sale or Assignment of Transmission Service

23.1 *Procedures for Assignment or Transfer of Service:* 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 the Reseller 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. 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. A Reseller should notify the Transmission Provider as soon as possible after any assignment or transfer of service occurs but in any event, notification must be provided prior to any provision of service to the Assignee. The Assignee will be subject to all terms and conditions of the 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.

23.2 *Limitations on Assignment or Transfer of Service:* If the Assignee requests a change in the Point(s) of Receipt or Point(s) of Delivery, or a change in any other specifications set forth in the original Service Agreement, the Transmission Provider will consent to such change subject to the provisions of the Tariff, provided that the change will not impair the operation and reliability of the Transmission Provider's generation, transmission, or distribution systems. The Assignee shall compensate the Transmission Provider in advance for performing any System Impact Study needed to evaluate the capability of the Transmission System to accommodate the proposed change and any additional costs resulting from such change. The Reseller shall remain liable for the performance of all obligations under the Service Agreement, except as specifically agreed to by the Parties through an amendment to the Service Agreement.

23.3 *Information on Assignment or Transfer of Service:* In accordance with Section 4, Resellers may use the Transmission Provider's OASIS to post transmission capacity available for resale.

24 Metering and Power Factor Correction at Receipt and Delivery Point(s)

24.1 *Transmission Customer Obligations:* Unless otherwise agreed, the Transmission Customer shall be responsible for installing and maintaining compatible metering and communications equipment to accurately account for the capacity and energy being transmitted under Part II of the Tariff and to communicate the information to the Transmission Provider. Such equipment shall remain the property of the Transmission Customer.

24.2 *Transmission Provider Access to Metering Data:* The Transmission Provider shall have access to metering data, which may reasonably be required to facilitate measurements and billing under the Service Agreement.

24.3 *Power Factor:* Unless otherwise agreed, the Transmission Customer is required to maintain a power factor within the same range as the Transmission Provider pursuant to Good Utility Practices. The power factor requirements are specified in the Transmission Provider's rate schedule for transmission service.

25 Compensation for Transmission Service

Rates for Firm and Non-Firm Point-To-Point Transmission Service are provided in the Transmission Provider's rate schedule for transmission service which is promulgated, and may be modified, pursuant to applicable Federal law, regulations, and policies. The Transmission Provider shall use Part II of the Tariff to make its Third-Party Sales. The Transmission Provider shall account for such use at the applicable rates.

26 Stranded Cost Recovery

The Transmission Provider may seek to recover stranded costs from the Transmission Customer pursuant to this Tariff in accordance with the terms, conditions, and procedures set forth in FERC Order No. 888, in a manner consistent with applicable Federal law and regulations.

27 Compensation for New Facilities and Redispatch Costs

Whenever a System Impact Study performed by the Transmission Provider in connection with the provision of Firm Point-To-Point Transmission Service identifies the need for new facilities, the Transmission Customer shall be responsible for such costs to the extent consistent with Commission policy. Whenever a System Impact Study performed by the Transmission Provider identifies capacity constraints that may be relieved more economically by redispatching the Transmission Provider's resources than by building new facilities or upgrading existing facilities to eliminate such constraints, the Transmission Customer shall be responsible for the redispatch costs to the extent consistent with Commission policy.

Part III. Network Integration Transmission Service

Preamble

The Transmission Provider will provide Network Integration Transmission Service pursuant to the applicable terms and conditions contained in the Tariff and Service Agreement. Network Integration

Transmission Service allows the Network Customer to integrate, economically dispatch and regulate its current and planned Network Resources to serve its Network Load in a manner comparable to that in which the Transmission Provider utilizes its Transmission System to serve its Native Load Customers. Network Integration Transmission Service also may be used by the Network Customer to deliver economy energy purchases to its Network Load from non-designated resources on an as-available basis without additional charge. Transmission service for sales to non-designated loads will be provided pursuant to the applicable terms and conditions of Part II of the Tariff.

28 Nature of Network Integration Transmission Service

28.1 *Scope of Service:* Network Integration Transmission Service is a transmission service that allows Network Customers to efficiently and economically utilize their Network Resources (as well as other non-designated generation resources) to serve their Network Load located in the Transmission Provider's Control Area and any additional load that may be designated pursuant to Section 31.3 of the Tariff. The Network Customer taking Network Integration Transmission Service must obtain or provide Ancillary Services pursuant to Section 3.

28.2 *Transmission Provider Responsibilities:* The Transmission Provider will plan, construct, operate and maintain its Transmission System in accordance with Good Utility Practice in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider's Transmission System. The Transmission Provider, on behalf of its Native Load Customers, shall be required to designate resources and loads in the same manner as any Network Customer under Part III of the Tariff. This information must be consistent with the information used by the Transmission Provider to calculate available transmission capability. The Transmission Provider shall include the Network Customer's Network Load in its Transmission System planning and shall, consistent with Good Utility Practice, endeavor to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load on a basis comparable to the Transmission Provider's delivery of its own generating and purchased resources to its Native Load Customers. This obligation to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load is contingent upon the availability to the Transmission Provider of sufficient appropriations, when needed, and the Transmission Customer's advanced funds.

28.3 *Network Integration Transmission Service:* The Transmission Provider will provide firm transmission service over its Transmission System to the Network Customer for the delivery of capacity and energy from its designated Network Resources to service its Network Loads on a basis that is comparable to the Transmission Provider's use of the Transmission System to reliably serve its Native Load Customers.

28.4 *Secondary Service:* The Network Customer may use the Transmission Provider's Transmission System to deliver energy to its Network Loads from resources that have not been designated as Network Resources. Such energy shall be transmitted, on an as-available basis, at no additional charge. Deliveries from resources other than Network Resources will have a higher priority than any Non-Firm Point-To-Point Transmission Service under Part II of the Tariff.

28.5 *Real Power Losses:* Real Power Losses are associated with all transmission service. The Transmission Provider is not obligated to provide Real Power Losses. The Network Customer is responsible for replacing losses associated with all transmission service as calculated by the Transmission Provider. The applicable Real Power Loss factors are specified in the Transmission Provider's rate schedule for transmission service, and may be adjusted, from time to time, in accordance with the results of periodic studies.

28.6 *Restrictions on Use of Service:* The Network Customer shall not use Network Integration Transmission Service for (i) sales of capacity and energy to non-designated loads, or (ii) direct or indirect provision of transmission service by the Network Customer to third parties. All Network Customers taking Network Integration Transmission Service shall use Point-To-Point Transmission Service under Part II of the Tariff for any Third-Party Sale which requires use of the Transmission Provider's Transmission System.

29 Initiating Service

29.1 *Condition Precedent for Receiving Service:* Subject to the terms and conditions of Part III of the Tariff, the Transmission Provider will provide Network Integration Transmission Service to any Eligible Customer provided that (i) the Eligible Customer completes an Application for service as provided under Part III of the Tariff, (ii) the Eligible Customer and the Transmission Provider complete the technical arrangements set forth in Sections 29.3 and 29.4, (iii) the Eligible Customer executes a Service Agreement pursuant to Attachment F for service under Part III of the Tariff or requests in writing that the Transmission Provider provide service without an executed Service Agreement, and (iv) the Eligible Customer executes a Network Operating Agreement with the Transmission Provider pursuant to Attachment G. If the Transmission Provider and the Network Customer cannot agree on all the terms and conditions of the Network Service Agreement, the Transmission Provider shall commence providing Network Integration Transmission Service subject to the Network Customer's agreeing to (i) compensate the Transmission Provider at the existing rate placed in effect pursuant to applicable Federal law, regulations, and policies, and (ii) comply with the terms and conditions of the Tariff, including paying the appropriate processing fees in accordance with the terms of Section 29.2. If the Network Customer cannot accept all of the terms and conditions of the offered Service Agreement, the Network Customer may request resolution of the unacceptable terms and conditions under Section 12, Dispute Resolution Procedures, of the Tariff. Any changes resulting from the dispute resolution procedures will be effective upon the date of initial service.

29.2 *Application Procedures:* An Eligible Customer requesting service under Part III of the Tariff must submit an Application to the Transmission Provider as far as possible in advance of the month in which service is to commence. Unless subject to the procedures in Section 2, Completed Applications for Network Integration Transmission Service will be assigned a priority according to the date and time the Application is received, with the earliest Application receiving the highest priority. Applications should be submitted by entering the information listed below on the Transmission Provider's OASIS. Prior to implementation of the Transmission Provider's OASIS, a Completed Application may be submitted by (i) transmitting the required information to the Transmission Provider by telefax, or (ii) providing the information by telephone over the Transmission

Provider's time-recorded telephone line. Each of these methods will provide a time-stamped record for establishing the service priority of the Application. A Completed Application for Network Integration Transmission Service shall include a non-refundable application processing fee of $1,200. This fee does not apply to costs to complete System Impact Studies or Facility Studies or to add new facilities. A Completed Application shall provide all of the information included in 18 CFR 2.20 including but not limited to the following:

(i) The identity, address, telephone number and facsimile number of the party requesting service;

(ii) A statement that the party requesting service is, or will be upon commencement of service, an Eligible Customer under the Tariff;

(iii) A description of the Network Load at each delivery point. This description should separately identify and provide the Eligible Customer's best estimate of the total loads to be served at each transmission voltage level, and the loads to be served from each Transmission Provider substation at the same transmission voltage level. The description should include a ten (10) year forecast of summer and winter load and resource requirements beginning with the first year after the service is scheduled to commence;

(iv) The amount and location of any interruptible loads included in the Network Load. This shall include the summer and winter capacity requirements for each interruptible load (had such load not been interruptible), that portion of the load subject to interruption, the conditions under which an interruption can be implemented and any limitations on the amount and frequency of interruptions. An Eligible Customer should identify the amount of interruptible customer load (if any), included in the 10 year load forecast provided in response to (iii) above;

(v) A description of Network Resources (current and 10-year projection), which shall include, for each Network Resource:

—Unit size and amount of capacity from that unit to be designated as Network Resource;

—VAR capability (both leading and lagging) of all generators;

—Operating restrictions;

—Any periods of restricted operations throughout the year;

—Maintenance schedules;

—Minimum loading level of unit;

—Normal operating level of unit;

—Any must-run unit designations required for system reliability or contract reasons;

—Approximate variable generating cost ($/MWH) for redispatch computations;

—Arrangements governing sale and delivery of power to third parties from generating facilities located in the Transmission Provider Control Area, where only a portion of unit output is designated as a Network Resource;

—Description of purchased power designated as a Network Resource including source of supply, Control Area location, transmission arrangements and delivery point(s) to the Transmission Provider's Transmission System;

(vi) Description of Eligible Customer's transmission system:

—Load flow and stability data, such as real and reactive parts of the load, lines, transformers, reactive devices and load type, including normal and emergency ratings of all transmission equipment in a load flow format compatible with that used by the Transmission Provider;

—Operating restrictions needed for reliability;

—Operating guides employed by system operators;

—Contractual restrictions or committed uses of the Eligible Customer's transmission system, other than the Eligible Customer's Network Loads and Resources;

—Location of Network Resources described in subsection (v) above;

—10-year projection of system expansions or upgrades;

—Transmission System maps that include any proposed expansions or upgrades;

—Thermal ratings of Eligible Customer's Control Area ties with other Control Areas; and

(vii) Service Commencement Date and the term of the requested Network Integration Transmission Service. The minimum term for Network Integration Transmission Service is one year.

Unless the Parties agree to a different time frame, the Transmission Provider must acknowledge the request within ten (10) days of receipt. The acknowledgment must include a date by which a response, including a Service Agreement, will be sent to the Eligible Customer. If an Application fails to meet the requirements of this section, the Transmission Provider shall notify the Eligible Customer requesting service within fifteen (15) days of receipt and specify the reasons for such failure. Wherever possible, the Transmission Provider will attempt to remedy deficiencies in the Application through informal communications with the Eligible Customer. If such efforts are unsuccessful, the Transmission Provider shall return the Application without prejudice to the Eligible Customer filing a new or revised Application that fully complies with the requirements of this section. The Eligible Customer will be assigned a new priority consistent with the date of the new or revised Application. The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations.

29.3 *Technical Arrangements to be Completed Prior to Commencement of Service:* Network Integration Transmission Service shall not commence until the Transmission Provider and the Network Customer, or a third party, have completed installation of all equipment specified under the Network Operating Agreement consistent with Good Utility Practice and any additional requirements reasonably and consistently imposed to ensure the reliable operation of the Transmission System. The Transmission Provider shall exercise reasonable efforts, in coordination with the Network Customer, to complete such arrangements as soon as practicable taking into consideration the Service Commencement Date.

29.4 *Network Customer Facilities:* The provision of Network Integration Transmission Service shall be conditioned upon the Network Customer's constructing, maintaining and operating the facilities on its side of each delivery point or interconnection necessary to reliably deliver capacity and energy from the Transmission Provider's Transmission System to the Network Customer. The Network Customer shall be solely responsible for constructing or installing all facilities on the Network Customer's side of each such delivery point or interconnection.

30 Network Resources

30.1 *Designation of Network Resources:* Network Resources shall include all generation owned, purchased or leased by the Network Customer designated to serve Network Load under the Tariff. Network Resources may not include resources, or any portion thereof, that are committed for sale to non-designated third party load or otherwise cannot be called upon to meet the Network Customer's Network Load on a noninterruptible basis. Any owned or purchased resources that were serving the Network Customer's loads under firm agreements entered into on or before the Service

Commencement Date shall initially be designated as Network Resources until the Network Customer terminates the designation of such resources.

30.2 *Designation of New Network Resources:* The Network Customer may designate a new Network Resource by providing the Transmission Provider with as much advance notice as practicable. A designation of a new Network Resource must be made by a request for modification of service pursuant to an Application under Section 29.

30.3 *Termination of Network Resources:* The Network Customer may terminate the designation of all or part of a generating resource as a Network Resource at any time but should provide notification to the Transmission Provider as soon as reasonably practicable.

30.4 *Operation of Network Resources:* The Network Customer shall not operate its designated Network Resources located in the Network Customer's or Transmission Provider's Control Area such that the output of those facilities exceeds its designated Network Load, plus non-firm sales delivered pursuant to Part II of the Tariff, plus losses. This limitation shall not apply to changes in the operation of a Transmission Customer's Network Resources at the request of the Transmission Provider to respond to an emergency or other unforeseen condition which may impair or degrade the reliability of the Transmission System.

30.5 *Network Customer Redispatch Obligation:* As a condition to receiving Network Integration Transmission Service, the Network Customer agrees to redispatch its Network Resources as requested by the Transmission Provider pursuant to Section 33.2. To the extent practical, the redispatch of resources pursuant to this section shall be on a least cost, nondiscriminatory basis between all Network Customers, and the Transmission Provider.

30.6 *Transmission Arrangements for Network Resources Not Physically Interconnected With The Transmission Provider:* The Network Customer shall be responsible for any arrangements necessary to deliver capacity and energy from a Network Resource not physically interconnected with the Transmission Provider's Transmission System. The Transmission Provider will undertake reasonable efforts to assist the Network Customer in obtaining such arrangements, including without limitation, providing any information or data required by such other entity pursuant to Good Utility Practice.

30.7 *Limitation on Designation of Network Resources:* The Network Customer must demonstrate that it owns or has committed to purchase generation pursuant to an executed contract in order to designate a generating resource as a Network Resource. Alternatively, the Network Customer may establish that execution of a contract is contingent upon the availability of transmission service under Part III of the Tariff.

30.8 *Use of Interface Capacity by the Network Customer:* There is no limitation upon a Network Customer's use of the Transmission Provider's Transmission System at any particular interface to integrate the Network Customer's Network Resources (or substitute economy purchases) with its Network Loads. However, a Network Customer's use of the Transmission Provider's total interface capacity with other transmission systems may not exceed the Network Customer's Load.

30.9 *Network Customer Owned Transmission Facilities:* The Network Customer that owns existing transmission facilities that are integrated with the Transmission Provider's Transmission System may be eligible to receive consideration either through a billing credit or some other mechanism. In order to receive such consideration the Network Customer must demonstrate that its transmission facilities are integrated into the plans or operations of the Transmission Provider to serve its power and transmission customers. For facilities constructed by the Network Customer subsequent to the Service Commencement Date under Part III of the Tariff, the Network Customer shall receive credit where such facilities are jointly planned and installed in coordination with the Transmission Provider. Calculation of the credit shall be addressed in either the Network Customer's Service Agreement or any other agreement between the Parties.

31 Designation of Network Load

31.1 *Network Load:* The Network Customer must designate the individual Network Loads on whose behalf the Transmission Provider will provide Network Integration Transmission Service. The Network Loads shall be specified in the Service Agreement.

31.2 *New Network Loads Connected With the Transmission Provider:* The Network Customer shall provide the Transmission Provider with as much advance notice as reasonably practicable of the designation of new Network Load that will be added to its Transmission System. A designation of new Network Load must be made through a modification of service pursuant to a new Application. The Transmission Provider will use due diligence to install any transmission facilities required to interconnect a new Network Load designated by the Network Customer. The costs of new facilities required to interconnect a new Network Load shall be determined in accordance with the procedures provided in Section 32.4 and shall be charged to the Network Customer in accordance with Commission policies.

31.3 *Network Load Not Physically Interconnected with the Transmission Provider:* This section applies to both initial designation pursuant to Section 31.1 and the subsequent addition of new Network Load not physically interconnected with the Transmission Provider. To the extent that the Network Customer desires to obtain transmission service for a load outside the Transmission Provider's Transmission System, the Network Customer shall have the option of (1) electing to include the entire load as Network Load for all purposes under Part III of the Tariff and designating Network Resources in connection with such additional Network Load, or (2) excluding that entire load from its Network Load and purchasing Point-To-Point Transmission Service under Part II of the Tariff. To the extent that the Network Customer gives notice of its intent to add a new Network Load as part of its Network Load pursuant to this section the request must be made through a modification of service pursuant to a new Application.

31.4 *New Interconnection Points:* To the extent the Network Customer desires to add a new Delivery Point or interconnection point between the Transmission Provider's Transmission System and a Network Load, the Network Customer shall provide the Transmission Provider with as much advance notice as reasonably practicable.

31.5 *Changes in Service Requests:* Under no circumstances shall the Network Customer's decision to cancel or delay a requested change in Network Integration Transmission Service (*e.g.* the addition of a new Network Resource or designation of a new Network Load) in any way relieve the Network Customer of its obligation to pay the costs of transmission facilities constructed by the Transmission Provider and charged to the Network Customer as reflected in the Service Agreement. However, the Transmission Provider must treat any requested change in Network Integration Transmission Service in a non-discriminatory manner. The Transmission Provider will have no

obligation to refund any advance of funds expended for purposes of providing facilities for a Network Customer. However, upon receipt of a Network Customer's written notice of such a cancellation or delay, the Transmission Provider will use the same reasonable efforts to mitigate the costs and charges owed to the Transmission Provider as it would to reduce its own costs and charges.

31.6 *Annual Load and Resource Information Updates:* The Network Customer shall provide the Transmission Provider with annual updates of Network Load and Network Resource forecasts consistent with those included in its Application for Network Integration Transmission Service under Part III of the Tariff. The Network Customer also shall provide the Transmission Provider with timely written notice of material changes in any other information provided in its Application relating to the Network Customer's Network Load, Network Resources, its transmission system or other aspects of its facilities or operations affecting the Transmission Provider's ability to provide reliable service.

32 Additional Study Procedures for Network Integration Transmission Service Requests

32.1 *Notice of Need for System Impact Study:* After receiving a request for service, the Transmission Provider shall determine on a non-discriminatory basis whether a System Impact Study is needed. A description of the Transmission Provider's methodology for completing a System Impact Study is provided in Attachment D. If the Transmission Provider determines that a System Impact Study is necessary to accommodate the requested service, it shall so inform the Eligible Customer, as soon as practicable. In such cases, the Transmission Provider shall within thirty (30) days of receipt of a Completed Application, tender a System Impact Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required System Impact Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the System Impact Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the System Impact Study Agreement, its Application shall be deemed withdrawn.

32.2 *System Impact Study Agreement and Compensation:* (i) The System Impact Study Agreement will clearly specify the Transmission Provider's estimate of the actual cost, and time for completion of the System Impact Study. The charge shall not exceed the actual cost of the study. In performing the System Impact Study, the Transmission Provider shall rely, to the extent reasonably practicable, on existing transmission planning studies. The Eligible Customer will not be assessed a charge for such existing studies; however, the Eligible Customer will be responsible for charges associated with any modifications to existing planning studies that are reasonably necessary to evaluate the impact of the Eligible Customer's request for service on the Transmission System.

(ii) If in response to multiple Eligible Customers requesting service in relation to the same competitive solicitation, a single System Impact Study is sufficient for the Transmission Provider to accommodate the service requests, the costs of that study shall be pro-rated among the Eligible Customers.

(iii) For System Impact Studies that the Transmission Provider conducts on its own behalf, the Transmission Provider shall record the cost of the System Impact Studies pursuant to Section 8.

32.3 *System Impact Study Procedures:* Upon receipt of an executed System Impact Study Agreement, the Transmission Provider will use due diligence to complete the required System Impact Study within a sixty (60) day period. The System Impact Study shall identify any system constraints and redispatch options, additional Direct Assignment Facilities or Network Upgrades required to provide the requested service. In the event that the Transmission Provider is unable to complete the required System Impact Study within such time period, it shall so notify the Eligible Customer and provide an estimated completion date along with an explanation of the reasons why additional time is required to complete the required studies. A copy of the completed System Impact Study and related work papers shall be made available to the Eligible Customer. The Transmission Provider will use the same due diligence in completing the System Impact Study for an Eligible Customer as it uses when completing studies for itself. The Transmission Provider shall notify the Eligible Customer immediately upon completion of the System Impact Study if the Transmission System will be adequate to accommodate all or part of a request for service or that no costs are likely to be incurred for new transmission facilities or upgrades. In order for a request to remain a Completed Application, within fifteen (15) days of completion of the System Impact Study the Eligible Customer must execute a Service Agreement or request service without an executed Service Agreement pursuant to Section 29.1, or the Application shall be deemed terminated and withdrawn.

32.4 *Facilities Study Procedures:* If a System Impact Study indicates that additions or upgrades to the Transmission System are needed to supply the Eligible Customer's service request, the Transmission Provider, within thirty (30) days of the completion of the System Impact Study, shall tender to the Eligible Customer a Facilities Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required Facilities Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the Facilities Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the Facilities Study Agreement, its Application shall be deemed withdrawn and its deposit shall be returned. Upon receipt of an executed Facilities Study Agreement, the Transmission Provider will use due diligence to complete the required Facilities Study within a sixty (60) day period. If the Transmission Provider is unable to complete the Facilities Study in the allotted time period, the Transmission Provider shall notify the Eligible Customer and provide an estimate of the time needed to reach a final determination along with an explanation of the reasons that additional time is required to complete the study. When completed, the Facilities Study will include a good faith estimate of (i) the cost of Direct Assignment Facilities to be charged to the Eligible Customer, (ii) the Eligible Customer's appropriate share of the cost of any required Network Upgrades, and (iii) the time required to complete such construction and initiate the requested service. The Eligible Customer shall advance funds to the Transmission Provider for the construction of new facilities, and such advance and construction shall be provided for in a separate agreement. If the construction of new facilities requires the expenditure of Transmission Provider funds, such construction shall be contingent upon the availability of appropriated funds. The Eligible Customer shall have thirty (30) days to execute a construction agreement and a Service Agreement or request service

without an executed Service Agreement pursuant to Section 29.1, and pay the Transmission Customer's share of the costs, or the request no longer will be a Completed Application and shall be deemed terminated and withdrawn. Any advance payment made by the Transmission Customer which is in excess of the costs incurred by the Transmission Provider shall be refunded.

33 Load Shedding and Curtailments

33.1 *Procedures:* Prior to the Service Commencement Date, the Transmission Provider and the Network Customer shall establish Load Shedding and Curtailment procedures pursuant to the Network Operating Agreement with the objective of responding to contingencies on the Transmission System. The Parties will implement such programs during any period when the Transmission Provider determines that a system contingency exists and such procedures are necessary to alleviate such contingency. The Transmission Provider will notify all affected Network Customers in a timely manner of any scheduled Curtailment.

33.2 *Transmission Constraints:* During any period when the Transmission Provider determines that a transmission constraint exists on the Transmission System, and such constraint may impair the reliability of the Transmission Provider's system, the Transmission Provider will take whatever actions, consistent with Good Utility Practice, that are reasonably necessary to maintain the reliability of the Transmission Provider's system. To the extent the Transmission Provider determines that the reliability of the Transmission System can be maintained by redispatching resources, the Transmission Provider will initiate procedures pursuant to the Network Operating Agreement to redispatch all Network Resources and the Transmission Provider's own resources on a least-cost basis without regard to the ownership of such resources. Any redispatch under this section may not unduly discriminate between the Transmission Provider's use of the Transmission System on behalf of its Native Load Customers and any Network Customer's use of the Transmission System to serve its designated Network Load.

33.3 *Cost Responsibility for Relieving Transmission Constraints:* Whenever the Transmission Provider implements least-cost redispatch procedures in response to a transmission constraint, the Transmission Provider and Network Customers will each bear a proportionate share of the total redispatch cost based on their respective Load Ratio Shares.

33.4 *Curtailments of Scheduled Deliveries:* If a transmission constraint on the Transmission Provider's Transmission System cannot be relieved through the implementation of least-cost redispatch procedures and the Transmission Provider determines that it is necessary to Curtail scheduled deliveries, the Parties shall Curtail such schedules in accordance with the Network Operating Agreement.

33.5 *Allocation of Curtailments:* The Transmission Provider shall, on a non-discriminatory basis, Curtail the transaction(s) that effectively relieve the constraint. However, to the extent practicable and consistent with Good Utility Practice, any Curtailment will be shared by the Transmission Provider and Network Customer in proportion to their respective Load Ratio Shares. The Transmission Provider shall not direct the Network Customer to Curtail schedules to an extent greater than the Transmission Provider would Curtail the Transmission Provider's schedules under similar circumstances.

33.6 *Load Shedding:* To the extent that a system contingency exists on the Transmission Provider's Transmission System and the Transmission Provider determines that it is necessary for the Transmission Provider and the Network Customer to shed load, the Parties shall shed load in accordance with previously established procedures under the Network Operating Agreement.

33.7 *System Reliability:* Notwithstanding any other provisions of this Tariff, the Transmission Provider reserves the right, consistent with Good Utility Practice and on a not unduly discriminatory basis, to Curtail Network Integration Transmission Service without liability on the Transmission Provider's part for the purpose of making necessary adjustments to, changes in, or repairs on its lines, substations and facilities, and in cases where the continuance of Network Integration Transmission Service would endanger persons or property. In the event of any adverse condition(s) or disturbance(s) on the Transmission Provider's Transmission System or on any other system(s) directly or indirectly interconnected with the Transmission Provider's Transmission System, the Transmission Provider, consistent with Good Utility Practice, also may Curtail Network Integration Transmission Service in order to (i) limit the extent or damage of the adverse condition(s) or disturbance(s), (ii) prevent damage to generating or transmission facilities, or (iii) expedite restoration of service. The Transmission Provider will give the Network Customer as much advance notice as is practicable in the event of such Curtailment. Any Curtailment of Network Integration Transmission Service will be not unduly discriminatory relative to the Transmission Provider's use of the Transmission System on behalf of its Native Load Customers. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that the Network Customer fails to respond to established Load Shedding and Curtailment procedures.

34 Rates and Charges

The Network Customer shall pay the Transmission Provider for any Direct Assignment Facilities, Ancillary Services, and applicable study costs, consistent with Federal practice, along with the following:

34.1 *Monthly Demand Charge:* The Network Customer shall pay a monthly Demand Charge, which shall be determined by multiplying its Load Ratio Share times one twelfth (1/12) of the Transmission Provider's Annual Transmission Revenue Requirement specified in Schedule H.

34.2 *Determination of Network Customer's Monthly Network Load:* The Network Customer's Monthly Network Load is its hourly load (including its designated Network Load not physically interconnected with the Transmission Provider under Section 31.3) coincident with the Transmission Provider's Monthly Transmission System Peak.

34.3 *Determination of Transmission Provider's Monthly Transmission System Load:* The Transmission Provider's Monthly Transmission System Load is the Transmission Provider's Monthly Transmission System Peak minus the coincident peak usage of all Firm Point-To-Point Transmission Service customers pursuant to Part II of this Tariff plus the Reserved Capacity of all Firm Point-To-Point Transmission Service customers.

34.4 *Redispatch Charge:* The Network Customer shall pay a Load Ratio Share of any redispatch costs allocated between the Network Customer and the Transmission Provider pursuant to Section 33. To the extent that the Transmission Provider incurs an obligation to the Network Customer for redispatch costs in accordance with Section 33, such amounts shall be credited against the Network Customer's bill for the applicable month.

34.5 *Stranded Cost Recovery:* The Transmission Provider may seek to recover stranded costs from the Network

Customer pursuant to this Tariff in accordance with the terms, conditions and procedures set forth in FERC Order No. 888, in a manner consistent with applicable Federal law and regulations.

35 Operating Arrangements

35.1 *Operation Under The Network Operating Agreement:* The Network Customer shall plan, construct, operate and maintain its facilities in accordance with Good Utility Practice and in conformance with the Network Operating Agreement.

35.2 *Network Operating Agreement:* The terms and conditions under which the Network Customer shall operate its facilities and the technical and operational matters associated with the implementation of Part III of the Tariff shall be specified in the Network Operating Agreement. The Network Operating Agreement shall provide for the Parties to (i) operate and maintain equipment necessary for integrating the Network Customer within the Transmission Provider's Transmission System (including, but not limited to, remote terminal units, metering, communications equipment and relaying equipment), (ii) transfer data between the Transmission Provider and the Network Customer (including, but not limited to, heat rates and operational characteristics of Network Resources, generation schedules for units outside the Transmission Provider's Transmission System, interchange schedules, unit outputs for redispatch required under Section 33, voltage schedules, loss factors and other real time data), (iii) use software programs required for data links and constraint dispatching, (iv) exchange data on forecasted loads and resources necessary for long-term planning, and (v) address any other technical and operational considerations required for implementation of Part III of the Tariff, including scheduling protocols. The Network Operating Agreement will recognize that the Network Customer shall either (i) operate as a Control Area under applicable guidelines of the North American Electric Reliability Council (NERC) and the [applicable regional reliability council], (ii) satisfy its Control Area requirements, including all necessary Ancillary Services, by contracting with the Transmission Provider, or (iii) satisfy its Control Area requirements, including all necessary Ancillary Services, by contracting with another entity, consistent with Good Utility Practice, which satisfies NERC and the [applicable regional reliability council] requirements. The Transmission Provider shall not unreasonably refuse to accept contractual arrangements with another entity for Ancillary Services. The Network Operating Agreement is included in Attachment G.

35.3 Network Operating Committee

A Network Operating Committee (Committee) shall be established to coordinate operating criteria for the Parties' respective responsibilities under the Network Operating Agreement. Each Network Customer shall be entitled to have at least one representative on the Committee. The Committee shall meet from time to time as need requires, but no less than once each calendar year.

Schedule 1

Scheduling, System Control and Dispatch Service

This service is required to schedule the movement of power through, out of, within, or into a Control Area. This service can be provided only by the operator of the Control Area in which the transmission facilities used for transmission service are located. Scheduling, System Control and Dispatch Service is provided directly by the Transmission Provider (if the Transmission Provider is the Control Area Operator) or indirectly by the Transmission Provider making arrangements with the Control Area operator that performs this service for the Transmission Provider's Transmission System. The Transmission Customer must purchase this service from the Transmission Provider or the Control Area operator. The charges for Scheduling, System Control and Dispatch Service are to be based on the rates referred to below. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The charges for Scheduling, System Control and Dispatch Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the charges for Scheduling, System Control and Dispatch Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Scheduling, System Control and Dispatch Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations, and policies, and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 2

Reactive Supply and Voltage Control From Generation Sources Service

In order to maintain transmission voltages on the Transmission Provider's transmission facilities within acceptable limits, generation facilities under the control of the Control Area operator are operated to produce (or absorb) reactive power. Thus, Reactive Supply and Voltage Control from Generation Sources Service must be provided for each transaction on the Transmission Provider's transmission facilities. The amount of Reactive Supply and Voltage Control from Generation Sources Service that must be supplied with respect to the Transmission Customer's transaction will be determined based on the reactive power support necessary to maintain transmission voltages within limits that are generally accepted in the region and consistently adhered to by the Transmission Provider.

Reactive Supply and Voltage Control from Generation Sources Service is to be provided directly by the Transmission Provider (if the Transmission Provider is the Control Area operator) or indirectly by the Transmission Provider making arrangements with the Control Area operator that performs this service for the Transmission Provider's Transmission System. The Transmission Customer must purchase this service from the Transmission Provider or the Control Area operator. The charges for such service will be based upon the rates referred to below. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by the Control Area Operator.

The charges for Reactive Supply and Voltage Control from Generation Sources Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the charges for Reactive Supply and Voltage Control from Generation Sources Service upon written notice to

the Transmission Customer. Any change to the charges to the Transmission Customer for Reactive Supply and Voltage Control from Generation Sources Service shall be as set forth in a subsequent rate schedule promulgated pursuant to the above procedures and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 3

Regulation and Frequency Response Service

Regulation and Frequency Response Service is necessary to provide for the continuous balancing of resources (generation and interchange) with load and for maintaining scheduled interconnection frequency at sixty cycles per second (60 Hz). Regulation and Frequency Response Service is accomplished by committing on-line generation whose output is raised or lowered (predominantly through the use of automatic generating control equipment) as necessary to follow the moment-by-moment changes in load. The obligation to maintain this balance between resources and load lies with the Transmission Provider (or the Control Area operator that performs this function for the Transmission Provider). The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either purchase this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Regulation and Frequency Response Service obligation. The charges for Regulation and Frequency Response Service are referred to below. The amount of Regulation and Frequency Response Service may be set forth in the Service Agreement. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The charges for Regulation and Frequency Response Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the charges for Regulation and Frequency Response Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Regulation and Frequency Response Service shall be as set forth in a subsequent rate schedule promulgated pursuant to the above procedures and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 4

Energy Imbalance Service

Energy Imbalance Service is provided when a difference occurs between the scheduled and the actual delivery of energy to a load located within a Control Area over a single hour. The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either obtain this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Energy Imbalance Service obligation. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The Transmission Provider shall establish a deviation band of +/−1.5 percent (with a minimum of 2 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s). Parties should attempt to eliminate energy imbalances within the limits of the deviation band within thirty (30) days or within such other reasonable period of time as is generally accepted in the region and consistently adhered to by the Transmission Provider. If an energy imbalance is not corrected within thirty (30) days or a reasonable period of time that is generally accepted in the region and consistently adhered to by the Transmission Provider, the Transmission Customer will compensate the Transmission Provider for such service. Energy imbalances outside the deviation band will be subject to charges to be specified by the Transmission Provider. Compensation for Energy Imbalance Service will be as set forth below.

The compensation for Energy Imbalance Service is set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the compensation for Energy Imbalance Service upon written notice to the Transmission Customer. Any change to the compensation to the Transmission Customer for Energy Imbalance Service shall be as set forth in a subsequent rate schedule promulgated pursuant to the above procedures and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 5

Operating Reserve—Spinning Reserve Service

Spinning Reserve Service is needed to serve load immediately in the event of a system contingency. Spinning Reserve Service may be provided by generating units that are on-line and loaded at less than maximum output. The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either purchase this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Spinning Reserve Service obligation. The charges for Spinning Reserve Service are referred to below. The amount of Spinning Reserve Service may be set forth in the Service Agreement. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The charges for Operating Reserve—Spinning Reserve Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the charges for Operating Reserve—Spinning Reserve Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Operating Reserve—Spinning Reserve Service shall be as set forth in a subsequent rate schedule promulgated

pursuant to the above procedures and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 6

Operating Reserve—Supplemental Reserve Service

Supplemental Reserve Service is needed to serve load in the event of a system contingency; however, it is not available immediately to serve load but rather within a short period of time. Supplemental Reserve Service may be provided by generating units that are on-line but unloaded, by quick-start generation or by interruptible load. The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either purchase this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Supplemental Reserve Service obligation. The charges for Supplemental Reserve Service are referred to below. The amount of Supplemental Reserve Service may be set forth in the Service Agreement. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The charges for Operating Reserve—Supplemental Reserve Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the charges for Operating Reserve—Supplemental Reserve Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Operating Reserve—Supplemental Reserve Service shall be as set forth in a subsequent rate schedule promulgated pursuant to the above procedures and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 7

Long-Term Firm and Short-Term Firm Point-to-Point Transmission Service

The Transmission Customer shall compensate the Transmission Provider each month for Reserved Capacity pursuant to its rate schedule for Firm Point-to-Point Transmission Service attached to and made a part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the charges for Firm Point-to-Point Transmission Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Firm Point-to-Point Transmission Service shall be as set forth in a subsequent rate schedule promulgated pursuant to the above procedures and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Discounts: Three principal requirements apply to discounts for transmission service as follows: (1) Any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers solely by posting on the OASIS, (2) any customer-initiated requests for discounts (including requests for use by one's wholesale merchant or an affiliate's use) must occur solely by posting on the OASIS, and (3) once a discount is negotiated, details must be immediately posted on the OASIS. For any discount agreed upon for service on a path, from point(s) of receipt to point(s) of delivery, the Transmission Provider must offer the same discounted transmission service rate for the same time period to all Eligible Customers on all unconstrained transmission paths that go to the same point(s) of delivery on the Transmission System.

Schedule 8

Non-Firm Point-To-Point Transmission Service

The Transmission Customer shall compensate the Transmission Provider for Non-Firm Point-to-Point Transmission Service pursuant to its rate schedule for Non-Firm Point-to-Point Transmission Service attached to and made a part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations, and policies.

The Transmission Provider may modify the charges for Firm Point-to-Point Transmission Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Firm Point-to-Point Transmission Service shall be as set forth in a subsequent rate schedule promulgated pursuant to the above procedures and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Discounts: Three principal requirements apply to discounts for transmission service as follows: (1) Any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers solely by posting on the OASIS, (2) any customer-initiated requests for discounts (including requests for use by one's wholesale merchant or an affiliate's use) must occur solely by posting on the OASIS, and (3) once a discount is negotiated, details must be immediately posted on the OASIS. For any discount agreed upon for service on a path, from point(s) of receipt to point(s) of delivery, the Transmission Provider must offer the same discounted transmission service rate for the same time period to all Eligible Customers on all unconstrained transmission paths that go to the same point(s) of delivery on the Transmission System.

Attachment A

Form of Service Agreement for Firm Point-To-Point Transmission Service

Note: The form of the agreement for short-term firm transmission service is Attachment B, which is an enabling agreement for short-term arrangements, both firm and non-firm.

Part A: Service Agreement for Long-Term, Firm Point-To-Point Transmission Service

1 This Service Agreement (Agreement), dated as of _____, is entered into, by and between Southwestern Power Administration (Transmission Provider or Southwestern), and _____ (Transmission Customer).

1.1 The Transmission Provider may revise rates for Firm Point-to-Point Transmission Service provided under this Service Agreement pursuant to applicable Federal laws, regulations, and policies upon written notice to the Transmission Customer.

1.2 The Transmission Provider may change the General Provisions of this Agreement (Part C) upon written notice to the Transmission Customer.

1.3 The Transmission Provider may recall all or part of the capacity reserved under this Service Agreement, with no less than 36

months' notice, if such capacity is required to fulfill the Transmission Provider's obligations under Section 5 of the Flood Control Act of 1944.

2 The Transmission Customer has been determined by the Transmission Provider to have a Completed Application for Long-Term, Firm Point-To-Point Transmission Service under the Transmission Provider's Open Access Transmission Tariff (Tariff).

3 The Transmission Customer has provided to the Transmission Provider a processing fee in accordance with Section 17.3 of the Tariff.

4 The Tariff as presently constituted or as it may be revised or superseded is incorporated herein and made a part hereof.

5 Southwestern's rate schedule applicable to Firm Point-to-Point Transmission Service (Rate Schedule) as presently constituted or as it may be revised or superseded is incorporated herein and made a part hereof.

6 Service under this Agreement shall commence on the latest of:

(1) _____, (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are completed, or (3) on the first day of the month following execution by both Parties. Service under this Agreement shall terminate on _____.

7 The Transmission Provider agrees to provide, and the Transmission Customer agrees to take and pay for, Firm Point-To-Point Transmission Service in accordance with the provisions of Part II of the Tariff and this Agreement.

8 All schedules for service under this Agreement which cross Control Area boundaries between the Transmission Provider and interconnected utilities shall conform to the standards for scheduled interchange of the North American Electric Reliability Council and the applicable regional reliability council.

9 The Transmission Provider is not obligated under this Agreement to satisfy any deficiencies that may occur for the Transmission Customer as a result of suspension or reduction of schedules by a Third Party, nor is the Transmission Provider obliged to notify any party if such schedules are suspended or reduced due to the action of a Third Party.

10 Any notice or request made to or by either Party regarding this Agreement shall be made to the representative of the other Party as indicated below.

Transmission Provider: Administrator, Southwestern Power Administration, One West Third Street, Suite 1400, Tulsa, OK 74103.

Transmission Customer:

_____

_____

_____

_____

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective authorized officials.

SOUTHWESTERN POWER ADMINISTRATION

By: _____

ADMINISTRATOR

P.O. Box 1619

Tulsa, Oklahoma, 74101–1619

Date: _____

Reviewed by Southwestern's General Counsel:

By: _____

(TRANSMISSION CUSTOMER)

By: _____

Title: _____

Address: _____

_____

Date: _____

Part B: Specifications for Long-Term Firm Point-To-Point Transmission Service

1 Term of Transaction: _____

Start Date: _____

Termination Date: _____

2 Description of capacity to be transmitted by Transmission Provider, including the electric Control Area in which the transaction originates.

_____

3 Point(s) of Receipt: _____

Delivering Party: _____ _____

4 Point(s) of Delivery: _____ _____

5 Receiving Party: _____ _____

Maximum amount of capacity to be transmitted (Reserved Capacity):

_____

6 Designation of party(ies) subject to reciprocal service obligation:

_____

_____

_____

_____

7 Name of the Control Area from which capacity and energy will be delivered to the Transmission Provider for Transmission Service:

_____

Name of the Control Area to which capacity and energy will be delivered by the Transmission Provider:

_____

Name(s) of any Intervening Systems providing Transmission Service:

_____

_____

8 Service under this Agreement may be subject to some combination of the charges detailed below. The appropriate charges for individual transactions will be determined in accordance with the terms and conditions of the Tariff and the Rate Schedule.

8.1 Transmission Charges are set forth in the Rate Schedule.

8.2 Real Power Losses will be applied and charged in accordance with the Rate Schedule.

8.3 Ancillary Services Charges are set forth in the Rate Schedule. The specific Ancillary Services to be charged initially under this Agreement are listed below. Changes in Ancillary Services, if applicable, are made in accordance with the Rate Schedule.

_____

_____

_____

_____

8.4 System Impact and/or Facilities Study Charge(s): (to be filled in if applicable)

_____

_____

8.5 Direct Assignment Facilities Charge: (to be filled in if applicable)

_____

8.5 Other Charges, including transformation services and penalties, if applicable, will be determined by the Rate Schedule or set forth below:

Part C: General Provisions Applicable to Transmission Service

1 *Propriety of Rates.* The Transmission Provider shall bill the Transmission Customer for the Transmission Customer's purchases of power, energy, and other services in accordance with the Rate Schedule, which is placed in effect pursuant to statute.

1.1 The Transmission Customer hereby agrees to promptly pay the Transmission Provider under such Rate Schedule, whether or not the Transmission Customer agrees with the propriety or the levels of the rates placed into effect pursuant to law, regulation, or the order of an appropriate authority, subject to the Transmission Customer's rights to terminate service.

1.2 In the event that the U.S. Congress amends the manner in which the Transmission Provider calculates or charges for its products and services, the Transmission Customer hereby agrees to promptly pay in such an amended manner, subject to the Transmission Customer's right to terminate.

2 *Changes in Rates:* The rates and/or terms and conditions set forth in the Rate Schedule may change upon confirmation and/or approval by the appropriate authority having responsibility to so confirm and/or approve rate schedules, and, whether on an interim basis or as finally confirmed and/or approved, such rates may be increased, decreased, modified, or superseded at any time and from time to time.

2.1 If such rates are so increased, decreased, modified, or superseded, the rates and terms and conditions shall thereupon become effective and applicable to the Transmission Service furnished by the Transmission Provider under this Agreement, in accordance with and on the effective date specified in the order of the appropriate authority.

2.2 The Transmission Provider shall promptly notify the Transmission Customer in writing of the redetermination and/or changes and modifications made in the then-effective Transmission Provider's rate schedules for Transmission Service.

2.3 If such notice advises that the rates to be paid by the Transmission Customer for the Transmission Service furnished by the Transmission Provider under this Agreement are greater than the then-effective rate for such service, The Transmission Customer may, by written notice to the Transmission Provider at any time within 90 days following the date of receipt of such notice from the Transmission Provider, terminate this Agreement in its entirety, such termination to become effective as of the last day of any month following no less than 6 months after the date of receipt by the Transmission Provider of such notice of termination from the Transmission Customer.

2.4 In the event that the Transmission Customer elects to terminate this Agreement pursuant to this Section 2, the Transmission

Customer shall pay for services under this Agreement at the then-effective rates during the interim between the date of such notice and the effective termination date specified in such notice.

3 *Availability of Funds to the Transmission Provider:* This Agreement and all rights and obligations hereunder, and the expenditure of funds by the Transmission Provider under its provisions, are expressly conditioned and contingent upon the U.S. Congress's making available (through direct appropriation, authorization of a revolving fund, the authority to borrow funds, or through such other means as it may provide) the necessary funds to enable the Transmission Provider to carry out the provisions of this Agreement, and if such funds are not available, this Agreement shall terminate and have no further force or effect as of the last day for which funds were available, and the Transmission Customer hereby releases the Transmission Provider from any and all liability for failure to perform and fulfill its obligations under this Agreement for that reason.

3.1 No obligation contained herein for the future payment of money by the Transmission Provider, or liability on the part of the Transmission Provider for breach of any of the provisions contained herein, shall be binding upon or enforceable against the Transmission Provider unless and until funds, as provided in this Section 3, are available out of which such obligations or liability can be legally paid.

3.2 Nothing in this Agreement may be considered as implying that the U.S. Congress will, at a later date, appropriate funds sufficient to meet any deficiencies or obligations incurred under this Agreement.

4 *Covenant Against Contingent Fees:* The Transmission Customer warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by the Transmission Customer for the purpose of securing business. For breach or violation of this warranty, the Transmission Provider shall have the right to annul this Agreement without liability, or, at its discretion, to add to the Agreement price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

5 *Termination for Breach:* If either Party breaches a material provision of this Agreement, the other Party, at its option, may terminate this Agreement upon 30 days' prior written notice of its intention to do so, and this Agreement *ipso facto* shall terminate at the end of such 30-day period unless such violation is corrected within that period. Neither Party shall be considered to be in default or breach with respect to any obligation under this Agreement if prevented from fulfilling such obligation by reason of an Uncontrollable Force.

6 *Convict Labor:* In connection with the performance of work under this Agreement, the Transmission Customer agrees not to employ any person under going sentence of imprisonment except as provided by Pub. L. 89–176, September 10, 1965 (18 U.S.C. 4062 (c)(2)), and Executive Order 11755, December 29, 1973.

7 *Equal Employment Opportunity:* During the performance of this Agreement, the Transmission Customer agrees to abide by and to fulfill the nondiscrimination requirements of the ''equal opportunity clause'' contained in Section 202 of Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive Order amending such order, and any other Executive Order superseding such order.

8 *Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era:* During the performance of this Agreement, the Transmission Customer agrees to comply with Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, Pub. L. 93–508 as it amends Pub. L. 92–540, to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era, and to fulfill the requirements of the ''affirmative action clause,'' 38 USCA Sections 2011 and 2012 (1979); 41 CFR 60–250 *et seq.*

9 *Affirmative Action for Handicapped Workers:* During the performance of this Agreement, the Transmission Customer agrees to comply with Section 503 of the Rehabilitation Act of 1973, Pub. L. 93–516, to take affirmative action to employ and advance in employment qualified handicapped individuals, and to otherwise fulfill the requirements of the ''affirmative action clause,'' 29 USCA Section 793 (1979); 41 CFR 60–741 *et seq.*

10 *Contract Work Hours and Safety Standards:* This Agreement, to the extent that it is of a character specified in Section 103 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327–333 (1986), is subject to the provisions of the said Act and to regulations promulgated by the Secretary of Labor pursuant to the said Act.

The following provisions are applicable only to Transmission Customers which receive service through facilities which are (1) jointly used by the Transmission Provider and the Transmission Customer, (2) where the Transmission Customer would have occasion to enter the facilities of the Transmission Provider, (3) where the Transmission Customer owns facilities installed on the property of the Transmission Provider, and/or (4) when the Transmission Customer takes service directly from facilities owned and maintained by the Transmission Provider.

11 *Meter Tests and Adjustments:* Any metering equipment which may be used in power accounting for Transmission Service under this Agreement shall be inspected and tested at least once each year by the Party responsible, and at any reasonable time upon request by either Party. Metering equipment found to be defective or inaccurate shall be repaired and readjusted or replaced by the owner.

11.1 A meter shall be considered inaccurate if it is found to deviate from an accurate standard meter in excess of 0.5 percent when tested at 100 percent of load or 1.0 percent when tested at 10 percent of load.

11.2 If any meter inspection or test discloses an error exceeding 2 percent, a correction based upon the inaccuracy found shall be made on the records of electric service furnished since the beginning of the monthly billing period immediately preceding the billing period during which the test was made, and such correction, when made, shall constitute full adjustment of any claim between the parties hereto arising out of such inaccuracy of metering equipment.

12 *Reliability, Safety, Health, and Environmental Requirements in Regard to Construction, Operation, and Maintenance on U.S. Government Property:* The provisions of this Section 12 shall apply only if the Transmission Customer, its agents or contractors, or its member entities perform maintenance, operations, or construction on the property of the U.S. Government (Government), or on easements shared by the Government and the Transmission Customer.

12.1 Such construction, maintenance, and operation shall be performed in accordance with standards at least equal to those provided by the National Electrical Safety Code and shall conform to safety, environmental, and security procedures identified by Transmission Provider as appropriate to each facility in which such work is performed. The Transmission Provider provides such written procedures in each of the facilities it maintains and to affected Transmission Customers.

12.2 The Transmission Customer and/or its member entities shall take all reasonable precautions in the performance of such work to protect the public and the environment. The Transmission Customer and/or its member entities shall comply with all applicable local, state, and Federal regulations and requirements in the performance of such work, including, but not limited to, the National Environmental Policy Act, the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Responsibility, Compensation, and Liability Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Superfund Amendments and Reauthorization Act (SARA); SARA Title III (Emergency Planning and Community Right-to-Know Act of 1986); and the Occupational Safety and Health Act.

12.3 In the event that the Transmission Provider, at its sole option and in its sole judgment, determines that construction, maintenance, or operation of facilities which are performed under this Agreement by the Transmission Customer, and/or one of its member entities, do not meet the standards and/or regulations and requirements specified in this Section 12, or if the Transmission Provider determines, in its sole judgment, that a condition exists which provides a potentially adverse impact (1) on the reliability of services provided by Transmission Provider to its customers, (2) on the safety and/or health of the public or employees and agents of the parties hereto, and/or (3) on the environment, then Transmission Provider may provide written notice to the Transmission Customer and/or its member entity of the deficient condition; *Provided*, That, if such condition, in Transmission Provider's sole judgment and at Transmission Provider's sole option, requires immediate attention and does not allow time

for such notice, Transmission Provider will remedy the condition and, where appropriate, bill the Transmission Customer.

12.4 Where, in the Transmission Provider's sole judgment, remedy of the said deficient condition is not time critical, the Transmission Customer and/or its member entity shall provide a written plan and schedule to Transmission Provider within 30 days of receipt of the said written notice. Such plan and schedule shall provide for correction of the said deficiency at the earliest possible time available to the Transmission Customer and/or its member entity; *Provided*, That, the maximum time allowed for the Transmission Customer and/or its member entity to correct any such deficiency shall not exceed 18 months from receipt of the said written notice. The Transmission Customer shall coordinate or, if applicable, cause its member entity to coordinate, any work and outages which may involve Transmission Provider's facilities with Transmission Provider's Dispatch Center (Dispatch Center) in Springfield, Missouri.

12.5 Unless otherwise agreed in writing, correction of deficiencies pursuant to this Section 12 shall be at the expense of the Transmission Customer.

12.6 If the Transmission Customer and/or its member entity fails to correct the deficiency within the time provided pursuant to this Section 12, the Transmission Provider shall have the right, at its sole option and in its sole discretion, to terminate service through the affected facilities until such deficiencies are corrected to the satisfaction of Transmission Provider.

12.7 If, within the time period provided pursuant to this Section 12, an emergency condition occurs which, in the sole judgment of Transmission Provider, may cause an adverse impact on the reliability of the Transmission System of Transmission Provider and/or on the environment, or which poses a hazard to the safety and/or health of the public or employees and agents of the parties hereto, then Transmission Provider may, at its sole option, remedy or repair such condition or equipment and bill the Transmission Customer, and the Transmission Customer agrees to render the Transmission Provider reimbursement.

13 Right of Installation and Access

Each Party grants to the other permission, or will obtain such permission for the other Party, to install, maintain, and operate, or cause to be installed, maintained, and operated, on the System of Transmission Provider and on the System of the Transmission Customer, at the Point(s) of Delivery between the System of Transmission Provider and the System of the Transmission Customer utilized under this Agreement, any and all terminal equipment and associated electrical apparatus and devices necessary in the performance of this Agreement.

13.1 Each party shall permit, or shall obtain permission for, duly authorized representatives and employees of the other Party to enter upon the System of the Transmission Provider and the System of the Transmission Customer at the said Point(s) of Delivery for the purpose of reading or checking meters; for inspecting, testing, repairing, renewing, or exchanging any or all of the equipment owned by the other party located on such premises; or for the purpose of performing any other work necessary in the performance of this Agreement.

13.2 Access for any work performed by one party under this Section 13 which may affect the other Party's equipment shall normally be preceded by at least one day's notice to the affected Party, except in the event of an emergency, in which case such notice shall be made as soon as possible after such emergency occurrence. Notice to Transmission Provider pursuant to this Section 13 shall be made to the Dispatch Center.

13.3 Any access to property controlled by the Transmission Provider shall include notification to Transmission Provider at the time of entry. Any employee or agent of the Transmission Customer, or of its member entities, who enters a Transmission Provider facility is expected to call the Dispatch Center from a telephone located in the control building in that facility and to identify himself or herself. Security devices located in the control buildings at Transmission Provider facilities sound an alarm in the Dispatch Center when the building is entered. Local law enforcement officers may be asked to investigate any unidentified entry.

13.4 Any equipment, apparatus, or devices installed on the System of the Transmission Provider by the Transmission Customer, as provided under this Section 13, shall be clearly and permanently marked to indicate ownership, and, in addition, a detailed description of each item so installed (including, if applicable, manufacturer's name, serial number, model number, etc.) shall be communicated to Transmission Provider to aid in maintenance of plant accounts.

13.5 In the event the equipment, apparatus, or devices are not marked in accordance with Section 13.4, ownership of said equipment, apparatus, or devices shall be presumed to be vested in Transmission Provider.

13.6 The Transmission Customer agrees that, if requested by Transmission Provider, the description required under Section 13.4 shall include a detailed analysis of all dielectrical oil, including, but not limited to, tests for polychlorinated biphenyls (PCBs). If such analysis indicates the presence of a known hazardous substance, which, in the Transmission Provider's sole judgment, presents a significant hazard to the environment or to the health and safety of employees of the parties hereto, the Transmission Provider may require, at its sole option, by written request, removal of any equipment containing such substance, and the Transmission Customer agrees to comply with such request for removal at no cost to Transmission Provider.

14 Right of Removal

Any and all equipment, apparatus, or devices placed or installed or caused to be placed or installed by the Parties on or in the System of the Transmission Provider or the System of the Transmission Customer shall be and shall remain the property of the Party owning and installing such equipment, apparatus, devices, or facilities, regardless of the mode or manner of annexation or attachment to real property, and, upon the termination of this Agreement, the owner thereof shall have the right to enter upon the premises or system of the other and shall, within a reasonable time, remove such equipment, apparatus, devices, or facilities, subject to the provisions of Section 13.5.

15 Right to Upgrade Facilities

The Transmission Provider reserves the right to modify or upgrade its Transmission System and any of the elements which support such Transmission System, including, but not limited to, changes in: (1) The Transmission Provider's transmission voltages, (2) The Transmission Provider's transmission system components, (3) The Transmission Provider's communications system, (4) The Transmission Provider's Supervisory Control and Data Acquisition (SCADA) System, and (5) other modifications necessary to comply with the standards and/or regulations and requirements mentioned in Section 16.

15.1 If, during the term of this Agreement, the Transmission Provider determines, in its sole judgment and at its sole option, that modifications or upgrades to its Transmission System and associated facilities are required, then, in that event, the Transmission Customer shall be responsible for any and all costs and expenses incurred by the Transmission Customer in order to continue to receive services provided under this Agreement.

15.2 If the Transmission Customer elects not to make changes in its facilities which, in The Transmission Provider's judgment, are required for the Transmission Customer to continue to receive reliable service from the Transmission Provider's modified or upgraded facilities, then the Transmission Customer will discontinue receipt of the services provided under this Agreement which are dependent on such modified or upgraded facilities, and the provisions of this Agreement which describe such services shall be terminated or, at the Transmission Provider's sole option, suspended, until the Transmission Customer completes the changes in its facilities which the Transmission Provider, in its sole judgment, deems necessary for safe and reliable service to the Transmission Customer.

15.3 The Transmission Provider shall notify the Transmission Customer of the specific sections or articles of the Agreement which are to be terminated or suspended pursuant to this Section 15.

15.4 Any provisions of this Agreement which are not specifically terminated or suspended pursuant to Section 15.3 shall not in any way be affected and shall remain in full force and effect except insofar as the services provided pursuant to the terminated or suspended provisions which are reflected in other provisions of this Agreement will also be terminated or suspended.

15.5 Termination or suspension of specific provisions of this Agreement pursuant to this Section 17 shall be without penalty to either of the Parties, except that

the rights of the Parties, if any, which accrued prior to the date of such termination or suspension shall be and hereby are preserved.

16 *Limitation on Rights of Entry:* The Transmission Provider reserves the right, upon notice to the Transmission Customer, to revoke or cancel the rights of entry granted under this Agreement with regard to any particular representative of the Transmission Customer, if, in the sole judgment of the Transmission Provider, such revocation or cancellation is required in the interest of national security.

17 *Assistance by Contracting Parties:* If assistance in maintenance and utilization of their respective systems is rendered by the Transmission Provider and/or the Transmission Customer, the following terms and conditions shall apply:

17.1 If, in the maintenance or utilization of their respective transmission systems and related facilities for the purpose of this Agreement, it becomes necessary by reason of any emergency or extraordinary condition for the Transmission Provider or the Transmission Customer to request the other to furnish personnel, materials, tools, and equipment for the maintenance or modification of, or other work on, such transmission systems and related facilities to insure continuity of power and energy deliveries, the Party requested shall cooperate with the other and render such assistance as the Party requested may determine to be available.

17.2 The Party making such request, upon receipt of properly itemized bills, shall reimburse the Party rendering such assistance, including overhead and administrative and general expenses. The Transmission Customer and the Transmission Provider agree to account for any incurred costs under a Work Order accounting procedure and in accordance with the Uniform System of Accounts prescribed for public utilities by the Commission.

17.3 Billing statements rendered by the Transmission Customer and the Transmission Provider for such reimbursement shall be due 20 days from the date thereof.

Attachment B

Form of Service Agreement for Firm and Non-Firm Point-To-Point Transmission Service

Note: The form of this agreement incorporates short-term firm transmission service with non-firm transmission service, and is an enabling agreement for all Southwestern short-term transmission arrangements, both firm and non-firm.

Part A: Service Agreement for Enabling Short-Term Point-To-Point Transmission Service

1 This Service Agreement (Agreement), dated as of _____, is entered into, by, and between the Southwestern Power Administration (Transmission Provider or Southwestern), and _____ (Transmission Customer).

1.1 The Transmission Provider may revise rates for Firm Point-to-Point Transmission Service provided under this Service Agreement pursuant to applicable Federal laws, regulations, and policies upon written notice to the Transmission Customer.

1.2 The Transmission Provider may change the General Provisions of this Agreement (Part C) upon written notice to the Transmission Customer.

2 The Transmission Customer has been determined by the Transmission Provider to have a Completed Application for receiving Short-Term Point-To-Point Transmission Service under the Transmission Provider's Open Access Transmission Tariff (Tariff).

3 The Tariff as presently constituted or as it may be revised or superseded is incorporated herein and made a part hereof.

4 Southwestern's rate schedule applicable to Point-to-Point Transmission Service (Rate Schedule) as presently constituted or as it may be revised or superseded is incorporated herein and made a part hereof.

5 Service under this agreement shall commence on the latest of: (1) _____, (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are completed, or (3) on the first day of the month following execution by both parties. Service under this Agreement shall terminate on _____.

6 The Transmission Provider agrees to provide, and the Transmission Customer agrees to take and pay for, Short-Term Point-To-Point Transmission Service in accordance with the provisions of Part II of the Tariff and this Agreement.

7 All schedules for service under this Agreement which cross Control Area boundaries between the Transmission Provider and interconnected utilities shall conform to the standards for scheduled interchange of the North American Electric Reliability Council and the applicable regional reliability council.

8 The Transmission Provider is not obligated under this Agreement to satisfy any deficiencies that may occur for the Transmission Customer as a result of suspension or reduction of schedules by a Third Party, nor is the Transmission Provider obliged to notify any party if such schedules are suspended or reduced due to the action of a Third Party.

9 Any notice or request made to or by either Party regarding this Agreement shall be made to the representative of the other Party as indicated below.

Transmission Provider: Administrator, Southwestern Power Administration, One West Third Street, Suite 1400, Tulsa, OK 74103.

Transmission Customer:

_____

_____

_____

_____

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective authorized officials.

SOUTHWESTERN POWER ADMINISTRATION

By: _____

ADMINISTRATOR

P.O. Box 1619

Tulsa, Oklahoma, 74101–1619

Date: _____

Reviewed by Southwestern's General Counsel:

By: _____

(TRANSMISSION CUSTOMER)

By: _____

Title: _____

Address: _____

_____

Date: _____

Part B: General Terms and Conditions for Short-Term Firm and Non-Firm Point-To-Point Transmission Service

1 This Agreement is intended to enable a variety of individual Short-Term Firm and Non-Firm Transmission Service Transactions (Transactions). For the purposes of this Agreement, the Transmission Customer has designated the following information in its Completed Application as ''various:''

(I) Points of Receipt and Delivery, including supply and delivery characteristics and voltages;

(ii) the Reserved Transmission Capacity desired;

(iii) the type of service (firm or non-firm, hourly, daily, weekly, monthly) desired;

(iv) the date(s) and, if applicable, hour(s) for the service which is desired,

(v) the identities of the Delivering and Receiving Parties; and

(vi) the location(s) of the resource from which power and energy are to be supplied and the location of the load or Control Area(s) to which it is to be transmitted.

2 Individual Transactions for Short-Term, Firm or Non-Firm, Transmission Service under this Agreement may be requested by the Transmission Customer in increments of a day, a week, or a month for Firm Transmission Service, or in increments of an hour, a day, a week, or a month for Non-Firm Transmission Service, and the Transmission Provider will grant such requests on an as-available basis.

2.1 For each specific Transaction requested, the Transmission Customer shall supply to the Transmission Provider the specific information listed in Section 1 pertinent to such Transaction, via Southwestern's OASIS and/or by telephone or facsimile, in accordance with the Tariff and with specific procedures which are mutually agreeable to the Parties.

2.2 The Transmission Customer shall request a separate Transaction for each type of service (firm or non-firm, and by rate types related to increments of hourly, daily, weekly, or monthly reservations).

2.3 The Transmission Provider shall review each Transaction request and determine whether a reservation for such Transaction is available. The Transmission Provider shall communicate, also via OASIS and/or other means as agreed, the results of such determination.

2.4 In the event that a capacity reservation is recorded for such Transaction, the Transmission Customer will submit actual schedules under such reservation in accordance with established procedures, subject to the priority provisions of the Tariff and of Section 7 of Part A of this Agreement.

3 Capacity reservations for any particular Transaction for Short-Term Firm Transmission Service will conform to the following minimum and maximum periods for making such reservation prior to actual service under such Transaction:

(a) For reservations in increments of one day (daily): No later than 2 days, no earlier than 60 days prior to service

(b) For reservations in increments of one week (weekly): No later than 2 days, no earlier than 60 days prior to service

(c) For reservations in increments of one month: No later than 14 days, no earlier than 120 days prior to service

4 Capacity reservations for any particular Transaction for Non-Firm Transmission Service will conform to the following minimum and maximum periods for making such reservation prior to actual service under such Transaction:

(a) For reservations in increments of one hour (hourly): No later than 20 minutes prior to the first hour requested, no earlier than 2:00 p.m. the day before

(b) For reservations in increments of one day (daily): No later than 10:00 a.m. the day before, no earlier than 30 days prior to service

(c) For reservations of one week to one month (weekly): No later than 2:00 p.m. the day before, no earlier than 60 days prior to service

(d) For reservations of one month: No later than 2:00 p.m. the day before, no earlier than 120 days prior to service

5 Reservations for any given one-week increment shall not cross the end of a calendar month, and reservations for any month shall be requested from the first day to the last day of a particular calendar month.

6 Service under this Agreement may be subject to some combination of the charges detailed below. The appropriate charges for individual transactions will be determined in accordance with the terms and conditions of the Tariff and the Rate Schedule.

6.1 Transmission Charges are set forth in the Rate Schedule.

6.2 Real Power Losses will be applied and charged in accordance with the Rate Schedule.

6.3 Ancillary Services Charges are set forth in the Rate Schedule. The specific Ancillary Services to be charged for any particular Transaction will be determined in accordance with the Rate Schedule.

6.4 Other Charges, including transformation services and penalties, if applicable, will be determined by the Rate Schedule or set forth below:

Part C: General Provisions Applicable to Transmission Service

1 *Propriety of Rates:* The Transmission Provider shall bill the Transmission Customer for the Transmission Customer's purchases of power, energy, and other services in accordance with the Rate Schedule, which is placed in effect pursuant to statute.

1.1 The Transmission Customer hereby agrees to promptly pay the Transmission Provider under such Rate Schedule, whether or not the Transmission Customer agrees with the propriety or the levels of the rates placed into effect pursuant to law, regulation, or the order of an appropriate authority, subject to the Transmission Customer's rights to terminate service.

1.2 In the event that the U.S. Congress amends the manner in which the Transmission Provider calculates or charges for its products and services, the Transmission Customer hereby agrees to promptly pay in such an amended manner, subject to the Transmission Customer's right to terminate.

2 *Changes in Rates:* The rates and/or terms and conditions set forth in the Rate Schedule may change upon confirmation and/or approval by the appropriate authority having responsibility to so confirm and/or approve rate schedules, and, whether on an interim basis or as finally confirmed and/or approved, such rates may be increased, decreased, modified, or superseded at any time and from time to time.

2.1 If such rates are so increased, decreased, modified, or superseded, the rates and terms and conditions shall thereupon become effective and applicable to the Transmission Service furnished by the Transmission Provider under this Agreement, in accordance with and on the effective date specified in the order of the appropriate authority.

2.2 The Transmission Provider shall promptly notify the Transmission Customer in writing of the redetermination and/or changes and modifications made in the then-effective Transmission Provider's rate schedules for Transmission Service.

2.3 If such notice advises that the rates to be paid by the Transmission Customer for the Transmission Service furnished by the Transmission Provider under this Agreement are greater than the then-effective rate for such service, The Transmission Customer may, by written notice to the Transmission Provider at any time within 90 days following the date of receipt of such notice from the Transmission Provider, terminate this Agreement in its entirety, such termination to become effective as of the last day of any month following no less than 6 months after the date of receipt by the Transmission Provider of such notice of termination from the Transmission Customer.

2.4 In the event that the Transmission Customer elects to terminate this Agreement pursuant to this Section 2, the Transmission Customer shall pay for services under this Agreement at the then-effective rates during the interim between the date of such notice and the effective termination date specified in such notice.

3 Availability of Funds to the Transmission Provider: This Agreement and all rights and obligations hereunder, and the expenditure of funds by the Transmission Provider under its provisions, are expressly conditioned and contingent upon the U.S. Congress's making available (through direct appropriation, authorization of a revolving fund, the authority to borrow funds, or through such other means as it may provide) the necessary funds to enable the Transmission Provider to carry out the provisions of this Agreement, and if such funds are not available, this Agreement shall terminate and have no further force or effect as of the last day for which funds were available, and the Transmission Customer hereby releases the Transmission Provider from any and all liability for failure to perform and fulfill its obligations under this Agreement for that reason.

3.1 No obligation contained herein for the future payment of money by the Transmission Provider, or liability on the part of the Transmission Provider for breach of any of the provisions contained herein, shall be binding upon or enforceable against the Transmission Provider unless and until funds, as provided in this Section 3, are available out of which such obligations or liability can be legally paid.

3.2 Nothing in this Agreement may be considered as implying that the U.S. Congress will, at a later date, appropriate funds sufficient to meet any deficiencies or obligations incurred under this Agreement.

4 *Covenant Against Contingent Fees:* The Transmission Customer warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by the Transmission Customer for the purpose of securing business. For breach or violation of this warranty, the Transmission Provider shall have the right to annul this Agreement without liability, or, at its discretion, to add to the Agreement price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

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6 *Convict Labor:* In connection with the performance of work under this Agreement, the Transmission Customer agrees not to employ any person undergoing sentence of imprisonment except as provided by Public Law 89–176, September 10, 1965 (18 U.S.C. 4062(c)(2)), and Executive Order 11755, December 29, 1973.

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Transmission Customer agrees to abide by and to fulfill the nondiscrimination requirements of the ''equal opportunity clause'' contained in Section 202 of Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive Order amending such order, and any other Executive Order superseding such order.

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9 *Affirmative Action for Handicapped Workers:* During the performance of this Agreement, the Transmission Customer agrees to comply with Section 503 of the Rehabilitation Act of 1973, Public Law 93–516, to take affirmative action to employ and advance in employment qualified handicapped individuals, and to otherwise fulfill the requirements of the ''affirmative action clause,'' 29 USCA Section 793 (1979); 41 CFR 60–741 *et seq.*

10 *Contract Work Hours and Safety Standards:* This Agreement, to the extent that it is of a character specified in Section 103 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327–333 (1986), is subject to the provisions of the said Act and to regulations promulgated by the Secretary of Labor pursuant to the said Act.

The following provisions are applicable only to Transmission Customers which receive service through facilities which are (1) jointly used by the Transmission Provider and the Transmission Customer, (2) where the Transmission Customer would have occasion to enter the facilities of the Transmission Provider, (3) where the Transmission Customer owns facilities installed on the property of the Transmission Provider, and/or (4) when the Transmission Customer takes service directly from facilities owned and maintained by the Transmission Provider.

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11.1 A meter shall be considered inaccurate if it is found to deviate from an accurate standard meter in excess of 0.5 percent when tested at 100 percent of load or 1.0 percent when tested at 10 percent of load.

11.2 If any meter inspection or test discloses an error exceeding 2 percent, a correction based upon the inaccuracy found shall be made on the records of electric service furnished since the beginning of the monthly billing period immediately preceding the billing period during which the test was made, and such correction, when made, shall constitute full adjustment of any claim between the parties hereto arising out of such inaccuracy of metering equipment.

12 *Reliability, Safety, Health, and Environmental Requirements in Regard to Construction, Operation, and Maintenance on U.S. Government Property:* The provisions of this Section 12 shall apply only if the Transmission Customer, its agents or contractors, or its member entities perform maintenance, operations, or construction on the property of the U.S. Government (Government), or on easements shared by the Government and the Transmission Customer.

12.1 Such construction, maintenance, and operation shall be performed in accordance with standards at least equal to those provided by the National Electrical Safety Code and shall conform to safety, environmental, and security procedures identified by Transmission Provider as appropriate to each facility in which such work is performed. The Transmission Provider provides such written procedures in each of the facilities it maintains and to affected Transmission Customers.

12.2 The Transmission Customer and/or its member entities shall take all reasonable precautions in the performance of such work to protect the public and the environment. The Transmission Customer and/or its member entities shall comply with all applicable local, state, and Federal regulations and requirements in the performance of such work, including, but not limited to, the National Environmental Policy Act, the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Responsibility, Compensation, and Liability Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Superfund Amendments and Reauthorization Act (SARA); SARA Title III (Emergency Planning and Community Right-to-Know Act of 1986); and the Occupational Safety and Health Act.

12.3 In the event that the Transmission Provider, at its sole option and in its sole judgment, determines that construction, maintenance, or operation of facilities which are performed under this Agreement by the Transmission Customer, and/or one of its member entities, do not meet the standards and/or regulations and requirements specified in this Section 12, or if the Transmission Provider determines, in its sole judgment, that a condition exists which provides a potentially adverse impact (1) on the reliability of services provided by Transmission Provider to its customers, (2) on the safety and/or health of the public or employees and agents of the parties hereto, and/or (3) on the environment, then Transmission Provider may provide written notice to the Transmission Customer and/or its member entity of the deficient condition; *Provided,* That, if such condition, in Transmission Provider's sole judgment and at Transmission Provider's sole option, requires immediate attention and does not allow time for such notice, Transmission Provider will remedy the condition and, where appropriate, bill the Transmission Customer.

12.4 Where, in the Transmission Provider's sole judgment, remedy of the said deficient condition is not time critical, the Transmission Customer and/or its member entity shall provide a written plan and schedule to Transmission Provider within 30 days of receipt of the said written notice. Such plan and schedule shall provide for correction of the said deficiency at the earliest possible time available to the Transmission Customer and/or its member entity; *Provided,* That, the maximum time allowed for the Transmission Customer and/or its member entity to correct any such deficiency shall not exceed 18 months from receipt of the said written notice. The Transmission Customer shall coordinate or, if applicable, cause its member entity to coordinate, any work and outages which may involve Transmission Provider's facilities with Transmission Provider's Dispatch Center (Dispatch Center) in Springfield, Missouri.

12.5 Unless otherwise agreed in writing, correction of deficiencies pursuant to this Section 12 shall be at the expense of the Transmission Customer.

12.6 If the Transmission Customer and/or its member entity fails to correct the deficiency within the time provided pursuant to this Section 12, the Transmission Provider shall have the right, at its sole option and in its sole discretion, to terminate service through the affected facilities until such deficiencies are corrected to the satisfaction of Transmission Provider.

12.7 If, within the time period provided pursuant to this Section 12, an emergency condition occurs which, in the sole judgment of Transmission Provider, may cause an adverse impact on the reliability of the Transmission System of Transmission Provider and/or on the environment, or which poses a hazard to the safety and/or health of the public or employees and agents of the parties hereto, then Transmission Provider may, at its sole option, remedy or repair such condition or equipment and bill the Transmission Customer, and the Transmission Customer agrees to render the Transmission Provider reimbursement.

13 *Right of Installation and Access:* Each Party grants to the other permission, or will obtain such permission for the other Party, to install, maintain, and operate, or cause to be installed, maintained, and operated, on the System of Transmission Provider and on the System of the Transmission Customer, at the Point(s) of Delivery between the System of Transmission Provider and the System of the Transmission Customer utilized under this Agreement, any and all terminal equipment and associated electrical apparatus and devices necessary in the performance of this Agreement.

13.1 Each party shall permit, or shall obtain permission for, duly authorized representatives and employees of the other Party to enter upon the System of the Transmission Provider and the System of the Transmission Customer at the said Point(s) of Delivery for the purpose of reading or checking meters; for inspecting, testing, repairing, renewing, or exchanging any or all of the equipment owned by the other party located on such premises; or for the purpose of performing any other work necessary in the performance of this Agreement.

13.2 Access for any work performed by one party under this Section 13 which may affect the other Party's equipment shall normally be preceded by at least one day's notice to the affected Party, except in the event of an emergency, in which case such notice shall be made as soon as possible after such emergency occurrence. Notice to Transmission Provider pursuant to this Section 13 shall be made to the Dispatch Center.

13.3 Any access to property controlled by the Transmission Provider shall include notification to Transmission Provider at the time of entry. Any employee or agent of the Transmission Customer, or of its member entities, who enters a Transmission Provider facility is expected to call the Dispatch Center from a telephone located in the control building in that facility and to identify himself or herself. Security devices located in the control buildings at Transmission Provider facilities sound an alarm in the Dispatch Center when the building is entered. Local law enforcement officers may be asked to investigate any unidentified entry.

13.4 Any equipment, apparatus, or devices installed on the System of the Transmission Provider by the Transmission Customer, as provided under this Section 13, shall be clearly and permanently marked to indicate ownership, and, in addition, a detailed description of each item so installed (including, if applicable, manufacturer's name, serial number, model number, etc.) shall be communicated to Transmission Provider to aid in maintenance of plant accounts.

13.5 In the event the equipment, apparatus, or devices are not marked in accordance with Section 13.4, ownership of said equipment, apparatus, or devices shall be presumed to be vested in Transmission Provider.

13.6 The Transmission Customer agrees that, if requested by Transmission Provider, the description required under Section 13.4 shall include a detailed analysis of all dielectrical oil, including, but not limited to, tests for polychlorinated biphenyls (PCBs). If such analysis indicates the presence of a known hazardous substance, which, in the Transmission Provider's sole judgment, presents a significant hazard to the environment or to the health and safety of employees of the parties hereto, the Transmission Provider may require, at its sole option, by written request, removal of any equipment containing such substance, and the Transmission Customer agrees to comply with such request for removal at no cost to Transmission Provider.

14 *Right of Removal:* Any and all equipment, apparatus, or devices placed or installed or caused to be placed or installed by the Parties on or in the System of the Transmission Provider or the System of the Transmission Customer shall be and shall remain the property of the Party owning and installing such equipment, apparatus, devices, or facilities, regardless of the mode or manner of annexation or attachment to real property, and, upon the termination of this Agreement, the owner thereof shall have the right to enter upon the premises or system of the other and shall, within a reasonable time, remove such equipment, apparatus, devices, or facilities, subject to the provisions of Section 13.5.

15 *Right to Upgrade Facilities:* The Transmission Provider reserves the right to modify or upgrade its Transmission System and any of the elements which support such Transmission System, including, but not limited to, changes in: (1) The Transmission Provider's transmission voltages, (2) The Transmission Provider's transmission system components, (3) The Transmission Provider's communications system, (4) The Transmission Provider's Supervisory Control and Data Acquisition (SCADA) System, and (5) other modifications necessary to comply with the standards and/or regulations and requirements mentioned in Section 16.

15.1 If, during the term of this Agreement, the Transmission Provider determines, in its sole judgment and at its sole option, that modifications or upgrades to its Transmission System and associated facilities are required, then, in that event, the Transmission Customer shall be responsible for any and all costs and expenses incurred by the Transmission Customer in order to continue to receive services provided under this Agreement.

15.2 If the Transmission Customer elects not to make changes in its facilities which, in The Transmission Provider's judgment, are required for the Transmission Customer to continue to receive reliable service from the Transmission Provider's modified or upgraded facilities, then the Transmission Customer will discontinue receipt of the services provided under this Agreement which are dependent on such modified or upgraded facilities, and the provisions of this Agreement which describe such services shall be terminated or, at the Transmission Provider's sole option, suspended, until the Transmission Customer completes the changes in its facilities which the Transmission Provider, in its sole judgment, deems necessary for safe and reliable service to the Transmission Customer.

15.3 The Transmission Provider shall notify the Transmission Customer of the specific sections or articles of the Agreement which are to be terminated or suspended pursuant to this Section 15.

15.4 Any provisions of this Agreement which are not specifically terminated or suspended pursuant to Section 15.3 shall not in any way be affected and shall remain in full force and effect except insofar as the services provided pursuant to the terminated or suspended provisions which are reflected in other provisions of this Agreement will also be terminated or suspended.

15.5 Termination or suspension of specific provisions of this Agreement pursuant to this Section 17 shall be without penalty to either of the Parties, except that the rights of the Parties, if any, which accrued prior to the date of such termination or suspension shall be and hereby are preserved.

16 *Limitation on Rights of Entry:* The Transmission Provider reserves the right, upon notice to the Transmission Customer, to revoke or cancel the rights of entry granted under this Agreement with regard to any particular representative of the Transmission Customer, if, in the sole judgment of the Transmission Provider, such revocation or cancellation is required in the interest of national security.

17 *Assistance by Contracting Parties:* If assistance in maintenance and utilization of their respective systems is rendered by the Transmission Provider and/or the Transmission Customer, the following terms and conditions shall apply:

17.1 If, in the maintenance or utilization of their respective transmission systems and related facilities for the purpose of this Agreement, it becomes necessary by reason of any emergency or extraordinary condition for the Transmission Provider or the Transmission Customer to request the other to furnish personnel, materials, tools, and equipment for the maintenance or modification of, or other work on, such transmission systems and related facilities to insure continuity of power and energy deliveries, the Party requested shall cooperate with the other and render such assistance as the Party requested may determine to be available.

17.2 The Party making such request, upon receipt of properly itemized bills, shall reimburse the Party rendering such assistance, including overhead and administrative and general expenses. The Transmission Customer and the Transmission Provider agree to account for any incurred costs under a Work Order accounting procedure and in accordance with the Uniform System of Accounts prescribed for public utilities by the Commission.

17.3 Billing statements rendered by the Transmission Customer and the Transmission Provider for such reimbursement shall be due 20 days from the date thereof.

Attachment C

Methodology To Assess Available Transmission Capability

The Transmission Provider is a member of the Southwest Power Pool (SPP), and participates in the SPP's process for the determination of Available Transfer Capability (ATC) and Total Transfer Capability. The SPP does seasonal transfer studies to determine the inter-area transfer capabilities. The methodology uses standard incremental transfer capability techniques that recognize thermal, voltage, and stability limitations as well as contractual limitations. This methodology is based on NERC Criteria, Operating Policies, and Reference Documents related to interchange and transfer capability estimates. The specifics for this methodology are available in Section 4 of SPP's publication titled ''Criteria.''

The Transmission Provider will post on the OASIS the values calculated by the SPP. When ATC approaches zero for any interface, the Transmission Provider may do dedicated, off-line studies in accordance with SPP methodology to update the seasonal values of ATC calculated by the SPP.

Attachment D

Methodology for Completing a System Impact Study

The Transmission Provider may require System Impact Studies to determine the feasibility of providing Transmission Service under this Tariff. The System Impact Studies will follow the general criteria and procedures as described below. In addition, the Transmission Provider is in the process of developing a written guideline for facilities evaluations, and such standards, when they are complete, will be available to an interested party. In determining the level of capacity available for new Transmission Service requests, the Transmission Provider may exclude the capacity needed to meet current and reasonably forecasted load of Native Load Customers and Network Customers, existing Firm Point-to-Point Transmission Service customers, previously pending applications for Firm Point-to-Point Transmission Service, and the capacity needed to meet existing contractual obligations.

Point-to-Point Service

The Transmission Provider will do a System Impact Study for a Point-to-Point Transmission Service request by simulating the proposed transaction along with all other contracted and pending uses of the transmission system of equal or greater priority. Criteria will be the same as those used to determine the ATC limits posted on the OASIS.

Network Integration Service

The Transmission Provider will do a System Impact Study for a Network Integration Transmission Service request using the criteria and assessment practices as detailed in Parts 4 and 5 of the Transmission Provider's annual FERC Form 715 submittal.

Attachment E

Index of Point-To-Point Transmission Service Customers

Customer	Date of service agreement
AES Power, Inc	5–18–94
Aquila Power Corporation	10–31–96
Arkansas Electric Cooperative Corp.	7–15–93 and 5–23–97
Arkansas Power & Light Company.	6–1–88
Associated Electric Cooperative, Inc.	6–26–92 & 10–9–92
Calpine Power Services Company.	8–21–96
Carthage, Missouri	10–25–60 & 10–26–92
Clarksville, Arkansas	3–25–86
CNG Power Services Corporation.	3–20–97
Coral Power, L.L.C	12–31–96
Delhi Energy Services, Inc	11–16–95
Duke/Louis Dreyfus, L.L.C	6–19–96
Eastex Power Marketing, Inc.	5–24–96
Electric Clearinghouse, Inc	9–7–95
Enron Power Marketing, Inc.	6–23–94
Entergy Power Marketing Corp.	10–24–96
Entergy Services, Inc	8–7–96
Federal Energy Sales, Inc	4–29–96
Grand River Dam Authority.	9–9–76 & 4–27–95
Illinois Power Company	2–11–97
Industrial Energy Applications, Inc.	8–7–96
Jackson, Missouri	6–19–92 & 12–8–95
Jonesboro, Arkansas	6–23–92, 5–31–94, & 2–18–97
Kennett, Missouri	5–22–92 & 3–31–95
KN Marketing, Inc	7–12–96
LG&E Power Marketing	1–27–95
Malden, Missouri	8–31–93 & 10–14–93
MidCon Power Services Corp.	9–18–95
Minnesota Power & Light Company.	2–18–97
Missouri Joint Municipal Electric Utility Commission.	7–29–81
Morgan Stanley Capital Group.	10–7–96
National Gas & Electric, L.P.	11–26–96
New Madrid, Missouri	2–18–96
Nixa, Missouri	5–21–92
NorAm Energy Services, Inc.	11–30–94
Oklahoma Municipal Power Authority.	11–24–92
Pacificorp Power Marketing, Inc.	5–15–97
PanEnergy Trading & Marketing Services, L.L.C.	9–13–96
Paragould, Arkansas	5–23–91 & 6–2–93
People's Electric Cooperative.	12–28–90 & 2–3–94
Piggott, Arkansas	11–19–92 & 4–12–95
Poplar Bluff, Missouri	3–23–92 & 5–13–93
Public Service Company of Oklahoma.	6–26–92
Rainbow Energy Marketing Corporation.	7–6–94
Sikeston, Missouri	9–15–92
Sonat Power Marketing, L.P.	11–29–96
Southern Energy Trading and Marketing, Inc.	3–31–97
Springfield, Missouri	7–29–93
Tennessee Power Company.	8–25–95
Union Electric Company	6–10–94
UtiliCorp United, Inc	6–4–96
Valero Power Services Company.	4–4–96
Western Farmers Electric Cooperative.	11–2–92, 5–28–93, & 8–24–94
Williams Energy Services Company.	7–12–96
WPS Energy Services, Inc	6–4–97

Attachment F

Form of Service Agreement for Network Integration Transmission Service

Part A: Service Agreement for Network Integration Transmission Service

1 This Service Agreement, dated as of _____, is entered into, by and between Southwestern Power Administration (Transmission Provider or Southwestern), and _____ (Transmission Customer).

11 The Transmission Provider may revise rates for Network Integration Transmission Service provided under this Service Agreement pursuant to applicable Federal laws, regulations, and policies upon written notice to the Transmission Customer.

12 The Transmission Provider may change the General Provisions of this Agreement (Part C) upon written notice to the Transmission Customer.

13 The Transmission Provider may recall all or part of the capacity reserved under this Service Agreement, with no less than 36 months' notice, if such capacity is required to fulfill the Transmission Provider's obligations under Section 5 of the Flood Control Act of 1944.

2 The Transmission Customer has been determined by the Transmission Provider to have a Completed Application for Network Integration Transmission Service under the Transmission Provider's Open Access Transmission Tariff (Tariff).

3 The Transmission Customer has provided to the Transmission Provider a processing fee in accordance with Section 29.2 of the Tariff.

4 A Network Operating Agreement (Operating Agreement) has been executed between the Parties and is incorporated herein and made a part hereof.

5 The Tariff as presently constituted or as it may be revised or superseded is incorporated herein and made a part hereof.

6 Southwestern's rate schedule applicable to Network Integration Transmission Service (Rate Schedule) as presently constituted or as it may be revised or superseded is incorporated herein and made a part hereof.

7 Service under this Service Agreement shall commence on the latest of (1) _____, or (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are completed, or (3) on the first day of the month following execution by both Parties. Service under this Service Agreement shall terminate on _____.

8 The Transmission Provider agrees to provide, and the Transmission Customer agrees to take and pay for, Network Integration Transmission Service in accordance with the provisions of Part III of the Tariff and this Service Agreement.

9 All schedules for service under this Agreement which cross Control Area boundaries between the Transmission

Provider and interconnected utilities shall conform to standards for scheduled interchange of the North American Electric Reliability Council and the applicable regional reliability council.

10 The Transmission Provider is not obligated under this Agreement to satisfy any deficiencies that may occur for the Transmission Customer as a result of suspension or reduction of schedules by a Third Party, nor is the Transmission Provider obliged to notify any party if such schedules are suspended or reduced due to the action of a Third Party.

11 The Parties specifically recognize that the Transmission Provider's ability to construct new or upgraded facilities to meet the Designated Network Loads of the Transmission Customer are contingent upon the availability of funds by the U.S. Congress to the Transmission Provider for such purpose, as set forth in Section 3 of Part C, ''General Provisions Applicable to Transmission Service,'' appended to this Service Agreement.

11.1 The Transmission Provider's responsibilities to the Transmission Customer pursuant to Section 28.2 of the Tariff, or under other provisions of the Tariff which may require construction of additional transmission facilities in the system of the Transmission Provider to meet Designated Network Loads, are specifically limited to the extent that funds are available to the Transmission Provider for such purposes.

11.2 In the event that such facilities may be needed to meet Designated Network Loads, the Transmission Customer may elect to provide, in advance, the necessary funds for such construction by the Transmission Provider, in accordance with a separate construction agreement between the Parties. The Transmission Provider's ability to accept such funds is subject to the authority granted to the Transmission Provider by the U.S. Congress.

12 Any notice or request made to or by either Party regarding this Service Agreement shall be made to the representative of the other Party as indicated below.

Transmission Provider: Administrator, Southwestern Power Administration, One West Third Street, Suite 1400, Tulsa, OK 74103.

Transmission Customer:

_____

_____

_____

_____

IN WITNESS WHEREOF, the Parties have caused this Service Agreement to be executed by their respective authorized officials.

SOUTHWESTERN POWER ADMINISTRATION

By: _____

ADMINISTRATOR
One West Third Street, Suite 1400
Tulsa, OK 74103

Date: _____

Reviewed by Southwestern's General Counsel:

By: _____

(TRANSMISSION CUSTOMER)

By: _____

Title: _____

Address: _____

_____

Date: _____

Part B: Specifications for Network Integration Transmission Service

1 The Transmission Provider will provide Network Integration Transmission Service over the Transmission Provider's Transmission System for the delivery of capacity and energy from the Transmission Customer's designated Network Resources, as set forth in Section 3 of this Part B, to the Transmission Customer's Designated Network Loads which are located in the Transmission Provider's Control Area, as set forth in Section 4 of this Part B.

2 The Transmission Provider will provide non-firm transmission service (Secondary Transmission Service) from non-designated Network Resources to meet Designated Network Loads, on an as-available basis, under the terms of this Service Agreement and in accordance Section 28.4 and other applicable Sections of the Tariff.

3 Designated Network Resources to be delivered into [or from] the Transmission Provider's Control Area on behalf of the Network Customer:

3.1 [To be specified in each Agreement, using information provided in the Transmission Customer's application for Network Integration Transmission Service.]

3.2 Any change in Network Resources shall be effected in accordance with procedures set forth in the Tariff.

4 Designated Network Loads to be served under this Service Agreement:

4.1 [To be specified in each Agreement, using information provided in the Transmission Customer's application for Network Integration Transmission Service.]

4.2 Any change in Designated Network Loads shall be effected in accordance with procedures set forth in the Tariff.

5 Specific operations under this Service Agreement are set forth in the Operating Agreement

6 Service under this Agreement may be subject to some combination of the charges detailed below.

6.1 The Network Transmission Capacity Charge is set forth in the Rate Schedule. The specific capacity which the Transmission Customer will be invoiced for is computed in accordance with procedures set forth in the Tariff and updated in conformity to such procedures. The initial charges and the specific basis for such charges for Network Integration Transmission Service applicable to this Service Agreement are included in the Operating Agreement.

6.2 Real Power Losses will be applied and charged in accordance with the Rate Schedule.

6.3 Ancillary Services Charges are set forth in the Rate Schedule. The specific Ancillary Services to be charged initially under this Agreement are listed below. Changes in Ancillary Services, if applicable, are made in accordance with the Rate Schedule.

_____

_____

_____

Z_____

6.4 System Impact and/or Facilities Study Charge(s): (to be filled in if applicable)

_____

_____

6.5 Direct Assignment Facilities Charge: (to be filled in if applicable)

_____

6.5 Penalties Associated with unauthorized use of the Transmission Provider's Transmission System and associated facilities, as provided in the Operating Agreement or the Rate Schedule: _____.

6.6 Other Charges: To be filled in and defined if applicable.

Part C: General Provisions Applicable to Transmission Service

1 *Propriety of Rates:* The Transmission Provider shall bill the Transmission Customer for the Transmission Customer's purchases of power, energy, and other services in accordance with the Rate Schedule, which is placed in effect pursuant to statute.

1.1 The Transmission Customer hereby agrees to promptly pay the Transmission Provider under such Rate Schedule, whether or not the Transmission Customer agrees with the propriety or the levels of the rates placed into effect pursuant to law, regulation, or the order of an appropriate authority, subject to the Transmission Customer's rights to terminate service.

1.2 In the event that the U.S. Congress amends the manner in which the Transmission Provider calculates or charges for its products and services, the Transmission Customer hereby agrees to promptly pay in such an amended manner, subject to the Transmission Customer's right to terminate.

2 *Changes in Rates:* The rates and/or terms and conditions set forth in the Rate Schedule may change upon confirmation and/or approval by the appropriate authority having responsibility to so confirm and/or approve rate schedules, and, whether on an interim basis or as finally confirmed and/or approved, such rates may be increased, decreased, modified, or superseded at any time and from time to time.

2.1 If such rates are so increased, decreased, modified, or superseded, the rates and terms and conditions shall thereupon become effective and applicable to the Transmission Service furnished by the Transmission Provider under this Agreement, in accordance with and on the effective date specified in the order of the appropriate authority.

2.2 The Transmission Provider shall promptly notify the Transmission Customer in writing of the redetermination and/or changes and modifications made in the then-effective Transmission Provider's rate schedules for Transmission Service.

2.3 If such notice advises that the rates to be paid by the Transmission Customer for the Transmission Service furnished by the Transmission Provider under this Agreement are greater than the then-effective rate for such service, The Transmission Customer may, by written notice to the Transmission Provider at any time within 90 days

following the date of receipt of such notice from the Transmission Provider, terminate this Agreement in its entirety, such termination to become effective as of the last day of any month following no less than 6 months after the date of receipt by the Transmission Provider of such notice of termination from the Transmission Customer.

2.4 In the event that the Transmission Customer elects to terminate this Agreement pursuant to this Section 2, the Transmission Customer shall pay for services under this Agreement at the then-effective rates during the interim between the date of such notice and the effective termination date specified in such notice.

3 *Availability of Funds to the Transmission Provider:* This Agreement and all rights and obligations hereunder, and the expenditure of funds by the Transmission Provider under its provisions, are expressly conditioned and contingent upon the U.S. Congress's making available (through direct appropriation, authorization of a revolving fund, the authority to borrow funds, or through such other means as it may provide) the necessary funds to enable the Transmission Provider to carry out the provisions of this Agreement, and if such funds are not available, this Agreement shall terminate and have no further force or effect as of the last day for which funds were available, and the Transmission Customer hereby releases the Transmission Provider from any and all liability for failure to perform and fulfill its obligations under this Agreement for that reason.

3.1 No obligation contained herein for the future payment of money by the Transmission Provider, or liability on the part of the Transmission Provider for breach of any of the provisions contained herein, shall be binding upon or enforceable against the Transmission Provider unless and until funds, as provided in this Section 3, are available out of which such obligations or liability can be legally paid.

3.2 Nothing in this Agreement may be considered as implying that the U.S. Congress will, at a later date, appropriate funds sufficient to meet any deficiencies or obligations incurred under this Agreement.

4 *Covenant Against Contingent Fees.* The Transmission Customer warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by the Transmission Customer for the purpose of securing business. For breach or violation of this warranty, the Transmission Provider shall have the right to annul this Agreement without liability, or, at its discretion, to add to the Agreement price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

5 *Termination for Breach.* If either Party breaches a material provision of this Agreement, the other Party, at its option, may terminate this Agreement upon 30 days' prior written notice of its intention to do so, and this Agreement *ipso facto* shall terminate at the end of such 30-day period unless such violation is corrected within that period. Neither Party shall be considered to be in default or breach with respect to any obligation under this Agreement if prevented from fulfilling such obligation by reason of an Uncontrollable Force.

6 *Convict Labor.* In connection with the performance of work under this Agreement, the Transmission Customer agrees not to employ any person undergoing sentence of imprisonment except as provided by Public Law 89–176, September 10, 1965 (18 U.S.C. 4062 (c)(2)), and Executive Order 11755, December 29, 1973.

7 *Equal Employment Opportunity.* During the performance of this Agreement, the Transmission Customer agrees to abide by and to fulfill the nondiscrimination requirements of the ''equal opportunity clause'' contained in Section 202 of Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive Order amending such order, and any other Executive Order superseding such order.

8 Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era. During the performance of this Agreement, the Transmission Customer agrees to comply with Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, Public Law 93–508 as it amends Public Law 92–540, to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era, and to fulfill the requirements of the ''affirmative action clause,'' 38 USCA Sections 2011 and 2012 (1979); 41 CFR 60–250 *et seq.*

9 Affirmative Action for Handicapped Workers. During the performance of this Agreement, the Transmission Customer agrees to comply with Section 503 of the Rehabilitation Act of 1973, Public Law 93–516, to take affirmative action to employ and advance in employment qualified handicapped individuals, and to otherwise fulfill the requirements of the ''affirmative action clause,'' 29 USCA Section 793 (1979); 41 CFR 60–741 *et seq.*

10 *Contract Work Hours and Safety Standards.* This Agreement, to the extent that it is of a character specified in Section 103 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327–333 (1986), is subject to the provisions of the said Act and to regulations promulgated by the Secretary of Labor pursuant to the said Act. The following provisions are applicable only to Transmission Customers which receive service through facilities which are (1) jointly used by the Transmission Provider and the Transmission Customer, (2) where the Transmission Customer would have occasion to enter the facilities of the Transmission Provider, (3) where the Transmission Customer owns facilities installed on the property of the Transmission Provider, and/or (4) when the Transmission Customer takes service directly from facilities owned and maintained by the Transmission Provider.

11 *Meter Tests and Adjustments.* Any metering equipment which may be used in power accounting for Transmission Service under this Agreement shall be inspected and tested at least once each year by the Party responsible, and at any reasonable time upon request by either Party. Metering equipment found to be defective or inaccurate shall be repaired and readjusted or replaced by the owner.

11.1 A meter shall be considered inaccurate if it is found to deviate from an accurate standard meter in excess of 0.5 percent when tested at 100 percent of load or 1.0 percent when tested at 10 percent of load.

11.2 If any meter inspection or test discloses an error exceeding 2 percent, a correction based upon the inaccuracy found shall be made on the records of electric service furnished since the beginning of the monthly billing period immediately preceding the billing period during which the test was made, and such correction, when made, shall constitute full adjustment of any claim between the parties hereto arising out of such inaccuracy of metering equipment.

12 *Reliability, Safety, Health, and Environmental Requirements in Regard to Construction, Operation, and Maintenance on U.S. Government Property.* The provisions of this Section 12 shall apply only if the Transmission Customer, its agents or contractors, or its member entities perform maintenance, operations, or construction on the property of the U.S. Government (Government), or on easements shared by the Government and the Transmission Customer.

12.1 Such construction, maintenance, and operation shall be performed in accordance with standards at least equal to those provided by the National Electrical Safety Code and shall conform to safety, environmental, and security procedures identified by Transmission Provider as appropriate to each facility in which such work is performed. The Transmission Provider provides such written procedures in each of the facilities it maintains and to affected Transmission Customers.

12.2 The Transmission Customer and/or its member entities shall take all reasonable precautions in the performance of such work to protect the public and the environment. The Transmission Customer and/or its member entities shall comply with all applicable local, state, and Federal regulations and requirements in the performance of such work, including, but not limited to, the National Environmental Policy Act, the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Responsibility, Compensation, and Liability Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Superfund Amendments and Reauthorization Act (SARA); SARA Title III (Emergency Planning and Community Right-to-Know Act of 1986); and the Occupational Safety and Health Act.

12.3 In the event that the Transmission Provider, at its sole option and in its sole judgment, determines that construction, maintenance, or operation of facilities which are performed under this Agreement by the Transmission Customer, and/or one of its member entities, do not meet the standards and/or regulations and requirements specified in this Section 12, or if the Transmission Provider determines, in its sole judgment, that a condition exists which provides a potentially adverse impact (1) on the reliability of services provided by

Transmission Provider to its customers, (2) on the safety and/or health of the public or employees and agents of the parties hereto, and/or (3) on the environment, then Transmission Provider may provide written notice to the Transmission Customer and/or its member entity of the deficient condition; *Provided,* That, if such condition, in Transmission Provider's sole judgment and at Transmission Provider's sole option, requires immediate attention and does not allow time for such notice, Transmission Provider will remedy the condition and, where appropriate, bill the Transmission Customer.

12.4 Where, in the Transmission Provider's sole judgment, remedy of the said deficient condition is not time critical, the Transmission Customer and/or its member entity shall provide a written plan and schedule to Transmission Provider within 30 days of receipt of the said written notice. Such plan and schedule shall provide for correction of the said deficiency at the earliest possible time available to the Transmission Customer and/or its member entity; *Provided,* That, the maximum time allowed for the Transmission Customer and/or its member entity to correct any such deficiency shall not exceed 18 months from receipt of the said written notice. The Transmission Customer shall coordinate or, if applicable, cause its member entity to coordinate, any work and outages which may involve Transmission Provider's facilities with Transmission Provider's Dispatch Center (Dispatch Center) in Springfield, Missouri.

12.5 Unless otherwise agreed in writing, correction of deficiencies pursuant to this Section 12 shall be at the expense of the Transmission Customer.

12.6 If the Transmission Customer and/or its member entity fails to correct the deficiency within the time provided pursuant to this Section 12, the Transmission Provider shall have the right, at its sole option and in its sole discretion, to terminate service through the affected facilities until such deficiencies are corrected to the satisfaction of Transmission Provider.

12.7 If, within the time period provided pursuant to this Section 12, an emergency condition occurs which, in the sole judgment of Transmission Provider, may cause an adverse impact on the reliability of the Transmission System of Transmission Provider and/or on the environment, or which poses a hazard to the safety and/or health of the public or employees and agents of the parties hereto, then Transmission Provider may, at its sole option, remedy or repair such condition or equipment and bill the Transmission Customer, and the Transmission Customer agrees to render the Transmission Provider reimbursement.

13 *Right of Installation and Access:* Each Party grants to the other permission, or will obtain such permission for the other Party, to install, maintain, and operate, or cause to be installed, maintained, and operated, on the System of Transmission Provider and on the System of the Transmission Customer, at the Point(s) of Delivery between the System of Transmission Provider and the System of the Transmission Customer utilized under this Agreement, any and all terminal equipment and associated electrical apparatus and devices necessary in the performance of this Agreement.

13.1 Each party shall permit, or shall obtain permission for, duly authorized representatives and employees of the other Party to enter upon the System of the Transmission Provider and the System of the Transmission Customer at the said Point(s) of Delivery for the purpose of reading or checking meters; for inspecting, testing, repairing, renewing, or exchanging any or all of the equipment owned by the other party located on such premises; or for the purpose of performing any other work necessary in the performance of this Agreement.

13.2 Access for any work performed by one party under this Section 13 which may affect the other Party's equipment shall normally be preceded by at least one day's notice to the affected Party, except in the event of an emergency, in which case such notice shall be made as soon as possible after such emergency occurrence. Notice to Transmission Provider pursuant to this Section 13 shall be made to the Dispatch Center.

13.3 Any access to property controlled by the Transmission Provider shall include notification to Transmission Provider at the time of entry. Any employee or agent of the Transmission Customer, or of its member entities, who enters a Transmission Provider facility is expected to call the Dispatch Center from a telephone located in the control building in that facility and to identify himself or herself. Security devices located in the control buildings at Transmission Provider facilities sound an alarm in the Dispatch Center when the building is entered. Local law enforcement officers may be asked to investigate any unidentified entry.

13.4 Any equipment, apparatus, or devices installed on the System of the Transmission Provider by the Transmission Customer, as provided under this Section 13, shall be clearly and permanently marked to indicate ownership, and, in addition, a detailed description of each item so installed (including, if applicable, manufacturer's name, serial number, model number, etc.) shall be communicated to Transmission Provider to aid in maintenance of plant accounts.

13.5 In the event the equipment, apparatus, or devices are not marked in accordance with Section 13.4, ownership of said equipment, apparatus, or devices shall be presumed to be vested in Transmission Provider.

13.6 The Transmission Customer agrees that, if requested by Transmission Provider, the description required under Section 13.4 shall include a detailed analysis of all dielectrical oil, including, but not limited to, tests for polychlorinated biphenyls (PCBs). If such analysis indicates the presence of a known hazardous substance, which, in the Transmission Provider's sole judgment, presents a significant hazard to the environment or to the health and safety of employees of the parties hereto, the Transmission Provider may require, at its sole option, by written request, removal of any equipment containing such substance, and the Transmission Customer agrees to comply with such request for removal at no cost to Transmission Provider.

14 *Right of Removal:* Any and all equipment, apparatus, or devices placed or installed or caused to be placed or installed by the Parties on or in the System of the Transmission Provider or the System of the Transmission Customer shall be and shall remain the property of the Party owning and installing such equipment, apparatus, devices, or facilities, regardless of the mode or manner of annexation or attachment to real property, and, upon the termination of this Agreement, the owner thereof shall have the right to enter upon the premises or system of the other and shall, within a reasonable time, remove such equipment, apparatus, devices, or facilities, subject to the provisions of Section 13.5.

15 *Right to Upgrade Facilities:* The Transmission Provider reserves the right to modify or upgrade its Transmission System and any of the elements which support such Transmission System, including, but not limited to, changes in: (1) The Transmission Provider's transmission voltages, (2) The Transmission Provider's transmission system components, (3) The Transmission Provider's communications system, (4) The Transmission Provider's Supervisory Control and Data Acquisition (SCADA) System, and (5) other modifications necessary to comply with the standards and/or regulations and requirements mentioned in Section 16.

15.1 If, during the term of this Agreement, the Transmission Provider determines, in its sole judgment and at its sole option, that modifications or upgrades to its Transmission System and associated facilities are required, then, in that event, the Transmission Customer shall be responsible for any and all costs and expenses incurred by the Transmission Customer in order to continue to receive services provided under this Agreement.

15.2 If the Transmission Customer elects not to make changes in its facilities which, in The Transmission Provider's judgment, are required for the Transmission Customer to continue to receive reliable service from the Transmission Provider's modified or upgraded facilities, then the Transmission Customer will discontinue receipt of the services provided under this Agreement which are dependent on such modified or upgraded facilities, and the provisions of this Agreement which describe such services shall be terminated or, at the Transmission Provider's sole option, suspended, until the Transmission Customer completes the changes in its facilities which the Transmission Provider, in its sole judgment, deems necessary for safe and reliable service to the Transmission Customer.

15.3 The Transmission Provider shall notify the Transmission Customer of the specific sections or articles of the Agreement which are to be terminated or suspended pursuant to this Section 15.

15.4 Any provisions of this Agreement which are not specifically terminated or suspended pursuant to Section 15.3 shall not in any way be affected and shall remain in full force and effect except insofar as the services provided pursuant to the terminated

or suspended provisions which are reflected in other provisions of this Agreement will also be terminated or suspended.

15.5 Termination or suspension of specific provisions of this Agreement pursuant to this Section 17 shall be without penalty to either of the Parties, except that the rights of the Parties, if any, which accrued prior to the date of such termination or suspension shall be and hereby are preserved.

16 *Limitation on Rights of Entry:* The Transmission Provider reserves the right, upon notice to the Transmission Customer, to revoke or cancel the rights of entry granted under this Agreement with regard to any particular representative of the Transmission Customer, if, in the sole judgment of the Transmission Provider, such revocation or cancellation is required in the interest of national security.

17 *Assistance by Contracting Parties:* If assistance in maintenance and utilization of their respective systems is rendered by the Transmission Provider and/or the Transmission Customer, the following terms and conditions shall apply:

17.1 If, in the maintenance or utilization of their respective transmission systems and related facilities for the purpose of this Agreement, it becomes necessary by reason of any emergency or extraordinary condition for the Transmission Provider or the Transmission Customer to request the other to furnish personnel, materials, tools, and equipment for the maintenance or modification of, or other work on, such transmission systems and related facilities to insure continuity of power and energy deliveries, the Party requested shall cooperate with the other and render such assistance as the Party requested may determine to be available.

17.2 The Party making such request, upon receipt of properly itemized bills, shall reimburse the Party rendering such assistance, including overhead and administrative and general expenses. The Transmission Customer and the Transmission Provider agree to account for any incurred costs under a Work Order accounting procedure and in accordance with the Uniform System of Accounts prescribed for public utilities by the Commission.

17.3 Billing statements rendered by the Transmission Customer and the Transmission Provider for such reimbursement shall be due 20 days from the date thereof.

Attachment G

Network Operating Agreement

To be provided by the Transmission Provider at such time as the Transmission Provider has negotiated or offered a Network Integration Transmission Service Agreement. The terms and conditions under which the Network Customer will be required to operate its facilities and the technical and operational matters associated with the implementation of Network Integration Transmission Service will be specified in a separate Network Operating Agreement and appended to the applicable Service Agreement.

The Network Operating Agreement may include, but is not limited to, provisions addressing the following matters:

Authorized Representatives of the Parties
Network Operating Committee
Load Following
System Protection
Redispatch to Manage Transmission Constraints
Maintenance of Facilities
Load Shedding
Operation Impacts
Service Conditions
Data, Information and Reports
Metering
Communications
System Regulation and Operating Reserves
Assignment
Notices
Accounting for Transmission Losses
Ancillary Services
Penalties for Unauthorized Use of Transmission Provider's System

Attachment H

Annual Transmission Revenue Requirement For Network Integration Transmission Service

1.0 The Annual Transmission Revenue Requirement for purposes of the Network Integration Transmission Service is set forth in the Transmission Provider's rate schedule for transmission services.

Attachment I

Index of Network Integration Transmission Service Customers

Customer Date of Service Agreement.
Transmission Provider has no Network Customers at this time.

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BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Open Access Transmission Service Tariff

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of final Tariff.

SUMMARY: The Western Area Power Administration (Western) is adopting this final Open Access Transmission Service Tariff (Tariff) in order to be consistent with the Federal Energy Regulatory Commission (FERC) Order Nos. 888 and 888–A to the extent consistent with laws applicable to Western's activities.

DATES: The Tariff will become effective February 5, 1998. The Tariff will remain in effect until superseded.

FOR FURTHER INFORMATION CONTACT:
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Mr. James D. Keselburg, Power Marketing Manager, Rocky Mountain Region, Western Area Power Administration, P.O. Box 3700, Loveland, CO 80539–3003; (970) 490–7370
Ms. Zola Jackson, Power Marketing Manager, Sierra Nevada Region, Western Area Power Administration, 114 Parkshore Drive, Folsom, CA 95630–4710; (916) 353–4421
Mr. Robert Fullerton, Corporate Communications Office, Western Area Power Administration, Post Office Box 3402, Golden, CO 80401–0098; (303) 275–2700.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Procedures
II. Background
III. Comments Raised During the Development of this Final Tariff
IV. Summary of Significant Changes from Western's Proposed Tariff
V. Coordination with Adoption of Open Access Transmission Rates
VI. Regulatory Requirements

I. Procedures

Western will submit the final Tariff to FERC under a non-jurisdictional docket and will request a declaratory order that the Tariff meets FERC comparability standards as set forth in FERC Order Nos. 888 and 888–A. Western will make the necessary changes in response to the FERC declaratory order and will publish the revised final Tariff in the **Federal Register**.

II. Background

Use of transmission facilities that Western owns, operates, or to which it has contract rights for delivery of Federal long-term firm capacity and energy to project use and electric service customers is a Western responsibility under the terms and conditions of marketing criteria and electric service contracts implementing statutory obligations to market Federal power. This is complementary with the provisions of the Tariff. Transmission service provided by Western under the Tariff is solely for the use of available transmission capability in excess of the

amount Western requires for the delivery of long-term firm capacity and energy to project use and electric service customers of the Federal government. Western will offer to provide others transmission service equivalent to the service Western provides itself.

Western was established on December 21, 1977, pursuant to Section 302 of the Department of Energy (DOE) Organization Act, Public Law 95–91, dated August 4, 1977. Western's primary and long-standing mission is to market Federal power resources with emphasis on maintaining an efficient and reliable power system. Western is a power supplier that markets and transmits Federal power resources in 15 Central and Western States encompassing a geographic area of 3.38 million-square-kilometers (1.3 million-square-miles). Western has four Customer Service Regional Offices and the Colorado River Storage Project Customer Service Center (CRSP CSC), each referred to in the Tariff as a Regional Office. Western markets power and provides transmission service from various multi-purpose hydroelectric projects.

Western is not a public utility under Sections 205 and 206 of the Federal Power Act and is not specifically subject to the requirements of the FERC Order Nos. 888 and 888–A. Western is a transmitting utility subject to Section 211 of the Federal Power Act as amended by the Energy Policy Act of 1992.

FERC issued a Notice of Proposed Rulemaking (NOPR) for Open Access Transmission Service, published at 60 FR 17662, on April 7, 1995. On October 4, 1995, the Secretary of DOE adopted a Power Marketing Administration Open Access Transmission Policy which stated that DOE supported the spirit and intent of the NOPR. The Secretary of DOE stated that the Power Marketing Administrations would comply with the principles set forth in the FERC's final rule to the extent consistent with applicable law. FERC issued its final rule, Order No. 888, published at 61 FR 21540 on May 10, 1996, and followed with Order No. 888–A, published at 62 FR 12273, on March 14, 1997.

In early 1996, Western began developing a Tariff Equivalent Package (TEP) to comply with the Secretary's directive. A draft TEP, which was designed as a Western-wide document that would contain Region-specific rates and charges, was completed in July 1996 and sent to Western's electric service customers, transmission-service customers, and other interested parties for review and comment. Western accepted comments on the TEP through November 1996.

After evaluating comments, Western modified its original concept of preparing a Western-wide TEP and began developing Regional Open Access Transmission Service Guidelines (Regional Guidelines). These Regional Guidelines contained service agreements consistent with the specific conditions applicable to each Region. The resulting documents were sent to electric service customers, transmission customers, and other interested parties for review and comment in April 1997. The review period for those documents ended in early June 1997. Customer and interested party participation was conducted informally.

Western began its formal process of developing this Tariff when it issued a Notice of Proposed Tariff published at 62 FR 50572 on September 26, 1997. A formal comment period lasted for 31 days. On October 7, 1997, Western held a combined public information and public comment forum. The comments received during the comment period were considered in developing this final Tariff.

Western will submit the Tariff document to FERC under a non-jurisdictional docket and request a declaratory order from FERC that this Tariff meets the FERC comparability standards as set forth in FERC Order Nos. 888 and 888–A. Consistent with a single FERC filing, Western has developed and will file this Tariff with appended schedules and attachments. Western's Tariff includes Attachment J, Provisions Specific to the Transmission Provider, and Attachment K, Authorities and Obligations, which are specific to Western and are not found in FERC's pro forma tariff.

By law, the Bureau of Reclamation (Reclamation) provides Federal power resources to its project use customers. By law, Western markets Federal power resources to its electric service customers. Western's transmission system was built primarily to enable the delivery of Federal power to satisfy these contractual obligations. Western's Regional Offices reserved transmission capacity shall, therefore, include capacity sufficient to deliver Federal power resources to customers of the Federal government. Nothing in this Tariff shall alter, amend, or abridge the statutory or contractual obligations of Western to market and deliver Federal power resources and to repay the Federal investment in such projects. This Tariff provides for transmission, including each Regional Office's use of those facilities for third party sales, on the unused capacity of transmission facilities under the jurisdiction or control of each of Western's Regional Offices not required for the delivery of long-term firm capacity and energy to customers of the Federal government in a manner consistent with the spirit and intent of FERC Order Nos. 888 and 888–A.

Western has prepared this Tariff and service agreements to provide transmission service comparable to that required of public utilities by FERC Order Nos. 888 and 888-A, and to implement those Orders consistent with the DOE Policy. An entity desiring transmission service from Western must comply with the application procedures outlined herein. The review and approval requirements detailed herein will apply to all requesting parties. Western will perform the necessary studies or assessments for evaluating requests for transmission service as set forth in this Tariff. Any facility construction or interconnection necessary to provide transmission service will be subject to Western's General Requirements for Interconnection which are available upon request.

Western will provide Firm and Non-Firm Point-to-Point Transmission Service and Network Integration Transmission Service consistent with the Tariff. The specific terms and conditions for providing transmission service specific to a particular customer will be included in a Service Agreement. Operating Procedures, Available Transmission Capability (ATC), and System Impact Methodology are defined in the Attachments. Western's Regional Offices develop rates under separate public process pursuant to applicable Federal law and regulations. Therefore, rates and charges for specific services will be set forth in the appropriate Regional rates schedules attached to each Service Agreement.

Western has marketed the maximum practical amount of power from each of its projects, leaving little or no flexibility for provision of additional electric services from the projects. Changes in water conditions frequently affect the ability of hydroelectric projects to meet obligations on a short-term basis. The unique characteristics of the hydro resource, Western's marketing plans, and the limitations of the resource due to changing water conditions limit Western's ability to provide generation-related services including ancillary services and redispatching, using Federal hydro resources.

III. Comments Raised During the Development of this Final Tariff

Participants in the formal review process raised numerous comments about the proposed tariff. The following highlights the more significant comments and Western's responses.

Comment: A commentor stated that the ''Annual Transmission Costs'' definition (Section 1.2) does not appear to include the costs of the power produced at Reclamation's hydroelectric power facilities. The transmission rates do, however, indicate the need for ancillary generation service support. The definition should then also include costs associated with Reclamation's support of Ancillary Services.

Response: It is correct that the definition for ''Annual Transmission Costs'' does not include the costs of the power produced at the hydroelectric facilities. FERC Order Nos. 888 and 888–A provide that only transmission costs may be included in the definition of ''Annual Transmission Costs.''

Comment: A commentor asked if, in Section 1.2, it is correct that the Annual Transmission Costs can be modified by the FERC.

Response: FERC decisions may affect what facility costs will be included in Western's Annual Transmission Costs.

Comment: A commentor asked why Western deleted the reference to FERC's approval in Section 1.10.

Response: Western is not a public utility and, therefore, is not subject to FERC's jurisdiction under Sections 205 and 206 of the Federal Power Act. Western is not, therefore, required to submit Service Agreements to FERC for approval.

Comment: A commentor stated that, Western, as a Transmission Provider, does not have retail customers, and, therefore, the word ''retail'' should be deleted from Section 1.19.

Response: Inclusion of this language does not establish the type of customer Western serves. This change is not necessary.

Comment: A commentor asked if the definition of ''Transmission Provider'' in Section 1.46 includes the CRSP CSC in the context of the Regional Office reference.

Response: The definition of ''Transmission Provider'' does include the CRSP CSC in the context of the Regional Office reference. As specified in Attachment K, the CRSP CSC is a Transmission Provider as are Western's other Regional Offices.

Comment: A commentor requested clarification on whether Section 2.1 indicates that existing project use loads will be included in the initial allocation of available transmission capacity calculations.

Response: Section 2.1 addresses applications for transmission service received during the first 60 days commencing with the effective date of the Tariff. Section 2.1 does not address existing commitments for transmission. However, in response to the comment, existing project use loads are components in the Regional Office's calculations of ATC.

Comment: Several commentors requested that Western delete ''to the extent possible'' in the second paragraph of Section 3.0, and delete the requirement for a separate agreement to purchase Ancillary Services on behalf of the transmission customer.

Response: Western agrees and has modified Section 3.0.

Comment: A commentor suggested that, in Section 3.0, Western should insert the word ''uncommitted'' before the word ''surplus.''

Response: Western has removed the referenced sentence.

Comment: A commentor suggested that in Section 3.0 after the phrase, ''Services it will purchase from the Transmission Provider'' that Western insert this sentence: ''Ancillary Services are included as part of Federal customer transmission service.''

Response: This section applies only to transmission service provided under the Tariff and does not refer to existing transmission commitments of Western.

Comment: A commentor suggested that within the title of Section 5.1, replace the words ''Local Furnishing'' with the words ''Tax Exempt'' so that the subtitle reads ''Transmission Providers That Own Facilities Financed by Tax Exempt Bonds'' and make this change throughout the section. The commentor also suggested that in Section 5.2(i), Western delete the words ''local furnishing.''

Response: This issue was raised in comments to FERC as it developed its pro forma tariff. The result is the language in Section 5.0 of the pro forma tariff, which Western has adopted.

Comment: A commentor stated that the proposed Tariff does not comply with FERC Order Nos. 888 and 888–A. Western's Tariff does not recognize an exception to comparability and reciprocal service if each or both would jeopardize a public power utility's tax exempt financing. Another commentor stated that there has not been a genuine and good faith effort to include the specific treatment and special requirements of the non-jurisdictional/non-public utilities that are expressly recognized and available under FERC Order Nos. 888 and 888–A.

Response: Western has complied with FERC Order No. 888–A by adopting the pro forma language insofar as Western can and still comply with Federal law. Nothing in Western's Tariff abrogates any specific treatment and special requirements of the non-jurisdictional/non-public utilities that are expressly recognized and available under FERC Order Nos. 888 and 888–A. Non-public utilities seeking relief from this and other provisions should seek a waiver of reciprocity from FERC pursuant to 18 CFR 35.28(e).

Comment: A commentor asked how the cost of System Impact Studies conducted on behalf of Western or its Federal customers will be shared between Federal customers and customers served under the Tariff.

Response: Western will assign System Impact Study costs for Western's benefit in accordance with Section 8.0 of the Tariff.

Comment: A few comments were made that, in Section 10.1, the last part of the added sentence states, ''* * * and shall exercise due diligence to remove such inability with all reasonable dispatch.'' This language appears to either duplicate or modify the ''all reasonable efforts'' language in the previous sentence. In either case, it should be removed.

Response: Western agrees and has deleted the added sentence in Section 10.1.

Comment: A commentor stated that Western should add the following language to Section 12.1, ''In the event the designated representatives are unable to resolve the dispute within 45 days (or such other period as the Parties may agree upon) the dispute may be resolved through the procedures specified in Section 12.2.''

Response: Western agrees with the suggested concept and has modified Section 12.1 to allow external dispute resolution under Section 12.2 if disputes can not be resolved in 30 days.

Comment: Several commentors stated that Western should modify the final Tariff to provide that the Transmission Provider; i.e., the appropriate Regional Office of Western, agrees to apply the dispute resolution process adhered to by the regional transmission group to which the Transmission Provider belongs.

Response: Western agrees and has modified Section 12.2 to incorporate the suggested concept.

Comment: A commentor stated that Western must include a Dispute Resolution Procedure in Section 12 that is binding on Basin Electric Power Cooperative, Inc. (BEPC) and Heartland Consumers Power District (HCPD).

Response: Western's Upper Great Plains Region (UGPR) is the Transmission Provider and all disputes between the Transmission Provider and the transmission customer will be subject to the dispute resolution procedures of the Tariff, thus no modifications are warranted. Disputes that involve only a transmission customer and either BEPC or HCPD could still be resolved under appropriate Mid-Area Continent Power Pool (MAPP) procedures whenever it involves an issue discrete to either and is not a part of the general Tariff provisions.

Comment: A comment was made that Western should incorporate the word ''uncommitted'' in various sections of the Tariff, including Sections 13.5, 27.0, and 33.2.

Response: The addition of this term could jeopardize Western's ability to meet FERC's test for comparability. Therefore, Western has not made the suggested changes.

Comment: A commentor requested that in Sections 13.8 and 14.6 the reference to 10 a.m. should include a time zone; e.g., MST or PST for each operating area, and delete the language in the brackets.

Response: Western adopted the language of the pro forma tariff. Since this is a Western-wide document, Western is unable to assign a time zone. Western's scheduling offices are located in three different time zones. The 10 a.m. reference applies to the time of the appropriate scheduling office from which transmission service is being requested.

Comment: A commentor requested that the phrase, ''This does not apply to the Colorado River Front Work and Levee System or the Salinity transmission system'', be inserted at the end of Section 15.4.

Response: The last sentence in Section 15.4 addresses this comment. The facilities identified in the comment are considered distribution facilities and are not subject to the Tariff. Request for service on these facilities will be handled on a case-by-case basis.

Comment: Several commentors strongly encouraged the inclusion of transmission losses in Sections 15.7 and 28.5 of the Tariff and that the associated section in the applicable Service Agreements be removed, thus providing them with some reasonable assurance that these factors will be applied in a non-discriminatory and comparable manner.

Response: Since this is a Western-wide document and transmission loss factors are calculated separately for each Transmission System, Sections 15.7 and 28.5 of the pro forma tariff were modified to allow the applicable transmission loss percentages to be included in the Regional Office specific Service Agreements. Each of Western's Regional Offices periodically modifies its Transmission System loss factors based on system losses and all of its Regional Office(s) s are subject to these loss factors.

Comment: A commentor requested that Western, in Sections 17.2(iv) and 18.2, insert ''or other'' after ''Regional Transmission Group (RTG).''

Response: The commentor's proposed language is too broad and might adversely affect the rights of entities that are not parties to the agreement. Therefore, this change was not made.

Comment: Several commentors made the comment that Western's proposed application processing fees in Sections 17.3 and 29.2 are inconsistent with the pro forma provisions, and that the processing fee or at least some portion should be refunded if the request for transmission service is denied by Western. It is the opinion of the commentors that, as written, Western's processing fee procedures do not provide reciprocal service, and Western provides no numerical justification for the processing fees included in Attachment K.

Response: The processing fee is being collected to offset those costs incurred by Western in processing applications for transmission service. These costs will be incurred irrespective of whether transmission service is taken, so no refunds will be made. In developing the processing fee, each Regional Office used the same method, which reflects an average of staff wages and benefits multiplied by the average time it takes to analyze and respond to requests for service. Western plans to periodically review these costs. FERC has previously accepted this methodology.

Comment: A comment was made that Western should incorporate the phrase ''and applicable Federal law and regulations'' in Section 27.0. Comments were also made that Western should incorporate the phrase ''and permitted by Federal law and regulations'' in Section 30.5. Both sections address redispatch procedures.

Response: There are no Federal laws governing redispatch; however, Western does have certain limitations on this matter based on specific power marketing plans.

Comment: A commentor recommended that Western insert ''transmission'' in its clarifying statement at the end of Section 28.2, so that there is no misinterpretation of the meaning of capacity.

Response: Western agrees and has made the change.

Comment: A commentor stated FERC's Pricing Policy provides that Western can only charge the higher of embedded costs or opportunity costs, but not the sum of the two. This FERC Pricing Policy should be applicable to Western, since Western agreed to abide by FERC's rate-making policies as a condition of its membership in Southwest Regional Transmission Association (SWRTA).

Response: This comment is outside the scope of this process. Western is meeting the rate-making policies of FERC for Federal Power Marketing Administrations as agreed in the SWRTA agreement.

Comment: A commentor suggested that, in Section 30.8 in the second line after the word ''the'' and before ''Transmission Provider'', Western insert ''available capability of the''.

Response: Western has stated in Attachment K to its Tariff that only excess transmission capability will be available and has found this change unnecessary. This excess transmission capability will be determined as provided in Attachment C to the Tariff.

Comment: A commentor asked what is Federal policy as mentioned in Section 34.0. Is it published and who has oversight—FERC? What if it conflicts with FERC? The same commentor also asked what is meant by applicable Federal law and regulations, and is it different region-by-region or is it consistent region-by-region? The commentor further asked what are Western's current applicable laws and regulations relating to stranded costs?

Response: Federal policy as used in Section 34.0 includes FERC's policies, regulations and rulings pertaining to open access transmission service to the extent consistent with the body of Federal laws governing Western's activities. Applicable Federal law and regulations are the body of statutes and regulations governing the activities of Western as a Federal Power Marketing Administration. Treatment of stranded costs by Western will be governed by the principles contained in FERC Orders No. 888 and 888–A, related rulings and orders promulgated by FERC, and Western's statutory obligations as a Federal Power Marketing Administration.

Comment: Several commentors made comments regarding Western's decision to change certain pro forma tariff sections to require advance payment for the cost of any necessary transmission facility additions and the associated studies, and provide no interest on those advances. There is also a concern

that public agencies may not be able to meet the deadlines for providing advances of funds for Facilities Studies and New Construction, and that there may be improper cost shifting of Direct Assignment Facilities to other non-benefiting transmission customers.

Response: The Anti-Deficiency Act, 31 U.S.C. 1341(a), and other appropriations laws allow Federal agencies to incur obligations and make expenditures only in amounts available in an appropriation or fund and available to the government for the purpose for which the appropriation or fund is budgeted. Therefore, Western will request an advance of funds for construction of Direct Assignment Facilities in the construction agreement for such facilities as described in Sections 19.4 and 32.4. Recurring operation and maintenance costs related to Direct Assignment Facilities will be assessed on a periodic basis as set forth in the Service Agreement. This process will assure the proper allocation of costs among customers taking transmission. Western will return the unexpended portion of any funds advanced for studies or construction. Western is not able to pay interest on advances without shifting costs to other customers.

As for certain public agencies unable to meet the deadlines for providing advances of funds, Western will follow the deadlines required in the Tariff which, in turn, are the same as those in the pro forma tariff. To do otherwise could impair Western's ability to meet FERC's requirement that all requestors be treated in a non-discriminatory manner.

Comment: A commentor stated that Schedules 2 through 6 of the Tariff outline Western's offer to provide certain Ancillary Services as both the Transmission Provider and the Control Area operator. The commentor has no objection to these schedules if Western has available Ancillary Services to provide. However, the commentor is concerned that its generating resources and those of other parties may be used by the Control Area operator, Western, to provide Ancillary Services without compensation to the owning utilities. Of course, the opposite outcome could occur also. The commentor encourages Western to take the lead in establishing effective and practical operating measures to assure proper accounting for Ancillary Services. Western should also consider joint participation by all Control Area generators in supplying these services.

Response: Western appreciates the comment and will take the lead in establishing effective and practical operating measures to assure proper accounting for these Ancillary Services.

Comment: A few commentors stated their concern about the narrow bandwidth allowed for deviation from scheduled transactions contained in Schedule 4. One commentor believes that it will be extremely difficult to stay within this bandwidth because of limitations and errors in metering, scheduling practices, and unit control, and urges Western to adopt a broader deviation bandwidth, ±3.0 percent at a minimum, in order to mitigate these control and scheduling problems. Another commentor stated that some of Western's rate proposals include penalties of monetary charges for deviations beyond the scheduling band. This commentor does not agree that a ''one size fits all'' band is necessary and believes that any monetary charges should be cost based.

Response: Western is consistent with FERC Order Nos. 888 and 888–A on this service. The monetary charge is a rate issue and is outside the scope of this process.

Comment: A commentor stated that the accurate measurement of energy imbalances (Schedule 4) may not be possible in the UGPR. This is because there may be more than one supplier at a single point of measurement. Determining who was the cause of the imbalance may only be possible during after-the-fact analysis. The power supplier may not be responsible for being a Control Area operator and it may be the operator who causes the problem. The commentor states that they do not have accounting that would allow them to do this on an hourly basis and the imbalance may change from supplier to supplier within that period.

Response: Western recognizes that there are limitations to the capability of existing metering. However, FERC did not mandate next hour settlement of energy imbalances. This is a matter that will need to be further refined in development of Regional Tariff implementation procedures.

Comment: A commentor stated that there seems to be a redundancy in the information being requested in Sections 3.0, 4.0, and 5.0 of the Specifications for Long-Term Firm Point-to-Point Transmission Service in Attachment A. The commentor is questioning whether the bill to the customer will be based on the Capacity Reservation in Section 3.0, the Capacity Reservation in Section 4.0, or on the Reserved Capacity in Section 5.0.

Response: The information requested in these sections is necessary for multiple point-to-point transactions. The bill to the customer will be based on the Reserved Capacity in Section 5.0. In accordance with Section 13.7(c) of the Tariff, the amount in Section 5.0 will be the greater of the sum of the Point(s) of Receipt in Section 3.0 or the sum of the Point(s) of Delivery in Section 4.0.

Comment: A commentor stated that the control area information requested in Section 2.0 of the Specifications for Long-Term Firm Point-to-Point Transmission Service in Attachment A is considerably different than the Control Area information obtained from Sections 1.0 or 4.0. The Control Area to be referenced in Section 2.0 could be hundreds, or thousands, of miles from the Control Area of the Point of Receipt/Point of Delivery.

Response: Section 2.0 is intended to define the Control Area in which the transaction originates, while Sections 3.0 and 4.0 define the Point(s) of Receipt/Delivery into and out of the Transmission Provider's Transmission System. Western has followed the FERC pro forma tariff wording in these sections, and has found no reason to change the pro forma language.

Comment: A number of commentors made comments regarding Western's ATC, including suggestions that the methodology for determination of ATC must be set out in Attachment C and it must be reasonable, auditable, and supportable, and it should involve customer groups. Another commentor similarly requested that Western reference criteria specified within the SWRTA and/or Western Regional Transmission Association, Inc. (WRTA) agreements.

Response: Western has stated in Attachment C that it will use ''Good Utility Practice and the engineering and operating principles, standards, guidelines, and criteria of the * * * applicable Regional Reliability Council, and any entity of which the Transmission Provider is a member * * * such as a regional transmission group.'' Many customers are also members of these regional transmission groups. The methodology outlined in the specific regional transmission group criteria provides a clear set of guidelines for both Western and the transmission customer to evaluate Western's determination of ATC. This approach is consistent with filings approved by FERC for public and non-public utilities.

Comment: A commentor had concerns with the last sentence of Attachment C which refers to reserving transmission capability for ''forecasted power service obligations.'' It is improper for Western to withhold transmission capability in order to enhance future power

marketing activities, and the inclusion of this phrase violates both the letter and intent of FERC Order Nos. 888 and 888–A.

Response: In FERC Order Nos. 888 and 888–A, Section IV.C(5), FERC stated that, ''utilities may reserve existing transmission capacity needed for Native Load growth and Network load growth reasonably forecasted within the utility's current planning horizon.'' The Transmission Provider may market this capacity on a firm or non-firm basis until such time as the capacity is required by Native Load and Network Customers. Western has the same right to obtain transmission service for its own marketing activities as others have to obtain transmission service from Western for their marketing activities.

Comment: Western received a comment that Attachment F and Attachment G require overlapping information.

Response: The information required in Attachment F and Attachment G is not overlapping. Attachment G addresses technical and operational matters associated with the implementation of Attachment F.

Comment: Western received several comments regarding its proposed 10 times penalty included in Attachment H to the Tariff, and requesting Western to delete the 10 times penalty.

Response: Western believes the penalty is more appropriately addressed in Regional Office specific rate processes, and, therefore, has deleted the 10 times penalty from Section 3.0 of Attachment H.

Comment: A commentor asked if the general contract provisions: Contingent Upon Appropriations—Section 2.0, Contract Work Hours and Safety Standards—Section 4.0, Equal Employment Opportunity Practices—Section 5.0, and Use of Convict Labor—Section 6.0, of Attachment J are necessary in these types of contractual relationships.

Response: These provisions are required by law to be included in Federal contracts.

Comment: Several commentors stated that Section 7.0 of Attachment J gives Western the unilateral right to terminate service if it joins or is required to conform to the protocols of an independent system operator (ISO). By itself, the fact that Western joins an ISO does not automatically relieve Western of its obligation to provide comparable transmission service. The language referring to Western's unilateral right to terminate service is improper and should be removed.

Response: This language is required in the Sierra Nevada Region (SNR) Service Agreements consistent with the findings of FERC in Pacific Gas and Electric Company, et al., 81 FERC ¶ 61, 122 (1997). Western has moved this provision from Section J to the Service Agreements and this language shall be included by SNR in any Service Agreements entered into under this Tariff. Similar language may be required in the future by other Western Regional Offices which join ISO's to conform to the terms and conditions of the ISO agreement approved by FERC.

Comment: A commentor stated that Section 8.0 of Attachment J could be interpreted to bar the resale of transmission rights when such resale is provided for under FERC Order Nos. 888 and 888–A.

Response: The original Section 8.0 of Attachment J, ''Third Party Rights'', has been deleted.

Comment: A commentor asked what third party rights BEPC and HCPD have under Section 8.0 of Attachment J.

Response: The original Section 8.0 of Attachment J, ''Third Party Rights'', has been deleted.

Comment: A commentor asked why Western includes the phrase ''emergency power'' in Section 10.0 of Attachment J since the Tariff is for transmission service only and it does not provide for Western to supply capacity and energy. The same commentor asked how does Western define emergency power and under what circumstances will it be provided?

Response: Western has modified Section 10.0 of Attachment J to remove the reference to emergency power.

Comment: A commentor stated that the billing adjustments contemplated in Sections 13.0 and 14.0 of Attachment J need to include refunds of advances.

Response: Sections 13.0 and 14.0 are not the mechanism for Western to provide refunds for funds advanced to Western. Western added language to Sections 19.4 and 32.4 to clarify that amounts advanced in excess of costs incurred will be refunded.

Comment: Several commentors have raised issues regarding the bill crediting and net billing language in Sections 13.0 and 14.0 of Attachment J to the Tariff. There is a concern that the language is too broad and creates the potential for abuse. The provisions in Attachment J and the associated language in the proposed Service Agreements use the leverage of access to Western's Transmission System to require the transmission customer to agree to Western's Net Billing and Bill Crediting procedures as a condition for service and as means to provide alternative financing for Western. These provisions appear to be in conflict with the functional unbundling requirements of FERC Order Nos. 888 and 888–A and may, in fact, require the transmission customer to violate its own Standards of Conduct implementing FERC Order No. 889 and 18 CFR part 37. All provisions requiring the transmission customer to agree to Net Billing and Bill Crediting procedures as a condition for service under the Tariff must be removed.

Response: Western has modified these sections to clarify that the ''Net Billing and Bill Crediting'' provisions are optional. The inclusion of these provisions in the Tariff is non-discriminatory because they are not a condition for receiving service.

Comment: Western received several comments regarding proposed changes to Attachment K. A comment was received requesting that the phrase ''* * * from the Navajo Project for the Central Arizona Project, Boulder Canyon Project and the * * *'' be deleted from the Desert Southwest Region's (DSR) section of Attachment K. Another commentor requested that the phrase ''* * * of the Parker Davis-Project in DSR * * *'' be inserted. The same commentor also requested that in the first paragraph of Attachment K, that Western delete the phrase ''* * * and one coal fired power plant in Arizona * * *,'' and replace the word ''integrated'' with ''interconnect.'' A commentor requested that in the seventh paragraph of Attachment K that Western change ''little flexibility'' to ''little or no flexibility.''

Response: Western concurs with the comments and has made the changes to Attachment K.

Comment: A commentor proposed the following language for inclusion in the fourth paragraph of Attachment K, which would read as follows:

> * * * treat its Federal Customers in a manner analogous to the treatment of Native Load Customers by public utilities. The enabling legislation for the various projects authorizes both transmission and generation project expenses and contemplates recovery of these through power rates. For these reasons, Western will continue to recover transmission and generation related costs from Federal Customers through a bundled power sales rate. Western is committed to providing * * *

Response: Western does not believe that it is necessary to add the proposed text to Attachment K. The issue of cost recovery will be addressed on a case-by-case basis in the appropriate rate process.

Comment: A commentor stated that Sections 17.1 and 29.2 require that a written application for long-term, firm service be submitted to the ''appropriate Regional Office, as identified in

Attachment K.'' However, Attachment K provides no address, title, or even a phone number, to which such an application can be submitted. Western should correct Attachment K to include this information for each Regional Office.

Response: Western has noted the omission and has included the appropriate information in Attachment K to the Tariff.

Comment: Two commentors stated that there is no applicable definition for Federal project use loads.

Response: Western has modified Attachment K to the Tariff to clarify that Reclamation is responsible for providing Federal power resources to its project use customers. Western believes that this modification is sufficient to address this comment.

Comment: A commentor stated that Attachment K should include language stating that there will be no on-going transmission reservation maintained for incremental sales and that when Western does reserve transmission capacity for incremental sales, it will do so through its Open Access Same-Time Information System (OASIS) and account for such reservation as a Third Party Sale pursuant to Section 8.0 of the Tariff.

Response: The Tariff provides for the required treatment and Western has found no reason to include additional language as proposed by the commentor.

Comment: Western received many comments that raised issues concerning its obligations to serve Federal loads and the relationship of this obligation to Western's ability to comply with open access comparability standards set forth by FERC in Orders No. 888 and 888–A. The following summarizes the comments.

Western should be consistent between all of its Regional Offices in treating its existing transmission obligation to Federal customers as existing Point-to-Point Service. Any new sales Western makes to Federal customers should be unbundled and accounted for under the Tariff as Point-to-Point Service. Transmission for incremental sales to Federal customers should be reserved, provided, and accounted for as Point-to-Point Transmission Service under the Tariff.

It may be appropriate for Western to identify existing Federal customers as Native Load, but such partial requirements service at a discrete Point of Delivery clearly does not meet the definition of Network Load as set forth in Section 1.22.

To the extent Western has firm service obligations to Federal customers, reserving firm transmission capacity is appropriate. To the extent that Western intends to reserve firm transmission on its system in order to maintain the opportunity to make incremental sales to Federal customers above and beyond Western's firm obligations under certain favorable hydrologic conditions, such transmission reservations for generation merchant activities appear to be in direct conflict with the functional unbundling requirements of FERC Order No. 888.

Western has not clearly distinguished the jurisdictional separation of its statutory service from its proposed service under Western's Tariff. Western needs further revisions to its Tariff to clearly delineate the jurisdictional difference.

Western should perform two separate, parallel functions: statutory transmission service and third party transmission service.

Include the term ''Federal Customer'' in various places of the Tariff other than Attachment K.

In Attachment K, include the word ''retail'' before the word ''Native'' in the sentence which describes Western's treatment of its Federal customers.

The use of the term ''Native Load'' appears as an intention to unbundle firm electric service arrangements. Several commentors disputed Western's claim that its deliveries of power to Federal customers, defined by Western as ''the statutory and firm electric service and project use power users of the Federal Government'' are analogous to a public utility's deliveries to its own native load customers. Other comments included suggestions on how to redefine Federal customers and Federal generation and a suggestion that Western's deliveries were more precisely analogous to a public utility's retail Native Load.

The reservation provisions (2.2, 13.6 and 33.2) will not work. First, carried to its extreme, all current firm electric service contractors could cancel their contracts and be left with the ability to transfer other resources across Western's system, leaving Western no system to deliver hydropower.

The curtailment of contractors' firm electric service deliveries simultaneously with third party use of the system violates Western's statutory mandate. Another commentor stated that pro rata curtailments put Western's preference customers in the position of subsidizing third party transmission contractors.

A qualifier statement should be included in Section 33.0 to explain the process of load shedding and curtailment to be used, such as ''* * * that only load shedding and curtailments covered in this section are for new contracts entered into on the OASIS. They do not include existing contracts * * *'' Other commentors stated that there is no indication of how Reclamation's project use loads are served with Federal transmission capacity and expressed concern as to the applicability of curtailment.

How will load shedding and curtailment provisions of Section 33.0 work?

Response: Individual project authorization acts have provided Western the obligation and authority to market capacity and energy surplus to the needs of these multi-purpose projects. Western manages its transmission systems to meet these needs as well as to ensure the reliable operation of the overall transmission systems for which it is responsible. Section 211 of the Federal Power Act also requires Western to provide open transmission access. Western will meet all of these obligations in the following manner. Use of transmission facilities that Western owns, operates, or to which it has contract rights for delivery of Federal long-term firm capacity and energy to project use and electric service customers is a Western responsibility under the terms and conditions of marketing criteria and electric service contracts implementing statutory obligations to market Federal power. This is complementary with the provisions of the Tariff. Transmission service provided by Western under the Tariff is solely for the use of ATC in excess of the capability Western requires for deliveries of long-term firm capacity and energy to project use and electric service customers of the Federal government. Western has also stated that nothing in the Tariff shall alter, amend, or abridge the statutory or contractual obligations of Western to market and deliver Federal power resources and to repay the Federal investment in its projects.

Western has found it is no longer necessary to state that service to customers of the Federal government is analogous to service provided to Native Load Customers by public utilities. The term ''Federal Customers'' has been deleted from the Tariff. Further, Western clarifies that deliveries to discrete points of delivery can be made under existing authorities and contracts and deliveries of additional power at the same point may be made under the Tariff without violating the provisions of Section 1.22 of the Tariff. Western will use the Tariff for all Third Party Sales.

Western will operate its system according to Good Utility Practices, and unless otherwise provided for in existing contracts or regulations, will perform curtailments and other emergency procedures in a non-discriminatory manner in accordance with the terms of the Tariff and the governance of the National Electric Reliability Council, an RTG, or ISO as appropriate.

Western has modified the Tariff to be consistent with the above statements.

Comment: A commentor asked what does the term ''unused capacity'' in Attachment K mean and how does it apply to UGPR? Does Western have the right to terminate service if it determines the unused capacity no longer exists?

Response: Attachment K has been modified by deleting the term ''unused capacity''. Once committed to contractually, transmission capacity will be available to a transmission customer for the duration of the contract term in conformance with the provisions of the Tariff.

Comment: A commentor stated that preference should apply to rights to excess capacity on the Federal Transmission System.

Response: Neither Section 9(c) of the Reclamation Project Act of 1939 nor Section 5 of the Flood Control Act of 1944 require Western to give preference in the sale of excess transmission capacity to any particular type of entity.

Comment: A commentor stated that Western must jurisdictionally separate statutory service and tariff service because Western does not have new Environmental Impact Statements or Endangered Species Act determinations which indicate Western can provide Network Integration Transmission Service or Ancillary Services from its generation. Western's power contracts should not require future unbundling of transmission service because the unbundling of contracts and power deliveries may in fact be in contradiction of the environmental analysis performed for each of the power contract extensions. Another comment was made that Ancillary Services are generation-related but were not included in any environmental analyses for river ecosystem, hydrodam operations, or power marketing.

Response: Western has not committed or proposed any construction of specific new transmission or generation facilities in the Tariff. The establishment of contract language and transmission arrangements that do not involve: (1) The integration of a new generation resource, (2) physical changes in the transmission system beyond the previously developed facility area, or (3) changes in the normal operating limits of generation resources is categorically excluded by DOE regulations from the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Nothing in this generic contract language requires or causes such events to occur. If and when Western proposes to enter into a contract or transmission agreement which it reasonably would expect to require or cause such events to occur, Western will prepare appropriate documentation for its actions in compliance with the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321–4347, Council of Environmental Quality regulations, 40 CFR 1500–1508 and DOE regulations at 10 CFR part 1021.

Western's power contracts do not require future unbundling of transmission service. Decisions related to unbundling will be determined through a separate process.

Comment: Several commentors stated that they do not see how Western can maintain its statutory obligations to generate and deliver the maximum amount of firm capacity and energy to preference customers while unbundling, unless Western offers other services.

Response: This comment does not accurately describe Western's statutory obligations. The creation of the Tariff does not affect Western's obligations under existing contracts.

Comment: A commentor stated that unbundling will produce cost-shifts in the projects that are statutorily cost-recovery based.

Response: Western is complying with FERC Order Nos. 888 and 888–A. This requires the unbundling of Ancillary Services from transmission service for service under the Tariff. The rates for these services are based on the costs incurred to provide these services. Any revenues received from these services will be applied to project repayment.

Comment: A commentor stated that unbundling of firm electric service leaves no recourse but to file under Section 211 of the Federal Power Act. Customers may need more up-front oversight of Western's actions, such as Sections 205 and 206 require of FERC jurisdictional utilities.

Response: Oversight of Western's activities is outside the scope of this process.

Comment: Two comments were received stating that the reference to ''Western's hydroelectric power facilities'' is incorrect. The facilities referred to are Reclamation's hydroelectric power facilities.

Response: Western agrees with this comment.

Comment: A commentor noted that in FERC Order No. 888–A, FERC decided to implement Service Agreement procedures for firm point-to-point transactions of less than a year in duration (short-term firm) that are similar to those for non-firm point-to-point service. In other words, only one umbrella service agreement needs to be executed. Subsequent short-term firm transactions need only be requested and reserved via the OASIS. The commentor encourages Western to include in its Tariff a form of umbrella service agreement for Short-term Firm Point-to-Point Transmission Service that will operate in a similar manner to the Service Agreement for Non-Firm Service.

Response: Western agrees that Attachment A may be used as an umbrella service agreement for Short-term Firm Point-to-Point Transmission Service.

Comment: A commentor stated that the Tariff includes modifications to recognize Western's distinction as a Federal entity, and this seems to include non-Federal entities under the cloak of Federal law.

Response: These modifications apply to UGPR as the operator/manager of the Integrated System (IS). These modifications do not bring BEPC or HCPD under the cloak of Federal law.

Comment: Several commentors commended Western for its efforts in developing its proposed open access transmission service Tariff. With the understanding that Western is committed to working to modify its Tariff when it is found to be warranted, these commentors also support both the Tariff and Western's filing of the Tariff with FERC.

Response: Western appreciates these comments.

Comment: A commentor stated that all references to stranded costs should be deleted from the Tariff.

Response: The right to collect stranded costs is recognized in FERC Order Nos. 888 and 888–A. The stranded cost language in Western's Tariff is modeled upon the language in FERC's *pro forma* tariff. Recovery of stranded costs is neither incorporated in any of the Regional Office's proposed rates nor in the Open Access Transmission Rate formula for the UGPR.

Comment: A commentor asked Western what is its authority to collect stranded costs for BEPC and HCPD.

Response: Attachment K recognizes the right of UGPR, BEPC, and HCPD to collect stranded costs in accordance

with the principles established in FERC Order Nos. 888 and 888–A. Attachment K states that the collection of stranded costs by BEPC and HCPD will be subject to contracts separate from the Tariff.

Comment: Two commentors requested that Western's DSR and SNR implement the Ancillary Services, Schedules 1 through 6 under the Tariff, as a separate tariff on an interim basis to resolve areas of concern.

Response: The provision of Ancillary Services is an integral part of FERC's pro forma tariff and cannot be separated from Western's Tariff. Western is concerned that any further qualifiers on the provision of Ancillary Services could impair Western's ability to pass FERC's standards for comparability. This, in turn, would impair Western's ability to obtain reciprocal transmission service from public utilities. Therefore, Western will not consider implementing the Ancillary Services portion of the Tariff on an interim basis.

Comment: Two commentors stated that the language in each of the service schedules concerning pass-through costs from the Control Area operator does not apply in those cases when Western is not the Control Area operator. Reclamation does not pass the costs for generation through the Control Area operator in those cases, but allocates the costs to Western, who passes the costs through to the transmission customer.

Response: These provisions provide Western the ability to purchase capacity and energy from others when it is necessary and pass those costs on directly to the beneficiary. This is a transaction involving only the Control Area operator, the transmission customer, and Western.

Comment: A commentor suggested that Western's statutory obligations prevent it from effectively providing those Ancillary Services which involve the dedication of generation resources or output to non-Federal customers. Western should specifically limit itself to brokering these types of Ancillary Services to its transmission customers.

Response: Western does recognize resource limitations of the hydroelectric generation. Section 3 of the proposed Tariff was modified to include the option for Western to purchase Ancillary Services and pass through such costs to the transmission customer.

Comment: A commentor stated that it understands that Western will honor existing transmission service contracts without compelling existing customers to sign a Service Agreement under the Tariff. The commentor recommended that this commitment be described in Attachment J.

Response: Western will honor existing transmission service contracts without compelling existing customers to sign a Service Agreement under the Tariff. Western does not believe this needs to be specified in Attachment J. The Tariff provides for any new requests for transmission service.

Comment: A commentor stated that Western's power factor requirement should be clearly stated in the Tariff.

Response: There is no single Western power factor requirement. Western will include the applicable power factor requirement for each Regional Office in the offered Service Agreements.

Comment: A commentor asked that if the Tariff is binding upon Western, by what means would the Tariff be made binding on BEPC and HCPD?

Response: If the IS rate is approved in the rate setting public process, then the UGPR will enter into the contracts with BEPC and HCPD for the management and operation of the IS. Such contractual arrangements will make the terms of the Tariff binding upon BEPC and HCPD. This would preclude either BEPC or HCPD from making separate arrangements to sell transmission service over the IS.

Comment: A commentor is very supportive of Attachment F having provisions for a credit for integrated facilities and looks forward to negotiations to recognize and equitably credit customer facilities that have augmented the Federal system.

Response: Western appreciates the comment.

Comment: Western received a comment that Attachment K states that, ''Western will sell transmission service using Federally owned or controlled facilities only to the extent that transmission capacity is available in excess of that needed to deliver Federal power.'' This is inconsistent with the inclusion of non-Federal facilities in the definition of Transmission System.

Response: This comment is outside of the scope of this process. The determination of the facilities to be included in the Transmission System will be developed in the rate process.

Comment: A commentor stated that Attachment K to the Tariff describes the UGPR's intent to include the facilities of BEPC and HCPD in the UGPR transmission facilities. UGPR also includes provisions for recovery of stranded costs. The commentor recommends that the other Regional Offices' plans for their respective rate-making activities remain open to the possibility of incorporating this or similar joint rates.

Response: This issue is better addressed on a case-by-case basis in the appropriate rate process.

Comment: Several commentors have raised concerns regarding Western's provisions in the Tariff for changing rates. It appears to certain commentors that Western may change a rate only to an individual customer.

Response: The language is not intended to imply that Western will unilaterally change rates to one customer. Western's Regional Offices change rates through rate adjustment processes pursuant to Federal law and apply the rates uniformly to their respective customers.

Comment: Commentors raised a number of issues that related to Western's rate setting processes, including among others, inclusion of specific rates and charges with the Tariff, allocation of costs between transmission and ancillary services, inclusion of various costs and facilities in transmission rates, and rate setting methodology.

Response: These comments are outside the scope of this process. Each of Western's Regional Offices is at a different point in the process of developing open access transmission rates. Western's Regional Offices follow a separate and distinct process for the approval of their rates, which involves considerable public involvement and filing of the final rates with FERC. DOE approval of Western's rates is addressed in DOE Delegation Order No. 0204–108. Western's procedures for public involvement for rate procedures are covered in 10 CFR part 903. Filing requirements and procedures for FERC review of Federal Power Marketing Administration rates are detailed in 18 CFR part 300. Since Western's rate procedures are handled through so many separate processes, Western will not include specific rates and charges in the Tariff.

Comment: A commentor stated that the distinction between the transmission system used to deliver Federal power to UGPR's customers and the larger, more expensive system proffered for service to third parties does not comport with comparability.

Response: Transmission service to existing UGPR firm power customers is provided for under the provisions of existing contracts. This is consistent with FERC's treatment of such existing contracts under FERC Order Nos. 888 and 888–A.

Comment: A UGPR customer commented that in Section 2.2, existing firm electric service customers should not be subject to paying a transmission service rate that is different than all

other preference power customers simply due to the timing of a contract expiration or renewal.

Response: UGPR intends to have a single firm power rate for all preference customers who execute service agreements for implementation of the Post-85 Marketing Plan.

Comment: The statutory obligations referred to in Section II of the **Federal Register** are significant and important enough to be contained in the Tariff possibly at Section 11.0 of Attachment J.

Response: Western agrees that the various statutes governing Western's actions are significant, but does not agree that it would be appropriate to include a listing in the Tariff.

Comment: Existing preference customers should not be impacted by Western's commitment to meet the load growth of Network Integration Transmission Service Customers.

Response: This comment is a rate issue and is outside of the scope of this process.

Comment: One commentor stated that Western must carefully weigh the requirements of compliance with FERC Order No. 889 Standards of Conduct.

Response: Western will comply with FERC Order No. 889.

IV. Summary of Significant Changes From Western's Proposed Tariff

In Section 1.46, Western deleted portions of the additional language that were not necessary. In Section 1.49, Western reverted to the pro forma language. In Section 3, Western modified the proposed additional language to clarify Western's commitment to make every effort to provide Ancillary Services from purchased generation when Western's own resources are unavailable. In Section 10.1, Western removed the proposed additional language.

Western reinstated the last sentence in Section 12.1 except for ''submitted to arbitration and'', and ''arbitration.'' Those two phrases remained stricken. In Section 12.2, Western replaced the proposed language with language that refers to RTG dispute resolution processes.

In Sections 19.4 and 32.4, Western replaced ''provide the required letter of credit'' with ''pay the transmission customer's share of the costs'' and added language that Western will refund amounts advanced in excess of costs incurred.

A minor change was made to Section 29.1 consistent with the minor change in FERC Order 888–B, 81 FERC ¶ 61,248, issued November 25, 1997.

In Attachment H, Western removed references to the 10 times penalty provision. Western moved the provisions relating to the establishment of an ISO in Attachment J to Attachment A, Attachment B, and Attachment F. These terms initially will apply only to SNR. Western deleted provisions relating to third party rights in Attachment J. Western clarified that Net Billing and Bill Crediting provisions are applicable only when mutually agreed.

In Attachment K, Western made editorial changes including the insertion of the address, title, and telephone numbers of the Regional Office contacts. Western modified its language in Attachment K to clarify its statutory obligation to market Federal power. The modified language further clarifies that this Tariff does not affect existing contractual obligations.

V. Coordination with Adoption of Open Access Transmission Rates

Each of Western's Regional Offices is at a different point in the process of developing Open Access Transmission Rates. DOE approval of Western's rates is addressed in DOE Delegation Order No. 0204–108. Western's procedures for public involvement for rate procedures are covered in 10 CFR part 903. Filing requirements and procedures for FERC review of Power Marketing Administration rates are detailed in 18 CFR part 300. Until the Regional Offices complete the processes of placing rates in effect for the services to be provided under the open-access tariff, they will use existing rates when applicable. Rates for short-term sales may be placed in effect by Western's Administrator and used when no rates exist for such services.

The new SNR rates for ancillary services and transmission became effective October 1, 1997, and will be effective for a 5-year period ending September 30, 2002.

The CRSP CSC is currently conducting a public process to develop transmission and ancillary service rates consistent with FERC Order Nos. 888 and 888–A to be used with the Tariff. The public comment period concluded September 23, 1997. The proposed effective date of the rates will be April 1, 1998.

The DSR began a public involvement process to develop transmission and ancillary service rates consistent with FERC Order Nos. 888 and 888-A through a series of informational meetings with its customers held on March 5, 1997, July 23, 1997, and September 3, 1997. At the September 3, 1997, meeting, it was determined that the formal process to develop new rates will not begin until after publication of Western's Open Access Tariff. As a result, the proposed effective date for the new rates will be no later than October 1, 1998. DSR will implement this Tariff using rates for short-term sales approved by Western's Administrator in December 1997.

The UGPR has implemented Open Access Transmission Rates approved by Western's Administrator. These transmission rates and ancillary service rates became effective December 20, 1997, and will expire December 19, 1998. On March 28, 1997, by the mailing of an Advance Announcement of the transmission rate adjustment for the Pick-Sloan Missouri Basin Program, Eastern Division, a public process was initiated to establish long-term Open Access Transmission Rates for the UGPR. UGPR has received comments from that announcement and published its proposal in September 1997. The proposed effective date is February 1, 1998.

The Rocky Mountain Region (RMR) began a formal public involvement process on September 19, 1997, to develop transmission and ancillary service rates consistent with FERC Order Nos. 888 and 888–A to be used with the Tariff. The proposed effective date of the rates will be April 1, 1998. The RMR will have rates for short-term sales in effect between the effective date of the Tariff and April 1, 1998.

Subsequent changes to Regional Office Open Access Transmission Rates will be completed on a project-by-project basis using the public involvement and FERC review processes outlined above.

VI. Regulatory Requirements

Review Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget (OMB) is required.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, requires Federal agencies to perform a regulatory flexibility analysis if a proposed rule is likely to have a significant economic impact on a substantial number of small entities. The Acting Administrator for Western certifies that Western's providing open transmission access would not cause an adverse economic impact on a substantial number of such entities. Since the proposed open-access Tariff is of limited applicability, no flexibility analysis is required.

Review Under the Paperwork Reduction Act:

In accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. 3501–3520, Western has received approval from OMB for the collection of customer information in this rule, under OMB control number 1910–0100.

Review Under the National Environmental Policy Act

In compliance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et. seq.*; the Council on Environmental Quality regulations, 40 CFR parts 1500–1508; DOE NEPA regulations, 10 CFR part 1021, Western has determined that this action is categorically excluded from the preparation of an EIS or an EA.

Availability of Information

Western's final Tariff and a redline/strikeout comparison of Western's final Tariff to the FERC pro forma will be available from the informational contacts listed above or on the Internet at http://www.wapa.gov.

Dated: December 15, 1997.

Michael S. Hacskaylo,

Acting Administrator.

Open Access Transmission Service Tariff

Table of Contents

Part I. Common Service Provisions

1 Definitions
1.1 Ancillary Services
1.2 Annual Transmission Costs
1.3 Application
1.4 Commission
1.5 Completed Application
1.6 Control Area
1.7 Curtailment
1.8 Delivering Party
1.9 Designated Agent
1.10 Direct Assignment Facilities
1.11 Eligible Customer
1.12 Facilities Study
1.13 Firm Point-To-Point Transmission Service
1.14 Good Utility Practice
1.15 Interruption
1.16 Load Ratio Share
1.17 Load Shedding
1.18 Long-Term Firm Point-To-Point Transmission Service
1.19 Native Load Customers
1.20 Network Customer
1.21 Network Integration Transmission Service
1.22 Network Load
1.23 Network Operating Agreement
1.24 Network Operating Committee
1.25 Network Resource
1.26 Network Upgrades
1.27 Non-Firm Point-To-Point Transmission Service
1.28 Open Access Same-Time Information System
1.29 Part I
1.30 Part I
1.31 Part III
1.32 Parties
1.33 Point(s) of Delivery
1.34 Point(s) of Receipt
1.35 Point-To-Point Transmission Service
1.36 Power Purchaser
1.37 Receiving Party
1.38 Regional Transmission Group
1.39 Reserved Capacity
1.40 Service Agreement
1.41 Service Commencement Date
1.42 Short-Term Firm Point-To-Point Transmission Service
1.43 System Impact Study
1.44 Third-Party Sale
1.45 Transmission Customer
1.46 Transmission Provider
1.47 Transmission Provider's Monthly Transmission System Peak
1.48 Transmission Service
1.49 Transmission System
2 Initial Allocation and Renewal Procedures
2.1 Initial Allocation of Available Transmission Capability
2.2 Reservation Priority For Existing Firm Service Customers
3 Ancillary Services
3.1 Scheduling, System Control and Dispatch Service
3.2 Reactive Supply and Voltage Control from Generation Sources Service
3.3 Regulation and Frequency Response Service
3.4 Energy Imbalance Service
3.5 Operating Reserve—Spinning Reserve Service
3.6 Operating Reserve—Supplemental Reserve Service
4 Open Access Same-Time Information System (OASIS)
5 Local Furnishing Bonds
5.1 Transmission Providers That Own Facilities Financed by Local Furnishing Bonds
5.2 Alternative Procedures for Requesting Transmission Service
6 Reciprocity
7 Billing and Payment
7.1 Billing Procedures
7.2 Interest on Unpaid Balances
7.3 Customer Default
8 Accounting for the Transmission Provider's Use of the Tariff
8.1 Transmission Revenues
8.2 Study Costs and Revenues
9 Regulatory Filings
10 Force Majeure and Indemnification
10.1 Force Majeure
10.2 Indemnification
11 Creditworthiness
12 Dispute Resolution Procedures
12.1 Internal Dispute Resolution Procedures
12.2 External Dispute Resolution Procedures
12.3 Rights Under The Federal Power Act

Part II. Point-to-Point Transmission Service

Preamble

13 Nature of Firm Point-To-Point Transmission Service
13.1 Term
13.2 Reservation Priority
13.3 Use of Firm Transmission Service by the Transmission Provider
13.4 Service Agreements
13.5 Transmission Customer Obligations for Facility Additions or Redispatch Costs
13.6 Curtailment of Firm Transmission Service
13.7 Classification of Firm Transmission Service
13.8 Scheduling of Firm Point-To-Point Transmission Service
14 Nature of Non-Firm Point-To-Point Transmission Service
14.1 Term
14.2 Reservation Priority
14.3 Use of Non-Firm Point-To-Point Transmission Service by the Transmission Provider
14.4 Service Agreements
14.5 Classification of Non-Firm Point-To-Point Transmission Service
14.6 Scheduling of Non-Firm Point-To-Point Transmission Service
14.7 Curtailment or Interruption of Service
15 Service Availability
15.1 General Conditions
15.2 Determination of Available Transmission Capability
15.3 Initiating Service in the Absence of an Executed Service Agreement
15.4 Obligation to Provide Transmission Service that Requires Expansion or Modification of the Transmission System
15.5 Deferral of Service
15.6 Other Transmission Service Schedules
15.7 Real Power Losses
16 Transmission Customer Responsibilities
16.1 Conditions Required of Transmission Customers
16.2 Transmission Customer Responsibility for Third-Party Arrangements
17 Procedures for Arranging Firm Point-To-Point Transmission Service
17.1 Application
17.2 Completed Application
17.3 Processing Fee
17.4 Notice of Deficient Application
17.5 Response to a Completed Application
17.6 Execution of a Service Agreement
17.7 Extensions for Commencement of Service
18 Procedures for Arranging Non-Firm Point-To-Point Transmission Service
18.1 Application
18.2 Completed Application
18.3 Reservation of Non-Firm Point-To-Point Transmission Service
18.4 Determination of Available Transmission Capability
19 Additional Study Procedures For Firm Point-To-Point Transmission Service Requests
19.1 Notice of Need for System Impact Study
19.2 System Impact Study Agreement and Compensation
19.3 System Impact Study Procedures
19.4 Facilities Study Procedures
19.5 Facilities Study Modifications
19.6 Due Diligence in Completing New Facilities
19.7 Partial Interim Service
19.8 Expedited Procedures for New Facilities

20 Procedures if The Transmission Provider is Unable to Complete New Transmission Facilities for Firm Point-To-Point Transmission Service
20.1 Delays in Construction of New Facilities
20.2 Alternatives to the Original Facility Additions
20.3 Refund Obligation for Unfinished Facility Additions
21 Provisions Relating to Transmission Construction and Services on the Systems of Other Utilities
21.1 Responsibility for Third-Party System Additions
21.2 Coordination of Third-Party System Additions
22 Changes in Service Specifications
22.1 Modifications On a Non-Firm Basis
22.2 Modifications On a Firm Basis
23 Sale or Assignment of Transmission Service
23.1 Procedures for Assignment or Transfer of Service
23.2 Limitations on Assignment or Transfer of Service
23.3 Information on Assignment or Transfer of Service
24 Metering and Power Factor Correction at Receipt and Delivery Point(s)
24.1 Transmission Customer Obligations
24.2 Transmission Provider Access to Metering Data
24.3 Power Factor
25 Compensation for Transmission Service
26 Stranded Cost Recovery
27 Compensation for New Facilities and Redispatch Costs

Part III. Network Integration Transmission Service

Preamble

28 Nature of Network Integration Transmission Service
28.1 Scope of Service
28.2 Transmission Provider Responsibilities
28.3 Network Integration Transmission Service
28.4 Secondary Service
28.5 Real Power Losses
28.6 Restrictions on Use of Service
29 Initiating Service
29.1 Condition Precedent for Receiving Service
29.2 Application Procedures
29.3 Technical Arrangements to be Completed Prior to Commencement of Service
29.4 Network Customer Facilities
29.5 This section is intentionally left blank
30 Network Resources
30.1 Designation of Network Resources
30.2 Designation of New Network Resources
30.3 Termination of Network Resources
30.4 Operation of Network Resources
30.5 Network Customer Redispatch Obligation
30.6 Transmission Arrangements for Network Resources Not Physically Interconnected With The Transmission Provider
30.7 Limitation on Designation of Network Resources
30.8 Use of Interface Capacity by the Network Customer
30.9 Network Customer Owned Transmission Facilities
31 Designation of Network Load
31.1 Network Load
31.2 New Network Loads Connected With the Transmission Provider
31.3 Network Load Not Physically Interconnected with the Transmission Provider
31.4 New Interconnection Points
31.5 Changes in Service Requests
31.6 Annual Load and Resource Information Updates
32 Additional Study Procedures For Network Integration Transmission Service Requests
32.1 Notice of Need for System Impact Study
32.2 System Impact Study Agreement and Compensation
32.3 System Impact Study Procedures
32.4 Facilities Study Procedures
33 Load Shedding and Curtailments
33.1 Procedures
33.2 Transmission Constraints
33.3 Cost Responsibility for Relieving Transmission Constraints
33.4 Curtailments of Scheduled Deliveries
33.5 Allocation of Curtailments
33.6 Load Shedding
33.7 System Reliability
34 Rates and Charges
34.1 Monthly Demand Charge
34.2 Determination of Network Customer's Monthly Network Load
34.3 Determination of Transmission Provider's Monthly Transmission System Load
34.4 Redispatch Charge
34.5 Stranded Cost Recovery
35 Operating Arrangements
35.1 Operation under The Network Operating Agreement
35.2 Network Operating Agreement
35.3 Network Operating Committee

Schedule 1 Scheduling, System Control and Dispatch Service
Schedule 2 Reactive Supply and Voltage Control from Generation Sources Service
Schedule 3 Regulation and Frequency Response Service
Schedule 4 Energy Imbalance Service
Schedule 5 Operating Reserve—Spinning Reserve Service
Schedule 6 Operating Reserve—Supplemental Reserve Service
Schedule 7 long-Term Firm and Short-Term Firm Point-to-Point Transmission Service
Schedule 8 Non-Firm Point-to-Point Transmission Service
Attachment A Form of Service Agreement For Firm Point-to-Point Transmission Service
Attachment B Form of Service Agreement For Non-Firm Point-to-Point Transmission Service
Attachment C Methodology to Assess Available Transmission Capability
Attachment D Methodology for Completing a System Impact Study
Attachment E Index of Point-to-Point Transmission Service Customers
Attachment F Service Agreement For Network Integration Transmission Service
Attachment G Network Operating Agreement
Attachment H Annual Transmission Revenue Requirement For Network Integration Transmission Service
Attachment I Index of Network Integration Transmission Service Customers
Attachment J Provisions Specific to the Transmission Provider
Attachment K Transmission Provider Authorities and Obligations

Open Access Transmission Service Tariff

I. Part I. Common Service Provisions

1 Definitions

1.1 *Ancillary Services:* Those services that are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the Transmission Provider's Transmission System in accordance with Good Utility Practice.

1.2 *Annual Transmission Costs:* The total annual cost of the Transmission System for purposes of Network Integration Transmission Service shall be the amount specified in Attachment H until amended by the Transmission Provider or modified by the Commission, pursuant to Federal Law.

1.3 Application: A request by an Eligible Customer for transmission service pursuant to the provisions of the Tariff.

1.4 Commission: The Federal Energy Regulatory Commission.

1.5 *Completed Application:* An Application that satisfies all of the information and other requirements of the Tariff, including any required application processing fee.

1.6 *Control Area:* An electric power system or combination of electric power systems to which a common automatic generation control scheme is applied in order to:

(1) Match, at all times, the power output of the generators within the electric power system(s) and capacity and energy purchased from entities outside the electric power system(s), with the load within the electric power system(s);

(2) Maintain scheduled interchange with other Control Areas, within the limits of Good Utility Practice;

(3) Maintain the frequency of the electric power system(s) within reasonable limits in accordance with Good Utility Practice; and

(4) Provide sufficient generating capacity to maintain operating reserves in accordance with Good Utility Practice.

1.7 *Curtailment:* A reduction in firm or non-firm transmission service in response to a transmission capacity

shortage as a result of system reliability conditions.

1.8 *Delivering Party:* The entity supplying capacity and energy to be transmitted at Point(s) of Receipt.

1.9 *Designated Agent:* Any entity that performs actions or functions on behalf of the Transmission Provider, an Eligible Customer, or the Transmission Customer required under the Tariff.

1.10 *Direct Assignment Facilities:* Facilities or portions of facilities that are constructed by the Transmission Provider for the sole use/benefit of a particular Transmission Customer requesting service under the Tariff. Direct Assignment Facilities shall be specified in the Service Agreement that governs service to the Transmission Customer.

1.11 *Eligible Customer:* (i) Any electric utility (including the Transmission Provider and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an Eligible Customer under the Tariff. Electric energy sold or produced by such entity may be electric energy produced in the United States, Canada or Mexico. However, with respect to transmission service that the Commission is prohibited from ordering by Section 212(h) of the Federal Power Act, such entity is eligible only if the service is provided pursuant to a state requirement that the Transmission Provider offer the unbundled transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider. (ii) Any retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider offer the transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider, is an Eligible Customer under the Tariff.

1.12 *Facilities Study:* An engineering study conducted by the Transmission Provider to determine the required modifications to the Transmission Provider's Transmission System, including the cost and scheduled completion date for such modifications, that will be required to provide the requested transmission service.

1.13 *Firm Point-To-Point Transmission Service:* Transmission Service under this Tariff that is reserved and/or scheduled between specified Points of Receipt and Delivery pursuant to Part II of this Tariff.

1.14 *Good Utility Practice:* Any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

1.15 *Interruption:* A reduction in non-firm transmission service due to economic reasons pursuant to Section 14.7.

1.16 *Load Ratio Share:* Ratio of a Transmission Customer's Network Load to the Transmission Provider's total load computed in accordance with Sections 34.2 and 34.3 of the Network Integration Transmission Service under Part III of the Tariff and calculated on a rolling twelve month basis.

1.17 *Load Shedding:* The systematic reduction of system demand by temporarily decreasing load in response to transmission system or area capacity shortages, system instability, or voltage control considerations under Part III of the Tariff.

1.18 *Long-Term Firm Point-To-Point Transmission Service:* Firm Point-To-Point Transmission Service under Part II of the Tariff with a term of one year or more.

1.19 *Native Load Customers:* The wholesale and retail power customers of the Transmission Provider on whose behalf the Transmission Provider, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate the Transmission Provider's system to meet the reliable electric needs of such customers.

1.20 *Network Customer:* An entity receiving transmission service pursuant to the terms of the Transmission Provider's Network Integration Transmission Service under Part III of the Tariff.

1.21 *Network Integration Transmission Service:* The transmission service provided under Part III of the Tariff.

1.22 *Network Load:* The load that a Network Customer designates for Network Integration Transmission Service under Part III of the Tariff. The Network Customer's Network Load shall include all load served by the output of any Network Resources designated by the Network Customer. A Network Customer may elect to designate less than its total load as Network Load but may not designate only part of the load at a discrete Point of Delivery. Where an Eligible Customer has elected not to designate a particular load at discrete points of delivery as Network Load, the Eligible Customer is responsible for making separate arrangements under Part II of the Tariff for any Point-To-Point Transmission Service that may be necessary for such non-designated load.

1.23 *Network Operating Agreement:* An executed agreement that contains the terms and conditions under which the Network Customer shall operate its facilities and the technical and operational matters associated with the implementation of Network Integration Transmission Service under Part III of the Tariff.

1.24 *Network Operating Committee:* A group made up of representatives from the Network Customer(s) and the Transmission Provider established to coordinate operating criteria and other technical considerations required for implementation of Network Integration Transmission Service under Part III of this Tariff.

1.25 *Network Resource:* Any designated generating resource owned, purchased, or leased by a Network Customer under the Network Integration Transmission Service Tariff. Network Resources do not include any resource, or any portion thereof, that is committed for sale to third parties or otherwise cannot be called upon to meet the Network Customer's Network Load on a non-interruptible basis.

1.26 *Network Upgrades:* Modifications or additions to transmission-related facilities that are integrated with and support the Transmission Provider's overall Transmission System for the general benefit of all users of such Transmission System.

1.27 *Non-Firm Point-To-Point Transmission Service:* Point-To-Point Transmission Service under the Tariff that is reserved and scheduled on an as-available basis and is subject to Curtailment or Interruption as set forth in Section 14.7 under Part II of the Tariff. Non-Firm Point-To-Point Transmission Service is available on a stand-alone basis for periods ranging from one hour to one month.

1.28 *Open Access Same-Time Information System (OASIS):* The information system and standards of conduct contained in Part 37 of the Commission's regulations and all additional requirements implemented by subsequent Commission orders dealing with OASIS.

1.29 *Part I:* Tariff Definitions and Common Service Provisions contained in Sections 2 through 12.

1.30 *Part II:* Tariff Sections 13 through 27 pertaining to Point-To-Point

Transmission Service in conjunction with the applicable Common Service Provisions of Part I and appropriate Schedules and Attachments.

1.31 *Part III:* Tariff Sections 28 through 35 pertaining to Network Integration Transmission Service in conjunction with the applicable Common Service Provisions of Part I and appropriate Schedules and Attachments.

1.32 *Parties:* The Transmission Provider and the Transmission Customer receiving service under the Tariff.

1.33 *Point(s) of Delivery:* Point(s) on the Transmission Provider's Transmission System where capacity and energy transmitted by the Transmission Provider will be made available to the Receiving Party under Part II of the Tariff. The Point(s) of Delivery shall be specified in the Service Agreement for Long-Term Firm Point-to-Point Transmission Service.

1.34 *Point(s) of Receipt:* Point(s) of interconnection on the Transmission Provider's Transmission System where capacity and energy will be made available to the Transmission Provider by the Delivering Party under Part II of the Tariff. The Point(s) of Receipt shall be specified in the Service Agreement for Long-Term Firm Point-to-Point Transmission Service.

1.35 *Point-To-Point Transmission Service:* The reservation and transmission of capacity and energy on either a firm or non-firm basis from the Point(s) of Receipt to the Point(s) of Delivery under Part II of the Tariff.

1.36 *Power Purchaser:* The entity that is purchasing the capacity and energy to be transmitted under the Tariff.

1.37 *Receiving Party:* The entity receiving the capacity and energy transmitted by the Transmission Provider to Point(s) of Delivery.

1.38 *Regional Transmission Group (RTG):* A voluntary organization of transmission owners, transmission users and other entities approved by the Commission to efficiently coordinate transmission planning (and expansion), operation and use on a regional (and interregional) basis.

1.39 *Reserved Capacity:* The maximum amount of capacity and energy that the Transmission Provider agrees to transmit for the Transmission Customer over the Transmission Provider's Transmission System between the Point(s) of Receipt and the Point(s) of Delivery under Part II of the Tariff. Reserved Capacity shall be expressed in terms of whole megawatts on a sixty (60) minute interval (commencing on the clock hour) basis.

1.40 *Service Agreement:* The initial agreement and any amendments or supplements thereto entered into by the Transmission Customer and the Transmission Provider for service under the Tariff.

1.41 *Service Commencement Date:* The date the Transmission Provider begins to provide service pursuant to the terms of an executed Service Agreement, or the date the Transmission Provider begins to provide service in accordance with Section 15.3 or Section 29.1 under the Tariff.

1.42 *Short-Term Firm Point-To-Point Transmission Service:* Firm Point-To-Point Transmission Service under Part II of the Tariff with a term of less than one year.

1.43 *System Impact Study:* An assessment by the Transmission Provider of (i) the adequacy of the Transmission System to accommodate a request for either Firm Point-To-Point Transmission Service or Network Integration Transmission Service and (ii) whether any additional costs may be incurred in order to provide transmission service.

1.44 *Third-Party Sale:* Any sale for resale in interstate commerce to a Power Purchaser that is not designated as part of Network Load under the Network Integration Transmission Service.

1.45 *Transmission Customer:* Any Eligible Customer (or its Designated Agent) that (i) executes a Service Agreement, or (ii) requests in writing that the Transmission Provider provide transmission service without a Service Agreement, pursuant to section 15.3 of the Tariff. This term is used in the Part I Common Service Provisions to include customers receiving transmission service under Part II and Part III of this Tariff.

1.46 *Transmission Provider:* The Regional Office of the Western Area Power Administration (Western) which owns, controls, or operates the facilities used for the transmission of electric energy in interstate commerce and provides transmission service under the Tariff.

1.47 *Transmission Provider's Monthly Transmission System Peak:* The maximum firm usage of the Transmission Provider's Transmission System in a calendar month.

1.48 *Transmission Service:* Point-To-Point Transmission Service provided under Part II of the Tariff on a firm and non-firm basis.

1.49 *Transmission System:* The facilities owned, controlled or operated by the Transmission Provider that are used to provide transmission service under Part II and Part III of the Tariff.

2 Initial Allocation and Renewal Procedures

2.1 Initial Allocation of Available Transmission Capability

For purposes of determining whether existing capability on the Transmission Provider's Transmission System is adequate to accommodate a request for firm service under this Tariff, all Completed Applications for new firm transmission service received during the initial sixty (60) day period commencing with the effective date of the Tariff will be deemed to have been filed simultaneously. A lottery system conducted by an independent party shall be used to assign priorities for Completed Applications filed simultaneously. All Completed Applications for firm transmission service received after the initial sixty (60) day period shall be assigned a priority pursuant to Section 13.2.

2.2 Reservation Priority For Existing Firm Service Customers

Existing firm service customers (wholesale requirements and transmission-only, with a contract term of one-year or more), have the right to continue to take transmission service from the Transmission Provider when the contract expires, rolls over or is renewed. This transmission reservation priority is independent of whether the existing customer continues to purchase capacity and energy from the Transmission Provider or elects to purchase capacity and energy from another supplier. If at the end of the contract term, the Transmission Provider's Transmission System cannot accommodate all of the requests for transmission service, the existing firm service customer must agree to accept a contract term at least equal to a competing request by any new Eligible Customer and to pay the current rate for such service. This transmission reservation priority for existing firm service customers is an ongoing right that may be exercised at the end of all firm contract terms of one-year or longer.

3 Ancillary Services

Ancillary Services are needed with transmission service to maintain reliability within and among the Control Areas affected by the transmission service. The Transmission Provider is required to provide (or offer to arrange with the local Control Area operator as discussed below), and the Transmission Customer is required to purchase, the following Ancillary Services (i) Scheduling, System Control and Dispatch, and (ii) Reactive Supply and

Voltage Control from Generation Sources.

The Transmission Provider is required to offer to provide (or offer to arrange with the local Control Area operator as discussed below) the following Ancillary Services only to the Transmission Customer serving load within the Transmission Provider's Control Area (i) Regulation and Frequency Response, (ii) Energy Imbalance, (iii) Operating Reserve—Spinning, and (iv) Operating Reserve—Supplemental. The Transmission Customer serving load within the Transmission Provider's Control Area, is required to acquire these Ancillary Services, whether from the Transmission Provider, from a third party, or by self-supply. The Transmission Customer may not decline the Transmission Provider's offer of Ancillary Services unless it demonstrates that it has acquired the Ancillary Services from another source. However, when sufficient Federal generation is not available to provide the required Ancillary Services, the Transmission Provider will offer to make every effort to purchase Ancillary Services from others, as available. The costs of such purchases on behalf of a Transmission Customer will be passed directly through to that Transmission Customer. The Transmission Customer must list in its Application which Ancillary Services it will purchase from the Transmission Provider.

If the Transmission Provider is a utility providing transmission service, but is not a Control Area operator, it may be unable to provide some or all of the Ancillary Services. In this case, the Transmission Provider can fulfill its obligation to provide Ancillary Services by acting as the Transmission Customer's agent to secure these Ancillary Services from the Control Area operator. The Transmission Customer may elect to (i) have the Transmission Provider act as its agent, (ii) secure the Ancillary Services directly from the Control Area operator, or (iii) secure the Ancillary Services (discussed in Schedules 3, 4, 5, and 6) from a third party or by self-supply when technically feasible.

The Transmission Provider shall specify the rate treatment and all related terms and conditions in the event of an unauthorized use of Ancillary Services by the Transmission Customer.

The specific Ancillary Services, prices and/or compensation methods for each are described on the Schedules that are attached to and made a part of the Tariff. Three principal requirements apply to discounts for Ancillary Services provided by the Transmission Provider in conjunction with its provision of transmission service as follows: (1) Any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers solely by posting on the OASIS, (2) any customer-initiated requests for discounts (including requests for use by one's wholesale merchant or an affiliate's use) must occur solely by posting on the OASIS, and (3) once a discount is negotiated, details must be immediately posted on the OASIS. A discount agreed upon for an Ancillary Service must be offered for the same period to all Eligible Customers on the Transmission Provider's system. Sections 3.1 through 3.6 below list the six Ancillary Services.

3.1 *Scheduling, System Control and Dispatch Service:* The rates and/or methodology are described in Schedule 1.

3.2 *Reactive Supply and Voltage Control from Generation Sources Service:* The rates and/or methodology are described in Schedule 2.

3.3 *Regulation and Frequency Response Service:* Where applicable the rates and/or methodology are described in Schedule 3.

3.4 *Energy Imbalance Service:* Where applicable the rates and/or methodology are described in Schedule 4.

3.5 *Operating Reserve—Spinning Reserve Service:* Where applicable the rates and/or methodology are described in Schedule 5.

3.6 *Operating Reserve—Supplemental Reserve Service: Where applicable the rates and/or methodology are described in Schedule 6.*

4 Open Access Same-Time Information System (OASIS)

Terms and conditions regarding Open Access Same-Time Information System and standards of conduct are set forth in 18 CFR 37 of the Commission's regulations (Open Access Same-Time Information System and Standards of Conduct for Public Utilities). In the event available transmission capability as posted on the OASIS is insufficient to accommodate a request for firm transmission service, additional studies may be required as provided by this Tariff pursuant to Sections 19 and 32.

5 Local Furnishing Bonds

5.1 Transmission Providers That Own Facilities Financed by Local Furnishing Bonds

This provision is applicable only to Transmission Providers that have financed facilities for the local furnishing of electric energy with tax-exempt bonds, as described in Section 142(f) of the Internal Revenue Code (''local furnishing bonds''). Notwithstanding any other provision of this Tariff, the Transmission Provider shall not be required to provide transmission service to any Eligible Customer pursuant to this Tariff if the provision of such transmission service would jeopardize the tax-exempt status of any local furnishing bond(s) used to finance the Transmission Provider's facilities that would be used in providing such transmission service.

5.2 Alternative Procedures for Requesting Transmission Service

(i) If the Transmission Provider determines that the provision of transmission service requested by an Eligible Customer would jeopardize the tax-exempt status of any local furnishing bond(s) used to finance its facilities that would be used in providing such transmission service, it shall advise the Eligible Customer within thirty (30) days of receipt of the Completed Application.

(ii) If the Eligible Customer thereafter renews its request for the same transmission service referred to in (i) by tendering an application under Section 211 of the Federal Power Act, the Transmission Provider, within ten (10) days of receiving a copy of the Section 211 application, will waive its rights to a request for service under Section 213(a) of the Federal Power Act and to the issuance of a proposed order under Section 212(c) of the Federal Power Act. The Commission, upon receipt of the Transmission Provider's waiver of its rights to a request for service under Section 213(a) of the Federal Power Act and to the issuance of a proposed order under Section 212(c) of the Federal Power Act, shall issue an order under Section 211 of the Federal Power Act. Upon issuance of the order under Section 211 of the Federal Power Act, the Transmission Provider shall be required to provide the requested transmission service in accordance with the terms and conditions of this Tariff.

6 Reciprocity

A Transmission Customer receiving transmission service under this Tariff agrees to provide comparable transmission service that it is capable of providing to the Transmission Provider on similar terms and conditions over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer and over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer's corporate

affiliates. A Transmission Customer that is a member of a power pool or Regional Transmission Group also agrees to provide comparable transmission service to the members of such power pool and Regional Transmission Group on similar terms and conditions over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer and over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer's corporate affiliates.

This reciprocity requirement applies not only to the Transmission Customer that obtains transmission service under the Tariff, but also to all parties to a transaction that involves the use of transmission service under the Tariff, including the power seller, buyer and any intermediary, such as a power marketer. This reciprocity requirement also applies to any Eligible Customer that owns, controls or operates transmission facilities that uses an intermediary, such as a power marketer, to request transmission service under the Tariff. If the Transmission Customer does not own, control or operate transmission facilities, it must include in its Application a sworn statement of one of its duly authorized officers or other representatives that the purpose of its Application is not to assist an Eligible Customer to avoid the requirements of this provision.

7 Billing and Payment

7.1 Billing Procedures

Within a reasonable time after the first day of each month, the Transmission Provider shall submit an invoice to the Transmission Customer for the charges for all services furnished under the Tariff during the preceding month. The invoice shall be paid by the Transmission Customer within twenty (20) days of receipt. All payments shall be made in immediately available funds payable to the Transmission Provider, or by wire transfer to a bank named by the Transmission Provider.

7.2 Interest on Unpaid Balances

Interest on any unpaid amounts (including amounts placed in escrow) shall be calculated in accordance with the methodology specified for interest on refunds in the Commission's regulations at 18 CFR 35.19a(a)(2)(iii). Interest on delinquent amounts shall be calculated from the due date of the bill to the date of payment. When payments are made by mail, bills shall be considered as having been paid on the date of receipt by the Transmission Provider.

7.3 Customer Default

In the event the Transmission Customer fails, for any reason other than a billing dispute as described below, to make payment to the Transmission Provider on or before the due date as described above, and such failure of payment is not corrected within thirty (30) calendar days after the Transmission Provider notifies the Transmission Customer to cure such failure, a default by the Transmission Customer shall be deemed to exist. Within the same 30 calendar days after notice of failure to make payment, the Transmission Customer shall have the right of appeal to the Administrator of Western. The Transmission Provider shall submit its recommendation to the Administrator for review and approval, but shall not terminate service until the Administrator makes a determination on the Transmission Customer's appeal. In the event of a billing dispute between the Transmission Provider and the Transmission Customer, the Transmission Provider will continue to provide service under the Service Agreement as long as the Transmission Customer (i) continues to make all payments not in dispute, and (ii) pays into an independent escrow account the portion of the invoice in dispute, pending resolution of such dispute. If the Transmission Customer fails to meet these two requirements for continuation of service, then the Transmission Provider may provide notice to the Transmission Customer of its intention to suspend service in sixty (60) days, in accordance with Commission policy.

8 Accounting for the Transmission Provider's Use of the Tariff

The Transmission Provider shall record the following amounts, as outlined below.

8.1 Transmission Revenues

Include in a separate operating revenue account or subaccount the revenues it receives from Transmission Service when making Third-Party Sales under Part II of the Tariff.

8.2 Study Costs and Revenues

Include in a separate transmission operating expense account or subaccount, costs properly chargeable to expense that are incurred to perform any System Impact Studies or Facilities Studies which the Transmission Provider conducts to determine if it must construct new transmission facilities or upgrades necessary for its own uses, including making Third-Party Sales under the Tariff; and include in a separate operating revenue account or subaccount the revenues received for System Impact Studies or Facilities Studies performed when such amounts are separately stated and identified in the Transmission Customer's billing under the Tariff.

9 Regulatory Filings

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder.

10 Force Majeure and Indemnification

10.1 Force Majeure

An event of Force Majeure means any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any Curtailment, order, regulation or restriction imposed by governmental military or lawfully established civilian authorities, or any other cause beyond a Party's control. A Force Majeure event does not include an act of negligence or intentional wrongdoing. Neither the Transmission Provider nor the Transmission Customer will be considered in default as to any obligation under this Tariff if prevented from fulfilling the obligation due to an event of Force Majeure. However, a Party whose performance under this Tariff is hindered by an event of Force Majeure shall make all reasonable efforts to perform its obligations under this Tariff.

10.2 Indemnification

The Transmission Customer shall at all times indemnify, defend, and save the Transmission Provider harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider's performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of negligence or intentional wrongdoing by the Transmission Provider. The liability of the Transmission Provider shall be determined in accordance with the provisions of the Federal Tort Claims Act, as amended.

11 Creditworthiness

For the purpose of determining the ability of the Transmission Customer to meet its obligations related to service hereunder, the Transmission Provider may require reasonable credit review procedures. This review shall be made in accordance with standard commercial practices. In addition, the Transmission Provider may require the Transmission Customer to provide and maintain in effect during the term of the Service Agreement, an unconditional and irrevocable letter of credit as security to meet its responsibilities and obligations under the Tariff, or an alternative form of security proposed by the Transmission Customer and acceptable to the Transmission Provider and consistent with commercial practices established by the Uniform Commercial Code that protects the Transmission Provider against the risk of non-payment.

12 Dispute Resolution Procedures

12.1 Internal Dispute Resolution Procedures

Any dispute between a Transmission Customer and the Transmission Provider involving transmission service under the Tariff shall be referred to a designated senior representative of the Transmission Provider and a senior representative of the Transmission Customer for resolution on an informal basis as promptly as practicable. In the event the designated representatives are unable to resolve the dispute within thirty (30) days (or such other period as the Parties may agree upon) by mutual agreement, such dispute may be resolved in accordance with the procedures set forth below.

12.2 External Dispute Resolution Procedures

Any complaint arising concerning implementation of this Tariff shall be resolved as follows:

(a) Through a dispute resolution process, pursuant to the terms of a Regional Transmission Group governing agreement of which both Parties are members; or

(b) If both Parties are not members of the same Regional Transmission Group, through a dispute resolution process agreed to by the Parties, or through a transmission complaint filed with the Commission to the extent the Commission has jurisdiction over such dispute.

12.3 Rights Under The Federal Power Act

Nothing in this section shall restrict the rights of any party to file a Complaint with the Commission under relevant provisions of the Federal Power Act.

Part II. Point-to-Point Transmission Service

Preamble

The Transmission Provider will provide Firm and Non-Firm Point-To-Point Transmission Service pursuant to the applicable terms and conditions of this Tariff. Point-To-Point Transmission Service is for the receipt of capacity and energy at designated Point(s) of Receipt and the transmission of such capacity and energy to designated Point(s) of Delivery.

13 Nature of Firm Point-To-Point Transmission Service

13.1 Term

The minimum term of Firm Point-To-Point Transmission Service shall be one day and the maximum term shall be specified in the Service Agreement.

13.2 Reservation Priority

Long-Term Firm Point-To-Point Transmission Service shall be available on a first-come, first-served basis i.e., in the chronological sequence in which each Transmission Customer reserved service. Reservations for Short-Term Firm Point-To-Point Transmission Service will be conditional based upon the length of the requested transaction. If the Transmission System becomes oversubscribed, requests for longer term service may preempt requests for shorter term service up to the following deadlines; one day before the commencement of daily service, one week before the commencement of weekly service, and one month before the commencement of monthly service. Before the conditional reservation deadline, if available transmission capability is insufficient to satisfy all Applications, an Eligible Customer with a reservation for shorter term service has the right of first refusal to match any longer term reservation before losing its reservation priority. A longer term competing request for Short-Term Firm Point-To-Point Transmission Service will be granted if the Eligible Customer with the right of first refusal does not agree to match the competing request within 24 hours (or earlier if necessary to comply with the scheduling deadlines provided in Section 13.8) from being notified by the Transmission Provider of a longer-term competing request for Short-Term Firm Point-To-Point Transmission Service. After the conditional reservation deadline, service will commence pursuant to the terms of Part II of the Tariff. Firm Point-To-Point Transmission Service will always have a reservation priority over Non-Firm Point-To-Point Transmission Service under the Tariff. All Long-Term Firm Point-To-Point Transmission Service will have equal reservation priority with Native Load Customers and Network Customers. Reservation priorities for existing firm service customers are provided in Section 2.2.

13.3 Use of Firm Transmission Service by the Transmission Provider

The Transmission Provider will be subject to the rates, terms and conditions of Part II of the Tariff when making Third-Party Sales under agreements executed on or after March 9, 1998. The Transmission Provider will maintain separate accounting, pursuant to Section 8, for any use of the Point-To-Point Transmission Service to make Third-Party Sales.

13.4 Service Agreements

The Transmission Provider shall offer a standard form Firm Point-To-Point Transmission Service Agreement (Attachment A) to an Eligible Customer when it submits a Completed Application for Long-Term Firm Point-To-Point Transmission Service. The Transmission Provider shall offer a standard form Firm Point-to-Point Transmission Service Agreement (Attachment A) to an Eligible Customer when it first submits a Completed Application for Short-Term Firm Point-to-Point Transmission Service pursuant to the Tariff.

13.5 Transmission Customer Obligations for Facility Additions or Redispatch Costs

In cases where the Transmission Provider determines that the Transmission System is not capable of providing Firm Point-To-Point Transmission Service without (1) degrading or impairing the reliability of service to Native Load Customers, Network Customers and other Transmission Customers taking Firm Point-To-Point Transmission Service, or (2) interfering with the Transmission Provider's ability to meet prior firm contractual commitments to others, the Transmission Provider will be obligated to expand or upgrade its Transmission System pursuant to the terms of Section 15.4. The Transmission Customer must agree to compensate the Transmission Provider in advance for any necessary transmission facility additions pursuant to the terms of Section 27. To the extent the Transmission Provider can relieve any system constraint more economically by redispatching the Transmission Provider's resources than

through constructing Network Upgrades, it shall do so, provided that the Eligible Customer agrees to compensate the Transmission Provider pursuant to the terms of Section 27. Any redispatch, Network Upgrade or Direct Assignment Facilities costs to be charged to the Transmission Customer on an incremental basis under the Tariff will be specified in the Service Agreement or a separate agreement, as appropriate, prior to initiating service.

13.6 Curtailment of Firm Transmission Service

In the event that a Curtailment on the Transmission Provider's Transmission System, or a portion thereof, is required to maintain reliable operation of such system, Curtailments will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail service to Network Customers and Transmission Customers taking Firm Point-To-Point Transmission Service on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers. All Curtailments will be made on a non-discriminatory basis, however, Non-Firm Point-To-Point Transmission Service shall be subordinate to Firm Transmission Service. When the Transmission Provider determines that an electrical emergency exists on its Transmission System and implements emergency procedures to Curtail Firm Transmission Service, the Transmission Customer shall make the required reductions upon request of the Transmission Provider. However, the Transmission Provider reserves the right to Curtail, in whole or in part, any Firm Transmission Service provided under the Tariff when, in the Transmission Provider's sole discretion, an emergency or other unforeseen condition impairs or degrades the reliability of its Transmission System. The Transmission Provider will notify all affected Transmission Customers in a timely manner of any scheduled Curtailments.

13.7 Classification of Firm Transmission Service

(a) The Transmission Customer taking Firm Point-To-Point Transmission Service may (1) change its Receipt and Delivery Points to obtain service on a non-firm basis consistent with the terms of Section 22.1 or (2) request a modification of the Points of Receipt or Delivery on a firm basis pursuant to the terms of Section 22.2.

(b) The Transmission Customer may purchase transmission service to make sales of capacity and energy from multiple generating units that are on the Transmission Provider's Transmission System. For such a purchase of transmission service, the resources will be designated as multiple Points of Receipt, unless the multiple generating units are at the same generating plant in which case the units would be treated as a single Point of Receipt.

(c) The Transmission Provider shall provide firm deliveries of capacity and energy from the Point(s) of Receipt to the Point(s) of Delivery. Each Point of Receipt at which firm transmission capacity is reserved by the Transmission Customer shall be set forth in the Firm Point-To-Point Service Agreement for Long-Term Firm Transmission Service along with a corresponding capacity reservation associated with each Point of Receipt. Points of Receipt and corresponding capacity reservations shall be as mutually agreed upon by the Parties for Short-Term Firm Transmission. Each Point of Delivery at which firm transmission capacity is reserved by the Transmission Customer shall be set forth in the Firm Point-To-Point Service Agreement for Long-Term Firm Transmission Service along with a corresponding capacity reservation associated with each Point of Delivery. Points of Delivery and corresponding capacity reservations shall be as mutually agreed upon by the Parties for Short-Term Firm Transmission. The greater of either (1) the sum of the capacity reservations at the Point(s) of Receipt, or (2) the sum of the capacity reservations at the Point(s) of Delivery shall be the Transmission Customer's Reserved Capacity. The Transmission Customer will be billed for its Reserved Capacity under the terms of Schedule 7. The Transmission Customer may not exceed its firm capacity reserved at each Point of Receipt and each Point of Delivery except as otherwise specified in Section 22. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that a Transmission Customer, (including Third-Party Sales by the Transmission Provider) exceeds its firm reserved capacity at any Point of Receipt or Point of Delivery.

13.8 Scheduling of Firm Point-To-Point Transmission Service

Schedules for the Transmission Customer's Firm Point-To-Point Transmission Service must be submitted to the Transmission Provider no later than 10:00 a.m. (or a reasonable time that is generally accepted in the region and is consistently adhered to by the Transmission Provider) of the day prior to commencement of such service. Schedules submitted after 10:00 a.m. will be accommodated, if practicable. Hour-to-hour schedules of any capacity and energy that is to be delivered must be stated in increments of 1,000 kW per hour (or a reasonable increment that is generally accepted in the region and is consistently adhered to by the Transmission Provider). Transmission Customers within the Transmission Provider's service area with multiple requests for Transmission Service at a Point of Receipt, each of which is under 1,000 kW per hour, may consolidate their service requests at a common point of receipt into units of 1,000 kW per hour for scheduling and billing purposes. Scheduling changes will be permitted up to twenty (20) minutes (or a reasonable time that is generally accepted in the region and is consistently adhered to by the Transmission Provider) before the start of the next clock hour provided that the Delivering Party and Receiving Party also agree to the schedule modification. The Transmission Provider will furnish to the Delivering Party's system operator, hour-to-hour schedules equal to those furnished by the Receiving Party (unless reduced for losses) and shall deliver the capacity and energy provided by such schedules. Should the Transmission Customer, Delivering Party or Receiving Party revise or terminate any schedule, such party shall immediately notify the Transmission Provider, and the Transmission Provider shall have the right to adjust accordingly the schedule for capacity and energy to be received and to be delivered.

14 Nature of Non-Firm Point-To-Point Transmission Service

14.1 Term

Non-Firm Point-To-Point Transmission Service will be available for periods ranging from one (1) hour to one (1) month. However, a Purchaser of Non-Firm Point-To-Point Transmission Service will be entitled to reserve a sequential term of service (such as a sequential monthly term without having to wait for the initial term to expire before requesting another monthly term) so that the total time period for which the reservation applies is greater than one month, subject to the requirements of Section 18.3.

14.2 Reservation Priority

Non-Firm Point-To-Point Transmission Service shall be available from transmission capability in excess

of that needed for reliable service to Native Load Customers, Network Customers and other Transmission Customers taking Long-Term and Short-Term Firm Point-To-Point Transmission Service. A higher priority will be assigned to reservations with a longer duration of service. In the event the Transmission System is constrained, competing requests of equal duration will be prioritized based on the highest price offered by the Eligible Customer for the Transmission Service. Eligible Customers that have already reserved shorter term service have the right of first refusal to match any longer term reservation before being preempted. A longer term competing request for Non-Firm Point-To-Point Transmission Service will be granted if the Eligible Customer with the right of first refusal does not agree to match the competing request: (a) Immediately for hourly Non-Firm Point-To-Point Transmission Service after notification by the Transmission Provider; and, (b) within 24 hours (or earlier if necessary to comply with the scheduling deadlines provided in Section 14.6) for Non-Firm Point-To-Point Transmission Service other than hourly transactions after notification by the Transmission Provider. Transmission service for Network Customers from resources other than designated Network Resources will have a higher priority than any Non-Firm Point-To-Point Transmission Service. Non-Firm Point-To-Point Transmission Service over secondary Point(s) of Receipt and Point(s) of Delivery will have the lowest reservation priority under the Tariff.

14.3 Use of Non-Firm Point-To-Point Transmission Service by the Transmission Provider

The Transmission Provider will be subject to the rates, terms and conditions of Part II of the Tariff when making Third-Party Sales under agreements executed on or after March 9, 1998. The Transmission Provider will maintain separate accounting, pursuant to Section 8, for any use of Non-Firm Point-To-Point Transmission Service to make Third-Party Sales.

14.4 Service Agreements

The Transmission Provider shall offer a standard form Non-Firm Point-To-Point Transmission Service Agreement (Attachment B) to an Eligible Customer when it first submits a Completed Application for Non-Firm Point-To-Point Transmission Service pursuant to the Tariff.

14.5 Classification of Non-Firm Point-To-Point Transmission Service

Non-Firm Point-To-Point Transmission Service shall be offered under terms and conditions contained in Part II of the Tariff. The Transmission Provider undertakes no obligation under the Tariff to plan its Transmission System in order to have sufficient capacity for Non-Firm Point-To-Point Transmission Service. Parties requesting Non-Firm Point-To-Point Transmission Service for the transmission of firm power do so with the full realization that such service is subject to availability and to Curtailment or Interruption under the terms of the Tariff. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that a Transmission Customer (including Third-Party Sales by the Transmission Provider) exceeds its non-firm capacity reservation. Non-Firm Point-To-Point Transmission Service shall include transmission of energy on an hourly basis and transmission of scheduled short-term capacity and energy on a daily, weekly or monthly basis, but not to exceed one month's reservation for any one Application under Schedule 8.

14.6 Scheduling of Non-Firm Point-To-Point Transmission Service

Schedules for Non-Firm Point-To-Point Transmission Service must be submitted to the Transmission Provider no later than 2:00 p.m. (or a reasonable time that is generally accepted in the region and is consistently adhered to by the Transmission Provider) of the day prior to commencement of such service. Schedules submitted after 2:00 p.m. will be accommodated, if practicable. Hour-to-hour schedules of energy that are to be delivered must be stated in increments of 1,000 kW per hour (or a reasonable increment that is generally accepted in the region and is consistently adhered to by the Transmission Provider). Transmission Customers within the Transmission Provider's service area with multiple requests for Transmission Service at a Point of Receipt, each of which is under 1,000 kW per hour, may consolidate their schedules at a common Point of Receipt into units of 1,000 kW per hour. Scheduling changes will be permitted up to twenty (20) minutes (or a reasonable time that is generally accepted in the region and is consistently adhered to by the Transmission Provider) before the start of the next clock hour provided that the Delivering Party and Receiving Party also agree to the schedule modification. The Transmission Provider will furnish to the Delivering Party's system operator, hour-to-hour schedules equal to those furnished by the Receiving Party (unless reduced for losses) and shall deliver the capacity and energy provided by such schedules. Should the Transmission Customer, Delivering Party or Receiving Party revise or terminate any schedule, such party shall immediately notify the Transmission Provider, and the Transmission Provider shall have the right to adjust accordingly the schedule for capacity and energy to be received and to be delivered.

14.7 Curtailment or Interruption of Service

The Transmission Provider reserves the right to Curtail, in whole or in part, Non-Firm Point-To-Point Transmission Service provided under the Tariff for reliability reasons when, an emergency or other unforeseen condition threatens to impair or degrade the reliability of its Transmission System. The Transmission Provider reserves the right to Interrupt, in whole or in part, Non-Firm Point-To-Point Transmission Service provided under the Tariff for economic reasons in order to accommodate (1) a request for Firm Transmission Service, (2) a request for Non-Firm Point-To-Point Transmission Service of greater duration, (3) a request for Non-Firm Point-To-Point Transmission Service of equal duration with a higher price, or (4) transmission service for Network Customers from non-designated resources. The Transmission Provider also will discontinue or reduce service to the Transmission Customer to the extent that deliveries for transmission are discontinued or reduced at the Point(s) of Receipt. Where required, Curtailments or Interruptions will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint, however, Non-Firm Point-To-Point Transmission Service shall be subordinate to Firm Transmission Service. If multiple transactions require Curtailment or Interruption, to the extent practicable and consistent with Good Utility Practice, Curtailments or Interruptions will be made to transactions of the shortest term (e.g., hourly non-firm transactions will be Curtailed or Interrupted before daily non-firm transactions and daily non-firm transactions will be Curtailed or Interrupted before weekly non-firm transactions). Transmission service for Network Customers from resources other than designated Network Resources will have a higher priority than any Non-Firm Point-To-Point

Transmission Service under the Tariff. Non-Firm Point-To-Point Transmission Service over secondary Point(s) of Receipt and Point(s) of Delivery will have a lower priority than any Non-Firm Point-To-Point Transmission Service under the Tariff. The Transmission Provider will provide advance notice of Curtailment or Interruption where such notice can be provided consistent with Good Utility Practice.

15 Service Availability

15.1 General Conditions

The Transmission Provider will provide Firm and Non-Firm Point-To-Point Transmission Service over, on or across its Transmission System to any Transmission Customer that has met the requirements of Section 16.

15.2 Determination of Available Transmission Capability

A description of the Transmission Provider's specific methodology for assessing available transmission capability posted on the Transmission Provider's OASIS (Section 4) is contained in Attachment C of the Tariff. In the event sufficient transmission capability may not exist to accommodate a service request, the Transmission Provider will respond by performing a System Impact Study.

15.3 Initiating Service in the Absence of an Executed Service Agreement

If the Transmission Provider and the Transmission Customer requesting Firm or Non-Firm Point-To-Point Transmission Service cannot agree on all the terms and conditions of the Point-To-Point Service Agreement, the Transmission Provider shall commence providing Transmission Service subject to the Transmission Customer agreeing to (i) compensate the Transmission Provider at the existing rate placed in effect pursuant to applicable Federal law and regulations, and (ii) comply with the terms and conditions of the Tariff including paying the appropriate processing fees in accordance with the terms of Section 17.3. If the Transmission Customer cannot accept all of the terms and conditions of the offered Service Agreement, the Transmission Customer may request resolution of the unacceptable terms and conditions under Section 12, Dispute Resolution Procedures, of the Tariff. Any changes resulting from the Dispute Resolution Procedures will be effective upon the date of initial service.

15.4 Obligation to Provide Transmission Service that Requires Expansion or Modification of the Transmission System

If the Transmission Provider determines that it cannot accommodate a Completed Application for Firm Point-To-Point Transmission Service because of insufficient capability on its Transmission System, the Transmission Provider will use due diligence to expand or modify its Transmission System to provide the requested Firm Transmission Service, provided the Transmission Customer agrees to compensate the Transmission Provider in advance for such costs pursuant to the terms of Section 27. The Transmission Provider will conform to Good Utility Practice in determining the need for new facilities and in the design and construction of such facilities. The obligation applies only to those facilities that the Transmission Provider has the right to expand or modify.

15.5 Deferral of Service

The Transmission Provider may defer providing service until it completes construction of new transmission facilities or upgrades needed to provide Firm Point-To-Point Transmission Service whenever the Transmission Provider determines that providing the requested service would, without such new facilities or upgrades, impair or degrade reliability to any existing firm services.

15.6 Other Transmission Service Schedules

Eligible Customers receiving transmission service under other agreements on file with the Commission may continue to receive transmission service under those agreements until such time as those agreements may be modified by the Commission.

15.7 Real Power Losses

Real Power Losses are associated with all transmission service. The Transmission Provider is not obligated to provide Real Power Losses. The Transmission Customer is responsible for replacing losses associated with all transmission service as calculated by the Transmission Provider. The applicable Real Power Loss factors are specified in the Service Agreements.

16 Transmission Customer Responsibilities

16.1 Conditions Required of Transmission Customers

Point-To-Point Transmission Service shall be provided by the Transmission Provider only if the following conditions are satisfied by the Transmission Customer:

a. The Transmission Customer has pending a Completed Application for service;

b. The Transmission Customer meets the creditworthiness criteria set forth in Section 11;

c. The Transmission Customer will have arrangements in place for any other transmission service necessary to effect the delivery from the generating source to the Transmission Provider prior to the time service under Part II of the Tariff commences;

d. The Transmission Customer agrees to pay for any facilities constructed and chargeable to such Transmission Customer under Part II of the Tariff, whether or not the Transmission Customer takes service for the full term of its reservation; and

e. The Transmission Customer has executed a Point-To-Point Service Agreement or has agreed to receive service pursuant to Section 15.3.

16.2 Transmission Customer Responsibility for Third-Party Arrangements

Any scheduling arrangements that may be required by other electric systems shall be the responsibility of the Transmission Customer requesting service. The Transmission Customer shall provide, unless waived by the Transmission Provider, notification to the Transmission Provider identifying such systems and authorizing them to schedule the capacity and energy to be transmitted by the Transmission Provider pursuant to Part II of the Tariff on behalf of the Receiving Party at the Point of Delivery or the Delivering Party at the Point of Receipt. However, the Transmission Provider will undertake reasonable efforts to assist the Transmission Customer in making such arrangements, including without limitation, providing any information or data required by such other electric system pursuant to Good Utility Practice.

17 Procedures for Arranging Firm Point-To-Point Transmission Service

17.1 Application

A request for Firm Point-To-Point Transmission Service for periods of one year or longer must contain a written Application to the appropriate Regional Office, as identified in Attachment K to the Tariff, at least sixty (60) days in advance of the calendar month in which service is to commence. The Transmission Provider will consider requests for such firm service on shorter notice when feasible. Requests for firm

service for periods of less than one year shall be subject to expedited procedures that shall be negotiated between the Parties within the time constraints provided in Section 17.5. All Firm Point-To-Point Transmission Service requests should be submitted by entering the information listed below on the Transmission Provider's OASIS. Prior to implementation of the Transmission Provider's OASIS, a Completed Application may be submitted by (i) transmitting the required information to the Transmission Provider by telefax, or (ii) providing the information by telephone over the Transmission Provider's time recorded telephone line. Each of these methods will provide a time-stamped record for establishing the priority of the Application.

17.2 Completed Application

A Completed Application shall provide all of the information included in 18 CFR 2.20 including but not limited to the following:

(i) The identity, address, telephone number and facsimile number of the entity requesting service;

(ii) A statement that the entity requesting service is, or will be upon commencement of service, an Eligible Customer under the Tariff;

(iii) The location of the Point(s) of Receipt and Point(s) of Delivery and the identities of the Delivering Parties and the Receiving Parties;

(iv) The location of the generating facility(ies) supplying the capacity and energy and the location of the load ultimately served by the capacity and energy transmitted. The Transmission Provider will treat this information as confidential except to the extent that disclosure of this information is required by the Tariff, by Federal law, by regulatory or judicial order, for reliability purposes pursuant to Good Utility Practice or pursuant to RTG transmission information sharing agreements. The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations;

(v) A description of the supply characteristics of the capacity and energy to be delivered;

(vi) An estimate of the capacity and energy expected to be delivered to the Receiving Party;

(vii) The Service Commencement Date and the term of the requested Transmission Service;

(viii) The transmission capacity requested for each Point of Receipt and each Point of Delivery on the Transmission Provider's Transmission System; customers may combine their requests for service in order to satisfy the minimum transmission capacity requirement;

The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations.

17.3 Processing Fee

A Completed Application for Firm Point-To-Point Transmission Service also shall include a non-refundable processing fee. Such fee shall be applicable to all Transmission Customers for firm Transmission Service requests of one year or longer. Individual Transmission Provider processing fees will be calculated using the number of estimated hours it will take to process an application and will be set forth in Attachment K. This fee does not apply to costs to complete System Impact Studies or Facility Studies or to add new facilities.

17.4 Notice of Deficient Application

If an Application fails to meet the requirements of the Tariff, the Transmission Provider shall notify the entity requesting service within fifteen (15) days of receipt of the reasons for such failure. The Transmission Provider will attempt to remedy minor deficiencies in the Application through informal communications with the Eligible Customer. If such efforts are unsuccessful, the Transmission Provider shall return the Application. Upon receipt of a new or revised Application that fully complies with the requirements of Part II of the Tariff, the Eligible Customer shall be assigned a new priority consistent with the date of the new or revised Application.

17.5 Response to a Completed Application

Following receipt of a Completed Application for Firm Point-To-Point Transmission Service, the Transmission Provider shall make a determination of available transmission capability as required in Section 15.2. The Transmission Provider shall notify the Eligible Customer as soon as practicable, but not later than thirty (30) days after the date of receipt of a Completed Application either (i) if it will be able to provide service without performing a System Impact Study or (ii) if such a study is needed to evaluate the impact of the Application pursuant to Section 19.1. Responses by the Transmission Provider must be made as soon as practicable to all completed applications (including applications by its own merchant function) and the timing of such responses must be made on a non-discriminatory basis.

17.6 Execution of a Service Agreement

Whenever the Transmission Provider determines that a System Impact Study is not required and that the service can be provided, it shall notify the Eligible Customer as soon as practicable but no later than thirty (30) days after receipt of the Completed Application. Where a System Impact Study is required, the provisions of Section 19 will govern the execution of a Service Agreement. Failure of an Eligible Customer to execute and return the Service Agreement or request service without an executed Service Agreement pursuant to Section 15.3, within fifteen (15) days after it is tendered by the Transmission Provider will be deemed a withdrawal and termination of the Application. Nothing herein limits the right of an Eligible Customer to file another Application after such withdrawal and termination.

17.7 Extensions for Commencement of Service

The Transmission Customer can obtain up to five (5) one-year extensions for the commencement of service. The Transmission Customer may postpone service by paying a non-refundable annual reservation fee equal to one-month's charge for Firm Transmission Service for each year or fraction thereof. If during any extension for the commencement of service an Eligible Customer submits a Completed Application for Firm Transmission Service, and such request can be satisfied only by releasing all or part of the Transmission Customer's Reserved Capacity, the original Reserved Capacity will be released unless the following condition is satisfied. Within thirty (30) days, the original Transmission Customer agrees to pay the Firm Point-To-Point transmission rate for its Reserved Capacity concurrent with the new Service Commencement Date. In the event the Transmission Customer elects to release the Reserved Capacity, the reservation fees or portions thereof previously paid will be forfeited.

18 Procedures for Arranging Non-Firm Point-To-Point Transmission Service

18.1 Application

Eligible Customers seeking Non-Firm Point-To-Point Transmission Service must submit a Completed Application to the Transmission Provider. Applications should be submitted by entering the information listed below on the Transmission Provider's OASIS. Prior to implementation of the

Transmission Provider's OASIS, a Completed Application may be submitted by (i) transmitting the required information to the Transmission Provider by telefax, or (ii) providing the information by telephone over the Transmission Provider's time recorded telephone line. Each of these methods will provide a time-stamped record for establishing the service priority of the Application.

18.2 Completed Application

A Completed Application shall provide all of the information included in 18 CFR § 2.20 including but not limited to the following:

(i) The identity, address, telephone number and facsimile number of the entity requesting service;

(ii) A statement that the entity requesting service is, or will be upon commencement of service, an Eligible Customer under the Tariff;

(iii) The Point(s) of Receipt and the Point(s) of Delivery;

(iv) The maximum amount of capacity requested at each Point of Receipt and Point of Delivery; and

(v) The proposed dates and hours for initiating and terminating transmission service hereunder.

In addition to the information specified above, when required to properly evaluate system conditions, the Transmission Provider also may ask the Transmission Customer to provide the following:

(vi) The electrical location of the initial source of the power to be transmitted pursuant to the Transmission Customer's request for service;

(vii) The electrical location of the ultimate load.

The Transmission Provider will treat this information in (vi) and (vii) as confidential at the request of the Transmission Customer except to the extent that disclosure of this information is required by this Tariff, by Federal Law, by regulatory or judicial order, for reliability purposes pursuant to Good Utility Practice, or pursuant to RTG transmission information sharing agreements. The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations.

18.3 Reservation of Non-Firm Point-To-Point Transmission Service

Requests for monthly service shall be submitted no earlier than sixty (60) days before service is to commence; requests for weekly service shall be submitted no earlier than fourteen (14) days before service is to commence, requests for daily service shall be submitted no earlier than two (2) days before service is to commence, and requests for hourly service shall be submitted no earlier than noon the day before service is to commence. Requests for service received later than 2:00 p.m. prior to the day service is scheduled to commence will be accommodated if practicable [or such reasonable times that are generally accepted in the region and are consistently adhered to by the Transmission Provider].

18.4 Determination of Available Transmission Capability

Following receipt of a tendered schedule the Transmission Provider will make a determination on a non-discriminatory basis of available transmission capability pursuant to Section 15.2. Such determination shall be made as soon as reasonably practicable after receipt, but not later than the following time periods for the following terms of service (i) thirty (30) minutes for hourly service, (ii) thirty (30) minutes for daily service, (iii) four (4) hours for weekly service, and (iv) two (2) days for monthly service. [Or such reasonable times that are generally accepted in the region and are consistently adhered to by the Transmission Provider].

19 Additional Study Procedures For Firm Point-To-Point Transmission Service Requests

19.1 Notice of Need for System Impact Study

After receiving a request for service, the Transmission Provider shall determine on a non-discriminatory basis whether a System Impact Study is needed. A description of the Transmission Provider's methodology for completing a System Impact Study is provided in Attachment D. If the Transmission Provider determines that a System Impact Study is necessary to accommodate the requested service, it shall so inform the Eligible Customer, as soon as practicable. In such cases, the Transmission Provider shall within thirty (30) days of receipt of a Completed Application, tender a System Impact Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required System Impact Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the System Impact Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the System Impact Study Agreement, its application shall be deemed withdrawn.

19.2 System Impact Study Agreement and Compensation:

(i) The System Impact Study Agreement will clearly specify the Transmission Provider's estimate of the actual cost, and time for completion of the System Impact Study. The charge will not exceed the actual cost of the study. In performing the System Impact Study, the Transmission Provider shall rely, to the extent reasonably practicable, on existing transmission planning studies. The Eligible Customer will not be assessed a charge for such existing studies; however, the Eligible Customer will be responsible for charges associated with any modifications to existing planning studies that are reasonably necessary to evaluate the impact of the Eligible Customer's request for service on the Transmission System.

(ii) If in response to multiple Eligible Customers requesting service in relation to the same competitive solicitation, a single System Impact Study is sufficient for the Transmission Provider to accommodate the requests for service, the costs of that study shall be pro-rated among the Eligible Customers.

(iii) For System Impact Studies that the Transmission Provider conducts on its own behalf, the Transmission Provider shall record the cost of the System Impact Studies pursuant to Section 8.

19.3 System Impact Study Procedures

Upon receipt of an executed System Impact Study Agreement, the Transmission Provider will use due diligence to complete the required System Impact Study within a sixty (60) day period. The System Impact Study shall identify any system constraints and redispatch options, additional Direct Assignment Facilities or Network Upgrades required to provide the requested service. In the event that the Transmission Provider is unable to complete the required System Impact Study within such time period, it shall so notify the Eligible Customer and provide an estimated completion date along with an explanation of the reasons why additional time is required to complete the required studies. A copy of the completed System Impact Study and related work papers shall be made available to the Eligible Customer. The Transmission Provider will use the same due diligence in completing the System Impact Study for an Eligible Customer as it uses when completing studies for itself. The Transmission Provider shall notify the Eligible

Customer immediately upon completion of the System Impact Study if the Transmission System will be adequate to accommodate all or part of a request for service or that no costs are likely to be incurred for new transmission facilities or upgrades. In order for a request to remain a Completed Application, within fifteen (15) days of completion of the System Impact Study the Eligible Customer must execute a Service Agreement or request service without an executed Service Agreement pursuant to Section 15.3, or the Application shall be deemed terminated and withdrawn.

19.4 Facilities Study Procedures

If a System Impact Study indicates that additions or upgrades to the Transmission System are needed to supply the Eligible Customer's service request, the Transmission Provider, within thirty (30) days of the completion of the System Impact Study, shall tender to the Eligible Customer a Facilities Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required Facilities Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the Facilities Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the Facilities Study Agreement, its application shall be deemed withdrawn. Upon receipt of an executed Facilities Study Agreement, the Transmission Provider will use due diligence to complete the required Facilities Study within a sixty (60) day period. If the Transmission Provider is unable to complete the Facilities Study in the allotted time period, the Transmission Provider shall notify the Transmission Customer and provide an estimate of the time needed to reach a final determination along with an explanation of the reasons that additional time is required to complete the study. When completed, the Facilities Study will include a good faith estimate of (i) the cost of Direct Assignment Facilities to be charged to the Transmission Customer, (ii) the Transmission Customer's appropriate share of the cost of any required Network Upgrades as determined pursuant to the provisions of Part II of the Tariff, and (iii) the time required to complete such construction and initiate the requested service. The Transmission Customer shall pay the Transmission Provider in advance Transmission Customer's share of the costs of new facilities or upgrades. The Transmission Customer shall have thirty (30) days to execute a construction agreement and a Service Agreement and provide the advance payment or request service without an executed Service Agreement pursuant to Section 15.3 and pay the Transmission Customer's share of the costs or the request will no longer be a Completed Application and shall be deemed terminated and withdrawn. Any advance payment made by the Transmission Customer that is in excess of the costs incurred by the Transmission Provider shall be refunded.

19.5 Facilities Study Modifications

Any change in design arising from inability to site or construct facilities as proposed will require development of a revised good faith estimate. New good faith estimates also will be required in the event of new statutory or regulatory requirements that are effective before the completion of construction or other circumstances beyond the control of the Transmission Provider that significantly affect the final cost of new facilities or upgrades to be charged to the Transmission Customer pursuant to the provisions of Part II of the Tariff.

19.6 Due Diligence in Completing New Facilities

The Transmission Provider shall use due diligence to add necessary facilities or upgrade its Transmission System within a reasonable time. The Transmission Provider will not upgrade its existing or planned Transmission System in order to provide the requested Firm Point-To-Point Transmission Service if doing so would impair system reliability or otherwise impair or degrade existing firm service.

19.7 Partial Interim Service

If the Transmission Provider determines that it will not have adequate transmission capability to satisfy the full amount of a Completed Application for Firm Point-To-Point Transmission Service, the Transmission Provider nonetheless shall be obligated to offer and provide the portion of the requested Firm Point-To-Point Transmission Service that can be accommodated without addition of any facilities and through redispatch. However, the Transmission Provider shall not be obligated to provide the incremental amount of requested Firm Point-To-Point Transmission Service that requires the addition of facilities or upgrades to the Transmission System until such facilities or upgrades have been placed in service.

19.8 Expedited Procedures for New Facilities

In lieu of the procedures set forth above, the Eligible Customer shall have the option to expedite the process by requesting the Transmission Provider to tender at one time, together with the results of required studies, an ''Expedited Service Agreement'' pursuant to which the Eligible Customer would agree to compensate the Transmission Provider in advance for all costs incurred pursuant to the terms of the Tariff. In order to exercise this option, the Eligible Customer shall request in writing an expedited Service Agreement covering all of the above-specified items within thirty (30) days of receiving the results of the System Impact Study identifying needed facility additions or upgrades or costs incurred in providing the requested service. While the Transmission Provider agrees to provide the Eligible Customer with its best estimate of the new facility costs and other charges that may be incurred, such estimate shall not be binding and the Eligible Customer must agree in writing to compensate the Transmission Provider in advance for all costs incurred pursuant to the provisions of the Tariff. The Eligible Customer shall execute and return such an Expedited Service Agreement within fifteen (15) days of its receipt or the Eligible Customer's request for service will cease to be a Completed Application and will be deemed terminated and withdrawn.

20 Procedures if The Transmission Provider is Unable to Complete New Transmission Facilities for Firm Point-To-Point Transmission Service

20.1 Delays in Construction of New Facilities

If any event occurs that will materially affect the time for completion of new facilities, or the ability to complete them, the Transmission Provider shall promptly notify the Transmission Customer. In such circumstances, the Transmission Provider shall within thirty (30) days of notifying the Transmission Customer of such delays, convene a technical meeting with the Transmission Customer to evaluate the alternatives available to the Transmission Customer. The Transmission Provider also shall make available to the Transmission Customer studies and work papers related to the delay, including all information that is in the possession of the Transmission Provider that is reasonably needed by the Transmission Customer to evaluate any alternatives.

20.2 Alternatives to the Original Facility Additions

When the review process of Section 20.1 determines that one or more alternatives exist to the originally planned construction project, the Transmission Provider shall present such alternatives for consideration by the Transmission Customer. If, upon review of any alternatives, the Transmission Customer desires to maintain its Completed Application subject to construction of the alternative facilities, it may request the Transmission Provider to submit a revised Service Agreement for Firm Point-To-Point Transmission Service. If the alternative approach solely involves Non-Firm Point-To-Point Transmission Service, the Transmission Provider shall promptly tender a Service Agreement for Non-Firm Point-To-Point Transmission Service providing for the service. In the event the Transmission Provider concludes that no reasonable alternative exists and the Transmission Customer disagrees, the Transmission Customer may seek relief under the dispute resolution procedures pursuant to Section 12 or it may refer the dispute to the Commission for resolution.

20.3 Refund Obligation for Unfinished Facility Additions

If the Transmission Provider and the Transmission Customer mutually agree that no other reasonable alternatives exist and the requested service cannot be provided out of existing capability under the conditions of Part II of the Tariff, the obligation to provide the requested Firm Point-To-Point Transmission Service shall terminate and any advance payment made by the Transmission Customer that is in excess of the costs incurred by the Transmission Provider through the time construction was suspended shall be returned. However, the Transmission Customer shall be responsible for all prudently incurred costs by the Transmission Provider through the time construction was suspended.

21 Provisions Relating to Transmission Construction and Services on the Systems of Other Utilities

21.1 Responsibility for Third-Party System Additions

The Transmission Provider shall not be responsible for making arrangements for any necessary engineering, permitting, and construction of transmission or distribution facilities on the system(s) of any other entity or for obtaining any regulatory approval for such facilities. The Transmission Provider will undertake reasonable efforts to assist the Transmission Customer in obtaining such arrangements, including without limitation, providing any information or data required by such other electric system pursuant to Good Utility Practice.

21.2 Coordination of Third-Party System Additions

In circumstances where the need for transmission facilities or upgrades is identified pursuant to the provisions of Part II of the Tariff, and if such upgrades further require the addition of transmission facilities on other systems, the Transmission Provider shall have the right to coordinate construction on its own system with the construction required by others. The Transmission Provider, after consultation with the Transmission Customer and representatives of such other systems, may defer construction of its new transmission facilities, if the new transmission facilities on another system cannot be completed in a timely manner. The Transmission Provider shall notify the Transmission Customer in writing of the basis for any decision to defer construction and the specific problems which must be resolved before it will initiate or resume construction of new facilities. Within sixty (60) days of receiving written notification by the Transmission Provider of its intent to defer construction pursuant to this section, the Transmission Customer may challenge the decision in accordance with the dispute resolution procedures pursuant to Section 12 or it may refer the dispute to the Commission for resolution.

22 Changes in Service Specifications

22.1 Modifications On a Non-Firm Basis

The Transmission Customer taking Firm Point-To-Point Transmission Service may request the Transmission Provider to provide transmission service on a non-firm basis over Receipt and Delivery Points other than those specified in the Service Agreement (''Secondary Receipt and Delivery Points''), in amounts not to exceed its firm capacity reservation, without incurring an additional Non-Firm Point-To-Point Transmission Service charge or executing a new Service Agreement, subject to the following conditions.

(a) Service provided over Secondary Receipt and Delivery Points will be non-firm only, on an as-available basis and will not displace any firm or non-firm service reserved or scheduled by third-parties under the Tariff or by the Transmission Provider on behalf of its Native Load Customers.

(b) The sum of all Firm and non-firm Point-To-Point Transmission Service provided to the Transmission Customer at any time pursuant to this section shall not exceed the Reserved Capacity in the relevant Service Agreement under which such services are provided.

(c) The Transmission Customer shall retain its right to schedule Firm Point-To-Point Transmission Service at the Receipt and Delivery Points specified in the relevant Service Agreement in the amount of its original capacity reservation.

(d) Service over Secondary Receipt and Delivery Points on a non-firm basis shall not require the filing of an Application for Non-Firm Point-To-Point Transmission Service under the Tariff. However, all other requirements of Part II of the Tariff (except as to transmission rates) shall apply to transmission service on a non-firm basis over Secondary Receipt and Delivery Points.

22.2 Modifications on a Firm Basis

Any request by a Transmission Customer to modify Receipt and Delivery Points on a firm basis shall be treated as a new request for service in accordance with Section 17 hereof except that such Transmission Customer shall not be obligated to pay any additional application processing fee if the capacity reservation does not exceed the amount reserved in the existing Service Agreement. While such new request is pending, the Transmission Customer shall retain its priority for service at the existing firm Receipt and Delivery Points specified in its Service Agreement.

23 Sale or Assignment of Transmission Service

23.1 Procedures for Assignment or Transfer of Service

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 the Reseller 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. 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. A Reseller should notify the Transmission Provider as soon as possible after any assignment or transfer of service occurs but in any event, notification must be provided prior to any provision of service to the Assignee. The Assignee will be subject to all terms and conditions of the 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.

23.2 Limitations on Assignment or Transfer of Service

If the Assignee requests a change in the Point(s) of Receipt or Point(s) of Delivery, or a change in any other specifications set forth in the original Service Agreement, the Transmission Provider will consent to such change subject to the provisions of the Tariff, provided that the change will not impair the operation and reliability of the Transmission Provider's generation, transmission, or distribution systems. The Assignee shall compensate the Transmission Provider in advance for performing any System Impact Study needed to evaluate the capability of the Transmission System to accommodate the proposed change and any additional costs resulting from such change. The Reseller shall remain liable for the performance of all obligations under the Service Agreement, except as specifically agreed to by the Parties through an amendment to the Service Agreement.

23.3 Information on Assignment or Transfer of Service

In accordance with Section 4, Resellers may use the Transmission Provider's OASIS to post transmission capacity available for resale.

24 Metering and Power Factor Correction at Receipt and Delivery Point(s)

24.1 Transmission Customer Obligations

Unless otherwise agreed, the Transmission Customer shall be responsible for installing and maintaining compatible metering and communications equipment to accurately account for the capacity and energy being transmitted under Part II of the Tariff and to communicate the information to the Transmission Provider. Such equipment shall remain the property of the Transmission Customer.

24.2 Transmission Provider Access to Metering Data

The Transmission Provider shall have access to metering data, which may reasonably be required to facilitate measurements and billing under the Service Agreement.

24.3 Power Factor

Unless otherwise agreed, the Transmission Customer is required to maintain a power factor within the same range as the Transmission Provider pursuant to Good Utility Practices. The power factor requirements are specified in the Service Agreement where applicable.

25 Compensation for Transmission Service

Rates for Firm and Non-Firm Point-To-Point Transmission Service are provided in the Schedules appended to the Tariff: Firm Point-To-Point Transmission Service (Schedule 7); and Non-Firm Point-To-Point Transmission Service (Schedule 8). The Transmission Provider shall use Part II of the Tariff to make its Third-Party Sales. The Transmission Provider shall account for such use at the applicable Tariff rates, pursuant to Section 8.

26 Stranded Cost Recovery

The Transmission Provider may seek to recover stranded costs from the Transmission Customer in a manner consistent with applicable Federal law and regulations.

27 Compensation for New Facilities and Redispatch Costs

Whenever a System Impact Study performed by the Transmission Provider in connection with the provision of Firm Point-To-Point Transmission Service identifies the need for new facilities, the Transmission Customer shall be responsible for such costs to the extent consistent with Commission policy. Whenever a System Impact Study performed by the Transmission Provider identifies capacity constraints that may be relieved more economically by redispatching the Transmission Provider's resources than by building new facilities or upgrading existing facilities to eliminate such constraints, the Transmission Customer shall be responsible for the redispatch costs to the extent consistent with Commission policy.

Part III. Network Integration Transmission Service

Preamble

The Transmission Provider will provide Network Integration Transmission Service pursuant to the applicable terms and conditions contained in the Tariff and Service Agreement. Network Integration Transmission Service allows the Network Customer to integrate, economically dispatch and regulate its current and planned Network Resources to serve its Network Load in a manner comparable to that in which the Transmission Provider utilizes its Transmission System to serve its Native Load Customers. Network Integration Transmission Service also may be used by the Network Customer to deliver economy energy purchases to its Network Load from non-designated resources on an as-available basis without additional charge. Transmission service for sales to non-designated loads will be provided pursuant to the applicable terms and conditions of Part II of the Tariff.

28 Nature of Network Integration Transmission Service

28.1 Scope of Service

Network Integration Transmission Service is a transmission service that allows Network Customers to efficiently and economically utilize their Network Resources (as well as other non-designated generation resources) to serve their Network Load located in the Transmission Provider's Control Area and any additional load that may be designated pursuant to Section 31.3 of the Tariff. The Network Customer taking Network Integration Transmission Service must obtain or provide Ancillary Services pursuant to Section 3.

28.2 Transmission Provider Responsibilities

The Transmission Provider will plan, construct, operate and maintain its Transmission System in accordance with Good Utility Practice in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider's Transmission System. The Transmission Provider, on behalf of its Native Load Customers, shall be required to designate resources and loads in the same manner as any Network Customer under Part III of the Tariff. This information must be consistent with the information used by the Transmission Provider to calculate available transmission capability. The

Transmission Provider shall include the Network Customer's Network Load in its Transmission System planning and shall, consistent with Good Utility Practice, endeavor to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load on a basis comparable to the Transmission Provider's delivery of its own generating and purchased resources to its Native Load Customers. This obligation to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load is contingent upon the availability to Western of sufficient appropriations, when needed, and the Transmission Customer's advanced funds.

28.3 Network Integration Transmission Service

The Transmission Provider will provide firm transmission service over its Transmission System to the Network Customer for the delivery of capacity and energy from its designated Network Resources to service its Network Loads on a basis that is comparable to the Transmission Provider's use of the Transmission System to reliably serve its Native Load Customers.

28.4 Secondary Service

The Network Customer may use the Transmission Provider's Transmission System to deliver energy to its Network Loads from resources that have not been designated as Network Resources. Such energy shall be transmitted, on an as-available basis, at no additional charge. Deliveries from resources other than Network Resources will have a higher priority than any Non-Firm Point-To-Point Transmission Service under Part II of the Tariff.

28.5 Real Power Losses

Real Power Losses are associated with all transmission service. The Transmission Provider is not obligated to provide Real Power Losses. The Network Customer is responsible for replacing losses associated with all transmission service as calculated by the Transmission Provider. The applicable Real Power Loss factors are specified in the Service Agreements.

28.6 Restrictions on Use of Service

The Network Customer shall not use Network Integration Transmission Service for (i) sales of capacity and energy to non-designated loads, or (ii) direct or indirect provision of transmission service by the Network Customer to third parties. All Network Customers taking Network Integration Transmission Service shall use Point-To-Point Transmission Service under Part II of the Tariff for any Third-Party Sale which requires use of the Transmission Provider's Transmission System.

29 Initiating Service

29.1 Condition Precedent for Receiving Service

Subject to the terms and conditions of Part III of the Tariff, the Transmission Provider will provide Network Integration Transmission Service to any Eligible Customer provided that (i) the Eligible Customer completes an Application for service as provided under Part III of the Tariff, (ii) the Eligible Customer and the Transmission Provider complete the technical arrangements set forth in Sections 29.3 and 29.4, (iii) the Eligible Customer executes a Service Agreement pursuant to Attachment F for service under Part III of the Tariff or requests in writing that the Transmission Provider provide service without an executed Service Agreement, and (iv) the Eligible Customer executes a Network Operating Agreement with the Transmission Provider pursuant to Attachment G, or requests in writing that the Transmission Provider provide service without an executed Network Operating Agreement. If the Transmission Provider and the Network Customer cannot agree on all the terms and conditions of the Network Service Agreement, the Transmission Provider shall commence providing Network Integration Transmission Service subject to the Network Customer agreeing to (i) compensate the Transmission Provider at the existing rate placed in effect pursuant to applicable Federal law and regulations, and (ii) comply with the terms and conditions of the Tariff including paying the appropriate processing fees in accordance with the terms of Section 29.2. If the Network Customer cannot accept all of the terms and conditions of the offered Service Agreement, the Network Customer may request resolution of the unacceptable terms and conditions under Section 12, Dispute Resolution Procedures, of the Tariff. Any changes resulting from the Dispute Resolution Procedures will be effective upon the date of initial service.

29.2 Application Procedures

An Eligible Customer requesting service under Part III of the Tariff must submit an Application to the Transmission Provider as far as possible in advance of the month in which service is to commence. Unless subject to the procedures in Section 2, Completed Applications for Network Integration Transmission Service will be assigned a priority according to the date and time the Application is received, with the earliest Application receiving the highest priority. Applications should be submitted by entering the information listed below on the Transmission Provider's OASIS. Prior to implementation of the Transmission Provider's OASIS, a Completed Application may be submitted by (i) transmitting the required information to the Transmission Provider by telefax, or (ii) providing the information by telephone over the Transmission Provider's time recorded telephone line. Each of these methods will provide a time-stamped record for establishing the service priority of the Application. A Completed Application for Network Integration Transmission Service also shall include a non-refundable processing fee. Such fee shall be applicable to all Transmission Customers for firm Transmission Service requests of one year or longer. Individual Transmission Provider processing fees will be calculated using the number of estimated hours it will take to process an application and will be set forth in Attachment K. This fee does not apply to costs to complete System Impact Studies or Facility Studies or to add new facilities. A Completed Application shall provide all of the information included in 18 CFR 2.20 including but not limited to the following:

(i) The identity, address, telephone number and facsimile number of the party requesting service;

(ii) A statement that the party requesting service is, or will be upon commencement of service, an Eligible Customer under the Tariff;

(iii) A description of the Network Load at each delivery point. This description should separately identify and provide the Eligible Customer's best estimate of the total loads to be served at each transmission voltage level, and the loads to be served from each Transmission Provider substation at the same transmission voltage level. The description should include a ten (10) year forecast of summer and winter load and resource requirements beginning with the first year after the service is scheduled to commence;

(iv) The amount and location of any interruptible loads included in the Network Load. This shall include the summer and winter capacity requirements for each interruptible load (had such load not been interruptible), that portion of the load subject to interruption, the conditions under

which an interruption can be implemented and any limitations on the amount and frequency of interruptions. An Eligible Customer should identify the amount of interruptible customer load (if any), included in the 10 year load forecast provided in response to (iii) above;

(v) A description of Network Resources (current and 10-year projection), which shall include, for each Network Resource:

—Unit size and amount of capacity from that unit to be designated as Network Resource
—VAR capability (both leading and lagging), of all generators
—Operating restrictions
  —Any periods of restricted operations throughout the year
  —Maintenance schedules
  —Minimum loading level of unit
  —Normal operating level of unit
  —Any must-run unit designations required for system reliability or contract reasons
—Approximate variable generating cost ($/MWH) for redispatch computations
—Arrangements governing sale and delivery of power to third parties from generating facilities located in the Transmission Provider Control Area, where only a portion of unit output is designated as a Network Resource
—Description of purchased power designated as a Network Resource including source of supply, Control Area location, transmission arrangements and delivery point(s) to the Transmission Provider's Transmission System;

(vi) Description of Eligible Customer's transmission system:

—Load flow and stability data, such as real and reactive parts of the load, lines, transformers, reactive devices and load type, including normal and emergency ratings of all transmission equipment in a load flow format compatible with that used by the Transmission Provider
—Operating restrictions needed for reliability
—Operating guides employed by system operators
—Contractual restrictions or committed uses of the Eligible Customer's transmission system, other than the Eligible Customer's Network Loads and Resources
—Location of Network Resources described in subsection (v) above
—10 year projection of system expansions or upgrades
—Transmission System maps that include any proposed expansions or upgrades
—Thermal ratings of Eligible Customer's Control Area ties with other Control Areas;

(vii) Service Commencement Date and the term of the requested Network Integration Transmission Service. The minimum term for Network Integration Transmission Service is one year.

Unless the Parties agree to a different time frame, the Transmission Provider must acknowledge the request within ten (10) days of receipt. The acknowledgment must include a date by which a response, including a Service Agreement, will be sent to the Eligible Customer. If an Application fails to meet the requirements of this section, the Transmission Provider shall notify the Eligible Customer requesting service within fifteen (15) days of receipt and specify the reasons for such failure. Wherever possible, the Transmission Provider will attempt to remedy deficiencies in the Application through informal communications with the Eligible Customer. If such efforts are unsuccessful, the Transmission Provider shall return the Application without prejudice to the Eligible Customer filing a new or revised Application that fully complies with the requirements of this section. The Eligible Customer will be assigned a new priority consistent with the date of the new or revised Application. The Transmission Provider shall treat this information consistent with the standards of conduct contained in Part 37 of the Commission's regulations.

29.3 Technical Arrangements to be Completed Prior to Commencement of Service

Network Integration Transmission Service shall not commence until the Transmission Provider and the Network Customer or a third party, have completed installation of all equipment specified under the Network Operating Agreement consistent with Good Utility Practice and any additional requirements reasonably and consistently imposed to ensure the reliable operation of the Transmission System. The Transmission Provider shall exercise reasonable efforts, in coordination with the Network Customer to complete such arrangements as soon as practicable taking into consideration the Service Commencement Date.

29.4 Network Customer Facilities

The provision of Network Integration Transmission Service shall be conditioned upon the Network Customer constructing, maintaining and operating the facilities on its side of each delivery point or interconnection necessary to reliably deliver capacity and energy from the Transmission Provider's Transmission System to the Network Customer. The Network Customer shall be solely responsible for constructing or installing all facilities on the Network Customer's side of each such delivery point or interconnection.

29.5 This section is intentionally left blank.

30 Network Resources

30.1 Designation of Network Resources

Network Resources shall include all generation owned, purchased, or leased by the Network Customer designated to serve Network Load under the Tariff. Network Resources may not include resources, or any portion thereof, that are committed for sale to non-designated third party load or otherwise cannot be called upon to meet the Network Customer's Network Load on a non-interruptible basis. Any owned or purchased resources that were serving the Network Customer's loads under firm agreements entered into on or before the Service Commencement Date shall initially be designated as Network Resources until the Network Customer terminates the designation of such resources.

30.2 Designation of New Network Resources

The Network Customer may designate a new Network Resource by providing the Transmission Provider with as much advance notice as practicable. A designation of a new Network Resource must be made by a request for modification of service pursuant to an Application under Section 29.

30.3 Termination of Network Resources

The Network Customer may terminate the designation of all or part of a generating resource as a Network Resource at any time but should provide notification to the Transmission Provider as soon as reasonably practicable.

30.4 Operation of Network Resources

The Network Customer shall not operate its designated Network Resources located in the Network Customer's or Transmission Provider's Control Area such that the output of those facilities exceeds its designated Network Load, plus non-firm sales delivered pursuant to Part II of the Tariff, plus losses. This limitation shall not apply to changes in the operation of a Transmission Customer's Network Resources at the request of the Transmission Provider to respond to an emergency or other unforeseen

condition which may impair or degrade the reliability of the Transmission System.

30.5 Network Customer Redispatch Obligation

As a condition to receiving Network Integration Transmission Service, the Network Customer agrees to redispatch its Network Resources as requested by the Transmission Provider pursuant to Section 33.2. To the extent practical, the redispatch of resources pursuant to this section shall be on a least cost, non-discriminatory basis between all Network Customers, and the Transmission Provider.

30.6 Transmission Arrangements for Network Resources Not Physically Interconnected With The Transmission Provider

The Network Customer shall be responsible for any arrangements necessary to deliver capacity and energy from a Network Resource not physically interconnected with the Transmission Provider's Transmission System. The Transmission Provider will undertake reasonable efforts to assist the Network Customer in obtaining such arrangements, including without limitation, providing any information or data required by such other entity pursuant to Good Utility Practice.

30.7 Limitation on Designation of Network Resources

The Network Customer must demonstrate that it owns or has committed to purchase generation pursuant to an executed contract in order to designate a generating resource as a Network Resource. Alternatively, the Network Customer may establish that execution of a contract is contingent upon the availability of transmission service under Part III of the Tariff.

30.8 Use of Interface Capacity by the Network Customer

There is no limitation upon a Network Customer's use of the Transmission Provider's Transmission System at any particular interface to integrate the Network Customer's Network Resources (or substitute economy purchases) with its Network Loads. However, a Network Customer's use of the Transmission Provider's total interface capacity with other transmission systems may not exceed the Network Customer's Load.

30.9 Network Customer Owned Transmission Facilities

The Network Customer that owns existing transmission facilities that are integrated with the Transmission Provider's Transmission System may be eligible to receive consideration either through a billing credit or some other mechanism. In order to receive such consideration the Network Customer must demonstrate that its transmission facilities are integrated into the plans or operations of the Transmission Provider to serve its power and transmission customers. For facilities constructed by the Network Customer subsequent to the Service Commencement Date under Part III of the Tariff, the Network Customer shall receive credit where such facilities are jointly planned and installed in coordination with the Transmission Provider. Calculation of the credit shall be addressed in either the Network Customer's Service Agreement or any other agreement between the Parties.

31 Designation of Network Load

31.1 Network Load

The Network Customer must designate the individual Network Loads on whose behalf the Transmission Provider will provide Network Integration Transmission Service. The Network Loads shall be specified in the Service Agreement.

31.2 New Network Loads Connected With the Transmission Provider

The Network Customer shall provide the Transmission Provider with as much advance notice as reasonably practicable of the designation of new Network Load that will be added to its Transmission System. A designation of new Network Load must be made through a modification of service pursuant to a new Application. The Transmission Provider will use due diligence to install any transmission facilities required to interconnect a new Network Load designated by the Network Customer. The costs of new facilities required to interconnect a new Network Load shall be determined in accordance with the procedures provided in Section 32.4 and shall be charged to the Network Customer in accordance with Commission policies.

31.3 Network Load Not Physically Interconnected with the Transmission Provider

This section applies to both initial designation pursuant to Section 31.1 and the subsequent addition of new Network Load not physically interconnected with the Transmission Provider. To the extent that the Network Customer desires to obtain transmission service for a load outside the Transmission Provider's Transmission System, the Network Customer shall have the option of (1) electing to include the entire load as Network Load for all purposes under Part III of the Tariff and designating Network Resources in connection with such additional Network Load, or (2) excluding that entire load from its Network Load and purchasing Point-To-Point Transmission Service under Part II of the Tariff. To the extent that the Network Customer gives notice of its intent to add a new Network Load as part of its Network Load pursuant to this section the request must be made through a modification of service pursuant to a new Application.

31.4 New Interconnection Points

To the extent the Network Customer desires to add a new Delivery Point or interconnection point between the Transmission Provider's Transmission System and a Network Load, the Network Customer shall provide the Transmission Provider with as much advance notice as reasonably practicable.

31.5 Changes in Service Requests

Under no circumstances shall the Network Customer's decision to cancel or delay a requested change in Network Integration Transmission Service (e.g. the addition of a new Network Resource or designation of a new Network Load) in any way relieve the Network Customer of its obligation to pay the costs of transmission facilities constructed by the Transmission Provider and charged to the Network Customer as reflected in the Service Agreement. However, the Transmission Provider must treat any requested change in Network Integration Transmission Service in a non-discriminatory manner. The Transmission Provider will have no obligation to refund any advance of funds expended for purposes of providing facilities for a Network Customer. However, upon receipt of a Network Customer's written notice of such a cancellation or delay, the Transmission Provider will use the same reasonable efforts to mitigate the costs and charges owed to the Transmission Provider as it would to reduce its own costs and charges.

31.6 Annual Load and Resource Information Updates

The Network Customer shall provide the Transmission Provider with annual updates of Network Load and Network Resource forecasts consistent with those included in its Application for Network Integration Transmission Service under Part III of the Tariff. The Network Customer also shall provide the Transmission Provider with timely

written notice of material changes in any other information provided in its Application relating to the Network Customer's Network Load, Network Resources, its transmission system or other aspects of its facilities or operations affecting the Transmission Provider's ability to provide reliable service.

32 Additional Study Procedures for Network Integration Transmission Service Requests

32.1 Notice of Need for System Impact Study

After receiving a request for service, the Transmission Provider shall determine on a non-discriminatory basis whether a System Impact Study is needed. A description of the Transmission Provider's methodology for completing a System Impact Study is provided in Attachment D. If the Transmission Provider determines that a System Impact Study is necessary to accommodate the requested service, it shall so inform the Eligible Customer, as soon as practicable. In such cases, the Transmission Provider shall within thirty (30) days of receipt of a Completed Application, tender a System Impact Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required System Impact Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the System Impact Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the System Impact Study Agreement, its Application shall be deemed withdrawn.

32.2 System Impact Study Agreement and Compensation

(i) The System Impact Study Agreement will clearly specify the Transmission Provider's estimate of the actual cost, and time for completion of the System Impact Study. The charge shall not exceed the actual cost of the study. In performing the System Impact Study, the Transmission Provider shall rely, to the extent reasonably practicable, on existing transmission planning studies. The Eligible Customer will not be assessed a charge for such existing studies; however, the Eligible Customer will be responsible for charges associated with any modifications to existing planning studies that are reasonably necessary to evaluate the impact of the Eligible Customer's request for service on the Transmission System.

(ii) If in response to multiple Eligible Customers requesting service in relation to the same competitive solicitation, a single System Impact Study is sufficient for the Transmission Provider to accommodate the service requests, the costs of that study shall be pro-rated among the Eligible Customers.

(iii) For System Impact Studies that the Transmission Provider conducts on its own behalf, the Transmission Provider shall record the cost of the System Impact Studies pursuant to Section 8.

32.3 System Impact Study Procedures

Upon receipt of an executed System Impact Study Agreement, the Transmission Provider will use due diligence to complete the required System Impact Study within a sixty (60) day period. The System Impact Study shall identify any system constraints and redispatch options, additional Direct Assignment Facilities or Network Upgrades required to provide the requested service. In the event that the Transmission Provider is unable to complete the required System Impact Study within such time period, it shall so notify the Eligible Customer and provide an estimated completion date along with an explanation of the reasons why additional time is required to complete the required studies. A copy of the completed System Impact Study and related work papers shall be made available to the Eligible Customer. The Transmission Provider will use the same due diligence in completing the System Impact Study for an Eligible Customer as it uses when completing studies for itself. The Transmission Provider shall notify the Eligible Customer immediately upon completion of the System Impact Study if the Transmission System will be adequate to accommodate all or part of a request for service or that no costs are likely to be incurred for new transmission facilities or upgrades. In order for a request to remain a Completed Application, within fifteen (15) days of completion of the System Impact Study the Eligible Customer must execute a Service Agreement or request service without an executed Service Agreement pursuant to Section 29.1, or the Application shall be deemed terminated and withdrawn.

32.4 Facilities Study Procedures

If a System Impact Study indicates that additions or upgrades to the Transmission System are needed to supply the Eligible Customer's service request, the Transmission Provider, within thirty (30) days of the completion of the System Impact Study, shall tender to the Eligible Customer a Facilities Study Agreement pursuant to which the Eligible Customer shall agree to advance funds to the Transmission Provider for performing the required Facilities Study. For a service request to remain a Completed Application, the Eligible Customer shall execute the Facilities Study Agreement and return it to the Transmission Provider within fifteen (15) days. If the Eligible Customer elects not to execute the Facilities Study Agreement, its Application shall be deemed withdrawn. Upon receipt of an executed Facilities Study Agreement, the Transmission Provider will use due diligence to complete the required Facilities Study within a sixty (60) day period. If the Transmission Provider is unable to complete the Facilities Study in the allotted time period, the Transmission Provider shall notify the Eligible Customer and provide an estimate of the time needed to reach a final determination along with an explanation of the reasons that additional time is required to complete the study. When completed, the Facilities Study will include a good faith estimate of (i) the cost of Direct Assignment Facilities to be charged to the Eligible Customer, (ii) the Eligible Customer's appropriate share of the cost of any required Network Upgrades, and (iii) the time required to complete such construction and initiate the requested service. The Eligible Customer shall advance funds to the Transmission Provider for the construction of new facilities and such advance and construction shall be provided for in a separate agreement. If the construction of new facilities requires the expenditure of Transmission Provider funds, such construction shall be contingent upon the availability of appropriated funds. The Eligible Customer shall have thirty (30) days to execute a construction agreement and a Service Agreement and provide the advance payment or request service without an executed Service Agreement pursuant to Section 29.1 and pay the Transmission Customer's share of the costs or the request no longer will be a Completed Application and shall be deemed terminated and withdrawn. Any advance payment made by the Transmission Customer that is in excess of the costs incurred by the Transmission Provider shall be refunded.

33 Load Shedding and Curtailments

33.1 Procedures

Prior to the Service Commencement Date, the Transmission Provider and the

Network Customer shall establish Load Shedding and Curtailment procedures pursuant to the Network Operating Agreement with the objective of responding to contingencies on the Transmission System. The Parties will implement such programs during any period when the Transmission Provider determines that a system contingency exists and such procedures are necessary to alleviate such contingency. The Transmission Provider will notify all affected Network Customers in a timely manner of any scheduled Curtailment.

33.2 Transmission Constraints

During any period when the Transmission Provider determines that a transmission constraint exists on the Transmission System, and such constraint may impair the reliability of the Transmission Provider's system, the Transmission Provider will take whatever actions, consistent with Good Utility Practice, that are reasonably necessary to maintain the reliability of the Transmission Provider's system. To the extent the Transmission Provider determines that the reliability of the Transmission System can be maintained by redispatching resources, the Transmission Provider will initiate procedures pursuant to the Network Operating Agreement to redispatch all Network Resources and the Transmission Provider's own resources on a least-cost basis without regard to the ownership of such resources. Any redispatch under this section may not unduly discriminate between the Transmission Provider's use of the Transmission System on behalf of its Native Load Customers and any Network Customer's use of the Transmission System to serve its designated Network Load.

33.3 Cost Responsibility for Relieving Transmission Constraints

Whenever the Transmission Provider implements least-cost redispatch procedures in response to a transmission constraint, the Transmission Provider and Network Customers will each bear a proportionate share of the total redispatch cost based on their respective Load Ratio Shares.

33.4 Curtailments of Scheduled Deliveries

If a transmission constraint on the Transmission Provider's Transmission System cannot be relieved through the implementation of least-cost redispatch procedures and the Transmission Provider determines that it is necessary to Curtail scheduled deliveries, the Parties shall Curtail such schedules in accordance with the Network Operating Agreement.

33.5 Allocation of Curtailments

The Transmission Provider shall, on a non-discriminatory basis, Curtail the transaction(s) that effectively relieve the constraint. However, to the extent practicable and consistent with Good Utility Practice, any Curtailment will be shared by the Transmission Provider and Network Customer in proportion to their respective Load Ratio Shares. The Transmission Provider shall not direct the Network Customer to Curtail schedules to an extent greater than the Transmission Provider would Curtail the Transmission Provider's schedules under similar circumstances.

33.6 Load Shedding

To the extent that a system contingency exists on the Transmission Provider's Transmission System and the Transmission Provider determines that it is necessary for the Transmission Provider and the Network Customer to shed load, the Parties shall shed load in accordance with previously established procedures under the Network Operating Agreement.

33.7 System Reliability

Notwithstanding any other provisions of this Tariff, the Transmission Provider reserves the right, consistent with Good Utility Practice and on a not unduly discriminatory basis, to Curtail Network Integration Transmission Service without liability on the Transmission Provider's part for the purpose of making necessary adjustments to, changes in, or repairs on its lines, substations and facilities, and in cases where the continuance of Network Integration Transmission Service would endanger persons or property. In the event of any adverse condition(s) or disturbance(s) on the Transmission Provider's Transmission System or on any other system(s) directly or indirectly interconnected with the Transmission Provider's Transmission System, the Transmission Provider, consistent with Good Utility Practice, also may Curtail Network Integration Transmission Service in order to (i) limit the extent or damage of the adverse condition(s) or disturbance(s), (ii) prevent damage to generating or transmission facilities, or (iii) expedite restoration of service. The Transmission Provider will give the Network Customer as much advance notice as is practicable in the event of such Curtailment. Any Curtailment of Network Integration Transmission Service will be not unduly discriminatory relative to the Transmission Provider's use of the Transmission System on behalf of its Native Load Customers. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that the Network Customer fails to respond to established Load Shedding and Curtailment procedures.

34 Rates and Charges

The Network Customer shall pay the Transmission Provider for any Direct Assignment Facilities, Ancillary Services, and applicable study costs, consistent with Federal policy, along with the following:

34.1 Monthly Demand Charge

The Network Customer shall pay a monthly Demand Charge, which shall be determined by multiplying its Load Ratio Share times one twelfth (1/12) of the Transmission Provider's Annual Transmission Revenue Requirement specified in Schedule H.

34.2 Determination of Network Customer's Monthly Network Load

The Network Customer's monthly Network Load is its hourly load (including its designated Network Load not physically interconnected with the Transmission Provider under Section 31.3) coincident with the Transmission Provider's Monthly Transmission System Peak.

34.3 Determination of Transmission Provider's Monthly Transmission System Load

The Transmission Provider's monthly Transmission System load is the Transmission Provider's Monthly Transmission System Peak minus the coincident peak usage of all Firm Point-To-Point Transmission Service customers pursuant to Part II of this Tariff plus the Reserved Capacity of all Firm Point-To-Point Transmission Service customers.

34.4 Redispatch Charge

The Network Customer shall pay a Load Ratio Share of any redispatch costs allocated between the Network Customer and the Transmission Provider pursuant to Section 33. To the extent that the Transmission Provider incurs an obligation to the Network Customer for redispatch costs in accordance with Section 33, such amounts shall be credited against the Network Customer's bill for the applicable month.

34.5 Stranded Cost Recovery

The Transmission Provider may seek to recover stranded costs from the Network Customer in a manner consistent with applicable Federal law and regulations.

35 Operating Arrangements

35.1 Operation under The Network Operating Agreement

The Network Customer shall plan, construct, operate and maintain its facilities in accordance with Good Utility Practice and in conformance with the Network Operating Agreement.

35.2 Network Operating Agreement

The terms and conditions under which the Network Customer shall operate its facilities and the technical and operational matters associated with the implementation of Part III of the Tariff shall be specified in the Network Operating Agreement. The Network Operating Agreement shall provide for the Parties to (i) operate and maintain equipment necessary for integrating the Network Customer within the Transmission Provider's Transmission System (including, but not limited to, remote terminal units, metering, communications equipment and relaying equipment), (ii) transfer data between the Transmission Provider and the Network Customer (including, but not limited to, heat rates and operational characteristics of Network Resources, generation schedules for units outside the Transmission Provider's Transmission System, interchange schedules, unit outputs for redispatch required under Section 33, voltage schedules, loss factors and other real time data), (iii) use software programs required for data links and constraint dispatching, (iv) exchange data on forecasted loads and resources necessary for long-term planning, and (v) address any other technical and operational considerations required for implementation of Part III of the Tariff, including scheduling protocols. The Network Operating Agreement will recognize that the Network Customer shall either (i) operate as a Control Area under applicable guidelines of the North American Electric Reliability Council (NERC) and the applicable regional reliability council, (ii) satisfy its Control Area requirements, including all necessary Ancillary Services, by contracting with the Transmission Provider, or (iii) satisfy its Control Area requirements, including all necessary Ancillary Services, by contracting with another entity, consistent with Good Utility Practice, which satisfies NERC and the applicable regional reliability council requirements. The Transmission Provider shall not unreasonably refuse to accept contractual arrangements with another entity for Ancillary Services. The Network Operating Agreement is included in Attachment G.

35.3 Network Operating Committee

A Network Operating Committee (Committee) shall be established to coordinate operating criteria for the Parties' respective responsibilities under the Network Operating Agreement. Each Network Customer shall be entitled to have at least one representative on the Committee. The Committee shall meet from time to time as need requires, but no less than once each calendar year.

Schedule 1

Scheduling, System Control and Dispatch Service

This service is required to schedule the movement of power through, out of, within, or into a Control Area. This service can be provided only by the operator of the Control Area in which the transmission facilities used for transmission service are located. Scheduling, System Control and Dispatch Service is provided directly by the Transmission Provider if the Transmission Provider is the Control Area Operator or indirectly by the Transmission Provider making arrangements with the Control Area operator that performs this service for the Transmission Provider's Transmission System. The Transmission Customer must purchase this service from the Transmission Provider or the Control Area operator. The charges for Scheduling, System Control and Dispatch Service are to be based on the rates referred to below. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The Transmission System specific charges for Scheduling, System Control and Dispatch Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the charges for Scheduling, System Control and Dispatch Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Scheduling, System Control and Dispatch Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 2

Reactive Supply and Voltage Control From Generation Sources Service

In order to maintain transmission voltages on the Transmission Provider's transmission facilities within acceptable limits, generation facilities under the control of the Control Area operator are operated to produce or absorb reactive power. Thus, Reactive Supply and Voltage Control from Generation Sources Service must be provided for each transaction on the Transmission Provider's transmission facilities. The amount of Reactive Supply and Voltage Control from Generation Sources Service that must be supplied with respect to the Transmission Customer's transaction will be determined based on the reactive power support necessary to maintain transmission voltages within limits that are generally accepted in the region and consistently adhered to by the Transmission Provider.

Reactive Supply and Voltage Control from Generation Sources Service can be provided directly by the Transmission Provider if the Transmission Provider is the Control Area operator or indirectly by the Transmission Provider making arrangements with the Control Area operator that performs this service for the Transmission Provider's Transmission System. The Transmission Customer must purchase this service from the Transmission Provider or the Control Area operator. The charges for such service will be based upon the rates referred to below. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by the Control Area Operator.

The Transmission System specific charges for Reactive Supply and Voltage Control from Generation Sources Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the charges for Reactive Supply and Voltage Control from Generation Sources Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Reactive Supply and Voltage Control from Generation Sources Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 3

Regulation and Frequency Response Service

Regulation and Frequency Response Service is necessary to provide for the continuous balancing of resources, generation and interchange, with load and for maintaining scheduled interconnection frequency at sixty cycles per second (60 Hz). Regulation and Frequency Response Service is accomplished by committing on-line generation whose output is raised or lowered, predominantly through the use of automatic generating control equipment, as necessary to follow the moment-by-moment changes in load. The obligation to maintain this balance between resources and load lies with the Transmission Provider (or the Control Area operator that performs this function for the Transmission Provider). The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either purchase this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Regulation and Frequency Response Service obligation. The charges for Regulation and Frequency Response Service are referred to below. The amount of Regulation and Frequency Response Service will be set forth in the Service Agreement. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The Transmission System specific charges for Regulation and Frequency Response Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the charges for Regulation and Frequency Response Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Regulation and Frequency Response Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 4

Energy Imbalance Service

Energy Imbalance Service is provided when a difference occurs between the scheduled and the actual delivery of energy to a load located within a Control Area over a single hour. The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either obtain this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Energy Imbalance Service obligation. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The Transmission Provider shall establish a deviation band of +/−1.5 percent (with a minimum of 2 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s). Parties should attempt to eliminate energy imbalances within the limits of the deviation band within thirty (30) days or within such other reasonable period of time as is generally accepted in the region and consistently adhered to by the Transmission Provider. If an energy imbalance is not corrected within thirty (30) days or a reasonable period of time that is generally accepted in the region and consistently adhered to by the Transmission Provider, the Transmission Customer will compensate the Transmission Provider for such service. Energy imbalances outside the deviation band will be subject to charges to be specified by the Transmission Provider. Compensation for Energy Imbalance Service will be as set forth below.

The Transmission System specific compensation for Energy Imbalance Service is set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the compensation for Energy Imbalance Service upon written notice to the Transmission Customer. Any change to the compensation to the Transmission Customer for Energy Imbalance Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 5

Opeating Reserve—Spinning Reserve Service

Spinning Reserve Service is needed to serve load immediately in the event of a system contingency. Spinning Reserve Service may be provided by generating units that are on-line and loaded at less than maximum output. The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either purchase this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Spinning Reserve Service obligation. The charges for Spinning Reserve Service are referred to below. The amount of Spinning Reserve Service will be set forth in the Service Agreement. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The Transmission System specific charges for Operating Reserve—Spinning Reserve Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the charges for Operating Reserve—Spinning Reserve Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Operating Reserve—Spinning Reserve Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 6

Operating Reserve—Supplemental Reserve Service

Supplemental Reserve Service is needed to serve load in the event of a system contingency; however, it is not available immediately to serve load but rather within a short period of time. Supplemental Reserve Service may be provided by generating units that are on-line but unloaded, by quick-start generation or by interruptible load. The Transmission Provider must offer this service when the transmission service is used to serve load within its Control Area. The Transmission Customer must either purchase this service from the Transmission Provider or make alternative comparable arrangements to satisfy its Supplemental Reserve Service obligation. The charges for Supplemental Reserve Service are referred to below. The amount of Supplemental Reserve Service will be set forth in the Service Agreement. To the extent the Control Area operator performs this service for the Transmission Provider, charges to the Transmission Customer are to reflect only a pass-through of the costs charged to the Transmission Provider by that Control Area operator.

The Transmission System specific charges for Operating Reserve—Supplemental Reserve Service are set forth in the appropriate rate schedule attached to and made part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the charges for Operating Reserve—Supplemental Reserve Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Operating Reserve—Supplemental Reserve Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Schedule 7

Long-Term Firm and Short-Term Firm Point-to-Point Transmission Service

The Transmission Customer shall compensate the Transmission Provider each month for Reserved Capacity pursuant to the Transmission System specific Firm Point-to-Point Transmission Service Rate Schedule attached to and made a part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the charges for Firm Point-to-Point Transmission Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Firm Point-to-Point Transmission Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Discounts: Three principal requirements apply to discounts for transmission service as follows: (1) Any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers solely by posting on the OASIS, (2) any customer-initiated requests for discounts, including requests for use by one's wholesale merchant or an affiliate's use, must occur solely by posting on the OASIS, and (3) once a discount is negotiated, details must be immediately posted on the OASIS. For any discount agreed upon for service on a path, from Point(s) of Receipt to Point(s) of Delivery, the Transmission Provider must offer the same discounted transmission service rate for the same time period to all Eligible Customers on all unconstrained transmission paths that go to the same point(s) of delivery on the Transmission System.

Schedule 8

Non-Firm Point-To-Point Transmission Service

The Transmission Customer shall compensate the Transmission Provider for Non-Firm Point-to-Point Transmission Service pursuant to the Transmission System specific Non-Firm Point-to-Point Transmission Service Rate Schedule attached to and made a part of the applicable Service Agreement. The rates or rate methodology used to calculate the charges for service under this schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies.

The Transmission Provider may modify the charges for Non-Firm Point-to-Point Transmission Service upon written notice to the Transmission Customer. Any change to the charges to the Transmission Customer for Non-Firm Point-to-Point Transmission Service shall be as set forth in a subsequent rate schedule promulgated pursuant to applicable Federal laws, regulations and policies and attached to and made part of the applicable Service Agreement. The Transmission Provider shall charge the Transmission Customer in accordance with the rate then in effect.

Discounts: Three principal requirements apply to discounts for transmission service as follows: (1) Any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers solely by posting on the OASIS, (2) any customer-initiated requests for discounts, including requests for use by one's wholesale merchant or an affiliate's use, must occur solely by posting on the OASIS, and (3) once a discount is negotiated, details must be immediately posted on the OASIS. For any discount agreed upon for service on a path, from Point(s) of Receipt to Point(s) of Delivery, the Transmission Provider must offer the same discounted transmission service rate for the same time period to all Eligible Customers on all unconstrained transmission paths that go to the same point(s) of delivery on the Transmission System.

Attachment A

Form of Service Agreement for Firm Point-To-Point Transmission Service

1.0 This Service Agreement, dated as of _____, is entered into, by and between the (Region) of Western Area Power Administration (Transmission Provider), and _____ (Transmission Customer). The Transmission Provider may revise charges or losses for Firm Point-to-Point Transmission Service provided under this Service

Agreement pursuant to applicable Federal Laws, regulations and policies upon written notice to the Transmission Customer.

2.0 The Transmission Customer has been determined by the Transmission Provider to have a Completed Application for Firm Point-To-Point Transmission Service under the Tariff.

3.0 The Transmission Customer has provided to the Transmission Provider a nonrefundable Application processing fee in accordance with the provisions of Section 17.3 of the Tariff.

4.0 Service under this agreement shall commence on the later of (1) the requested Service Commencement Date, or (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are completed, or (3) such other date as is mutually agreed. Service under this agreement shall terminate on _____.

5.0 The Transmission Provider agrees to provide and the Transmission Customer agrees to take and pay for Firm Point-To-Point Transmission Service in accordance with the provisions of Part II of the Tariff, and this Service Agreement.

6.0 Any notice or request made to or by either Party regarding this Service Agreement shall be made to the representative of the other Party as indicated below.

Transmission Provider:

_____

_____

_____

Transmission Customer:

_____

_____

_____

7.0 The Tariff and the ''Specifications For Long-Term Firm Point-To-Point'' as presently constituted or as they may be revised or superseded are incorporated herein and made a part hereof.

In Witness Whereof, the Parties have caused this Service Agreement to be executed by their respective authorized officials.

WESTERN AREA POWER ADMINISTRATION

By: _____

Title: _____

Address: _____

_____

Date: _____

(TRANSMISSION CUSTOMER)

By: _____

Title: _____

Address: _____

_____

Date: _____

Specifications for Long-Term Firm Point-To-Point Transmission Service

For purposes of this Service Agreement, the Transmission Provider's Transmission System consists of the facilities of the (Region) as described in Attachment K.

1.0 Term of Transaction _____

Start Date: _____

Termination Date: _____

2.0 Description of capacity and energy to be transmitted by Transmission Provider including the electric Control Area in which the transaction originates.

_____

3.0 Point(s) of Receipt: _____

Delivering Party: _____

Capacity Reservation: _____

4.0 Point(s) of Delivery: _____

Receiving Party: _____

Capacity Reservation: _____

5.0 The Maximum amount of capacity and energy to be transmitted (Reserved Capacity) is : _____

6.0 Designation of party(ies) subject to reciprocal service obligation:

_____

_____

_____

7.0 Name of the Control Area from which capacity and energy will be delivered to the Transmission Provider for Transmission Service:

_____

Name of the Control Area to which capacity and energy will be delivered by the Transmission Provider:

_____

Name(s) of any Intervening Systems providing transmission service:

_____

_____

8.0 Service under this Agreement may be subject to some combination of the charges detailed below. The appropriate charges for individual transactions will be determined in accordance with the terms and conditions of the Tariff.

8.1 Transmission Charge:

_____

8.2 System Impact and/or Facilities Study Charge(s):

_____

_____

8.3 Direct Assignment Facilities Charge:

_____

8.4 Ancillary Services Charges:

_____

_____

_____

_____

8.5 Redispatch Charges:
To be filled in if applicable.

8.6 Network Upgrade Charges:
To be filled in if applicable.

9.0 *Power Factor:* The Transmission Customer will be required to maintain a power factor between__-percent lagging and__-percent leading for all deliveries of capacity and energy to and from the Transmission Provider's Transmission System.

10.0 *Transmission Losses:*

10.1 *Loss Factors:*

10.1.1 If, based on operating experience and technical studies, the Transmission Provider determines that any of the transmission loss factors on the Transmission Provider's Transmission System differs from the loss factors set forth in this Service Agreement, the Transmission Provider will notify the Transmission Customer of the revised loss factor(s) pursuant to Section 1.0 of this Service Agreement.

10.1.2 Transmission Provider Transmission Loss Factor: Transmission Provider transmission losses shall initially be__% and shall be assessed on the power scheduled and transmitted to a point of delivery on the Transmission Provider's Transmission System.

11.0 *Ancillary Services*

11.1 Provided by Transmission Provider

11.1.1 Scheduling, System Control, and Dispatch Service

11.1.2 Reactive Supply and Voltage Control from Generation Sources Service

11.2 Provided by Transmission Customer

11.2.1 (To be filled in if applicable)

11.2.2

11.3 Provided by_____

11.3.1 (To be filled in if applicable)

11.3.2

12.0 *Net Billing and Bill Crediting Option:* The Parties have agreed to implement [Net Billing, Bill Crediting, or both] as set forth in Attachment J.

13.0 *Charges for Service:* Charges for Firm Point-to-Point Transmission Service and associated Ancillary Services shall be calculated in accordance with [Rate Schedules] attached hereto and made a part of this Service Agreement. The rates or rate methodology used to calculate the charges for service under that schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies. [This section will be included as appropriate at the Transmission Provider's discretion]

14.0 *Independent System Operator:* The Parties understand that the Transmission Provider may join an independent system operator under Commission jurisdiction. In the event the Transmission Provider either joins or is required to conform to protocols of the independent system operator, the Parties agree that the Transmission Provider either may (1) may make any changes necessary to conform to the terms and conditions required by Commission approval of the independent system operator, or (2) terminate this Service Agreement by providing a one-year written notice to the Transmission Customer.

Attachment B

Form of Service Agreement for Non-Firm Point-To-Point Transmission Service

1.0 This Service Agreement, dated as of_____, is entered into, by and between the (Region) of Western Area Power Administration (Transmission Provider), and_____(Transmission Customer). The Transmission Provider may revise charges or losses for Non-Firm Point-to-Point Transmission Service provided under this Service Agreement pursuant to applicable Federal laws, regulations and policies upon written notice to the Transmission Customer.

2.0 The Transmission Customer has been determined by the Transmission Provider to be a Transmission Customer under Part II of the Tariff and has filed a Completed Application for Non-Firm Point-To-Point Transmission Service in accordance with Section 18.2 of the Tariff.

3.0 Service under this Service Agreement shall be provided by the Transmission Provider upon request by an authorized representative of the Transmission Customer.

For purposes of this Service Agreement, the Transmission Provider's Transmission System consists of the facilities of the (Region) as described in Attachment K.

4.0 The Transmission Customer agrees to supply information the Transmission Provider deems reasonably necessary in accordance with Good Utility Practice in order for it to provide the requested service.

5.0 The Transmission Provider agrees to provide and the Transmission Customer agrees to take and pay for Non-Firm Point-To-Point Transmission Service in accordance with the provisions of Part II of the Tariff, and this Service Agreement.

6.0 Any notice or request made to or by either Party regarding this Service Agreement shall be made to the representative of the other Party as indicated below.

Transmission Provider:

_____

_____

_____

Transmission Customer:

_____

_____

_____

7.0 The Tariff as presently constituted or as it may be revised or superseded is incorporated herein and made a part hereof.

8.0 *Power Factor:* The Transmission Customer will be required to maintain a power factor between __-percent lagging and __-percent leading for all deliveries of capacity and energy to and from the Transmission Provider's Transmission System.

9.0 *Transmission Losses:*

9.1 *Loss Factors:*

9.1.1 If, based on operating experience and technical studies, the Transmission Provider determines that any of the transmission loss factors on the Transmission Provider's Transmission System differs from the loss factors set forth in this Service Agreement, the Transmission Provider will notify the Transmission Customer of the revised loss factor(s) pursuant to Section 1.0 of this Service Agreement.

9.1.2 *Transmission Provider Transmission Loss Factor:* Transmission Provider transmission losses shall initially be _____% and shall be assessed on the power scheduled and transmitted to a point of delivery on the Transmission Provider's Transmission System.

10.0 *Ancillary Services*

10.1 Provided by Transmission Provider

10.1.1 Scheduling, System Control, and Dispatch Service

10.1.2 Reactive Supply and Voltage Control from Generation Sources Service

10.2 Provided by Transmission Customer

10.2.1 To be filled in if appropriate

10.2.2

10.3 Provided by _____

10.3.1 To be filled in if appropriate

10.3.2

11.0 *Net Billing and Bill Crediting Option:* The Parties have agreed to implement [Net Billing, Bill Crediting, or both] as set forth in Attachment J.

12.0 *Charges for Service:* Charges for Non-Firm Point-to-Point Transmission Service and associated Ancillary Services shall be calculated in accordance with [Rate Schedules] attached hereto and made a part of this Service Agreement. The rates or rate methodology used to calculate the charges for service under that schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies. [This section will be included as appropriate at the Transmission Provider's discretion.]

13.0 *Independent System Operator:* The Parties understand that the Transmission Provider may join an independent system operator under Commission jurisdiction. In the event the Transmission Provider either joins or is required to conform to protocols of the independent system operator, the Parties agree that the Transmission Provider either may (1) may make any changes necessary to conform to the terms and conditions required by Commission approval of the independent system operator, or (2) terminate this Service Agreement by providing a one-year written notice to the Transmission Customer.

In Witness Whereof, the Parties have caused this Service Agreement to be executed by their respective authorized officials.

WESTERN AREA POWER ADMINISTRATION

By: _____

Title: _____

Address: _____

_____

Date: _____

(TRANSMISSION CUSTOMER)

By: _____

Title: _____

Address: _____

Date: _____

Attachment C

Methodology To Assess Available Transmission Capability

The Transmission Provider will compute the transmission transfer capability available on a point-to-point basis from the Delivering Party to the Receiving Party using Good Utility Practice and the engineering and operating principles, standards, guidelines and criteria of the Transmission Provider, the applicable Regional Reliability Council, any entity of which the Transmission Provider is a member and is approved by the Commission to promulgate or apply regional or national reliability planning standards (such as a regional transmission group, RTG), or any similar organization that may exist in the future of which the Transmission Provider is then a member. Principal items used to determine maximum transmission transfer capability available shall include reliability, transmission element loading, system contingency performance, voltage levels, and stability. In determining Available Transmission Capability, the Transmission Provider will reserve sufficient transmission capability to meet its current and forecasted power service obligations, current and forecasted Network Customer loads, and existing transmission service obligations.

Attachment D

Methodology for Completing a System Impact Study

The Transmission Provider will assess the capability of the Transmission System to provide the service requested using the criteria and process for this assessment as detailed in Sections 4 and 5 of the Transmission Provider's annual FERC Form 715 submittal in those instances where the Transmission Provider is a member of the Western Systems Coordinating Council. (CRSP, DSW, RMR, and SNR) The Transmission Provider will use the Mid-Continent Area Power Pool (MAPP) System Impact Study Methodology when the Transmission Provider is a member of MAPP. (UGPR)

Attachment E

Index of Point-To-Point Transmission Service Customers

Customer	Date of service agreement

Attachment F

Service Agreement for Network Integration Transmission Service

1.0 This Service Agreement, dated as of _____, is entered into, by and between the (Region) of Western Area Power Administration (Transmission Provider), and _____ (Transmission Customer).

2.0 The Transmission Customer has been determined by the Transmission Provider to have a Completed Application for Network Integration Transmission Service under the Tariff.

3.0 Service under this Service Agreement shall commence on the later of (1) _____, or (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are completed, or (3) such other date as is mutually agreed upon. Service under this Service Agreement shall terminate on _____.

4.0 The Transmission Provider agrees to provide and the Transmission Customer agrees to take and pay for Network Integration Transmission Service in accordance with the provisions of Part III of the Tariff, and this Service Agreement.

5.0 Any notice or request made to or by either Party regarding this Service Agreement shall be made to the representative of the other Party as indicated below.

Transmission Provider:

_____

_____

_____

Transmission Customer:

_____

_____

_____

6.0 The Tariff and the ''Specifications for Network Integration Transmission Service'' as presently constituted or as they may be

revised or superseded are incorporated herein and made a part hereof.

IN WITNESS WHEREOF, the Parties have caused this Service Agreement to be executed by their respective authorized officials.

WESTERN AREA POWER ADMINISTRATION
By: _____
Title: _____
Address: _____
_____
Date: _____

(TRANSMISSION CUSTOMER)
By: _____
Title: _____
Address: _____
_____
Date: _____

Specifications for Network Integration Transmission Service

For purposes of this Service Agreement, the Transmission Provider's Transmission System consists of the facilities of the (Region) as described in Attachment K.

1.0 The Transmission Provider will provide Network Integration Transmission Service over the Transmission Provider's Transmission System for the delivery of capacity and energy from the Network Customer's designated Network Resources to the Network Customer's designated Network Load. The Transmission Provider will also provide non-firm transmission service from non-designated Network Resources under the terms of this Service Agreement. The loss factors associated with this Network Integration Transmission Service are set forth below. Such losses shall be applied and accounted for as set forth in Section 4.

2.0 *Designated Network Resources:*

Designated network resources & estimated maximum resource (MW)	Point of receipt	Delivering party and voltage

3.0 *Designated Network Loads:*

Designated network load & estimated maximum resource (MW)	Point of delivery	Voltage

4.0 *Transmission Losses:*

4.1 *Loss Factors:*

4.1.1 If, based on operating experience and technical studies, the Transmission Provider determines that any of the transmission loss factors on the Transmission Provider's Transmission System differs from the loss factors set forth in this Service Agreement, the Transmission Provider will notify the Transmission Customer of the revised loss factor(s) pursuant to Section 1.0 of this Service Agreement.

4.1.2 *Transmission Provider Transmission Loss Factor:* For deliveries to the Network Customer Network Load, Transmission Provider transmission losses shall initially be __% and shall be assessed on the power scheduled and transmitted to a point of delivery on the Transmission Provider's Transmission System.

4.2 Transmission losses may be revised by written notice from the Transmission Provider to the Transmission Customer.

5.0 The Network Customer's transmission facilities that are integrated with the Transmission Provider's Transmission System will receive ____ credit. These facilities include the following:

5.1 _____

5.2 _____

6.0 Names of any intervening systems with whom the Network Customer has arranged for transmission service to the Transmission Provider's Transmission System.

6.1 _____

6.2 _____

7.0 *Power Factor:* The Transmission Customer will be required to maintain a power factor between ____-percent lagging and ____-percent leading for all deliveries of capacity and energy to and from the Transmission Provider's Transmission System.

8.0 *Ancillary Services*

8.1 Provided by Transmission Provider

8.1.1 Scheduling, System Control, and Dispatch Service

8.1.2 Reactive Supply and Voltage Control from Generation Sources Service

8.2 Provided by Transmission Customer

8.2.1 (To be filled in if appropriate)

8.2.2

8.3 Provided by _____

8.3.1 (To be filled in if appropriate)

8.3.2

9.0 *Net Billing and Bill Crediting Option:* The Parties have agreed to implement [Net Billing, Bill Crediting, or both] as set forth in Attachment J.

10.0 *Charges for Service:* Charges for associated Ancillary Services shall be calculated in accordance with [Rate Schedule] attached hereto and made a part of this Service Agreement. The rates or rate methodology used to calculate the charges for service under that schedule were promulgated and may be modified pursuant to applicable Federal laws, regulations and policies. [This section will be included as appropriate at the Transmission Provider's discretion]

11.0 *Independent System Operator:* The Parties understand that the Transmission Provider may join an independent system operator under Commission jurisdiction. In the event the Transmission Provider either joins or is required to conform to protocols of the independent system operator, the Parties agree that the Transmission Provider either (1) may make any changes necessary to conform to the terms and conditions required by Commission approval of the independent system operator, or (2) terminate this Service Agreement by providing a one-year written notice to the Transmission Customer.

Attachment G

Network Operating Agreement

To be filed by the Transmission Provider at such time as the Transmission Provider has negotiated or offered a Network Integration Transmission Service Agreement. The terms and conditions under which the Network Customer will be required to operate its facilities and the technical and operational matters associated with the implementation of Network Integration Transmission Service and this Service

Agreement will be specified in a separate Network Operating Agreement.

The Network Operating Agreement will include provisions addressing the following:

Authorized Representatives of the Parties
Network Operating Committee
Load Following
System Protection
Redispatch to Manage Transmission Constraints
Maintenance of Facilities
Load Shedding
Operation Impacts
Service Conditions
Data, Information and Reports
Metering
Communications
System Regulation and Operating Reserves
Assignment
Notices
Accounting for Transmission Losses
(Alternative language to be used only by UGPR) Network Integration

Transmission provided by the Transmission Provider will be subject to all operating and scheduling procedures and protocols of the Mid-Continent Area Power Pool (MAPP) as stated in the MAPP Restated Agreement and the MAPP Operating Handbook as existing and as may be amended, superseded or replaced. The Transmission Provider will, therefore, not enter into a separate Network Operating Agreement with each Network Customer.

Attachment H

Annual Transmission Revenue Requirement for Network Integration Transmission Service

1.0 The Annual Transmission Revenue Requirement for purposes of the Network Integration Transmission Service is to be set forth in a separate Rate Schedule.

2.0 The amount in 1 shall be effective until amended by the Transmission Provider or modified by the Commission pursuant to applicable Federal laws, regulations and policies, and may be revised upon written notice to the Transmission Customer.

Attachment I

Index of Network Integration Customers

Customer	Date of service agreement

Attachment J

Provisions Specific to the Transmission Provider

1.0 Change of Rates

Rates applicable under the Service Agreements shall be subject to change by Western in accordance with appropriate rate adjustment procedures. If at any time the United States promulgates a rate changing a rate then in effect under a Service Agreement, it will promptly notify the Transmission Customer thereof. Rates shall become effective as to the Service Agreements as of the effective date of such rate. The Transmission Customer, by written notice to the Transmission Provider within ninety (90) days after the effective date of a rate change, may elect to terminate the service billed by the Transmission Provider under the new rate. Said termination shall be effective on the last day of the billing period requested by the Transmission Customer not later than two (2) years after the effective date of the new rate. Service provided by the Transmission Provider shall be paid for at the new rate regardless of whether the Transmission Customer exercises the option to terminate service.

2.0 Contingent Upon Appropriations

Where activities provided for in the Service Agreement extend beyond the current fiscal year, continued expenditures by the Transmission Provider are contingent upon Congress making necessary appropriations required for the continued performance of the Transmission Provider's obligations under the Service Agreement. In the event that such appropriation by Congress is not made, the Transmission Customer hereby releases the Transmission Provider from its obligations under the Service Agreement and from all liability due to the failure of Congress to make such appropriation.

3.0 Covenant Against Contingent Fees

The Transmission Customer warrants that no person or selling agency has been employed or retained to solicit or secure the Service Agreement upon a contract or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Transmission Customer for the purpose of securing business. For breach or violation of this warranty, the Transmission Provider shall have the right to annul the Service Agreement without liability or in its discretion to deduct from the Service Agreement price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

4.0 Contract Work Hours and Safety Standards

The Service Agreement, to the extent that it is of a character specified in Section 103 of the Contract Work Hours and Safety Standards Act (Act), 40 U.S.C. 329 (1986), is subject to the provisions of the Act, 40 U.S.C. 327–333 (1986), and to regulations promulgated by the Secretary of Labor pursuant to the Act.

5.0 Equal Opportunity Employment Practices

Section 202 of Executive Order No. 11246, 43 FR 46501 (1978), which provides, among other things, that the Transmission Customer will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin, is incorporated by reference in the Service Agreement.

6.0 Use of Convict Labor

The Transmission Customer agrees not to employ any person undergoing sentence of imprisonment in performing the Service Agreement except as provided by 18 U.S.C. 4082(c)(2) and Executive Order 11755, December 29, 1973.

7.0 Entire Agreement

The Service Agreements, including the Tariff, together with the specifications under such Service Agreement and any completed scheduling forms shall constitute the entire understanding between the Transmission Provider and the Transmission Customer with respect to Transmission Service thereunder.

8.0 Power Supply Obligations

The Transmission Provider shall not be obligated to supply capacity and energy from its own sources or from its purchases from other neighboring systems during Interruptions or Curtailments in the delivery by the Transmission Provider or delivery to the Transmission Provider by the Delivering Party of capacity and energy for Transmission Service hereunder, and nothing in the Service Agreement or in the Transmission Customer's agreements with others shall have the effect of making, nor shall anything in the Service Agreement or said agreements with others be construed to require the Transmission Provider to take any action which would make the Transmission Provider, directly or indirectly, a source of power supply to the Transmission Customer, to any Delivering Party or Receiving Party, or to any ultimate recipient other than through the provision of Operating Reserve Service.

9.0 Federal Law

Performance under the Tariff and Service Agreement shall be governed by applicable Federal law.

10.0 Continuing Obligations

The applicable provisions of the Service Agreement will continue in effect after termination of the Service Agreement to the extent necessary to provide for final billing, billing adjustments and payments, and with respect to liability and indemnification from acts or events that occurred while this Service Agreement was in effect.

11.0 Net Billing

As mutually agreed in the Service Agreement, payments due the Transmission Provider by a Transmission Customer may be offset against payments due the Transmission Customer by the Transmission Provider for the use of transmission facilities, operation and maintenance of electric facilities, and other services. For services included in net billing procedures, payments due one Party in any month shall be offset against payments due the other Party in such month, and the resulting net balance shall be paid to the Party in whose favor such balance exists. The Parties shall exchange such reports and information that either Party requires for billing purposes. Net billing shall not be used for any amounts due which are in dispute.

12.0 Bill Crediting

As mutually agreed in the Service Agreement, payments due the Transmission Provider by a Transmission Customer shall be paid by a Transmission Customer to a third party when so directed by the

Transmission Provider. Any third party designated to receive payment in lieu of the Transmission Provider, and the amount to be paid to that party, will be so identified in writing to a Transmission Customer with the monthly power bill. The payment to the third party shall be due and payable by the payment due date specified on the Transmission Provider's bill. When remitting payment to a designated third party, a Transmission Customer shall indicate that such payment is being made on behalf of the Transmission Provider. The Transmission Provider shall credit a Transmission Customer for the amount paid as if payment had been made directly to the Transmission Provider. All other payment provisions shall remain in full force and effect.

Attachment K

Authorities and Obligations

Western Area Power Administration (Western) was established on December 21, 1977, pursuant to Section 302 of the Department of Energy (DOE) Organization Act, Public Law 95–91, dated August 4, 1977. By law, the Bureau of Reclamation provides Federal power resources to its project use customers. By law, Western markets Federal power resources to its electric service customers. Western's transmission system was built primarily to enable the delivery of Federal power to satisfy these contractual obligations.

Western is not a public utility under Sections 205 and 206 of the Federal Power Act and is not specifically subject to the requirements of the Federal Energy Regulatory Commission's (FERC or Commission) Final Orders No. 888 and 888–A. Western is a transmitting utility subject to Section 211 of the Federal Power Act as amended by the Energy Policy Act of 1992. The Department of Energy has issued a Power Marketing Administration Open Access Transmission Policy that supports the intent of the FERC Notice of Proposed Rulemaking for Open Access Transmission.

Use of transmission facilities that Western owns, operates, or to which it has contract rights for delivery of Federal long-term firm capacity and energy to project use and electric service customers is a Western responsibility under the terms and conditions of marketing criteria and electric service contracts implementing statutory obligations to market Federal power. This is complementary with the provisions of the Tariff. Transmission service provided by Western under the Tariff is solely for the use of available transmission capability in excess of the capability Western requires for the delivery of long-term firm capacity and energy to project use and electric service customers of the Federal government. Western will offer to provide others transmission service equivalent to the service Western provides itself.

Western's Regional Offices reserved transmission capacity shall, therefore, include capacity sufficient to deliver Federal power resources to customers of the Federal government. Nothing in this Tariff shall alter, amend or abridge the statutory or contractual obligations of Western to market and deliver Federal power resources and to repay the Federal investment in such projects. The Tariff provides for transmission, including each Regional Office's use of those facilities for third party sales, on the unused capability of transmission facilities under the jurisdiction or control of each of Western's Regional Offices not required for the delivery of long term firm capacity and energy to customers of the Federal government in a manner consistent with the spirit and intent of FERC Order Nos. 888 and 888–A.

Western has prepared this Tariff and service agreements to provide transmission service comparable to that required of public utilities by FERC Order Nos. 888 and 888–A, and to implement those Orders consistent with the DOE Policy. An entity desiring transmission service from Western must comply with the application procedures outlined herein. The review and approval requirements detailed herein will apply to all requesting parties. Western will perform the necessary studies or assessments for evaluating requests for transmission service as set forth in the Tariff. Any facility construction or interconnection necessary to provide transmission service will be subject to Western's General Requirements for Interconnection which are available upon request.

Western will provide Firm and Non-Firm Point-to-Point Transmission Service and Network Integration Transmission Service under this Tariff. The specific terms and conditions for providing transmission service to a customer will be included in a Service Agreement. Operating Procedures, Available Transmission Capability (ATC), and System Impact Methodology are defined in the Attachments. Western's rates are developed under separate public processes pursuant to applicable Federal law and regulations. Therefore, rates and charges for specific services will be set forth in the appropriate Regional rates schedules attached to each Service Agreement.

Western has marketed the maximum practical amount of power from each of its projects, leaving little or no flexibility for provision of additional power services. Changes in water conditions frequently affect the ability of hydroelectric projects to meet obligations on a short term basis. The unique characteristics of the hydro resource, Western's marketing plans and the limitations of the resource due to changing water conditions limit Western's ability to provide generation-related services including ancillary services and redispatching using Federal hydro resources.

Western operates in 15 Central and Western States encompassing a geographic area of 3.38 million-square-kilometers (1.3 million-square-miles). Western has four Customer Service Regional Offices and the Colorado River Storage Project Customer Service Center, each referred to in the Tariff as Regional Office. The addresses for submitting applications to Western's Regional Offices are as follows: Colorado River Storage Project, CRSP Manager, P.O. Box 11606, Salt Lake City, UT, 84147–0606, telephone number (801) 524–6372; Desert Southwest Region, Power Marketing Manager, P.O. Box 6457, Phoenix, AZ, 95005–6457, telephone number (602) 352–2789; Rocky Mountain Region, Power Marketing Manager, P.O. Box 3700, Loveland, CO, 80539–3003, telephone number (970) 490–7370; Sierra Nevada Region, Power Marketing Manager, 114 Parkshore Drive, Folsom, CA, 95630–4710, telephone number (916) 353–4421; Upper Great Plains Region, Power Marketing Manager, P.O. Box 35800, Billings, MT, 59107–5800, telephone number (406) 247–7394.

Colorado River Storage Project Customer Service Center

The Colorado River Storage Project Customer Service Center (CRSP CSC), located in Salt Lake City, Utah, markets power from three Federal multipurpose water development projects; the Colorado River Storage Project (CRSP), the Collbran Project, and the Rio Grande Project, collectively called the Integrated Projects. The hydroelectric facilities associated with these projects include: Flaming Gorge and Fontenelle powerplants on the Green River; Blue Mesa, Morrow Point, and Crystal powerplants on the Gunnison River; Upper and Lower Molina powerplants of the Collbran Project in Western Colorado; the largest of the CRSP facilities, Glen Canyon power plant on the Colorado River; and Elephant Butte power plant, part of the Rio Grande Project on the Rio Grande River in South Central New Mexico. The CRSP transmission system consists of high-voltage transmission lines and attendant facilities extending from Arizona, into New Mexico, through Colorado, and into portions of Utah and Wyoming. The CRSP CSC uses the CRSP transmission system to meet its commitments to its federal customers, point-to-point transmission customers, and exchange power contractors. The CRSP CSC must, therefore, reserve sufficient transmission capacity to meet these long-term obligations. The CRSP CSC also needs to reserve capacity in its transmission system to enable it to deliver power produced by the Integrated Projects hydroelectric powerplants during periods when flood control water releases produce greater than normal generation levels.

The CRSP CSC office, located in Salt Lake City, is a member of the Western Regional Transmission Group and Southwest Regional Transmission Group and operates within the Western Systems Coordinating Council (WSCC).

The CRSP CSC does not operate a control area and as such may be unable to provide some or all of the services under the Tariff from its Integrated Projects hydroelectric resources, including, but not limited to, ancillary services and Network Integration Transmission Service.

The CRSP CSC application processing fee will be $1,600.

Desert Southwest Region

The Desert Southwest Region (DSR) manages transmission facilities in the states of Arizona, California, and Nevada. The DSR transmission facilities are interconnected with transmission facilities of several non-Federal entities. DSR is a member of the Southwest Regional Transmission Group and the Western Regional Transmission Group

and its system is operated in the WSCC. For the purpose of implementing this Tariff the transmission facilities of the Parker-Davis Projects and the Pacific Northwest-Pacific Southwest Intertie Project will be utilized. DSR manages a control area operations center through its Desert Southwest Regional Office located in Phoenix, Arizona.

The DSR application processing fee will be $1,700.

Rocky Mountain Region

The Rocky Mountain Region (RMR) manages transmission facilities in the states of Colorado, Wyoming, Nebraska, and Kansas which were constructed for the primary purpose of marketing power from the Pick-Sloan Missouri Basin Program—Western Division. The RMR office and control area operations center is located in Loveland, Colorado. The RMR is a member of the Western Regional Transmission Group and its system is operated in the Western Systems Coordinating Council.

For RMR, the rates for Point-to-Point and Network Integration Transmission Service charged pursuant to the Tariff will be calculated using the costs of the transmission facilities of the Pick-Sloan Missouri Basin Program—Western Division. The rates for the ancillary services will be calculated using the costs of the generation facilities of the Pick-Sloan Missouri Basin Program—Western Division and the Fryingpan—Arkansas Project.

The RMR application processing fee will be $1,600.

Sierra Nevada Region

The Sierra Nevada Customer Service Region (SNR), located in Folsom, California, manages the Central Valley Project (CVP) transmission facilities in the state of California. These facilities were constructed for the primary purpose of marketing power resources from the CVP. SNR also has ownership rights to capacity in two multi-party transmission systems, the Pacific Northwest-Pacific Southwest Intertie Project (Pacific AC Intertie), and the California-Oregon Transmission Project (COTP). Congress authorized SNR's participation in the Pacific AC Intertie for the purpose of importing power from the Pacific Northwest. COTP rights were acquired pursuant to Public Law 98–630, primarily for the purpose of delivering power to the United States Department of Energy Laboratories (DOE Labs) and Federal Fish and Wildlife refuges. Long-term use of the Pacific AC Intertie and COTP by third parties is restricted under existing contracts. SNR is a member of the Western Regional Transmission Group regional transmission group and operates within the Western Systems Coordinating Council reliability council.

The SNR does not operate a control area and as such may be unable to provide some or all of the services under the Tariff, including but not limited to, ancillary services and Network Integration Transmission Service.

The SNR application processing fee will be $1,300.

Upper Great Plains Region

The Upper Great Plains Region (UGPR) manages transmission facilities in the states of Montana, North Dakota, South Dakota, Nebraska, Minnesota, and Iowa which were constructed for the primary purpose of marketing power from the Pick-Sloan Missouri Basin Program—Eastern Division. The UGPR office is located in Billings, Montana. The UGPR manages a control area operations center in Watertown, South Dakota. The eastern portion of the UGPR system is operated in the Mid-Continent Area Power Pool (MAPP) reliability council. The western portion of the system is operated in the Western Systems Coordinating Council.

The UGPR transmission facilities are integrated with the transmission facilities of Basin Electric Power Cooperative (Basin) and Heartland Consumers Power District (Heartland) such that transmission services are provided over an integrated transmission system. UGPR rates for Point-to-Point and Network Integration Transmission Service charged pursuant to the Tariff will be calculated using the costs of the transmission facilities of UGPR, Basin, and Heartland that are included in the Transmission System. This Transmission System is also called the Integrated System (IS) and the rates are identified as IS Rates. The integration of these facilities as the IS and the use of the IS rates for short-term sales have been approved by the Administrator of Western. The definition of the Transmission System and the rates for Point-To-Point and Network Integration Transmission Service may be subject to change upon conclusion of an Open Access Transmission Service rate development process conducted pursuant to applicable Federal Law and regulations.

Both Basin and Heartland also own generating facilities and must commit to deliver the output of those resources to their respective members. Basin and Heartland will, therefore, reserve sufficient capacity in their transmission facilities to deliver that output.

Any Transmission Customer taking service under this Tariff shall be subject to a Stranded Cost Charge payable to either UGPR, Basin or Heartland if such service is used for the transmission of power or energy that replaces wholly or in part, power or energy supplied by Western, Basin or Heartland respectively.

The Stranded Cost Charge of Basin shall be applicable regardless of whether the transmission relates to power and/or energy that is purchased by or on behalf of a Generation and Transmission Cooperative member of Basin (G&T), a Distribution Cooperative member of Basin or G&T, or a retail customer of a Distribution Cooperative member of Basin or a G&T.

The Stranded Cost Charge of Heartland shall be applicable whether the transmission service relates to power and/or energy that is purchased by or on behalf of a municipal customer of Heartland or a retail customer of a municipal customer of Heartland.

Stranded costs will be recovered only from a Transmission Customer who obtains transmission service under access rights granted through the Transmission Provider's compliance tariff developed pursuant to FERC Final Orders No. 888 and 888–A and causes either UGPR, Basin or Heartland to incur stranded costs. Stranded costs will be recovered through the terms and conditions of a separate contract entered into either by UGPR and the Transmission Customer or Basin and the Transmission Customer or Heartland and the Transmission Customer.

The UGPR application processing fee will be $1,700.

[FR Doc. 98–128 Filed 1–5–98; 8:45am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5947–6]

Agency Information Collection Activities: Proposed Collections; Comment Request; Information Requirements for Importation of Nonconforming Marine Engines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that EPA is planning to submit the following proposed and/or continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB): Information Requirements for Importation of Nonconforming Marine Engines, OMB Control Number 2060–0320. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before March 9, 1998.

ADDRESSES: Interested persons may obtain a copy of the ICR without charge by contacting: Vehicle Programs and Compliance Division, 401 M Street, S.W. (6405J), Washington, D.C. 20460, Attn: Imports.

FOR FURTHER INFORMATION CONTACT: Mr. Leonard Lazarus, telephone (202) 564–9240, telefax (202) 564–9596.

SUPPLEMENTARY INFORMATION:

Affected entities: Entities potentially affected by this action include individuals and businesses importing marine engines, including outboard engines and personal watercraft.

Title: Information Requirements for Importation of Nonconforming Marine Engines, EPA Control Number 2060–0320, expiration date May 31, 1997.

Abstract: Individuals and businesses importing marine engines, including outboard engines and personal watercraft, request approval for engine importations. The collection of this information is mandatory in order to

ensure compliance of nonconforming engines with Federal emissions requirements. Joint EPA and Customs regulations at 40 CFR 91.701 *et seq.* and 19 CFR 12.74 promulgated under the authority of Clean Air Act Sections 203 and 208 give authority for the collection of information. This authority was extended to nonroad engines under Section 213(d). The information is used by program personnel to ensure that all Federal emission requirements concerning imported nonconforming engines are met. Any information submitted to the Agency for which a claim of confidentiality is made is safeguarded according to policies set forth in Title 40, Chapter 1, Part 2, Subpart Confidentiality of Business Information (see CFR 2), and the public is not permitted access to information containing personal or organizational identifiers. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

The EPA would like to solicit comments to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.5 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected entities: Individuals and businesses importing marine engines.

Estimated Number of Respondents: 1,000.

Frequency of Response: 3.1 responses/year.

Estimated Total Annual Hour Burden: 3,100.

Estimated Total Annualized Costs Burden: $77,500.

Dated: December 29, 1997.

Richard D. Wilson,

Acting Assistant Administrator for Office of Air and Radiation.

[FR Doc. 98–242 Filed 1–5–98; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5947–5]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Notice of Intent for Storm Water Discharges Associated With Construction Activity Under a NPDES General Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Notice of Intent for Storm Water Discharges Associated with Construction Activity under a NPDES General Permit. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 5, 1998.

FOR FURTHER INFORMATION OR A COPY: Contact Sandy Farmer at EPA by phone at (202) 260–2740, by email at farmer.sandy@epamail.epa.gov, or download off the Internet at http://www.epa.gov/icr/icr.htm and refer to EPA ICR No. 1842.01.

SUPPLEMENTARY INFORMATION:

Title: Notice of Intent for Storm Water Discharges Associated with Construction Activity under a NPDES General Permit. This is a new collection. (EPA ICR No. 1842.01).

Abstract: This Information Collection Request (ICR) calculates the burden and costs associated with the preparation of the Notice of Intent (NOI) for Storm Water Discharges Associated with Construction Activity under a NPDES General Permit. EPA uses the data contained in the NOIs to track facilities covered by the storm water general permit and assess permit compliance. EPA has developed a format for construction NOIs. The standardized one-page form is called: Notice of Intent (NOI) for Storm Water Discharges Associated with Construction Activity Under a NPDES General Permit. This form is a revision of an existing form entitled, ''NOI for Storm Water Discharges Associated with Industrial Activity Under a NPDES General Permit.'' The following information is requested (the questions that are on the new NOI which are not on the existing NOI are indicated by asterisks at the end of the item):

- Name, address, phone number of the facility.
- Status of the owner/operator (whether federal, state, public, or private).
- Name and location of the project (City, State, ZIP, Latitude, Longitude, County*).
- Whether the facility is located on Indian Country Lands.
- Whether a Storm Water Pollution Prevention Plan (SWPPP) has been prepared*.
- Optional: location for viewing SWPPP and telephone number for scheduling viewing times: Address, City, State, ZIP*.
- The name of the receiving water.
- Estimated construction start date and completion date.
- The estimated area to be disturbed (to nearest acre).
- An estimate of the likelihood of a discharge*.
- Whether any protected species or critical habitat in the project area.
- Which section of Part I.B.3.e.(2) of the permit through which permit eligibility with regard to protection of endangered species is satisfied.
- Whether any historic properties in the project area.
- Which section of Part I.B.3.f.(2) of the permit through which permit eligibility with regard to protection of historic properties is satisfied.
- Responses are required to obtain coverage under the NPDES General

Permit for storm water discharges associated with construction activities. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. The **Federal Register** Notice required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on June 2, 1997 (62 FR 29826); no comments were received.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 3.7 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners/Operators of construction activities.

Estimated Number of Respondents: 13,632.

Frequency of Response: For each construction start.

Estimated Total Annual Hour Burden: 3.7 hours.

Estimated Total Annualized Cost Burden: $3,646,741.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to EPA ICR No.1842.01 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, OPPE Regulatory Information Division (2137), 401 M Street, SW, Washington, DC 20460.

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

Dated: December 30, 1997.

Joseph Retzer,

Director, Regulatory Information Division.

[FR Doc. 98–243 Filed 1–5–98; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Submitted to OMB for Review and Approval

December 30, 1997.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before February 5, 1998. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Judy Boley, Federal Communications Commission, Room 234, 1919 M St., N.W., Washington, DC 20554 or via Internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judy Boley at 202–418–0214 or via Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0349.

Title: Sections 76.73/76.75, Cable TV EEO Policy and Programs.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for profit.

Number of Respondents: 5,600.

Estimated Time Per Response: Of the 5,600 Cable/MVPD employment units, 2,125 will have 6 or more employees and will take an average of 52 hours per year to maintain an EEO program; 3,475 cable/MVPD employment units will have fewer than 6 employees and will take an average of 8 hours per year to maintain an EEO program.

Frequency of Response: Recordkeeping requirement.

Cost to Respondents: N/A.

Total Annual Burden: 138,300 hours.

Needs and Uses: Section 76.73 provides that equal opportunity in employment shall be afforded by all cable entities and multichannel video program distributors (MVPD) to all qualified persons and no person shall be discriminated against in employment by such entities because of race, color, religion, national origin, age or sex.

Sections 76.73 and 76.75 require that each cable/MVPD employment unit shall establish, maintain and carry out a program to ensure equal opportunity in every aspect of a cable entity's policy and practice.

The data is used by cable entities/MVPD in the preparation of the Cable Television/MVPD Annual Employment Report (FCC 395–A/395–M). The data is also used by FCC staff or in-house or field investigations involving equal employment opportunity. If this program was not maintained there could be no assurance that efforts are being made to afford equal opportunity in employment.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–190 Filed 1–5–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection(s) Approved by Office of Management and Budget

December 29, 1997.

The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public

information collection(s) pursuant to the Paperwork Reduction Act of 1995, Public Law 96–511. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Questions concerning the OMB control numbers and expiration dates should be directed to Jerry Cowden, Federal Communications Commission, (202) 418–0447.

Federal Communications Commission

OMB Control No.: 3060–0021.
Expiration Date: 12/31/2000.
Title: Civil Air Patrol Radio Station License.
Form Number: FCC 480.
Estimated Annual Burden: 1 hour; 0.084 hour per respondent; 12 respondents.
Description: FCC Rules require that applicants file the FCC Form 480 to apply for a new, renewed, or modified Civil Air Patrol Radio Station License. This form is required by the Communications Act of 1934, as amended; international treaties, and FCC Rules 47 CFR 1.922, 87.21, and 87.31. The data will be used by Commission personnel to evaluate the application to issue licenses, to provide information for enforcement and rule making proceedings and to maintain a current inventory of licensees.

OMB Control No.: 3060–0132.
Expiration Date: 12/31/2000.
Title: Supplemental Information—72–76 MHz Operational Fixed Stations.
Form Number: FCC 1068–A.
Estimated Annual Burden: 150 hours; 0.5 hour per response; 300 respondents.
Description: FCC rules require that the applicant agrees to eliminate any harmful interference caused by the operation to TV reception on either channel 4 or 5 that might develop. This form is required by the Communications Act of 1934, as amended; international treaties, and FCC Rules 47 CFR 90.257.

OMB Control No.: 3060–0136.
Expiration Date: 12/31/2000.
Title: Temporary Permit to Operate a General Mobile Radio Service System.
Form Number: FCC 574T.
Estimated Annual Burden: 150 hours; 0.1 hour per respondent; 1,500 respondents.
Description: The Commission rules state that applicants for new or modified radio stations in the General Mobile Radio Service complete FCC Form 574–T for immediate authorization to operate the radio station. The applicant retains this form during the processing of their application for license grant as a 180-day temporary authorization to operate their radio station. This form is required by the Communications Act of 1934, as amended; international treaties, and FCC Rules 47 CFR 1.922, 95.71, and 95.73.

OMB Control No.: 3060–0202.
Expiration Date: 12/31/2000.
Title: Section 87.37 Developmental license.
Estimated Annual Burden: 96 hours; 8 hours per response; 12 respondents.
Description: The information collection requirement contained in Section 87.37 is needed to gather data on developmental programs for which a developmental authorization was granted to determine whether the developmental authorization should be renewed or whether to initiate proceedings to include such operations within the normal scope of the Aviation Services. If the information was not collected the value of developmental programs in the Aviation Service would be severely limited.

OMB Control No.: 3060–0297.
Expiration Date: 12/31/2000.
Title: Section 80.503 Cooperative use of facilities.
Estimated Annual Burden: 1,600 hours; 16 hours per response; 100 respondents.
Description: The recordkeeping requirements contained in Section 80.503 are needed to ensure licensees which share private facilities operate within the specified scope of service, on a non-profit basis, and do not function as communications common carriers providing ship-shore public correspondence services. The information is used by FCC Compliance and Information Bureau personnel during inspection and investigations to insure compliance with applicable rules.

OMB Control No.: 3060–0222.
Expiration Date: 12/31/2000.
Title: Section 97.213 Telecommand of an amateur station.
Estimated annual burden: 100 hours; 0.2 hour per response; 500 respondents.
Description: the recordkeeping requirement in section 97.213 consists of posting a photocopy of the station license, a label with the name, address and telephone number of the station license, and the name of least one authorized control operator. The requirement is necessary so that quick resolution of any harmful interference problems can be achieved and to ensure that the station is operating in accordance with the Communications Act of 1934, as amended.

OMB Control No.: 3060–0264.
Expiration Date: 12/31/2000.
Title: Section 80.413 On-board station equipment records.
Estimated annual burden: 2,000 hours; 2 hours per response; 1,000 respondents.
Description: The recordkeeping requirement contained in Section 80.413 is needed to demonstrate that all on-board repeaters and transmitters are properly operating pursuant to a station authorization issued by the FCC. The information is used by FCC Compliance and Information Bureau personnel during inspections and investigations to determine what mobile units and repeaters are associated with on-board stations aboard a particular vessel.

OMB Control No.: 3060–0259.
Expiration Date: 12/31/2000.
Title: Section 90.263 Substitution of frequencies below 25 MHz.
Estimated annual burden: 30 hours; 0.5 hour per response; 60 respondents.
Description: The information collection requirement contained in section 90.263 is needed to require applicants to provide a supplemental information showing that the proposed use of frequencies below 25 MHz are needed from a safety standpoint and that frequencies above 25 MHz will not meet the operational needs of the applicant. The information is used to evaluate the applicant's need for such frequencies and the interference potential to other stations operating on the proposed frequencies.

OMB Control No.: 3060–0261.
Expiration Date: 12/31/2000.
Title: Section 90.215 Transmitter measurements.
Estimated annual burden: 4,417 hours; 0.034 hour per response; 129,900 respondents.
Description: This information collection requires technical measurements on each transmitter upon initial installation. This information helps assure proper operation of transmitters, thereby reducing instances of interference.

OMB Control No.: 3060–0295.
Expiration Date: 12/31/2000.
Title: Section 90.607(b)(1) & (c)(1) Supplemental information to be furnished by applicants for facilities under this subpart.
Estimated annual burden: 507 hours; 0.025 hour per response; 2,028 respondents.
Description: This information collection requires certain applicants requesting 800 MHz facilities to furnish a list of any other licensed facilities they

hold within 40 miles of the applied for base station. This information is used to determine if an applicant's proposed system is necessary in light of communications facilities it already owns.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–79 Filed 1–5–98 8:45 am]

BILLING CODE 6712–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984.

Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, N.W., Room 962. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 224–201044.

Title: San Francisco Port Commission/Marine Terminals Corporation Nonexclusive Management Agreement.

Parties:

San Francisco Port Commission (''Port'')

Marine Terminals Corporation (''MTC'').

Synopsis: The Proposed Agreement permits MTC to have non-exclusive right to operate at Pier 80, at the Port, and for the Port to compensate MTC for providing services at the facility. MTC will pay the Port an Annual Use Fee and a percentage of Tariff Revenue. In addition, MTC will be responsible for billing and collecting all tariff revenues. The term of the Agreement is for five years.

Dated: December 30, 1997.

By Order of the Federal Maritime Commission.

Ronald D. Murphy,

Assistant Secretary.

[FR Doc. 98–171 Filed 1–5–98; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 20, 1998.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105-1521:

1. Michael S. Stern, Vineland, New Jersey; to acquire voting shares of Penn Bancshares, Inc., Pennsville, New Jersey, and thereby indirectly acquire The Pennsville National Bank, Pennsville Township, New Jersey.

B. Federal Reserve Bank of Atlanta (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. Carl Coleman Hames, Jr., Woodstock, Georgia; to acquire additional voting shares of First Cherokee Bancshares, Inc., Woodstock, Georgia, and thereby indirectly acquire First National Bank of Cherokee, Woodstock, Georgia.

Board of Governors of the Federal Reserve System, December 31, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 98–237 Filed 1–5–98; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 30, 1998.

A. Federal Reserve Bank of Richmond (A. Linwood Gill III, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Carrollton Bancorp, Baltimore, Maryland; to acquire 9 percent of the voting shares of Patapsco Valley Bancshares, Inc., Ellicott City, Maryland, and thereby indirectly acquire Commercial & Farmers Bank, Ellicott City, Maryland.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. CNB Bancshares, Inc., Evansville, Indiana; to acquire 100 percent of the voting shares of Pinnacle Financial Services, Inc., St. Joseph, Michigan, and thereby indirectly acquire Pinnacle Bank, St. Joseph, Michigan.

In connection with this application, Applicant also has applied to acquire Pinnacle Financial Consultants, Inc., Valparaiso, Indiana, and thereby engage in financial and investment advisory services, pursuant to § 225.28(b)(6) of the Board's Regulation Y, and in securities brokerage services and riskless principal transactions, pursuant to § 225.28(b)(7) of the Board's Regulation Y; IndFed Mortgage Company, Valparaiso, Indiana, and thereby engage in community development activities and providing advice in connection with financing transactions, pursuant to §§ 225.28(b)(12) and (b)(6)(iii) of the Board's Regulation Y; Forrest Holdings, Inc., Lisle, Illinois and its wholly owned subsidiary, Forrest Financial Corporation, Lisle, Illinois, and thereby engage in leasing activities, pursuant to § 225.28(b)(3)(i) and (ii) of the Board's Regulation Y, and securities brokerage activities, pursuant to § 225.28(b)(7) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 31, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 98–236 Filed 1–5–98; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:00 a.m., Monday, January 12, 1998.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Joseph R. Coyne, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.bog.frb.fed.us for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: January 2, 1998.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 98–376 Filed 1–2–98; 2:49 pm]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97N–0515]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the recordkeeping requirements for manufacturers of Type A medicated articles.

DATES: Submit written comments on the collection of information by March 9, 1998.

ADDRESSES: Submit written comments on the collection of information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1472.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Current Good Manufacturing Practice Regulations for Type A Medicated Articles—(21 CFR 226)—(OMB Control Number 0910–0154—Reinstatement)

Under section 501 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 351), FDA has the statutory authority to issue current good manufacturing practice (CGMP) regulations for drugs, including Type A medicated articles. A Type A medicated article is a feed product containing a concentrated drug diluted with a feed carrier substance. A Type A medicated article is intended solely for use in the manufacture of another Type A medicated article or a Type B or Type C medicated feed. Medicated feeds are administered to animals for the prevention, cure, mitigation, or treatment of disease or for growth promotion and feed efficiency.

Statutory requirements for CGMP's for Type A medicated articles have been codified in part 226 (21 CFR part 226). Type A medicated articles which are not manufactured in accordance with these regulations are considered adulterated under section 501(a)(2)(B) of the act. Under part 226, a manufacturer is required to establish, maintain, and retain records for Type A medicated articles, including records to document procedures required under the manufacturing process to ensure that proper quality control is maintained. Such records would, for example, contain information concerning receipt and inventory of drug components, batch production, laboratory assay results (i.e., batch and stability testing), and product distribution. This information is needed so that FDA can monitor drug usage and possible misformulation of Type A medicated articles. The information could also prove useful to FDA in investigating product defects when a drug is recalled. In addition, FDA will use the CGMP criteria in part 226 to determine whether or not the systems used by manufacturers of Type A medicated articles are adequate to ensure that their medicated articles meet the requirements of the act as to safety and also meet the articles, claimed identity, strength, quality and purity, as required by section 501(a)(2)(B) of the act.

The respondents for Type A medicated articles are pharmaceutical firms that manufacture human and veterinary drugs, veterinary drugs, and commercial feed mills.

FDA estimate the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
226.42	200	120	24,000	0.75	18,000
226.58	200	120	24,000	1.75	42,000
226.80	200	120	24,000	0.75	18,000
226.102	200	120	24,000	1.75	42,000
226.110	200	120	24,000	0.25	6,000
226.115	200	120	24,000	1.00	24,000
Total burden hours					150,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimate of the times required for record preparation and maintenance is based on agency communications with industry. Other information needed to calculate the total burden hours (i.e., manufacturing sites, number of Type A medicated articles being manufactured, etc.) are derived from agency records and experience.

Dated: December 23, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–151 Filed 1–5–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97M–0520]

Abbott Laboratories, Premarket Approval of IMx® Tacrolimus II Assay

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application submitted by Abbott Laboratories, Abbott Park, IL, for premarket approval, under the Federal Food, Drug, and Cosmetic Act (the act), of the IMx® Tacrolimus II Assay. FDA's Center for Devices and Radiological Health (CDRH) notified the applicant, by letter of August 26, 1997, of the approval of the application.

DATES: Petitions for administrative review by February 5, 1998.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Steven I. Gutman, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, –2098 Gaither Rd., Rockville, MD 20850, 301–594–1243.

SUPPLEMENTARY INFORMATION: On February 18, 1997, Abbott Laboratories, Abbott Park, IL 60064–3537, submitted to CDRH an application for premarket approval of the IMx® Tacrolimus II Assay. The device is an in vitro reagent system for the quantitative determination of tacrolimus and some metabolites in human whole blood as an aid in the management of liver allograft patients receiving tacrolimus therapy.

In accordance with the provisions of section 515(c)(2) of the act (21 U.S.C. 360e(c)(2)) as amended by the Safe Medical Devices Act of 1990, this premarket approval application (PMA) was not referred to the Clinical Chemistry and Toxicology Devices Panel of the Medical Devices Advisory Committee, an FDA advisory committee, for review and recommendation because the information in the PMA substantially duplicates information previously reviewed by this panel.

On August 26, 1997, CDRH approved the application by a letter to the applicant from the Deputy Director, Clinical and Review Policy, the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

Opportunity for Administrative Review

Section 515(d)(3) of the act authorizes any interested person to petition, under section 515(g) of the act, for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under 21 CFR part 12 of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under 21 CFR 10.33(b). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before February 5, 1998, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the

Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: December 1, 1997.

Joseph A. Levitt,

Deputy Director for Regulations Policy, Center for Devices and Radiological Health.

[FR Doc. 98–153 Filed 1–5–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Appointment of Performance Review Board (PRB) Members

The Health Care Financing Administration (HCFA) announces the names of new and current members of the Performance Review Board as required by 5 U.S.C. 4314(c)(4). HCFA's PRB consists of: Mary May Smith, Chairperson; David S. Cade; Richard S. Foster; Barbara S. Cooper; A. Peter Bouxsein; Linda A. Ruiz; and Charles R. Booth.

For further information, contact the Director, Human Resources Management Group, Office of Internal Customer Support, Teresa A. Smith, 7500 Security Boulevard, Room C2–09–27, Baltimore, Maryland 21244–1850, telephone number 410–786–5489.

Dated: December 17, 1997.

Teresa A. Smith,

Director, Human Resources Management Group.

[FR Doc. 98–211 Filed 1–5–98; 8:45 am]

BILLING CODE 4120–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 1998 Funding Opportunities

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of funding availability.

SUMMARY: The Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Mental Health Services and Center for Substance Abuse Prevention announce the availability of FY 1998 funds for grants and/or cooperative agreements for the following activities. These activities are discussed in more detail under Section 4 of this notice. This notice is not a complete description of the activities; potential applicants must obtain a copy of the Guidance for Applicants (GFA) before preparing an application.

Activity	Application deadline	Estimated funds available (million)	Estimated number of awards	Project period (years)
State Incentive Program	03/06/98	$42.0	12–18	3
HIV/AIDS Education	04/03/98	2.0	7–9	3
Child Mental Health Initiative	04/03/98	8–12	8–12	5

Note: SAMHSA plans to publish additional notices of available funding opportunities for FY 1998 in subsequent issues of the **Federal Register**.

The actual amount available for awards and their allocation may vary, depending on unanticipated program requirements and the volume and quality of applications. Awards are usually made for grant periods from one to three years in duration. FY 1998 funds for activities discussed in this announcement were appropriated by the Congress under Public Law 105–78. SAMHSA's policies and procedures for peer review and Advisory Council review of grant and cooperative agreement applications were published in the **Federal Register** (Vol. 58, No. 126) on July 2, 1993.

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a PHS-led national activity for setting priority areas. The SAMHSA Centers' substance abuse and mental health services activities address issues related to Healthy People 2000 objectives of Mental Health and Mental Disorders; Alcohol and Other Drugs; Clinical Preventive Services; HIV Infection; and Surveillance and Data Systems. Potential applicants may obtain a copy of Healthy People 2000 (Full Report: Stock No. 017–001–00474–0) or Summary Report: Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (Telephone: 202–512–1800).

General Instructions: Applicants must use application form PHS 5161–1 (Rev. 5/96; OMB No. 0937–0189). The application kit contains the GFA (complete programmatic guidance and instructions for preparing and submitting applications), the PHS 5161–1 which includes Standard Form 424 (Face Page), and other documentation and forms. Application kits may be obtained from the organization specified for each activity covered by this notice (see Section 4).

When requesting an application kit, the applicant must specify the particular activity for which detailed information is desired. This is to ensure receipt of all necessary forms and information, including any specific program review and award criteria.

The PHS 5161–1 application form and the full text of each of the activities (i.e., the GFA) described in Section 4 are available electronically via SAMHSA's World Wide Web Home Page (address: http://www.samhsa.gov). The GFAs are also available on SAMHSA's Bulletin Board (800–424–2294 or 301–443–0040).

Application Submission: Unless otherwise stated in the GFA, applications must be submitted to: SAMHSA Programs, Center for Scientific Review, National Institutes of Health, Suite 1040, 6701 Rockledge Drive MSC–7710, Bethesda, Maryland 20892–7710*

(* Applicants who wish to use express mail or courier service should change the zip code to 20817)

Application Deadlines: The deadlines for receipt of applications are listed in the table above. Please note that the deadlines may differ for the individual activities.

Competing applications must be received by the indicated receipt dates to be accepted for review. An application received after the deadline may be acceptable if it carries a legible proof-of-mailing date assigned by the carrier and that date is not later than one week prior to the deadline date.

Private metered postmarks are not acceptable as proof of timely mailing.

Applications received after the deadline date and those sent to an address other than the address specified above will be returned to the applicant without review.

FOR FURTHER INFORMATION CONTACT: Requests for activity-specific technical information should be directed to the program contact person identified for each activity covered by this notice (see Section 4).

Requests for information concerning business management issues should be directed to the grants management contact person identified for each activity covered by this notice (see Section 4).

SUPPLEMENTARY INFORMATION: To facilitate the use of this Notice of Funding Availability, information has been organized as outlined in the Table of Contents below. For each activity, the following information is provided:

- Application Deadline.
- Purpose.
- Priorities.
- Eligible Applicants.
- Grants/Cooperative Agreements/Amounts.
- Catalog of Federal Domestic Assistance Number.
- Contacts
- Application Kits.

Table of Contents

1. Program Background and Objectives
2. Special Concerns
3. Criteria for Review and Funding
3.1 General Review Criteria
3.2 Funding Criteria for Scored Applications
4. Special FY 1998 Substance Abuse and Mental Health Services Activities
4.1 Cooperative Agreements
4.1.1 National Youth Substance Abuse Prevention, Initiative—State Incentive Cooperative Agreements for Community-Based Action (State Incentive Program)
4.1.2 Cooperative Agreements for the Mental Health Care Provider Education in HIV/AIDS Program II (HIV/AIDS Eduction)
4.2 Grants
4.2.1 Comprehensive Community Mental Health Services for Children and their Families (Child Mental Health Initiative)
5. Public Health System Reporting Requirements
6. PHS Non-use of Tobacco Policy Statement
7. Executive Order 12372

1. Program Background and Objectives

SAMHSA's mission within the Nation's health system is to improve the quality and availability of prevention, early intervention, treatment, and rehabilitation services for substance abuse and mental illnesses, including co-occurring disorders, in order to improve health and reduce illness, death, disability, and cost to society.

Reinventing government, with its emphases on redefining the role of Federal agencies and on improving customer service, has provided SAMHSA with a welcome opportunity to examine carefully its programs and activities. As a result of that process, SAMHSA moved assertively to create a renewed and strategic emphasis on using its resources to generate knowledge about ways to improve the prevention and treatment of substance abuse and mental illness and to work with State and local governments as well as providers, families, and consumers to effectively use that knowledge in everyday practice.

SAMHSA's FY 1998 Knowledge Development and Application (KD&A) agenda is the outcome of a process whereby providers, services researchers, consumers, National Advisory Council members and other interested persons participated in special meetings or responded to calls for suggestions and reactions. From this input, each SAMHSA Center developed a ''menu'' of suggested topics.

The topics were discussed jointly and an agency agenda of critical topics was agreed to. The selection of topics depended heavily on policy importance and on the existence of adequate research and practitioner experience on which to base studies. While SAMHSA's FY 1998 KD&A programs will sometimes involve the evaluation of some delivery of services, they are services studies and application activities, not merely evaluation, since they are aimed at answering policy-relevant questions and putting that knowledge to use.

SAMHSA differs from other agencies in focusing on needed information at the services delivery level, and in its question-focus. Dissemination and application are integral, major features of the programs. SAMHSA believes that it is important to get the information into the hands of the public, providers, and systems administrators as effectively as possible. Technical assistance, training, preparation of special materials will be used, in addition to normal communications means.

SAMHSA also continues to fund legislatively-mandated services programs for which funds are appropriated.

2. Special Concerns

SAMHSA's legislatively-mandated services programs do provide funds for mental health and/or substance abuse treatment and prevention services. However, SAMHSA's KD&A activities do not provide funds for mental health and/or substance abuse treatment and prevention services except sometimes for costs required by the particular activity's study design. Applicants are required to propose true knowledge application or knowledge development and application projects. Applications seeking funding for services projects under a KD&A activity will be considered nonresponsive.

Applications that are incomplete or nonresponsive to the GFA will be returned to the applicant without further consideration.

3. Criteria for Review and Funding

Consistent with the statutory mandate for SAMHSA to support activities that will improve the provision of treatment, prevention and related services, including the development of national mental health and substance abuse goals and model programs, competing applications requesting funding under the specific project activities in Section 4 will be reviewed for technical merit in accordance with established PHS/SAMHSA peer review procedures.

3.1 General Review Criteria

As published in the **Federal Register** on July 2, 1993 (Vol. 58, No. 126), SAMHSA's ''Peer Review and Advisory Council Review of Grant and Cooperative Agreement Applications and Contract Proposals,'' peer review groups will take into account, among other factors as may be specified in the application guidance materials, the following general criteria:

- Potential significance of the proposed project;
- Appropriateness of the applicant's proposed objectives to the goals of the specific program;
- Adequacy and appropriateness of the proposed approach and activities;
- Adequacy of available resources, such as facilities and equipment;
- Qualifications and experience of the applicant organization, the project director, and other key personnel; and
- Reasonableness of the proposed budget.

3.2 Funding Criteria for Scored Applications

Applications will be considered for funding on the basis of their overall technical merit as determined through the peer review group and the appropriate National Advisory Council (if applicable) review process.

Other funding criteria will include:

- Availability of funds.

Additional funding criteria specific to the programmatic activity may be

included in the application guidance materials.

4. Special FY 1998 Substance Abuse and Mental Health Activities

4.1 Cooperative Agreements

Two major activities for SAMHSA cooperative agreement programs are discussed below. Substantive Federal programmatic involvement is required in cooperative agreement programs. Federal involvement will include planning, guidance, coordination, and participating in programmatic activities (e.g., participation in publication of findings and on steering committees). Periodic meetings, conferences and/or communications with the award recipients may be held to review mutually agreed-upon goals and objectives and to assess progress. Additional details on the degree of Federal programmatic involvement will be included in the application guidance materials.

4.1.1 National Youth Substance Abuse Prevention Initiative—State Incentive Cooperative Agreements for Community-Based Action (State Incentive Program)

- Application Deadline: March 6, 1998
- Purpose: To reverse the trend in drug use by youth, the State Incentive Cooperative Agreements for Community-Based Action calls upon Governors to set a new course of action that will assess needs, identify gaps and channel or redirect resources (consistent with the requirements of the funding source) to implement comprehensive strategies for effective youth substance abuse prevention. This program gives States the opportunity to develop an innovative process for using these special incentive funds in a different way so as to complement and enhance existing prevention efforts. Through this State-led process, individual citizens can be encouraged to play a more forceful role in their community's anti-drug efforts; and additional resources can be mobilized to support promising prevention approaches across systems and settings.

The State Incentive Program will support the States in coordinating and redirecting all prevention resources available within the State and in developing a revitalized, comprehensive prevention strategy that will make optimal use of those resources. With these redirected resources and a viable prevention strategy in place, Governors can more effectively mobilize local citizens—youth, families, communities, schools and workplaces—to work proactively with State and local prevention organizations.

Therefore, the State Incentive Program has a two-fold purpose:

(1) Governors should coordinate, leverage and/or redirect, as appropriate, and legally permissible, all substance abuse prevention resources (funding streams and programs) within the State that are directed at communities, families, schools and workplaces in order to fill gaps with effective and promising prevention approaches targeted to marijuana and other drug use by youth. Any redirection of Federal funds, however, must be consistent with the terms and conditions of such funding and all other Federal laws.

(2) States should develop a revitalized, comprehensive State-wide strategy aimed at reducing drug use by youth through the implementation of promising community-based prevention efforts derived from sound scientific research findings.

- Priorities: None.
- Eligible Applicants: Eligibility is limited to the Office of the Governor so that a consistent State-wide strategy on substance abuse prevention will be implemented by the Governor and comprehensively evaluated as to effectiveness in the strategies used. Eligibility is limited to the Office of the Governor in those entities that receive the Substance Abuse Prevention and Treatment Block Grant (SAPT), Title XIX, Part B, Subpart II of the Public Health Service Act, 42 U.S.C. 300x-21, *et seq.* (hereinafter referred to as ''States''). That grant sets aside 20 percent of the funds for primary prevention activities. This set-aside is a large resource available to the State for prevention activities and, along with the resources available under this announcement and other resources available to the State for substance abuse prevention activities, should be used to assist the Governor in implementing a State-wide strategy.

By restricting eligibility to the Governor's Office, SAMHSA/CSAP believes optimal conditions and incentives needed to establish a successful State Incentive Program are assured. The Governor's leadership and involved commitment to youth substance abuse prevention, coupled with the infrastructure previously developed through the substance abuse Block Grant funds can spur the renewed support of organizations throughout the State and ensure that substance abuse prevention aimed at youth remains a high-priority, comprehensive, and systemically integrated State-wide effort.

For this State Incentive Program, SAMHSA/CSAP strongly supports State use of existing prevention expertise and resources that already reside in the Alcohol and Drug Single State Agency (SSA), which continues to fund prevention strategies through the Substance Abuse Prevention and Treatment Block Grant. Therefore, SAMHSA/CSAP encourages Governors to include a significant role for the SSA in the development, planning and implementation of State efforts under this cooperative agreement. For example, the SSA director or his/her designee could serve as the project director for the cooperative agreement, thereby serving in a key leadership and oversight capacity.

- Cooperative Agreements/Amounts: It is estimated that approximately $42 million will be available to support approximately 12–18 awards under this cooperative agreement announcement in FY 1998. In determining award amounts, consideration will be given to the State's population, substance abuse prevention needs, and the cost requirements of the proposed plan. Accordingly, it is expected that awards will range from $2 million to $3 million. Final award amounts and the actual number of awards made will depend on the number and quality of applications received, and on consideration of the relative cost reasonableness of projects approved for funding.
- Catalog of Federal Domestic Assistance Number: 93.230
- Program Contact: For programmatic or technical assistance, contact: Dave Robbins or Dan Fletcher, DSCSD, Systems Applications Branch, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services, Administration, Rockwall II Building, 9th Floor, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–0369.
- Grants Management Contact: For business management assistance, contact: Peggy Jones, Division of Grants Management, OPS, Substance Abuse and Mental Health Services, Administration, Rockwall II Building, Room 630, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–9666.
- Application Kits: Application kits are available from: National Clearinghouse for Alcohol and Drug Information (NCADI), P.O. Box 2345, Rockville, MD 20847–2345, 1–800–729–6686; 1–800–487–4889 TDD, Via Internet: www.health.org (Go into the Forum Section of the Web site, click on ''CSAP FY 98 Grant Opportunities.'')

Visually impaired: Disk versions of the application may be requested.

4.1.2 Cooperative Agreements for the Mental Health Care Provider Education in HIV/AIDS Program II (HIV/AIDS Education)

• Application Deadline: April 3, 1998.

• Purpose: The purpose of this cooperative agreement program is twofold: (1) To disseminate to mental health care service providers state-of-the-art knowledge about how to identify and treat the psychological and the neuropsychiatric sequelae of HIV/AIDS; and (2) to develop knowledge on how to be more effective in the dissemination of this knowledge.

The latter includes an assessment, through a multisite evaluation, of both the use and usefulness of this knowledge for providers of HIV/AIDS specific mental health care services (the assessment protocol and measures are being developed under a separate contract).

Applications are being solicited for 6 to 8 established education sites (funds will not be available to develop new HIV/AIDS education projects) to provide education/training (incorporating the required activities outlined in the Guidance for Applicants, GFA) to a minimum of 1,000 individual mental health care service providers per year, per site, for 3 years. At least five (5) provider groups must be included in the training project (e.g., psychiatrists, psychologists, social workers, medical students, primary care residents, psychiatry residents, nurses, counselors, the clergy and other spiritual providers).

Applications are also being sought for a coordinating/technical assistance center to provide overall coordination of the program. The role of the coordinating center will be to (1) provide leadership and guidance to the education sites on the implementation of the multisite evaluation, (2) manage and analyze the common data collected across education sites, and (3) provide technical assistance to the sites in modifying their projects based on the multisite evaluation interim findings.

• Priorities: None.

• Eligible Applicants: Applications to be an education site or the coordinating center may be submitted by organizations such as units of State or local governments and by domestic private nonprofit and for-profit organizations such as community-based organizations, universities, colleges, and hospitals. Applications from Historically Black Colleges and Universities, Hispanic Serving Institutions and Tribal Colleges and Universities are encouraged.

Applicants may apply to be either an education site or a coordinating center, or both; however, separate applications must be submitted.

• Cooperative Agreements/Amounts: It is estimated that approximately $1.6 million will be available to support approximately 6 to 8 education site awards under this GFA in FY 1998. The average award is expected to range from $200,000 to $300,000 in total costs (direct+indirect). It is also estimated that approximately $400,000 in total costs (direct+indirect) will be available to support one (1) coordinating center award under this GFA in FY 1998. Actual funding levels will depend upon the availability of appropriated funds.

• Catalog of Federal Domestic Assistance Number: 93.230.

• Program Contact: For programmatic or technical assistance contact: Barbara J. Silver, Ph.D., Director, Mental Health Care Provider Education in HIV/AIDS Program II, Office of the Associate Director for Medical Affairs, Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, Parklawn Building, Room 15–81, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–7817.

• Grants Management Contact: For business management assistance, contact: Stephen Hudak, Grants Management Specialist, Substance Abuse and Mental Health Services Administration, Parklawn Building, Room 15C–05, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–4456.

• Application Kits: Application kits are available from: National Mental Health Services, Knowledge Exchange Network (KEN), P.O. Box 42490, Washington, DC 20015, Voice: (800) 789–2647, TTY: (301) 443–9006, FAX: (301) 984–8796.

The full text of the GFA is available electronically via the Center for Mental Health Services Knowledge Exchange Network (KEN) (voice line 800–789–2647 or Electronic Bulletin Board 800–790–2647).

4.2 Grants

4.2.1 Comprehensive Community Mental Health Services for Children and their Families (Child Mental Health Initiative)

• Application Deadline: April 3, 1998.

• Purpose: Under Section 561(a) of the Public Health Service Act grants will be awarded to implement, in one or more communities, a broad array of community-based and family-focused services for children with serious emotional disturbance and their families, including individualized case planning and coordination, and to enable communities to integrate child- and family-serving agencies, including health, mental health, substance abuse treatment, child welfare, education, and juvenile justice into a local comprehensive system of care. The statute further requires that an evaluation of the system(s) of care implemented under the Program be conducted and that it include, among other things, longitudinal studies of the outcomes of services provided by such systems.

The primary goal of the program is to successfully implement systems of care at the grant sites. A second goal after implementing systems of care, is evaluation of the outcomes of services delivered under the system. This will be accomplished through a national multi-site evaluation conducted under a separate contract and grantees will be required to cooperate with the multi-site evaluation contractor. The final goal of the Program is to use the results of both the system development efforts of each service site and the results of the descriptive, process and outcome evaluation to shape future program direction with proven exemplary practices that work best for children and their families.

• Priorities: None.

• Eligible Applicants: Eligible entities include States (as defined in Section 2 of the PHS Act), political subdivisions of States, and Indian tribes or tribal organizations (as defined in Section 4(b) and Section 4(c) of the Indian Self-Determination and Education Assistance Act). Applications from all State level, political subdivisions of States (e.g., counties, cities), tribe or tribal organization child-serving agencies are allowed. In order for an entity to be eligible, a plan must be in place for the development of a system of care for community-based services for children with a serious emotional disturbance approved by the Secretary of the U.S. Department of Health and Human Services per Section 564(b) of the PHS Act. For the purposes of this program, an approved State Mental Health Plan for Children and Adolescents with Serious Emotional Disturbance, submitted under Public Law 102–321, will be accepted as such a plan.

• Grants/Amounts: Approximately $8–12 million will be available to support 8 to 12 awards under this GFA in FY 1998. Actual funding will depend upon the availability of funds at the time of award. These grants are for a period of 5 years; it is anticipated that approximately $1 million will be available to each grantee in year one; $1 million in year two; $2 million in year

three, $1.5 million in year four, and $1.5 million in five. An applicant must arrange and demonstrate the availability of match of non-Federal funds in mandated ratios.

• Catalog of Federal Domestic Assistance Number: 93.104.

• Program Contact: For programmatic or technical assistance, contact: Gary De Carolis, Chief, Child, Adolescent, and Family Branch, Division of Knowledge Development and Systems Change Center for Mental Health Services/SAMHSA, Room 18–49, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–1333/FAX (301) 443–3693, Internet: gdecarol@samhsa.gov.

For grants management issues, contact:

Stephen Hudak, Grants Management Officer, Office of Program Services/SAMHSA, Room 15C–05, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–4456/FAX (301) 594–2336, Internet: shudak@samhsa.gov.

• Application kits, contact:, National Mental Health Services, Knowledge Exchange Network (KEN), P.O. Box 42490, Washington, D.C. 20015, Voice: (800) 789–2647, TTY: (301) 443–9006, FAX: (301) 984–8796.

• CMHS intends to sponsor two technical assistance workshops for potential applicants: February 10–11, 1998 in Denver, Colorado and February 23–24, 1998 in Washington, D.C. For more information, potential applicants may contact: Ken Currier, Director, Technical Assistance Operations, National Resource Network for Child and Family Mental Health Services, Washington Business Group on Health, 777 North Capitol Street, N.E., Suite 800, Washington, D.C. 20002, (202) 408–9320/FAX (202) 408–9332, Internet: currier@wbgh.com.

5. Public Health System Reporting Requirements

The Public Health System Impact Statement (PHSIS) is intended to keep State and local health officials apprised of proposed health services grant and cooperative agreement applications submitted by community-based nongovernmental organizations within their jurisdictions.

Community-based nongovernmental service providers who are not transmitting their applications through the State must submit a PHSIS to the head(s) of the appropriate State and local health agencies in the area(s) to be affected not later than the pertinent receipt date for applications. This PHSIS consists of the following information:

a. A copy of the face page of the application (Standard form 424).

b. A summary of the project (PHSIS), not to exceed one page, which provides:

(1) A description of the population to be served.

(2) A summary of the services to be provided.

(3) A description of the coordination planned with the appropriate State or local health agencies.

State and local governments and Indian Tribal Authority applicants are not subject to the Public Health System Reporting Requirements.

Application guidance materials will specify if a particular FY 1998 activity described above is/is not subject to the Public Health System Reporting Requirements.

6. PHS Non-use of Tobacco Policy Statement

The PHS strongly encourages all grant and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of a facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

7. Executive Order 12372

Applications submitted in response to all FY 1998 activities listed above are subject to the intergovernmental review requirements of Executive Order 12372, as implemented through DHHS regulations at 45 CFR Part 100. E.O. 12372 sets up a system for State and local government review of applications for Federal financial assistance. Applicants (other than Federally recognized Indian tribal governments) should contact the State's Single Point of Contact (SPOC) as early as possible to alert them to the prospective application(s) and to receive any necessary instructions on the State's review process. For proposed projects serving more than one State, the applicant is advised to contact the SPOC of each affected State. A current listing of SPOCs is included in the application guidance materials. The SPOC should send any State review process recommendations directly to: Office of Extramural Activities Review, Substance Abuse and Mental Health Services Administration, Parklawn Building, Room 17–89, 5600 Fishers Lane, Rockville, Maryland 20857.

The due date for State review process recommendations is no later than 60 days after the specified deadline date for the receipt of applications. SAMHSA does not guarantee to accommodate or explain SPOC comments that are received after the 60-day cut-off.

Dated: December 30, 1997.

Richard Kopanda,

Executive Officer, SAMHSA.

[FR Doc. 98–192 Filed 1–5–98; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

PRT–837246

Applicant: Language Research Center, Georgia State University, Decatur, GA.

The applicant requests a permit to export one female Sumatran orangutan (*Pongo pygmaeus abelii*) to the Japan Monkey Center, Inuyama City, Japan for the purpose of the enhancement of the survival of the species through a breeding loan for captive propagation.

PRT–837412

Applicant: Wildlife Conservation Society, Bronx, NY.

The applicant requests a permit to export a collection of pathology slides to the Guadalajara Zoo, Mexico for the purpose of scientific research. This collection includes samples obtained opportunistically from endangered mammals (*Rhinoceros unicornis, Papio sphinx, Pudu pudu, Nasalis larvatus, Bos gaurus,Gazella leptoceros, Equus grevyi, Cervus nippon*), endangered reptiles (*Geochelone radiata*), and endangered birds (*Lophura swinhoii, Geronticus eremita, Tragopan blythi, Macrocephalon maleo*).

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

The public is invited to comment on the following application for permits to conduct certain activities with marine mammals. The application was

submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing marine mammals (50 CFR 18).

PRT–837847

Applicant: Arthur Cantando, Huntingdon Valley, PA.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the Lancaster Sound polar bear population, Northwest Territories, Canada prior to April 30, 1994, for personal use.

PRT–837990

Applicant: Stephen C. Slack, Chanhassen, MN.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the Davis Strait polar bear population, Northwest Territories, Canada prior to April 30, 1994, for personal use.

Written data or comments, requests for copies of any of these complete applications, or requests for a public hearing on these applications should be sent to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Room 700, Arlington, Virginia 22203, telephone 703/358–2104 or fax 703/358–2281 and must be received within 30 days of the date of publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Documents and other information submitted with the application are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the above address within 30 days of the date of publication of this notice.

Dated: December 31, 1997.

MaryEllen Amtower,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 98–200 Filed 1–5–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

Applicant: Richard T. Adams, Reno, NV, PRT–837459.

The applicant requests a permit to import the sport-hunted trophy of one bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Olds Schupp, Ann Arbor, MI, PRT–837779.

The applicant requests a permit to import the sport-hunted trophy of one bontebok *Damaliscus pygargus dorcas* culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Thomas R. Plooy, Anchorage, AK, PRT–837778.

The applicant requests a permit to import the sport-hunted trophy of one bontebok *Damaliscus pygargus dorcas* culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: S.C. Department of Natural Resources, Columbia, SC, PRT–834977.

The applicant requests a permit to export biological samples of loggerhead (*Caretta caretta*) sea turtles, collected by the South Carolina Department of Natural Resources under a Section 6 Agreement with the U.S. Fish and Wildlife Service. This notice is applicable for the proposed activities carried out under the permit, if issued, for a period of five years.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 432, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

The public is invited to comment on the following application for permits to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing marine mammals (50 CFR 18).

Applicant: David Dybvig, Tucson, AZ, PRT-837757.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the McClintock Channel polar bear population, Northwest Territories, Canada for personal use.

Written data or comments, requests for copies of any of these complete applications, or requests for a public hearing on these applications should be sent to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Room 700, Arlington, Virginia 22203, telephone 703/358–2104 or fax 703/358-2281 and must be received within 30 days of the date of publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Documents and other information submitted with the application are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the above address within 30 days of the date of publication of this notice.

Dated: December 19, 1997.

MaryEllen Amtower,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 98–203 Filed 1–5–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permit for Marine Mammals

On November 5, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 214, Page 59876, that an application had been filed with the Fish and Wildlife Service by Robert Moses, Worthington, IN, for a permit (PRT–836090) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, taken from the Lancaster Sound population, Northwest Territories, Canada prior to April 30, 1994, for personal use.

Notice is hereby given that on December 16, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

On October 21, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 203, Page 54648, that an application had been filed with the Fish and Wildlife Service by William R. Williamson, Austin, TX for a permit (PRT–832316) to import a sport-hunted polar bear (*Ursus maritimus*) trophy,

taken from the McClintock Channel population, Northwest Territories, Canada,for personal use.

Notice is hereby given that on December 9, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

On September 25, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 186, Page 50394, that an application had been filed with the Fish and Wildlife Service by Wilton Hardesty, Gunnison, CO for a permit (PRT–832902) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, taken from the Davis Strait population, Northwest Territories, Canada, prior to April 30, 1994, for personal use.

Notice is hereby given that on December 16, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

On September 25, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 186, Page 50394, that an application had been filed with the Fish and Wildlife Service by the Seattle Aquarium, Seattle, WA for a permit (PRT–834418) to take for the purpose of public display one female northern sea otter (*Enhydra lutris lutris*) recovered by the Fish and Wildlife Service as an orphaned pup near Kodiak, AK.

Notice is hereby given that on November 20, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

Documents and other information submitted for these applications are available for review by any party who submits a written request to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Rm 700, Arlington, Virginia 22203. Phone (703) 358–2104 or Fax (703) 358–2281.

Dated: December 31, 1997.

MaryEllen Amtower,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 98–199 Filed 1–5–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permit for Marine Mammals

On September 25, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 186, Page 50394, that an application had been filed with the Fish and Wildlife Service by Mote Marine Laboratory, for a permit (PRT–834406) to opportunistically take manatees (*Trichecus manatus*) for scientific research of the manatee cellular immune system.

Notice is hereby given that on November 26, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

Documents and other information submitted for these applications are available for review by any party who submits a written request to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Rm. 700, Arlington, Virginia 22203. Phone (703) 358–2104 or Fax (703) 358–2281.

Dated: December 19, 1997.

MaryEllen Amtower,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 98–201 Filed 1–5–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Denial of Permit for Marine Mammals

On July 31, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 147, Page 41072, that an application had been filed with the Fish and Wildlife Service by Bruce Shoeneweis for a permit (PRT–831928) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, taken from the McClintock Channel population, Northwest Territories, Canada for personal use.

Notice is hereby given that on December 3, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service denied the requested permit.

Documents and other information submitted for these applications are available for review by any party who submits a written request to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Rm 430, Arlington, Virginia 22203. Phone (703) 358–2104 or Fax (703) 358–2281.

Dated: December 19, 1997.

MaryEllen Amtower,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 98–202 Filed 1–5–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Letters of Authorization To Take Marine Mammals

AGENCY: U.S. Fish and Wildlife Service.

ACTION: Notice of issuance of Letters of Authorization to take marine mammals incidental to oil and gas industry activities.

SUMMARY: In accordance with section 101(a)(5) of the Marine Mammal Protection Act of 1972, as amended, and the U.S. Fish and Wildlife Service implementing regulations [50 CFR 18.27(f)(3)], notice is hereby given that Letters of Authorization to take polar bears incidental to oil and gas industry exploration, development, and production activities have been issued to the following companies:

Company	Activity	Location	Date issued
ARCO Alaska, Inc	Exploration	Colville River	December 9, 1997.
ARCO Alaska, Inc	Exploration	Kuparuk River Unit	December 9, 1997.
Northern Geophysical	Exploration	Hemisprings, Fish Creek, Sag River	December 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. John W. Bridges at the U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503, (800) 362–5148 or (907) 786–3810.

SUPPLEMENTARY INFORMATION: Letters of Authorization were issued in accordance with U.S. Fish and Wildlife

Service Federal Rules and Regulations ''Marine Mammals; Incidental Take During Specified Activities'' (58 FR 60402; November 16, 1993); modified and extended (60 FR 42805; August 17, 1995).

Dated: December 24, 1997.

David B. Allen,

Regional Director.

[FR Doc. 98–155 Filed 1–5–98; 8:45 am]

BILLING CODE 4310–01–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of approved Tribal-State Compact.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act, Public Law 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III (casino) gambling on Indian reservations. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Compact between the Pyramid Lake Paiute Tribe and the State of Nevada, which was executed on August 4, 1997.

DATES: This action is effective January 6, 1998.

FOR FURTHER INFORMATION CONTACT: Director, Indian Gaming Management Staff, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4068.

Dated: December 12, 1997.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 98–219 Filed 1–5–98; 8:45am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–020–5101–00–LO12]

Availability of the Draft Environmental Impact Statement (EIS) for the Golden Valley Electric Association Northern Intertie Project (EIS #97–47); Alaska

AGENCY: Bureau of Land Management.

ACTION: Notice.

SUMMARY: Golden Valley Electric Association has applied to the Bureau of Land Management (BLM) for a Right of Way (ROW) to construct a 230kv transmission line from Healy, Alaska, to Fairbanks, Alaska. Therefore, in compliance with the Federal Land Policy and Management Act, as amended, the National Environmental Policy Act of 1969, as amended, and 40 CFR Parts 1500–1508, the Bureau of Land Management has prepared a Draft EIS. The Draft EIS evaluates the granting of the ROW necessary for the Golden Valley Electric Association Northern Intertie Project.

The public can view a set of large-scale maps and pick up copies of the Draft EIS at the following locations:

Fairbanks: BLM-Northern District Office and the Alaska Department of Natural Resources Office.

Nenana: Nenana Public Library.

Anderson: Anderson City Hall.

Healy: Healy Community Center.

Copies are also available by mail by contacting the BLM Northern District Office, 1150 University Avenue, Fairbanks, Alaska 99709, or by calling (907) 474–2339.

DATES: Written comments on the Draft EIS must be submitted or postmarked no later than March 5, 1998. Oral and/or written comments may also be presented at four public meetings scheduled as follows:

Fairbanks: February 9, 1998, Carlson Center.

Nenana: February 10, 1998, Nenana Senior Center.

Anderson: February 11, 1998, Anderson City Hall.

Healy: February 12, 1998, Healy Community Center.

The meetings will be conducted at all locations in the following manner: 1 p.m. to 5 p.m.—Open House where information and maps will be displayed and staff will be available to answer questions. Written comments will be accepted. 7 p.m. to 9 p.m.—Public Hearing where oral comments will be recorded. Written comments will also be accepted.

ADDRESSES: Written comments on the document should be addressed to the Bureau of Land Management, Northern District Office, Attn: Gary Foreman, 1150 University Avenue, Fairbanks, Alaska 99709–3899. Comments can also be entered via the internet at http://aurora.ak.blm.gov.

FOR FURTHER INFORMATION CONTACT: Gary Foreman, Project Manager, at 1–800–437–7021 or (907) 474–2339.

SUPPLEMENTARY INFORMATION: The Draft EIS analyzes seven transmission line route alternatives and the No Action alternative. The preferred alternative is the Rex/South Route, Option B.

Public participation for this project has occurred throughout the process. The BLM and the Rural Utilities Service completed an Environmental Assessment of the project in January 1997. Based on public and agency comments the BLM decided to complete an EIS for this project. The Notice of Intent for the EIS was filed in the **Federal Register** in May, 1997. Public meetings, open houses, and mail outs have been conducted for the Environmental Assessment and the Environmental Impact Statement processes. Any comments presented during these processes have been considered.

Dated: December 30, 1997.

Donald L. Hinrichsen,

Acting Associate State Director.

[FR Doc. 98–189 Filed 1–5–98; 8:45 am]

BILLING CODE 4310–JA–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–97–16]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: January 15, 1998 at 3:00 p.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. No. TA–201–67 (Wheat Gluten) (Injury Phase)—briefing and vote.
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: December 30, 1997.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 98–369 Filed 1–2–98; 1:05 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

John Paul King, M.D., Denial of Applications

On August 12, 1997, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order

to Show Cause to John Paul King, M.D., of Reynoldsburg, Ohio, notifying him of an opportunity to show cause as to why DEA should not deny his application, dated August 28, 1995, for a DEA Certificate of Registration as a practitioner pursuant to 21 U.S.C. 823(f), for reason that this registration would be inconsistent with the public interest. Specifically, the Order to Show Cause alleged that:

''(1) In December 1991, the DEA conducted an inspection of [Dr. King's] controlled premises which revealed recordkeeping violations including failure to maintain a biennial inventory, failure to maintain receipt and dispensing records, failure to properly maintain Schedule II records, and illegal import and export of controlled substances. In addition, an audit revealed a shortage of approximately 19,000 dosage units of Schedule II, III and IV controlled substances.

(2) Subsequently, in a civil proceeding against [Dr. King] for violations of the Controlled Substances Act, the United States District Court for the Southern District of Ohio issued a Summary Judgment in favor of the Government on August 24, 1993. In February 1994, [Dr. King] agreed to a settlement in which [he] paid a $14,000 civil fine and agreed to certain restrictions with regard to [his] DEA registration to handle controlled substances. [Dr. King] also agreed to surrender [his] DEA Certificate of Registration if later [he was] found to be in violation of any provision of the agreement.

(3) In March 1994, DEA conducted an inspection of [Dr. King's] controlled premises and found regulatory violations related to [his] inventory records. In August 1994, DEA conducted another inspection of [his] premises in which it was determined that [he] failed to maintain a proper dispensing log, failed to maintain a record of inventory, maintained certain controlled substances in stock contrary to the settlement agreement, and improperly maintained Schedule II records. An audit of [his] records indicated an overage of the Schedule II controlled substance, Demerol. Consistent with the earlier settlement agreement, on September 20, 1994, [Dr. King] voluntarily surrendered [his] DEA Certificate of Registration, AK2838766.

(4) In November 1994, the Ohio Pharmacy Board provided DEA with a captured prescription which indicated that on October 20, 1994 [Dr. King] had prescribed Restoril, a Schedule IV controlled substance, to a patient without being registered to do so, in violation of 21 U.S.C. 841(a)(1) and 843(a)(3).''

The Order to Show Cause also notified Dr. King that should no request for a hearing be filed within 30 days, his hearing right would be deemed waived. The DEA received a signed receipt indicating that the order was received on August 19, 1997. No request for a hearing or any other reply was received by the DEA from Dr. King or anyone purporting to represent him in this matter. Therefore, the Acting Deputy Administrator, finding that (1) 30 days have passed since the receipt of the Order to Show Cause, and (2) no request for a hearing having been received, concludes that Dr. King is deemed to have waived his hearing right. After considering the relevant material from the investigative file in this matter, the Acting Deputy Administrator now enters his final order without a hearing pursuant to 21 C.F.R. 1301.43 (d) and (e) and 1301.46.

The Acting Deputy Administrator finds that subsequent to the issuance of the Order to Show Cause, DEA learned that by Order dated June 26, 1997, the State Medical Board of Ohio (Board) permanently revoked Dr. King's license to practice medicine and surgery in the State of Ohio based upon *inter alia*, Dr. King's improper handling of controlled substances. A letter from the Board to DEA dated September 23, 1997, indicates that Dr. King has appealed the Board's order, and that pending the appeal, the Franklin County Court of common Pleas granted Dr. King a partial stay, ''permitting him to perform [Federal Aviation Administration] flight physicals only.'' The Acting Deputy Administrator concludes that the partial stay of the Board's permanent revocation of Dr. King's medical license does not extend to his handling of controlled substances, and therefore, Dr. King is not currently authorized to handle controlled substances in the State of Ohio.

The DEA does not have statutory authority under the Controlled Substances Act to issue or maintain a registration if the application or registrant is without state authority to handle controlled substances in the state in which he conducts his business. 21 U.S.C. 802(21) 823(f) and 824(a)(3). This prerequisite has been consistently upheld. See *Romeo J. Perez*, M.D., 62 FR 16,193 (1997); *Demetris A. Green*, M.D., 61 FR 60,728 (1996); *Dominick A. Ricci*, M.D., 58 FR 51,104 (1993).

The Acting Deputy Administrator concludes that Dr. King is not currently authorized to handle controlled substances in the State of Ohio, where he has applied for registration with DEA. Therefore, Dr. King is not entitled to a DEA registration in that state. The Acting Deputy Administrator further concludes that since Dr. King is not entitled to a DEA registration in Ohio, it is unnecessary to address whether his registration would be inconsistent with the public interest, as alleged in the Order to Show Cause.

Accordingly, the Acting Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 C.F.R. 0.100(b) and 0.104, hereby orders that the application, submitted by John Paul King, M.D., on August 28, 1995, for a DEA Certificate of Registration, be, and it hereby is, denied. This order is effective February 5, 1998.

Dated: December 24, 1997.

James S. Milford,

Acting Deputy Administrator.

[FR Doc. 98–146 Filed 1–5–98; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA Number 170M2]

Task Force on Suspicious Orders Meeting

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Suspicious Orders Task Force will be held on February 04–05, 1998. The panel will meet from 9:00 a.m. to 5:00 p.m. both days at San Diego California Federal Building, 880 Front Street, San Diego, California. All proceedings will be held in the Sixth Floor Auditorium.

This meeting will be open to the public on a space available basis. Any interested person may observe meetings or portions thereof and shall be permitted to participate in the discussions at the discretion of the meeting chairman and with the approval of the full-time Designated Federal Official (DFO) in attendance.

In addition to presenting limited verbal statements, interested parties shall be permitted to file written statements with Task Force members. Written statements will be taken at any time during the meeting and distributed to the Task Force as soon as feasible. Presenters of written statements are requested to provide 25 copies of the

statement to expedite distribution to the Task Force members. If the presenter does not/can not provide the requested copies, the DFO will arrange for the copies and the Task Force will consider the statement when the copies are available. Verbal comments may be limited in time by the DFO to insure adequate opportunity for testimony by as many presenters as possible. Any person wishing to submit agenda items or desiring to present formal testimony should contact the DFO at least ten (10) days prior to the meeting.

DATES: February 4, 5, 1998.

FOR FURTHER INFORMATION CONTACT:

Michael Leser, Program Analyst, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, D.C. 20537, Telephone (202) 307–4026, Facsimile (202) 307–8570.

SUPPLEMENTARY INFORMATION: If you need special accommodations due to a disability, please contact the Office of Diversion Control, Drug Enforcement Administration, 600 Army Navy Drive, Arlington, Virginia, 22202, (202) 307–4026 at least seven (7) days prior to the meeting.

Dated: December 30, 1997.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 98–147 Filed 1–5–98; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility to Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Acting Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Acting Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 16, 1998.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Acting Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 16, 1998.

The petitions filed in this case are available for inspection at the Office of the Acting Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Signed at Washington, D.C. this 8th day of December, 1997.

Grant D. Beale,

Acting Director, Office of the Trade Adjustment Assistance.

APPENDIX

[Petitions Instituted On 12/08/97]

TA–W	Subject firm (petitioners)	Location	Date of petition	Product(s)
34,062	Can Corp. of America (Wkrs)	Blandon, PA	11/01/97	Metal Cans.
34,063	Giorgio Foods, Inc (Co.)	Temple, PA	11/01/97	Process Mushrooms.
34,064	Masco (Wkrs)	Jacksboro, TN	11/22/97	Grills, Register & Diffusers—Heat & Air.
34,065	General Workers Corp (Wkrs)	Albany, GA	11/17/97	Automotive Generators.
34,066	Johnstown Wire Tech. (Wkrs)	Buffalo, NY	11/24/97	Wire Coils.
34,067	Duracell North Atlantic (Wkrs)	Waterbury, CT	11/21/97	Rechargeable Batteries.
34,068	International Wire (Co.)	Bourbon, IN	11/07/97	Automotive PVC Insulation Wire.
34,069	Franklin Disposables (Wkrs)	Columbus, OH	11/24/97	Hair nets and Beard Restraints.
34,070	American Fabrics (The) (Wkrs)	Picayune, MS	11/18/97	Tablecloths, Curtains.
34,071	Kessler Industries, Inc (Co.)	El Paso, TX	11/06/97	Metal Furniture.
34,072	Greenfield Industries (Co.)	South Deerfield, MA	11/26/97	Lawn Tools, Drill Bits.
34,073	Greenfield Industries (Co.)	Anaheim, CA	11/26/97	Lawn Tools.
34,074	Greenfield Industries (Co.)	Greensboro, NC	11/26/97	Lawn Tools, Drill Bits.
34,075	Sutersville Lumber (Wkrs)	Sutersville, PA	11/26/97	Window and Door Units.
34,076	Hanes Printables (Co.)	Maxton, SC	11/24/97	Men's & Boys' T-Shirts.
34,077	Pikes Peak Greenhouse (Co.)	Colorado Spring, CO	12/02/97	Flowers.

[FR Doc. 98–186 Filed 1–5–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Acting Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II,

Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Acting Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 16, 1998.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Acting Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 16, 1998.

The petitions filed in this case are available for inspection at the Office of the Acting Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Signed at Washington, D.C. this 15th day of December, 1997.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

APPENDIX

[Petitions Instituted On 12/15/97]

TA–W	Subject firm (petitioners)	Location	Date of petition	Product(s)
34,078	Johns-Manville (UFCW)	Waukegan, IL	12/02/97	Commercial Roofing Systems.
34,079	Littonian Shoe Co (Wrks)	Littlestown, PA	11/28/97	Children's shoes.
34,080	Thunderbird Moulding Co (Comp)	Yreka, CA	11/24/97	Wood Moulding.
34,081	Kemet Electronics (Comp)	Shelby, NC	11/24/97	Ceramic Capacitors.
34,082	RMP (Wrks)	Pennsauken, NJ	12/02/97	Re-manufacture Auto & Marine Engines.
34,083	Russell Apparel Corp (Wrks)	Radford, VA	09/23/97	Men's & ladies' shirts, blouses, pants.
34,084	Hunt-Wesson, Inc (Wrks)	Fullerton, CA	09/23/97	Tomato-Based Products.
34,085	Weyerhaeuser CBX Sawmill (Wrks)	Coos Bay, OR	11/24/97	Plank Lumber.
34,086	Highland Industries (Wrks)	Cheraw, SC	11/25/97	Sew Automobile Airbags.
34,087	Douglas Furniture (Comp)	Bedford Park, IL	11/25/97	Dinette Sets.
34,088	Swansboro Garment Co. (Wrks)	Swansboro, NC	11/24/97	Men's Dress Shirts.
34,089	General Cable Corp (Comp)	Kenly, NC	11/25/97	Electrical Cordsets.
34,090	United Steering Systems (UPIU)	Grabill, IN	11/20/97	Steering Wheels, Air Bag Covers.
34,091	Globelle (Wrks)	Berlin, NJ	11/19/97	Computer Systems & Components.
34,092	Thomson Consumer Elect. (IBEW)	Bloomington, IN	12/01/97	Television Receivers.
34,093	Micro Switch (Wrks)	El Monte, CA	12/01/97	Temperature & Humidity Sensors.
34,094	W.R. Grace and Co. (Comp)	Beltsville, MD	12/02/97	Fireproofing Materials.
34,095	Eastman Kodak Co (Comp)	Windsor, CO	12/05/97	Graphic Arts & 110 Film.
34,096	Florence Dye & Textile (Comp)	Woonsocket, RI	11/26/97	Dyeing Yarn and Fabric for Apparel.
34,097	Criterion Plastics, Inc (Wrks)	Kingsville, TX	12/05/97	Molded Plastic Parts.
34,098	Goldtex, Inc (Comp)	Goldsboro, NC	12/05/97	Printed and Dyed Fabric.
34,099	Century Products, Inc (Comp)	Cheboygan, MI	12/02/97	Speaker Cabinets.
34,100	L.A. Manufacturing, Inc (Comp)	Livingston, TN	12/05/97	Men's & Ladies' Denim Jeans.
34,101	Levi Strauss and Co (Comp)	Mountain City, TN	12/09/97	Docker Slacks.

[FR Doc. 97–185 Filed 1–5–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–33,845]

Onan Corporation, Huntsville, Alabama; Including Leased Workers of Act Personnel and Services, Incorporated et al; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on October 23, 1997, applicable to all workers of Onan Corporation, located in Huntsville, Alabama. The notice was published in the **Federal Register** on November 7, 1997 (62 FR 60280).

At the request of the company, the Department reviewed the certification for workers of the subject firm. New information provided by the company shows that some employees of Onan Corporation were leased from ACT Personnel and Service, Incorporated, Snelling Temporary Services, Olsten Staffing Services, Team Source Personnel, and Interim Health Care to produce gasoline engines at the Huntsville, Alabama facility. Worker separations occurred at these companies as a result of the permanent closing of Onan Corporation, Huntsville, Alabama.

Based on these findings, the Department is amending the certification to include workers of ACT Personnel and Service, Incorporated, Snelling Temporary Services, Olsten Staffing Services, Team Source Personnel and Interim Health Care, Huntsville, Alabama leased to Onan Corporation, Huntsville, Alabama.

The intent of the Department's certification is to include all workers of Onan Corporation adversely affected by imports.

The amended notice applicable to TA–W–33,845 is hereby issued as follows:

All workers of Onan Corporation, Huntsville, Alabama and leased workers of ACT Personnel and Service, Incorporated, Snelling Temporary Services, Olsten Staffing Services, Team Source Personnel and Interim Health Care, Huntsville, Alabama engaged in employment related to the production of gasoline engines for Onan Corporation, Huntsville, Alabama who became totally or partially separated from employment on or after September 9, 1996, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC this 22nd day of December, 1997.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98–183 Filed 1–5–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–33,885]

R.G. Thomas Corporation, Palisades Park, New Jersey; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Acting Director of the Office of Trade Adjustment Assistance for workers at R.G. Thomas Corporation, Palisades Park, New Jersey. The review indicated that the application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–33,885; R.G. Corporation, Palisades Park, New Jersey (December 22, 1997)

Signed at Washington, DC this 22nd day of December, 1997.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98–182 Filed 1–5–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–33, 602]

Sweatt's Prefade, Incorporated OPP, Alabama and GSC Management Company OPP, Alabama; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 21, 1997, applicable to all workers of Sweatt's Prefade, Incorporated, Opp, Alabama. The notice was published in the **Federal Register** on September 17, 1997 (62 FR 48888).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of men's and women's jeans. The company reports that GSC Management Company, Opp, Alabama provided the management staff and office support staff to Sweatt's Prefade, Incorporated, Opp, Alabama. The workers of GSC Management Company, Opp, Alabama were inadvertently omitted from the certification. Accordingly, the Department is amending the certification to correctly identify the companies to read Sweatt's Prefade, Incorporated, Opp, Alabama and GSC Management Company, Opp, Alabama.

The intent of the Department's certification is to include all workers of Sweatt's Prefade, Incorporated adversely affect by increased imports.

The amended notice applicable to TA–W–33,602 is hereby issued as follows:

All workers of Sweatt's Prefade, Incorporated, Opp, Alabama and GSC Management Company, Opp, Alabama who became totally or partially separated from employment on or after May 5, 1996, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, D.C. this 19th day of December, 1997.

Grand D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98–184 Filed 1–5–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) issued during the period of December, 1997.

In order for an affirmative determination to be made and a certification of eligibility to apply for worker adjustment assistance to be issued, each of the group eligibility requirements of Section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determination for Worker Adjustment Assistance

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA–W–33,916 & TA–W–33,934; Delphi Energy and Engine, Anaheim Plant, Anaheim, CA and Olathe, KS.

TA–W–33,944; Kysor Michigan Fleet, Scott Manufacturing, Scottsburg, IN.

TA–W–33,918; Aeroquip Corp., Automotive Products Group, Spring Arbor, MI.

TA–W–33,969; Champion Aviation Products, Weatherly, PA.

In the following cases, the investigation revealed that the criteria for eligibility have not been met for the reasons specified.

TA–W–33,606; Specprint, Inc., A Division of John Deal Co., Olney, IL.

The sole customer of the subject firm made a business decision to shift production of its bicycles to Mexico and China.

TA–W–33,744; Creamette Co., A Division of Forden Foods Co., Inc., New Hope, MN.

The parent company decided to transfer production of its brand pasta products from the New Hope, MN facility to other domestic facilities.

TA–W–33,985; Gardin Logging, Inc., Winlock, WA.

Production at Gardin Logging, Inc. was exclusively for the export market. A loss of export market business cannot be considered a basis for worker group certification.

TA–W–33,760; Brandt, Inc. a De La Rue Co., Watertown, WI.

TA–W–34,000; Flexsys America, Nitro, WA.

TA–W–34,013; Alcatel Cable, Roanoke, VA.

Increased imports did not contribute importantly to worker separations at the firm.

TA–W–33,978; Howden Fan Co., Buffalo, NY.

The investigation revealed that criteria (1) and criteria (2) have not been met. A significant number or proportion of the workers did not become totally or

partially separated as required for certification. Sales or production did not decline during the relevant period as required for certification.

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued; the date following the company name and location for each determination references the impact date for all workers for such determination.

TA–W–33,935; Reef Gear Manufacturing, Inc., Plant II, Marine City, MI: October 10, 1996.
TA–W–34,069; Franklin Disposables, Columbus, OH: November 24, 1996.
TA–W–33,866; Faribault Woolen Mills Co., Faribault, MN: September 16, 1996.
TA–W–33,986; Texas Instrument, Inc., Central Lake, MI: October 27, 1996.
TA–W–34,005; Tishomingo Shoe Co., A Division of Genesco, Inc., Iuka, MS: October 28, 1996.
TA–W–33,806; Creative Embroidery Corp, Bloomfield, NJ: August 25, 1996.
TA–W–33,947 & A; Herman Katz Enterprises d/b/a H.K. Co., New York, NY and Emil Katz of New Jersey, West New York, NJ: October 7, 1996.
TA–W–33,970; GE Control Products, a Subsidiary of the General Electric Co., Carroll, IA: October 20, 1996.
TA–W–34,004; MAPA Pioneer Corp., Willard, OH: November 1, 1996.
TA–W–34,011; SRAM Corp., Elk Grove, IL: November 4, 1996.
TA–W–33,945; General Motors Corp., Powertrain Danville Plant, Danville, IL: February 17, 1997.
TA–W–34,014; Dee's Mfg Inc., El Paso, TX: November 6, 1996.
TA–W–33,871; Philips Lighting Co., Little Rock AR: September 22, 1996.
TA–33,818; Sew More, Inc., Albemarle, NC: August 25, 1996.
TA–W–34,043; Hogg's Factory, Malden, MO: November 14, 1996.
TA–W–33,997; Century Mfg Co., Pierre, SC: November 3, 1996.
TA–W–33,908 & A; Tennessee River, Inc., Plant #7, Russellville, AL and Plant ι11, Hamilton, AL: October 3, 1996.
TA–W–33,940 & A; Liberty Childrenswear Co., Snead, AL and Geraldine, AL: October 17, 1996.
TA–W–33,919; Brooklyn Foil, Inc., A Subsidiary of Stanniolfabrik Eppstein, Brooklyn, NY: October 7, 1996.
TA–W–33,975; The Marion Power Shovel Co., Global Industrial Technologies, Inc., Marion, OH: October 24, 1996.
TA–W–33,998; American Standard Apparel Corp., American Standard Div. & Bertha's Boys Div., Williamsport, PA: November 3, 1996.
TA–W–34,076; Hanes Printables, Maxton Sewing Plant, Maxton, NC: November 24, 1996.
TA–W–34,083; Russell Apparel Corp., Radford, VA: September 23, 1996.
TA–W–33,953; Royal Craft Trimmings, Inc., New York, NY: October 14, 1996.
TA–W–34,087; Douglas Furniture, Bedford Park, IL: May 4, 1997.
TA–W–33,832 & A; Medline Industries, Inc., Frisco City, AL and Pell City, AL: September 10, 1996.
TA–W–33,994; Wilroy, Inc., Secaucus, NJ: October 29, 1996.
TA–W–33,857; Hopeland Manufacturing Co., Inc., Hopeland, PA: September 12, 1996.

Also, pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance hereinafter called (NAFTA–TAA) and in accordance with Section 250(a) Subchapter D, Chapter 2, Title II, of the Trade Act as amended, the Department of Labor presents summaries of determinations regarding eligibility to apply for NAFTA–TAA issued during the month of December, 1997.

In order for an affirmative determination to be made and a certification of eligibility to apply for NAFTA–TAA the following group eligibility requirements of Section 250 of the Trade Act must be met:

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, (including workers in any agricultural firm or appropriate subdivision thereof) have become totally or partially separated from employment and either—

(2) That sales or production, or both, of such firm or subdivision have decreased absolutely,

(3) That imports from Mexico or Canada of articles like or directly competitive with articles produced by such firm or subdivision have increased, and that the increases in imports contributed importantly to such workers' separations or threat of separation and to the decline in sales or production of such firm or subdivision; or

(4) That there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly coimpetitive with articles which are produced by the firm or subdivision.

Negative Determinations NAFTA–TAA

In each of the following cases the investigation revealed that criteria (3) and (4) were not met. Imports from Canada or Mexico did not contribute importantly to workers' separations. There was no shift in production from the subject firm to Canada or Mexico during the relevant period.

NAFTA–TAA–01969; Timberline Lumber, Inc., Kalispell, MT.
NAFTA–TAA–01976; International Paper Co., Erie Mill, Erie, PA.
NAFTA–TAA–01869; Brandt, Inc., A De La Rue Co., Watertown, WI.
NAFTA–TAA–01727; Kern Carpenter Farms, Inc., Homestead, FL.
NAFTA–TAA–01954; TKM Farms, Inc., Belle Glade, FL.
NAFTA–TAA–01706; Sam Accursio & Sons Packing & Produce, Inc., Homestead, FL.
NAFTA–TAA–01674; Produce Sales of South Florida, Inc., Florida City, FL.
NAFTA–TAA–01726; Southern Bean Farms, Inc., Southern Bean Packers, Inc., Homestead, FL.
NAFTA–TAA–01979; Kysor Michigan Fleet, Scott Manufacturing, Scottsburg, IN.
NAFTA–TAA–02011; Alcatel Cable, Roanoke, VA.
NAFTA–TAA–01923; Sew More, Inc., Albemarle, NC.
NAFTA–TAA–02017; The Marion Power Shovel Co., Global Industrial Technologies, Inc., Marion, OH.
NAFTA–TAA–01994; Champion Aviation Products, Weatherly, PA.
NAFTA–TAA–01750; Steven Borek Farms, Inc., Princeton, FL.
NAFTA–TAA–01991; Hantke and Ford Printers, Los Angeles, CA.
NAFTA–TAA–02031; Weyerhaeuser Co., Engineered Fibers Div., Snoqualmie, WA.
NAFTA–TAA–01881C; Fruite of The Loom Texas, Inc., Harlingen, TX.

In the following cases, the investigation revealed that the criteria for eligibility have not been met for the reasons specified.

NAFTA–TAA–02005 & A; Active Transportation, Dallas-Mavis, Louisville, KY. and Active Transportation, Provincial American Truck Transporters, Inc., Louisville, KY
NAFTA–TAA–01967; University Technical Services, Inc., University Energy, San Diego, CA.

The investigation revealed that the workers of the subject firm did not produce an article within the meaning of Section 250(a) of the Trade Act, as amended.

Affirmative Determinations NAFTA–TAA

The following certifications have been issued; the date following the company name & location for each determination references the impact date for all workers for such determination.

NAFTA–TAA–02035; Hanes Printables, Maxton Sewing Plant, Maxton, NC: November 24, 1996.

NAFTA–TAA–02012; American Standard Apparel Corp., American Standard Div., and Bertha's Boys Division, Williamsport, PA: November 3, 1996.

NAFTA–TAA–02023; Tyco Internation, Ltd., Kendall Healthcare Products Co., Ocala, FL: November 7, 1996.

NAFTA–TAA–02022; MAPA Pioneer Corp., Willard, OH: October 13, 1996.

NAFTA–TAA–02013; SRAM Corp., Elk Grove, IL: November 4, 1996.

NAFTA–TAA–02029; Hogg's Factory, Malden, MO: October 22, 1996.

NAFTA–TAA–02019; Barbee Mill Co., Renton, WA: November 11, 1996.

NAFTA–TAA–02034; Dee, Mfg., Inc., El Paso, TX: November 20, 1996.

NAFTA–TAA–01881 & A & B; Fruit of The Loom, Martin Mills, Inc., St. Martinville, LA, Abbeville Mills, Division of Martin Mills, Inc., Abbeville, LA, Port Barre Mills, Division of Martin Mills, Inc., Port Barre, LA: August 13, 1996.

NAFTA–TAA–01998 & A; Tennessee River, Inc., Plant #7, Russellville, AL and Plant #11, Hamilton, AL: October 30, 1996.

NAFTA–TAA–02014; Alcoa Fujikura Ltd., Campbellsburg, KY: November 6, 1996.

NAFTA–TAA–01971; Reef Gear Manufacturing, Inc., Plant II, Marine City, MI: October 10, 1996.

I hereby certify that the aforementioned determinations were issued during the month of December, 1997. Copies of these determinations are available for inspection in Room C–4318, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: December 16, 1997.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 97–181 Filed 1–5–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[V–97–1]

Application for Permanent Variance From Dixie Divers; Extension of Comment Period

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Extension of comment period.

SUMMARY: On October 31, 1997, OSHA published a notice requesting comments on the application of Dixie Divers, Inc., for a permanent variance from the Occupational Safety and Health Administration (OSHA) requirements. OSHA has received a number of requests for extension of the comment period. In response to these requests, OSHA is extending the comment period for 60 days.

DATES: The last date for interested parties to submit comments on the variance application is March 2, 1998.

ADDRESSES: The original and four copies of written comments must be submitted to: U.S. Department of Labor, Occupational Safety and Health Administration, Office of Variance Determination, Room N–3653, Attention: Ms. Juanita Jones, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

For comments, one original (hardcopy) and one diskette ((5¼)-or 3(½)-inch) in Wordperfect 5.0, 5.1 or 6.1, or ASCII may be sent to this address; however, any information not contained on the diskettes (e.g., studies, articles) must be submitted in quadruplicate with the original written comments. Written comments of 10 pages or less may be transmitted by facsimile (fax) to OSHA's office of Variance Determination at (202) 219–7068, provided the original and four copies of the fax material are sent to OSHA's Office of Variance Determination within the period allowed for comments.

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Jones, Office of Variance Determination (see **ADDRESSES** above), Telephone: (202) 219–7193, Fax: (202) 219–7068, E–mail: juanita.jones@osha-no.osha.gov or the following Regional and Area Offices:

U.S. Department of Labor—OSHA, 1375 Peachtree Street, N.W., Suite 587, Atlanta, Georgia 30367, Telephone: (404) 562–2300, Fax: (404) 562–2295, E–mail: buryoyne-joanne@dol.gov

and

U.S. Department of Labor—OSHA, 5807 Breckenridge Parkway, Suite A, Tampa, Florida 33610, Telephone: (813) 626–1177, Fax: (813) 626–7015, E–mail: larry.falck@tampa.osha.gov.

For an electronic copy of this Federal Register notice, contact the Labor News Bulletin Board at (202) 219–4748, or access OSHA's web page on the Internet at http://www.OSHA.gov.

SUPPLEMENTARY INFORMATION: On October 31, 1997, OSHA published a notice (62 FR 58995) requesting comments on the application of Dixie Divers, Inc., for a permanent variance from the Occupational Safety and Health Administration (OSHA) requirements for the availability and use of decompression chambers for mixed-gas diving operations (i.e., 29 CFR 1910.423(b)(2), 29 CFR 1910.423(c)(3)(iii), and 29 CFR 1910.426(b)(1)). OSHA provided all the details for this application for permanent variance in this previous notice.

Authority and Signature

This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary of Labor, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, pursuant to Section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655); Secretary of Labor's orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), or 6–96 (62 FR 111), as applicable; and 29 CFR part 1905.

Signed at Washington, D.C. this 24th day of December, 1997.

Charles N. Jeffress,

Assistant Secretary.

[FR Doc. 98–150 Filed 1–5–98; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL SAFETY TRANSPORTATION BOARD

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., Tuesday, January 13, 1998.

PLACE: NTSB Board Room, 5th Floor, 490 L'Enfant Plaza, S.W., Washington, D.C. 20594.

STATUS: Open.

MATTERS TO BE CONSIDERED:

6885A—Marine Accident Report: Allision of the Liberian Freighter *Bright Field* with the Poydras Street Wharf, Riverwalk Marketplace, and New Orleans Hilton Hotel, New Orleans, Louisiana, December 14, 1996.

6725C—Aircraft Accident Report: Uncontained Engine Failure, Delta Air Lines Flight 1288, McDonnell Douglas MD–88, N927DA, Pensacola, Florida, July 6, 1996.

6958—Safety Recommendation Letter: Aerial advertising/banner towing.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

FOR MORE INFORMATION CONTACT: Ray Smith (202) 314–6065.

Dated: January 2, 1998.

Ray Smith,

Alternate Federal Register Liaison Officer.

[FR Doc. 98–374 Filed 1–2–98; 2:56 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–155]

Consumers Energy Company (Big Rock Point Nuclear Plant; Exemption

I

Consumers Energy Company (Consumers or the licensee) is the holder of Facility Operating License No. DPR–6, which authorizes the licensee to possess the Big Rock Point Nuclear Plant (BRP or facility). The license states, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (the Commission or NRC) now or hereafter in effect. The facility consists of a boiling water reactor located at the licensee's site in Charlevoix County, Michigan. The facility is permanently shut down and defueled and is no longer authorized to operate or place fuel in the reactor vessel.

II

Section 50.54(q) of 10 CFR part 50 requires a power reactor licensee to follow and maintain in effect emergency plans that meet the standards of 10 CFR 50.47(b) and the requirements of Appendix E to 10 CFR part 50. Section 50.47(b) provides, in part, that the offsite emergency plan must meet the standards specified in subparagraphs (1) through (16) of 10 CFR 50.47(b). Appendix E, Section IV.F.2.c, of 10 CFR part 50 requires a licensee to exercise its offsite emergency plans biennially with full participation by each authorized authority having a role under the plan.

NRC may grant exemptions from the requirements of the regulations which, pursuant to 10 CFR 50.12(a), are (1) authorized by law, will not present an undue risk to public health and safety, and are consistent with the common defense and security and (2) present special circumstances. Special circumstances exist when application of the regulation in the particular circumstance would not serve the underlying purpose of the rule (10 CFR 50.12(a)(2)(ii)). Special circumstances also exist, in part, when the exemption would provide only temporary relief from the applicable regulation (10 CFR 50.12(a)(2)(v)). The underlying purpose of 10 CFR part 50, Appendix E, Section IV.F.2.c, is to demonstrate that the emergency plans are adequate and capable of being implemented and that the state of offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be undertaken in the event of a radiological emergency.

III

On July 17, 1997, the licensee requested exemption from the ''annual'' emergency preparedness exercise and then on August 5, 1997, submitted Revision 1 to their July 17 request to clarify that they are requesting exemption from the ''biennial'' offsite emergency exercise requirement of 10 CFR part 50, Appendix E, Section IV.F.2.c. In a letter dated July 22, 1997, the licensee described the scope and objectives for the planned offsite emergency plan exercise, involving the State of Michigan and each authorized authority having a role under the plan.

On August 8, 1997, the licensee requested a schedular exemption to defer the October 21, 1997, offsite exercise to June 1998 to allow additional time for the BRP staff to revise the exercise scenario to reflect the permanently shut down and defueled condition of the BRP facility. Then, on August 22, 1997, Consumers gave notice that the current offsite exercise scenario (reflecting an operating nuclear power plant) will be forwarded to the NRC Region III office, as required. Consumers then rescheduled the offsite exercise to December 16, 1997 (within the biennial time period stipulated by the regulations and, thus, not requiring an exemption from NRC requirements). On September 4, 1997, the licensee provided additional clarification of its reasons to defer the 1997 offsite exercise until June 1998. These reasons included, in part, a discussion concluding that the exercise would result in ''significant resource expenditure by the company and outside agencies'' and a reference to an NRC Initial Decision dated August 29, 1984, regarding the licensee's amendment request to expand the spent fuel storage capacity of the BRP spent fuel pool. Therefore, the licensee requested only temporary relief (10 CFR 50.12(a)(2)(v)) from 10 CFR part 50, Appendix E, Section IV.F.2.c.

On September 19, 1997, Consumers submitted a number of documents reflecting the permanent cessation of power operations and the defueled condition of BRP, including, in part, the BRP Defueled Technical Specifications and the Defueled Emergency Plan. This submittal also contained a request for exemption from the requirements of 10 CFR part 50, Appendix E, Section IV.F.2.c, because, as Consumers asserted, there are ''no design basis or other credible events that would result in doses beyond the site area boundary that would exceed the EPA PAGs [Environmental Protection Agency Protective Action Guides] following 68 days post shutdown (11/5/97).'' The September 19, 1997, exemption request is still undergoing NRC staff review.

In a letter to Federal Emergency Management Agency (FEMA) Region V, dated November 25, 1997, the State of Michigan stated that ''requiring the state and counties to conduct an exercise at this time, based on assumptions of an operating full power reactor, would be unrealistic and counter-productive to all parties involved.'' The State further asserted that a ''more realistic test of local and state capabilities would be to assess response to an accident once all plans and procedures have been revised to reflect the new status of the plant.'' The State of Michigan's position was again documented to FEMA Region V in a letter dated December 5, 1997.

By letter dated December 9, 1997, Consumers informed the Commission that they have reasonable assurance that the offsite emergency plan is adequate and that appropriate measures can be taken to protect the health and safety of the public in the event of a radiological emergency at BRP to support a postponement in the conduct of the offsite exercise. The licensee based its determination on the successful performance of the 1995 full-participation offsite/onsite emergency exercise, the 1996 onsite emergency exercise, and the conduct of emergency plan drills.

By letter dated December 17, 1997, FEMA informed the NRC that, based on its evaluation, ''the offsite radiological emergency response plans and preparedness are adequate and that there is reasonable assurance that they can be implemented to protect the health and safety of the public in the event of an emergency'' at the BRP facility. Further, FEMA supports the rescheduling of the 1997 offsite exercise to a date within the first quarter of 1998 and the revision of the offsite exercise

scenario to reflect the permanently shut down and defueled condition of the BRP facility.

The most recent NRC Systematic Assessment of Licensee Performance (SALP 13, Report No. 50–155/96001) for BRP, issued on December 6, 1996, for the period May 1, 1994, through November 25, 1995, indicated that the performance of the emergency preparedness program was good. NRC Inspection Report No. 50–155/95010 documented NRC staff inspection of the onsite portion of the August 1995 exercise and concluded that, overall, there was acceptable performance with no violations of NRC requirements identified. Additionally, NRC Inspection Report No. 50–155/97003, dated May 13, 1997, evaluated the onsite portions of the BRP emergency preparedness program and concluded that the overall effectiveness of emergency preparedness facilities, equipment, training, and organization was very good and that the licensee had conservatively implemented the emergency plan in declaring three separate Unusual Events in 1996. Therefore, there is reasonable assurance that onsite plans, facilities, and personnel are adequate and in place to respond to a radiological emergency at BRP.

In the permanently shut down and defueled condition, BRP is no longer susceptible to any of the operating type of reactor accidents and events, as described in Chapter 15 of the BRP Final Hazards Summary Report. Further, by letters dated February 27, 1995, and August 5, September 4 and 19, and November 12 and 20, 1997, the licensee provided credible analysis of accidents and events that could possibly occur during BRP decommissioning. These accidents and events included, in part, those described in NUREG–0586, ''Final Generic Environmental Impact Statement on decommissioning nuclear facilities,'' and NUREG/CR–0672, ''Technology, Safety, and Costs of Decommissioning Reference Boiling Water Reactor Power Station.'' Consumers also evaluated (1) a release of gap radioactive isotopes from all spent fuel, (2) gamma shine resulting from a complete draindown of the spent fuel pool, and (3) an airborne release of radioactive isotopes from primary system chemical decontamination. Further, Consumers stated that they will not perform any decommissioning activities that result in significant environmental impacts not previously reviewed (10 CFR 50.82(a)(6)(ii)). The licensee has also provided reasonable assurance that the environmental impacts associated with the decommissioning of the BRP facility are bounded by appropriate previously issued environmental impact statements and that the above-mentioned accidents and events would not result in offsite doses exceeding EPA PAGs.

Based upon the aforementioned NRC and FEMA findings regarding onsite and offsite preparedness, respectively, the exemption will not present an undue risk to public health and safety. Additionally, the schedule for future exercises will not be affected by this exemption. The NRC staff is still reviewing licensee request for exemption from certain 10 CFR Part 50 requirements for emergency planning (Consumers' letter to the Commission dated September 19, 1997). Therefore, the licensee is still required to comply with all NRC rules and regulations and their current emergency plan, as approved or until revised by subsequent Commission action.

IV

The NRC staff has completed its review of the licensee's request for schedular exemption from the requirement to conduct an offsite emergency preparedness exercise in calender year 1997 and FEMA's letter dated December 17, 1997, stating FEMA's determination that the offsite radiological emergency plans and preparedness of the State and local offsite emergency preparedness staffs are adequate and that there is reasonable assurance that protective measures can be implemented following a radiological emergency at the BRP facility. Based on this review, the NRC staff finds that the underlying purposes of the regulation will not be adversely affected by delaying the 1997 offsite emergency preparedness exercise for a period not to exceed 90 days commencing on January 1, 1998. Thus, an offsite exercise in calendar year 1997 is not necessary to achieve the underlying purpose of the rule and the requested exemption, as modified herein, will not adversely affect the overall state of emergency preparedness at the BRP site.

For these reasons, the Commission has determined that, pursuant to 10 CFR 50.12, a 90-day schedular exemption commencing on January 1, 1998, as discussed above, is authorized by law, will not present undue risk to public health and safety, and is consistent with the common defense and security. Further, special circumstances are present as set forth in 10 CFR 50.12(a)(2)(ii) and (v).

Pursuant to 10 CFR 51.32, the Commission has determined that granting this exemption will have no significant impact on the environment (62 FR 67667).

This Exemption is effective upon issuance.

Dated at Rockville, Maryland, this 30th day of December 1997.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 98–193 Filed 1–5–98; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

The National Partnership Council; Meeting

Time and Date: 1:00 p.m., January 14, 1998.

Place: OPM Conference Center, Room 1350, Theodore Roosevelt Building, 1900 E Street, NW., Washington, DC 20415–0001. The conference center is located on the first floor.

Status: This meeting will be open to the public. Seating will be available on a first-come, first-served basis. Individuals with special access needs wishing to attend should contact OPM at the number shown below to obtain appropriate accommodations.

Matters To Be Considered: The National Partnership Council will complete its discussion of and adopt the 1997 Report to the President on the Progress of Labor-Management Partnerships. Professor Marick F. Masters of the Joseph M. Katz Graduate School of Business, University of Pittsburgh, and Professor Robert R. Albright of the U.S. Coast Guard Academy will present the findings of the Council's 1997 Federal Sector Labor Relations Climate Survey. The Council will be briefed on Reinvention Impact Centers (RICs), an initiative of the National Performance Review.

Contact Person for More Information: Rose M. Gwin, Director, Center for Partnership and Labor-Management Relations, Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street, NW., Room 7H28, Washington, DC 20415–0001, (202) 606–2930.

Supplementary Information: We invite interested persons and organizations to submit written comments. Mail or deliver your comments to Rose M. Gwin at the address shown above.

Office of Personnel Management.

Janice R. Lachance,

Director.

[FR Doc. 98–218 Filed 1–5–98; 8:45 am]

BILLING CODE 6325–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:
Rule 206(3)–2
SEC File No. 270–216
OMB Control No. 3235–0243.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.),* the Securities and Exchange Commission (''Commission'') is publishing the following summary of collections for public comment.

Rule 206(3)–2 permits investment advisers to comply with section 206(3) of the Investment Advisers Act of 1940 by obtaining a blanket consent from a client to enter into agency cross transactions, provided that certain disclosures are made to the client. The information requirements of the rule consist of the following: (1) Prior to obtaining the client's consent appropriate disclosure must be made to the client as to the practice of, and the conflicts of interest involved in, agency cross transactions; (2) at or before the completion of any such transaction the client must be furnished with a written confirmation containing specified information and offering to furnish upon request certain additional information; and (3) at least annually, the client must be furnished with a written statement or summary as to the total number of transactions during the period covered by the consent and the total amount of commissions received by the adviser or its affiliated broker-dealer attributable to such transactions.

The information required by rule 206(3)–2 is used by the Commission in connection with its investment adviser inspection program to ensure that advisers are in compliance with rule 206(3)–2. The information is also used by clients. Without the information collected under the rule, the Commission would be less efficient and effective in its inspection program and clients would not have information valuable for monitoring the adviser's handling of their accounts.

The Commission estimates that approximately 233 respondents utilize the rule annually, necessitating about 122 responses per respondent each year, for a total of 28,426 responses. Each response requires about .5 hours, for a total of 14,213 hours.

The estimated average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, N.W., Washington, DC 20549.

Dated: December 23, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–160 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission Office of Filings and Information Services Washington, DC 20549.

Rule 11Aa3–2
OMB Control No. 3235-new
SEC File No. 270–439

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for approval.

- Rule 11Aa3–2 Filing and Amendment of National Market System Plans

Rule 11Aa3–2 provides that self-regulatory organizations (''SROs'') may, acting jointly, file a national market system plan or may propose an amendment to an effective national market system plan by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by Rule 11Aa3–2(b)(4) and (5). These record keeping requirements assist the Commission with monitoring SROs, national market system plans, and ensuring compliance with the rule.

There are nine SROs which are members of the Intermarket Trading System (''ITS''), the Consolidated Tape Association (''CTA''), the Consolidated Quote System (''CQS''), the Nasdaq Stock Market, Inc., (''Nasdaq''), or the Options Price Reporting Association (''OPRA''). Only ITS, CTA, CQS, Nasdaq, or OPRA submit filings pursuant to Rule 11Aa3–2 and only after an agreement is reached among member SROs. The staff estimates that there will be approximately six filings pursuant to Rule 11Aa3–2 each year. The staff also estimates that the average number of hours necessary for compliance with the Rule 11Aa3–2 is 33 annually. The total burden is approximately 200 hours annually, based upon past submissions. The average cost per hour is approximately $50. Therefore, the total cost of compliance for SROs is $10,000.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, N.W., Washington, DC 20549.

Dated: December 7, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–233 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–26805]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

December 29, 1997.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 22, 1998, to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

National Fuel Gas Company (70–9149)

Notice of Proposal to Issue Common and Preferred Stock; Order Authorizing Solicitation of Proxies

National Fuel Gas Company (''NFG''), 10 Lafayette Square, Buffalo, New York 14201, a gas registered holding company, has filed a declaration under sections 6(a), 7 and 12(e) of the Public Utility Holding Company Act of 1935, as amended (''Act''), and rules 62 and 65 under the Act relating to proposed changes to its certificate of incorporation.

On December 11, 1997, the Board of Directors of NFG adopted resolutions to amend Article Fourth of NFG's Restated Certificate of Incorporation, as amended (''Certificate of Incorporation''), to: increase the number of authorized shares of common stock, $1 par value (''Common Stock''), from 100,000,000 shares to 200,000,000 shares of Common Stock, eliminate NFG's existing 3,200,000 shares of authorized but unissued preferred stock, $25 par value, and all related provisions in the Certificate of Incorporation [1] and authorize 10,000,000 shares, $1 par value, of a new class of preferred stock (''New Preferred Stock''). NFG states that it has no present plans to issue New Preferred Stock or any material amount of additional shares of Common Stock.

NFG states that the New Preferred Stock will be issued in one or more series and with certain powers, designations, preferences and relative, participating, optional or other special rights and qualifications as the Board of Directors determines, in its discretion, without further action by the shareholders unless shareholder action is required by applicable law or stock exchange requirements. Issuances of New Preferred Stock will also be subject to then existing and applicable provisions of the Certificate of Incorporation.

NFG proposes to solicit proxies from its shareholders to approve amendments to NFG's Certificate of Incorporation required to effect these changes at the next annual shareholders meeting, scheduled for February 26, 1998. Accordingly, NFG requests that an order authorizing the solicitation of proxies be issued as soon as practicable under rule 62(d).

It appears to the Commission that NFG's declaration regarding the proposed solicitation of proxies should be permitted to become effective immediately.

It is ordered, under rule 62 under the Act, that the declaration regarding the proposed solicitation of proxies can become effective immediately, subject to the terms and conditions contained in rule 24 under the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–156 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

[1] NFG represents that currently there are no outstanding shares of preferred stock.

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–22980]

Notice of Applications for Deregistration under Section 8(f) of the Investment Company Act of 1940

December 30, 1997.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of December, 1997. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth St., N.W., Washington, D.C. 20549 (tel. 202–942–8090). An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 26, 1998, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. For Further Information Contact: Diane L. Titus, at (202) 942–0564, SEC, Division of Investment Management, Office of Investment Company Regulation, Mail Stop 5–6, 450 Fifth Street, N.W., Washington, D.C. 20549.

Lexington Tax Free Money Fund, Inc. [File No. 811–2714]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 8, 1997, applicant made a liquidating distribution to its shareholders at net asset value. Approximately $4,900 in expenses incurred in connection with the liquidation were borne by applicant. In addition, applicant has retained $10,791 to cover outstanding liabilities relating to accounting, printing and mailing expenses, and tax costs associated with the liquidation. Costs in excess of this amount will be borne by applicant's investment adviser.

Filing Dates: The application was filed on November 4, 1997.

Applicant's Address: Park 80 West Plaza Two, Saddle Brook, New Jersey 07663.

Israel Growth Fund, Inc. [File No. 811–7906]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant made liquidating distributions to its security holders on July 31, 1995, and December 29, 1995, totaling $551,801. Applicant has paid $40,231 in expenses related to the liquidation and has retained $1,067 for the purpose of paying its remaining debts, which include legal and accounting expenses incurred in connection with its liquidation.

Filing Dates: The application was filed on September 3, 1996, and amendments to the application were filed on April 8, 1997, and December 9, 1997.

Applicant's Address: 95 Revere Drive, Northbrook, Illinois 60062.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–234 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39498; File No. SR–CHX–97–21]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Chicago Stock Exchange, Incorporated, Regarding Suitability of Customer Recommendations

December 29, 1997.

On September 18, 1997, the Chicago Stock Exchange, Incorporated (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] a proposed rule change regarding the suitability of customer recommendations. The proposed rule change was published for comment in the **Federal Register**.[2] The Commission received no comment letters on the proposed rule change, and for the reasons discussed below, is approving the proposal.

I. Description of Proposal

The Exchange proposes to add Article VIII, Rule 25 to the Exchange's Rules. The Exchange currently does not have rule that expressly addresses suitability, churning and related matters for Exchange members. While the Exchange believes that such conduct may currently fall within existing Exchange rules, such as the Exchange's rule relating to ''just and equitable'' activity, the Exchange believes that it is desirable at this time to specifically address this type of conduct. As a result, the purpose of the proposed rule change is to add Rule 25 to Article VIII of the Exchange's rules, requiring that, in recommending to a customer the purchase, sale or exchange of any security, a member must have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

Specifically, prior to the execution of a transaction recommended to a customer, other than transactions with customers where investments are limited to money market mutual funds, a member would be required to make reasonable efforts to obtain information concerning the customer's financial status, the customer's tax status, the customer's investment objectives, and such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

The rule change would contain a non-exclusive list of practices that the Exchange deems to violate a member's duty to recommend to a customer only securities suitable for that customer. These would be: (1) Recommending speculative low-priced securities to customers without knowledge of or an attempt to obtain information concerning the customer's other securities holdings, their financial situation and other necessary data; (2) excessive activity in a customer's account, often referred to a ''churning'' or ''overtrading''; (3) trading in mutual fund shares, particularly on a short-term basis; (4) fraudulent activity (including establishing fictitious accounts in order to execute transactions which otherwise would be prohibited, executing transactions in discretionary accounts in excess of or without actual authority from customers, causing the execution of transactions which are unauthorized by customers or the sending of confirmations in order to cause customers to accept transactions not actually agreed upon, and unauthorized use or borrowing of customers' funds and securities); and (5) recommending the purchase of securities or the continuing purchase of securities in amounts that are inconsistent with the reasonable expectation that the customer has the financial ability to meet such a commitment.

In addition, with regard to derivative financial products, the rule change would require that members make every effort to familiarize themselves with each customer's financial situation, trading experience, and ability to meet the risks involved with such products and to make every effort to make customers aware of the pertinent information regarding new financial products.

II. Discussion

The Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act and the rules and regulations thereunder applicable to a national securities exchange, and specifically, with the requirements of Section 6(b).[3] In particular, the Commission believes that the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and in general to protect investors and the public interest.

The Commission believes that the Exchange's proposal to add Article VIII, Rule 25 to the Exchange's Rules benefits investors by requiring exchange members, in recommending to a customer the purchase, sale or exchange of any security, to have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs. The Commission also believes that including a non-exclusive list of practice that the Exchange deems violates a member's duty of suitability with the rule is a beneficial guide for investors. Additionally, the proposal will benefit exchange members by providing them a rule specifically addressing suitability, churning and related conduct.

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[4] that the proposed rule change (SR–97–21) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–158 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

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[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 3907 (November 6, 1997), 62 FR 61157 (November 21, 1997).

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78s(b)(12).

[5] 17 CFR 300.30(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39495; File No. SR–MSRB–97–18]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Transaction Reporting Procedures

December 29, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 23, 1997, the Municipal Securities Rulemaking Board (''Board'' or ''MSRB'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change (File No. SR–MSRB–97–18). The proposed rule change is described in Items I, II, and III below, which Items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Rule G–14—Reports of Sales or Purchases [1]

No change.

Rule G–14 Transaction Reporting Procedures

(a) Inter-Dealer Transactions

No change.

(b) Customer Transactions

(i) Each broker, dealer and municipal securities dealer shall report to the Board all transactions with customer effected after [January 1, 1998] *March 1, 1998*, except as described in paragraph (iii) of this section (b). A broker, dealer or municipal securities dealer shall report a transaction by submitting or causing to be submitted to the Board, by midnight of trade date, the customer transaction information specified in paragraph (ii) of this section (b) in such format and manner specified in the current *User's Manual for Customer Transaction Reporting.* The broker, dealer or municipal securities dealer shall promptly report cancellation of the trade or corrections to any required data items.

(ii)–(iv) No change.

[1] *Italics* indicate additions; [brackets] indicate deletions.

II. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

In its filing with the Commission, the Board included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The texts of these statements may be examined at the places specified in Item IV below. The board has prepared summaries, set forth in Section A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change changes the effective date for the beginning of the customer transaction phase of the Board's Transaction Reporting Program. The customer transaction phase of the program was filed by the Board and approved by the Commission in 1996, with an effective date for system operations of January 1, 1998. The addition of customer transactions to the existing transaction reporting system for inter-dealer transactions will allow the Board to include customer data in the daily reports of price and volume activity and in the surveillance database that the Board makes available to regulators.[2] The Commission also approved the Board's plan to conduct a mandatory testing program.[3] The testing program is designed to ensure that modifications to dealer computer systems necessary for customer transaction reporting have occurred and that links between dealer systems that submit data and Board computer systems for processing data are coordinated and are operating correctly. The start date for the testing program was set for July 1, 1997.

The proposed rule change consists of two parts: (i) An amendment to the language of Rule G–14 Transaction Reporting Procedures, changing the effective date of dealers' obligations to report data correctly and accurately to the Board's Transaction Reporting Program from January 1, 1998, to March 1, 1998 (the ''operational start date''); and (ii) a notice to the industry that explains, notwithstanding the delay in the operational start date, dealers are responsible under rule G–14 to continue to test their transaction reporting capabilities with the Board prior to the new operational start date. The notice states that, once initial testing protocols have been successfully completed, the testing program requires that dealers continue to submit live test data to the Board. This will allow the Board and dealers to resolve possible problems in reporting of certain types of transactions prior to the operational start date for the system. It also will provide the Board with information about the market that will help the Board to design the daily price and volume reports that will include customer transaction data.

The Board has determined that it is necessary to delay full system operations and to extend the testing period from January 1, 1998 to March 1, 1998, because of technical difficulties encountered in the development of computer systems that will operate the Program. The Board plans to complete computer system design and construction in time to place the Program on an operational basis for trades occurring on or after March 1, 1998. At its February 1998 meeting, the Board plans to review the status of system development and construction. At that time, the Board intends to review test data that has been submitted thus far and to decide how best to structure the daily price and volume reports that will reflect the customer transaction activity that is occurring in the market.

The Board believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which provides that the Board's rules shall:

> Be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The Board believes that the proposed rule change is necessary so that initial operations of the customer transaction reporting phase of the Transaction Reporting Program can begin as soon as possible and so that the Board's production of daily price/volume reports can reflect customer transaction data as soon as possible. The Board believes that the operation of the Transaction Reporting Program, in general, will facilitate the statutory purposes noted above because the Program will provide an additional

[2] A complete description of the program is found in the Board's filing with the Commission on the customer phase of the program and the Commission's Approval Order. See Securities Exchange Act Release No. 37998 (November 29, 1996).

[3] See Rule G–14 Transaction Reporting Procedures, section (b)(iv).

degree of price transparency in the municipal securities market and will provide a surveillance audit trail that may be used by market regulators in furtherance of their regulatory purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Board does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it would apply equally to all brokers, dealers and municipal securities dealers and merely delays the start-up date for a program that previously has been approved by the Commission.

C. Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change is merely a technical correction of rule language, the Board has designated this proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement or an existing Board rule under Section 19(b)(3)(A) of the Act, which renders the proposed rule change effective upon receipt of this filing by the Commission. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR–MSRB–97–18 and should be submitted by January 27, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–159 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39494; File No. SR–NASD–97–97]

Self-Regulatory Organizations; Notice of Filing, Immediate Effectiveness and Designation of Accelerated Operative Date of Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Conforming, Technical Amendments to Certain Rules Relating to Procedures on Grievances Concerning The Automated Systems

December 29, 1997.

Pursuant to Section 19(b)(3)(A) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 24, 1997, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly owned subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Several technical amendments were made to the proposal on the same date.[2] The Association has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (e)(6) of Rule 19b–4 under the Act[3] which renders the proposal effective upon receipt of this filing by the Commission.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Association is filing the proposed rule change to make conforming technical changes to the Rule 9700 Series to substitute the ''Nasdaq Hearing Review Committee,'' whose tenure will terminate next month, with the ''Nasdaq Listing and Hearing Council,'' which will perform similar functions thereafter. These changes are necessary to conform the Rule 9700 Series to the recently approved revisions to the Nasdaq By-Laws that will take effect in January 1998.[5] In addition, the text of new rule 4880 has been revised to reflect recent changes in the review process approved by the Commission at the same time as the by-laws.[6] Finally, for ease of reference, the Rule 9700 Series has been renumbered as the Rule 4800 Series, since the rules contained therein relate to other rules within the Rule 4000 Series. The text of the proposed rule change follows:[7]

* * * * *

Rules of the Association

* * * * *

4000. The Nasdaq Stock Market

* * * * *

[9700] 4800. Procedures on Grievances Concerning the Automated Systems

[9710] 4810. Purpose

The purpose of this Rule [9700] *4800* Series is to provide, where justified, redress for persons aggrieved by the operations of any automated quotation, execution, or communication system owned or operated by the Association, or any subsidiary thereof, and approved by the Commission, not otherwise provided for by *the* [this] Code *of Procedure as set forth in the Rule 9000 Series* or the Uniform Practice Code as set forth in the Rule 11000 Series, and to provide procedures for the handling of qualification matters pursuant to The Nasdaq Stock Market Rules, as set forth in the Rule 4000 Series.

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[1] 15 U.S.C. 78s(b)(3)(a).

[2] Conversation between Arnold Golub, Office of General Counsel, Nasdaq with Mandy Cohen, Division of Market Regulation, Commission (December 24, 1995).

[3] 17 CFR 240.19b–4(e)(6).

[4] The Association has represented that this proposed rule change: (1) Will not significantly affect the protection of investors or the public interest; (ii) will not impose any significant burden on competition, and (iii) will not become operative for 30 days after the date of this filing, unless otherwise accelerated by the Commission. The Association also has provided at least five business days notice to the Commission of its intent to file this proposed rule change, as required by Rule 19b–4(e)(6) under the Act. *Id.*

[5] See Securities Exchange Act Release No. 39326 (November 14, 1997), 62 FR 62385 (November 21, 1997) (File No. SR–NASD–97–71).

[6] See *Id.*

[7] Proposed new language is underline, proposed deletions are in brackets.

[9720] 4820. Form of Application

All applications shall be in writing, and shall specify in reasonable detail the nature of and basis for the redress requested. If the application consists of several allegations, each allegation shall be stated separately. All applications must be signed and shall be directed to [the Association] *Nasdaq.*

[9730] 4830. Request for Hearing

Upon request, the applicant shall be granted a hearing after reasonable notice. In the absence of such request for a hearing, [the Association] *Nasdaq* may, in its discretion, have any application set down for hearing or consider the matter on the basis of the application and supporting documents.

[9740] 4840. Consideration of Applications

All applications shall be considered by a hearing panel designated by the Board of Governors. The applicant shall be entitled to be hear in person and by counsel and to submit any relevant matter. In any such proceeding a record shall be kept.

[9750] 4850. Decision

Decisions on applications shall be in writing and a copy shall be sent by mail to the applicant. The hearing panel may communicate its determination to the applicant prior to the issuance of a written decision, which shall be effective as of the time of such communication. The written decision shall contain the reasons supporting the hearing panel's conclusions.

[9760] 4860. Review by the Nasdaq Listing and Hearing Review [Committee] Council

The decision shall be subject to review by the Nasdaq *Listing and* Hearing Review [Committee] *Council* on its own motion within 45 calendar days after issuance of the written decision. Any such decision shall also be subject to review upon application of any person aggrieved thereby, filed within 15 calendar days after issuance. The institution of a review, whether on application or on the initiative of the Nasdaq *Listing and* Hearing Review [Committee] *Council,* shall not operate as a stay of the decision.

[9770] 4870. Findings of the Nasdaq Listing and Hearing Review [Committee] Council on Review

Upon consideration of the record, and after such further hearings as it shall order, the Nasdaq *Listing and* Hearing Review [Committee] *Council* shall affirm, modify, reverse, dismiss, or remand the decision. The Nasdaq *Listing and* Hearing Review [Committee] *Council* shall set forth specific grounds upon which its determination is based.

[9780] 4880. Discretionary Review by the Board

Determinations of the Nasdaq *Listing and* Hearing Review [Committee] *Council* may be reviewed by the *NASD* Board *of Governors* solely upon the request of one or more Governors *not later than the NASD Board meeting next following the Nasdaq Listing and Hearing Review Council's decision but which is 15 calendar days or more following the decision of the Nasdaq Listing and Hearing Review Council. Notwithstanding the preceding sentence, the NASD Board may determine it is advisable to call for review any decision of the Nasdaq Listing and Hearing Review Council within the 15 calendar day period following the decision of the Nasdaq Listing and Hearing Review Council.* Such review, which may be undertaken solely at the discretion of the Board, shall be in accordance with resolutions of the Board governing the review of Nasdaq *Listing and* Hearing Review [Committee] *Council* determinations. The Board shall affirm, modify or reverse the determinations of the Nasdaq *Listing and* Hearing Review [Committee] *Council* or remand the matter to the Nasdaq *Listing and* Hearing Review [Committee] *Council* with appropriate instructions. The institution of discretionary review by the Board shall not operate as a stay of the decision.

[9790] 4890. Application to Commission for Review

Any decision not appealed under Rule 4860 or called for review under Rule 4860 or Rule 4880 shall become the final action of the Association upon expiration of the time allowed for appeal or call for review. In any case where a person feels aggrieved by any final action of the Association [decision] issued pursuant to Rule [9770] 4870 or Rule [9780] 4880, the person may make application for review to the Commission in accordance with the Act.

* * * * *

In addition to the specific changes set forth above, the following conforming amendments are also necessary to ensure conformance to the corporate governance documents:

- In Rules 4480(e), 4530, 5360, and 9511(a)(3), all references to Rule 9700 Series should be changed to refer to the Rule 4800 Series.
- In Rule 4330(a), the reference to the Rule 9000 Series should be changed to refer to the Rule 4800 Series.
- In Rule 9110(a), the last sentence should be amended to read ''The Rule 9100 Series is of general applicability to all proceedings set forth in Rule 9000 Series, [except the proceedings set forth in the Rule 9700 Series,] unless a Rule specifically provides otherwise.''

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis For, the Proposed Rule Change

In its filing with the Commission, the Association included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Association has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose of the Rule Change

The purpose of the proposed rule change is to technically conform the Rule 9700 Series (as renumbered the Rule 4800 Series), to the recently revised Nasdaq By-Laws that will become effective upon conclusion of the NASD annual meeting in January 1998. The proposed changes are necessary to allow for the expedited and smooth transition from the Association's current corporate structure to the new corporate structure recently approved by the Commission.[8]

To conform the Rule 9700 Series to the Nasdaq By-Laws, as revised, the term ''Nasdaq Hearing Review Committee,'' is being replaced by the term, ''Nasdaq Listing and Hearing Review Council.'' Additionally, the Association is conforming proposed Rule 4880 (currently Rule 9780) to parallel the review process changes recently approved by the Commission at the same time the Nasdaq By-Laws revisions were approved.[9] As revised, proposed Rule 4880 establishes a period of at least 15 calendar days between the date of the decision of the Nasdaq Listing and Hearing Review Council decision and the meeting at which the NASD Board may consider whether to call a decision for review. Relocation to the Rule 4800 Series is proposed because the 9700 Series relates to the

[8] See Release No. 34–39326.

[9] See id.

grievance procedures currently set forth in the Rule 4000 Series. Finally, other conforming changes are being made to correct existing cross references to the Rule 9700 Series to those of the new Rule 4800 Series.

2. Statutory Basis of Rule Change

The Association believes that the proposed rule change is consistent with Section 15A(b)(4) of the Act [10] in that it assures a fair representation of its members in the selection of its directors and administration of its affairs and provides that one or more directors shall be representatives of issuers and investors and not be associated with a member of the Association, a broker, or a dealer.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Association does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has been filed by the Association as a ''non-controversial'' rule change under Rule 19b–4(e)(6).[11] Consequently, the rule change shall become operative 30 days after the date of this filing, or such shorter time as the Commission may designate if the change: (i) Will not significantly affect the protection of investors or the public interest; and (ii) will not impose any significant burden on competition, pursuant to Section 19(b)(3)(A)(iii) of the Act [12] and subparagraph (e)(6) of Rule 19b–4 thereunder.[13] To ensure conformity with the revised Nasdaq By-Laws, however, which are scheduled to become effective at the conclusion of the January 1998 annual meeting of the NASD, the Association requests acceleration of the operative date of the changes contained in this rule filing, so that the revised Rules of the Association and related corporate governance documents will be in force simultaneously.

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

For the reasons stated, and since such action is in the public interest, does not significantly affect the protection of investors or impose any significant burden on competition, and because the changes in this rule filing conform the Rules of the Association to the by-laws recently approved by the Commission (which will become effective at the conclusion of the NASA's annual meeting), the Commission finds good cause to accelerate the operative date of the changes contained herein, and designate such changes to become operative at the conclusion of the annual meeting of the NASD.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by January 27, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–161 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

[10] 15 U.S.C. 78*o*-3(b)(4).

[11] 17 CFR 240.19b–4(e)(6).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(e)(6).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39487; File No. SR–NASD–97–44]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Eligibility of Claims for Arbitration

December 23, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on June 24, 1997,[1] the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Regulation is proposing to amend Rules 10304, 10307 and 10324 of the NASD's Code of Arbitration Procedure (''Code'') to establish that all arbitration claims are eligible unless challenged, and to establish a procedure for challenging the eligibility of claims. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

10304. *Time Limit on Eligibility of Claims for Arbitration; Procedures for Determining Eligibility Under This Rule* [Time Limitation Upon Submission]

This rule describes when a claim must be filed in order to be eligible for arbitration, how and when parties may challenge the eligibility of claims, and the Director's role in determining eligibility.

[No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence

[1] The NASD filed Amendment Nos. 1, 2, 3 and 4 to the proposed rule change on July 15, 1997, July 21, 1997, December 3, 1997, and December 19, 1997, respectively, the substance of which is incorporated into the notice. See letters from to Elliot R. Curzon, Assistant General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Market Regulation, Commission, dated July 14, 1997 (''Amendment No. 1''), July 18, 1997 (''Amendment No. 2''), and December 18, 1997 (''Amendment No. 4''); and letter from Joan C. Conley, Secretary, NASD Regulation, to Katherine A. England, Assistant Director, Market Regulation, Commission, dated December 3, 1997 (and attachments) (''Amendment No. 3'').

or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.]

(a) Claims eligible for arbitration and the Director's role in determining the eligibility of claims.

(1) Any filed claim is eligible for arbitration unless the Director decides it is ineligible. The Director may decide a claim is ineligible only if:

(A) a party that is responding to a claim, the responding party, asks the Director to decide that the claim is ineligible; and

(B) the Director determines that the claim is based on an occurrence or event that took place 6 years or more before the claim was filed.

(2) The 6-year eligibility period in paragraph (a)(1)(B) will be extended only for the length of time that a claim is pending in court. (The eligibility period will not be extended during any period in which a responding party fraudulently concealed facts from the claimant.)

(b) Procedures for challenging eligibility and new time periods for answering and delivering documents.

(1) If a responding party wants the Director to decide whether a claim is ineligible:

(A) a responding party must serve a written request on the Director and all the other parties to the arbitration; and

(B) a responding party must serve the written request no later than 30 days after the responding party was served the Statement of Claim. (Rule 10314(c) explains how to serve a document.)

(2) To oppose the written request, a party must serve a written response on the Director and all the parties. This written response must be served no later than 14 days after the party was served the written request.

(3) The Director will try to determine eligibility issues within 30 days of receiving the written request. The Director will serve the decision on all the parties.

(4) The Director's determination is final. No party to the arbitration may seek review of the determination in any forum, in an action to vacate the arbitration award, or in any other proceeding

(5) If a claimant amends a Statement of Claim filed in arbitration, a responding party may challenge the eligibility of any new claim in the amended Statement of Claim.

(6) The parties do not have to file an answer or any other documents until 45 days after the Director serves the decision on eligibility.

(c) Challenges to eligibility when a claimant files a claim or claims in court.

(1) If a court orders a claim to arbitration at the request of the responding party, then the responding party may not challenge the claim's eligibility in arbitration.

(2) The responding party may challenge the eligibility of a claim in arbitration that a claimant initially filed in court when:

(A) the court orders the claim to arbitration and the responding party did not request the order, or

(B) the claimant moves the claim from court to arbitration without a court order.

(d) Determinations of eligibility and statutes of limitation.

(1) All statutes of limitation or any other time limitations that may apply to a claim are extended from the time a Statement of Claim is filed until 45 days after the Director serves a decision on eligibility or the Association no longer has jurisdiction over a claim, whichever is later. The parties agree that they will not assert a statute of limitations defense in court that is inconsistent with this subparagraph.

(2) The Director's determination that a claim is eligible or ineligible does not determine whether a claim was filed later than the time allowed by a statute of limitations. The parties may still assert to the arbitrators or the court that has jurisdiction over a claim any statute of limitations defense that applies to a claim.

(3) A claimant may pursue a claim in court even if a court or the Director determines the claim is ineligible for arbitration.

(e) Consolidation of eligible and ineligible claims. If the Director decides that one or more of the claims is not eligible for arbitration, a customer claimant may:

(1) pursue all of the claims included in the Statement of Claim in court; or

(2) pursue the eligible claims in arbitration and the ineligible claims in court.

(f) Definitions.

(1) ''Claim''—For purposes of this Rule, the term ''claim'' means any dispute or controversy described in a Statement of Claim, including Counter-claims, Cross-claims, and Third-party claims, for which the claimant is seeking any form of relief, damages or other remedy.

(2) ''Occurrence or event''—For purposes of this Rule, the term ''occurrence or event'' means:

(A) the date of the transaction upon which the claim is based; or,

(B) if the claim does not arise from a transaction, the date of the occurrence of the act or omission upon which the claim is based.

* * * * *

10307. *Reserved.* [Tolling of Time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration]

[(a) Where permitted by applicable law, the time limitations which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the Association shall retain jurisdiction upon the matter submitted.]

[(b) The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such period as the court shall retain jurisdiction upon the matter submitted.]

* * * * *

10324. Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings

[The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.] *The arbitrators may interpret and apply the provisions of this Code and take appropriate action to obtain compliance with any ruling that they make, except as provided in other provisions of this Code. The interpretations and actions of the arbitrators to obtain compliance shall be final and binding upon the parties.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Purpose

Background

Origins of the Eligiblilyt Rule. A time limitation on matters eligible for arbitration has existed in the Code since it was first adopted in 1968. Originally set at two (2) years, the time limit had been extended to six years by the time the Rule was added to the original Uniform Code of Arbitration developed by the Securities Industry Conference on Arbitration (''SICA'') in 1978. Currently, Rule 10304 of the Code provides, ''No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.''

The original purpose of the rule was to prevent aged claims from being litigated in arbitration. The six-year time limitation was consistent with the SEC's books and records rule, SEC Rule 17a–4, which required certain significant broker/dealer records to be retained for no more than six years, and members may have believed that they would be disadvantaged if forced to arbitrate claims if records were not available. Moreover, the securities industry believed that the inherently equitable nature of arbitration posed a greater risk that arbitrators might not strictly apply legal defenses such as statutes of limitation, thereby permitting a customer (investor) to recover in a case that would have been dismissed had it been brought in court.

Resolving Eligibility Issues. Until about seven or eight years ago, relatively few cases called for the application of the eligibility rule; however, as public investor claims relating to limited partnerships increased in the late 1980s, with many filed more than six years after the public investor's original purchase, member firm respondents employed the eligibility limitation of Rule 10304 to avoid arbitrating those claims.

Member firms's efforts to defeat claims in arbitration on eligibility grounds have had mixed success because arbitrators tend to delay eligibility decisions until the hearing on the merits. Member firms have had greater success when they have taken eligibility issues to the courts in the form of actions to enjoin the arbitration of a claim as ineligible, particularly because courts have not applied the equitable tolling doctrine [2] to eligibility decisions. The success has been augmented by an increasing number of courts that have decided that a predispute arbitration agreement amounts to an election of remedies barring the claim from being heard in court, when it is ineligible for arbitration.[3]

As a result, eligibility issues have become the subject of intense and contentious litigation, both in court and in arbitration, and member firms and customers (investors) often view the resolution of an eligibility dispute as the major strategic issue of a case. If a claim is found to be ineligible for arbitration, it may be either too costly or difficult for the customer (investor) to pursue in court, or it may be more susceptible to a statute of limitations defense in court. The customer (investor) may settle the case for an amount the customer (investor) believes is less than what could have been recovered in arbitration in order to avoid the expense of court litigation or the risk of losing the case. If the case is found to be eligible, the member firm may be more likely to settle because it believes that the equitable nature of arbitration renders one of its most valuable procedural defenses—statutes of limitation—less reliable and increases the risk of an adverse award.

Tactical maneuvering on the eligibility issue also resulted because the courts, the Director of Arbitration (''Director''), and the arbitrators, all have asserted jurisdiction over eligibility issues, or directed the issue to another forum. Parties attempt to gain an advantage by filing a claim or a motion in the forum they believe will produce a favorable ruling. The result is significant confusion about who should decide eligibility issues. Some courts have held that eligibility was for the courts to decide; others have held that the arbitrators could decide the issue.[4] In some cases, the courts have declined to decide the issue if the claim was clearly less than six years old and, instead, deferred to the decision of the Director or the arbitrators.

Until recently, the Director would examine arbitration claims to determine if they were eligible.[5] If the Director rejected a claim as clearly ineligible, the customer (investor) could ask a court to compel arbitration or attempt to litigate the claim in court. If the director determined that the claim was clearly eligible, the member firm could ask the arbitrators to reexamine the issue. If the arbitrators dismissed the claim as ineligible, the customer (investor) could ask a court to compel arbitration or attempt to litigate the claim in court.

Moreover, some courts, arbitrators, and the Director permitted certain claims to be arbitrated even though they appeared to be based on events more than six years old under a theory akin to equitable tolling. Other courts, some arbitrators, and, several years ago, the Director, applied a ''bright line'' transaction date test holding that the date of the transaction was determinative of the eligibility of a claim and that the limit could not be

[2] Equitable tolling based on fraudulent concealment is a legal doctrine that permits a plaintiff to pursue a claim after a time limitation for filing the claim has run out. Under the doctrine, when it appears that a defendant intentionally hid (fraudulently concealed) certain facts that would have alerted the plaintiff to the existence of a legal claim for damages, a court or arbitrator may determine that, in the interests of equity and fairness, the running of a time limitation for the filing of a claim should be tolled (stopped) during the time period when the facts were concealed.

[3] Some recent court rulings have held that if a claim submitted to arbitration under a predispute agreement to arbitrate is ineligible for arbitration, the claim may not be litigated in court because the customer (investor) had elected arbitration as the sole remedy. See *Calabria* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 855 F. Supp. 172 (N.D. Tex. 1994); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Shelapinsky,* No. 93–1553 (E.D. Pa. Mar. 16, 1994); *Piccolo* v. *Faragalli,* 1993 WL 331933 (E.D. Pa. Aug. 24, 1993); and, *Castellano* v. *Prudential-Bache Securities, Inc.,* 1990 WL 87575 (S.D.N.Y. June 19, 1990). Other courts have held there is no election of remedies. See *Smith Barney, Harris Upham & Co.* v. *St. Pierre,* 1994 WL 11600 (N.D. Ill., Jan. 4, 1994); *Prudential Securities* v. *LaPlant,* 829 F. Supp. 1239 (D. Kan. 1993).

[4] The rationale for holding that eligibility is for the courts to decide, and not the arbitrators, is that the arbitrators only have jurisdiction to hear claims the parties have agreed to submit to arbitration and that it is for the courts to determine what the parties have agreed to arbitrate. *See, e.g., Cogswell, Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 78 F.3d 474 (10th Cir. 1996); *Edward D. Jones & Co.* v. *Sorrells,* 957 F.2d 509, 514 (7th Cir. 1992). Other courts have held, however, that the parties may agree to permit the arbitrator to determine if a case is arbitrable. *See PaineWebber Incorporated* v. *Elahi,* 87 F.3d 589 (1st Cir. 1996); *Smith Barney Shearson, Inc.* v. *Boone,* 47 F.3d 750 (5th Cir. 1995).

The Supreme Court's recent decisions in *Mastrobuono* v. *Shearson Lehman Hutton,* 514 U.S. 52, 131 L.Ed.2d 76, 115 S.Ct. 1652 (1996), and *First Options of Chicago, Inc.* v. *Kaplan,* 514 U.S. 938, 131, L.Ed.2d 985, 115 S.Ct. 1920 (1995), among others, favoring arbitration and giving full effect to agreements to arbitrate, suggest that the Supreme Court would resolve the split between the circuits by affirming agreements that give decisionmakers other than the courts (e.g., the Director or the arbitrators) the power to decide eligibility issues.

[5] In October 1996, NASD Regulation filed SR–NASD–96–47 with the SEC setting forth its revised policy that, effective August 1, 1996, the staff of the Office of Dispute Resolution would no longer make preliminary eligibility determinations and, instead, would refer eligibility issues to the arbitrators. The SEC published the proposed rule change for comment in the **Federal Register**. NASD Regulation responded to the comments received by the SEC in a letter from John M. Ramsay to Katherine A. England dated July 1, 1997.

tolled.[6] In the last few years (until August 1996, when NASD Regulation's Office of Dispute Resolution (''Office'') changed the procedure for deciding eligibility issues and sent them to the arbitrators for eligibility determinations) the Office has declined the apply equitable theories tolling as a basis for finding a claim eligible for arbitration and, instead, has required the basis of a claim for relief to be a transaction or an act that occurred within six years of the filing of the claim.

Arbitration Policy Task Force Recommendations. In January 1996, the NASD's Arbitration Policy Task Force (''Task Force'') released its report on Securities Arbitration Reform. The Task Force's report identified eligibility disputes as one of the most important areas for reforming the arbitration process. The Task Force noted that: (1) The eligibility rule has resulted in frequent court litigation; (2) the eligibility rule, as presently written and applied, creates great uncertainty as to who is to decide eligibility and what the triggering event should be; (3) when the bright line transaction date test is not applied, fact intensive inquiry and discovery may be required to determine whether the claim is eligible for arbitration; and (4) the eligibility rule creates the potential for a bifurcated process. In considering its recommendations for resolving the problems with the eligibility rule, the Task Force was confronted with an apparently unbridgeable split of opinion. Customers (investors) want to eliminate the eligibility rule entirely; member firms want to keep the rule and apply it with a bright line test and no equitable tolling.[7]

From the standpoint of some, the rule is viewed as a burdensome, unfair impediment preventing customers (investors) from obtaining a hearing on their claims. The costs and delays involved in resolving eligibility disputes affect the ability of customers (investors) to receive complete recovery on their claims. Under some circumstances, customers (investors) are discouraged or prevented from seeking recovery for their claims because the costs and delays of litigating eligibility claims approach or exceed the value of their claims. Moreover, customers (investors) question the fairness of being forced into arbitration under a predispute agreement that they are required to sign as a condition of opening a securities account[8] and then being forced to litigate the eligibility of their claim. This circumstance appears especially unfair to customers (investors) who find themselves out of arbitration, but also barred from court under the election of remedies doctrine.

One byproduct of eligibility decisions is that if one of several claims filed in arbitration is found to be ineligible, the customer (investor) would be forced to litigate the ineligible claim in court and pursue arbitration of the remaining claims. The cost of litigating claims in two forums may preclude the customer (investor) from pursuing some of the claims. Indeed, the customer (investor) may find that it is uneconomical to pursue any of the claims if some must be litigated in arbitration and others litigated in court.

Some member firms argue that the original reason for the rule still prevails; members should not be forced to arbitrate claims if the records relating to the claim may no longer exist because the SEC's rules do not require them to keep the records. In addition, some argue that with the increasing mobility of associated persons in the securities industry, the individuals responsible for the actions alleged by customers (investors) often are no longer employed by the respondent member firm if the claim is filed many years later, making obtaining witnesses and information in aid of the defense increasingly difficult as time passes. Member firms also argue that arbitrators are not strictly bound to apply statutes of limitation[9] and, therefore, often allow customers (investors) to assert and recover for claims that would be barred if brought in court. Finally, respondents argue that the resulting uncertainty about arbitrator application of statutes of limitation makes analyzing the risks of litigating a claim much more difficult and makes decisions about disposing of records much riskier.

Consideration of Task Force Recommendations by NASD Regulation. NASD Regulation, through its National Arbitration and Mediation Committee, and in consultation with SICA, considered the Task Force's recommendations at length. NASD Regulation initially developed proposed rule changes designed to give effect to the Task Force's recommendations and consulted with SICA, the Public Investors Arbitration Bar Association (''PIABA''), the Securities Industry Association (''SIA''), the staff of the SEC, and others about the efficacy of the proposals.[10]

The Task Force recommended suspending the eligibility rule for three years as a pilot and, ultimately, repealing it. The Task Force also proposed adopting procedures to ensure that statute of limitations issues would be resolved early in a case and directing the arbitrators to resolve statute of limitations issues based on applicable law. Finally, the Task Force recommended prohibiting parties from litigating procedural arbitrability issues in court until after an award was rendered. The recommendations generated significant opposition.

First, customers (investors) objected that if the rule was reinstated after three years, customers (investors) who filed their claims after the rule was reinstated might have their claims dismissed as ineligible while those who filed identical claims before the change would not. Customers (investors) also argued that it was unfair to repeal the eligibility rule only temporarily while permanently adopting a rule capping punitive damages.[11] Member firms argued that repealing the rule either temporarily or permanently would eventually expose them to very old claims and they would be unable to predict or manage the risks of such claims.

[6] Under either standard, if there were a close question or if the facts about the eligibility of a claim were unclear, the Director would refer the decision to the arbitrators.

[7] The Task Force's specific recommendations were to: (1) Suspend the eligibility rule for three years (and repeal the rule if the pilot were successful) and adopt procedures to ensure that statute of limitations issues would be resolved early in a case; (2) suspend and repeal the rule prospectively only so that the eligibility of claims older than six years old at the time the suspension took effect would still be resolved under the old rule; (3) direct the arbitrators to resolve statute of limitations issues based on applicable law and train arbitrators to do so; and (4) prohibit parties from litigating procedural arbitrability issues in court until after an award is rendered.

[8] Not all member firms include predispute arbitration clauses in their new account agreements; however, such clauses are the industry norm.

[9] If the arbitrators err or refuse to apply a statute of limitation in the same manner as would a court, it is extremely difficult for respondents to overturn the decision because the standard of review for an arbitration award is much more limited than the standard of review on appeal from a court decision.

[10] As a member of SICA, NASD Regulation participated in considering several proposals to amend the eligibility rule advanced by other members of SICA. One proposed eligibility rule was adopted by SICA; however, upon further review, NASD Regulation became concerned about a number of unresolved issues and determined not to adopt the SICA rule language. Nevertheless, NASD Regulation has considered the concerns of SICA and its members in developing its proposed rule. While SICA has not adopted NASD Regulation's proposed rule, and some SICA members have indicated they are not in favor of the proposed rule, NASD Regulation believes that the proposed rule adequately addresses the issues raised by SICA and others.

[11] The Task Force recommended adopting a rule permitting punitive damages with a cap, but did not recommend a pilot period for the punitive damages rule.

Second, customers (investors) and member firms believed that adopting a prehearing procedure for resolving statute of limitation issues would add unnecessary burdens and delays, and would aggravate the current trend toward formalization of arbitration proceedings. They also argued that requiring arbitrators to resolve statue of limitations issues on the basis of applicable law would create a contractual limitation on the authority of the arbitrator to decide these issues and make it easier to overturn an arbitration award, because the losing party would have to show only that the arbitrator exceeded the contractual limitation by failing to apply the law rigorously. The usual, more onerous, standard of review that would apply in the absence of a contractual limitation established in the rule would be that the arbitrators so imperfectly exercised their powers by manifestly disregarding the law that a valid award was not rendered.[12]

Finally, some customers (investors) argued that permitting eligibility decisions to be reviewed after an award undermines certainty and finality of arbitration awards. Member firms argued that prohibiting review of eligibility decisions until after an award would cause both sides to expend resources litigating a claim that might ultimately be dismissed. Both customers (investors) and member firms agreed that eligibility decisions should occur early in a case and should be final, but member firms wanted the decisions to be immediately reviewable in court.

As a result of these concerns, NASD Regulation ultimately determined not to adopt the Task Force's recommendations concerning the eligibility rule. NASD Regulation concluded that repealing the rule could create more problems for both customers (investors) and member firms than were solved and that the original purpose for the rule remained valid. Also, the Task Force's recommendations, in the opinion of some, would ultimately work as a greater disadvantage to public investor claimants than to members and associated persons. Consequently, the proposed amendments reestablish the gatekeeping function and eliminate the aspects of the current rule that may be unfair to public investors.

In addition, NASD Regulation believes that the proposed rule addresses the concerns of customers (investors) and enhances the hallmarks of arbitration as an efficient, cost-effective, fair method of resolving disputes. Under the proposed rule, customers (investors) will be assured that their claims will be heard either in court or in arbitration, and that they will not be subjected to repeated, costly, time-consuming, and indeterminate battles over the eligibility of their claim for arbitration. First, by presuming that all filed claims are eligible for arbitration, the proposed rule eliminates the need for customers (investors) to fight their way in to arbitration if that is where they want to have their claims adjudicated. Second, by providing that the Director is the sole and final arbiter of eligibility issues, the parties will know in advance that they will not be engaged in a lengthy, indeterminate, multi-forum fight. Finally, by preventing the potentially costly and involuntary bifurcation of eligible and ineligible claims, the proposed rule will provide customers (investors) with a single forum (either court or arbitration) for the resolution of their disputes. Accordingly, NASD Regulation is proposing to amend the eligibility rule to provide a clear, quick, and final mechanism to resolve eligibility issues, prevent bifurcation of claims, and permit customers (investors) to pursue ineligible claims in court (and in arbitration under some circumstances).

Description of Proposed Rule

The proposed rule, which applies to all claims (public investor-member and intra-industry) filed in arbitration, the provisions of which are described in more detail below, would:

(1) Retain the current six-year eligibility rule but establish that all filed claims are eligible unless successfully challenged; (2) establish a bright line transaction date test for eligibility (i.e., it would preclude the application of the equitable tolling doctrine) and permit separate claims for non-transaction-based occurrences; (3) give investor claimants the option, in the face of a successful eligibility challenge, to consolidate their ineligible and eligible claims in court to avoid bifurcation; and (4) establish that an ineligible claim is not barred from court under the election of remedies doctrine. In the same manner that other provisions of the Code supersede the terms of a predispute arbitration agreement,[13] the proposed changes to Rule 10304 will supersede provisions in any existing or future arbitration agreements between members and others on issues relating to eligibility and statutes of limitations.

The proposed rule has been drafted using the ''plain English'' principles of written communication that the Commission has encouraged. NASD Regulation believes the proposed rule will be easier for all arbitration participants to understand, most notably participants who represent themselves (*pro se* parties). Unlike the NASD's Conduct Rules, which are mainly referred to and applied by member firms, their compliance offices, and their attorneys, the Code of Arbitration Procedure is often used by *pro se* parties who are not attorneys and who by seeking arbitration are usually coming into contact with the dispute resolution process for the first time.[14] In such circumstances, plain English rules are particularly important.

Eligibility Determinations. Paragraph (a)(1) provides that a claim filed with NASD Regulation's Office of Dispute Resolution (''Office'') is eligible for submission to arbitration unless the Director determines that the claim is ineligible. A determination by the Director can occur only if a respondent challenges a claim as ineligible, triggering the Director's action. The Director cannot act in the absence of a challenge. Moreover, in the absence of a challenge, and in contrast to the current rule, the proposed rule does not operate in any manner to preclude the arbitration of a claim. Thus, the rule fundamentally alters the legal effect and procedure surrounding eligibility by changing it from a substantive jurisdictional time limitation on the dispute that could be arbitrated to a presumption that all claims are eligible. The proposed rule establishes that all claims are eligible for arbitration unless the Director decides otherwise and it removes the courts and the arbitrators from any role in determining the eligibility of a claim.[15] Consequently, the proposed rule will eliminate much of the delay and uncertainty that has surrounded the resolution of eligibility issues.

Bright Line Standard for Eligibility Determination. Once a responding party has requested an eligibility determination, the Director, to decide that a claim is ineligible under paragraph (a)(1)(B) of the proposed rule, must find that the claim is based on an occurrence or event that took place more than six years before the claim was filed. The term ''occurrence or event'' is

[12] See Federal Arbitration Act, 9 U.S.C. 10(d).

[13] See Rule 3110(f) of the NASD's Conduct Rules.

[14] NASD Regulation estimates that as many as one-third of all claims filed involve a *pro se* party. See Securities Arbitration Commentator, Vol. VIII, No. 9 (February 1997). The number of *pro se* parties is much higher for smaller claims; more than three-quarters of claims involving $10,000 or less involved *pro se* claimants. *Id.*

[15] NASD Regulation is also proposing to amend Rule 10324 of the Code to clarify that the arbitrators have no power to decide eligibility issues under the proposed amendments to Rule 10304.

defined in paragraph (f)(2) of the proposed rule to mean either the transaction date or, if no transaction is involved, the date of the act or occurrence which is the subject of the claim. This provision and the definition are intended to establish that the six-year limitation in the proposed rule is a ''bright line.''

Further, under paragraph (a)(2), the six-year limitation period cannot be extended or ''tolled'' even if the claimant alleges that the respondent fraudulently concealed the facts that would have alerted the claimant to the existence of a claim. For example, if the customer's claim is for losses from the purchase of a limited partnership from a member in 1987, the claim will be ineligible for arbitration even if the member continued to send account statements to the claimant that showed the investment to be worth more than that current market value. If, however, the customer's claim is for losses suffered from the misrepresentations contained in the account statements sent less than six years before the claim was filed, the claim would be eligible for arbitration.

If the claim is based on an act or occurrence other than a transaction, the six-year period will run from the date of the act or occurrence. This point can be illustrated with the above-described example, assuming the following facts: (1) The claimant asked the member about the value of the limited partnership in 1992; (2) the member misrepresented the value to the claimant; (3) the claimant alleges that the misrepresentation caused the claimant not to sell the security; and (4) the claimant asks for damages for the difference between what the member represented as the actual value of the security at the time and the value at the time the claim is filed. A claim under these facts would be based on the misrepresentation made in 1992, not the original purchase in 1987, and thus would be eligible for arbitration.

While fraudulent concealment will not extend the eligibility period, proposed paragraph (a)(2) provides that if the claimant files a claim in court that is eventually moved to arbitration, either voluntarily or by court order, the six-year period will be tolled for as long as the claim remains in court. For example, if the claimant files a claim in court five years and eleven months after the claim arose and the court ordered the claim to arbitration six months later, the claim will be eligible for arbitration.

Procedure for Challenging Eligibility. Under paragraph (b) of the proposed rule, a respondent (called a ''responding party'' in the proposed rule) who wants to challenge the eligibility of a claim must serve a request on the Director and all the other parties no later than thirty calendar days after receiving the Statement of Claim. A claimant who wants to oppose the respondent's request must serve a response on the Director and all other parties no later than fourteen days after receiving the respondent's request. The Director will attempt to determine the eligibility of the claim within thirty days after receiving the respondent's request.

This requirement is intended to force eligibility issues to be raised, responded to, and decided early in a proceeding. Because of an early eligibility determination, parties will know early in the process whether a claim is eligible and will be able to decide where and how to litigate their claims, pursuant to the options provided by other provisions of the proposed rule.

If a claimant amends a Statement of Claim, under paragraph (b)(5) a respondent may challenge the eligibility of any new claim. This provision is intended to prevent respondents from being foreclosed from challenging a new claim after the time to challenge the initial claim has expired. Under this provision, if a claimant adds a new transaction to the claim, the respondent will have the opportunity to challenge the eligibility of the new claim. For example, if a claimant alleges that the respondent misrepresented certain facts to the claimant related to the sale of security A and purchase of security B five years before the claim was filed, that claim would be eligible. But if the claimant then amended the Statement of Claim to ask for damages relating to the original purchase of security A ten years before the claim was filed, the respondent could challenge the eligibility of that claim insofar as it is related to the purchase. This provision is not intended, however, to prevent or discourage a claimant from including or adding facts to the Statement of Claim that relate to events more than six years before the claim was filed if the facts are relevant to the claim. Because eligibility determinations belong exclusively to the Director under the proposed rule, any decision about what constitutes a new claim will necessarily be a part of that decision and also will belong exclusively to the Director.

Paragraph (b)(6) also provides that the parties need not file an answer or other documents that may be required by the Code until forty-five days after the Director serves an eligibility decision. This provision delays the start of the proceedings until decisions about the eligibility of a claim are made, and permits the parties sufficient time to consider how to proceed according to the various options provided by the proposed rule.

Finality of Director's Decision. Paragraph (b)(4) of the proposed rule provides that the Director's determination of eligibility issues is final and that the parties are prohibited from seeking review of the decision in any forum, in any action to vacate the arbitration award, or in any other proceeding. This provision is intended to establish conclusively that eligibility issues are gatekeeping issues only, internal to the Association's forum, and not a jurisdictional matter that would prevent arbitration of a claim. Providing finality on eligibility decisions early in the process will substantially reduce the expense, time, and uncertainty currently associated with eligibility determinations. Under this provision, parties cannot ask the arbitrators to revisit the Director's eligibility decision; nor can they ask to court to overturn it, either immediately or after the award. Thus, the current practice of seeking an injunction or writ of mandate to prevent or force the arbitration of an eligible or ineligible claim will be prohibited. Likewise, neither customers (investors) nor member firms may ask a court, in an action subsequent to an award, to reconsider the Director's eligibility decision.

NASD Regulation also is considering amending its rules (Rule 10106 and IM–10100 of the Code) to clarify its authority to discipline members and associated persons who attempt to seek review of eligibility decision. Under the plan being considered, if a member or associated person raises an eligibility issue in a motion to vacate an award or in an action to compel or bar an arbitration proceeding (or with the arbitrators, even though such an action is precluded by this rule), such persons may be subject to disciplinary action. While NASD Regulation does not have jurisdiction over non-members, members and associated persons should be able to use the plain language of the rule and any descriptive provisions contained herein to oppose any attempt by non-member parties to litigate eligibility rules.

Bifurcation. In considering how to draft a rule that would retain the six-year eligibility period yet permit parties to litigate ineligible claims in court, many participants in the drafting process became concerned that the eligible and ineligible claims of public investors might be bifurcated between arbitration and court. As noted above, the cost of litigating claims in two forums may preclude customers (investors) from pursuing some or all of

their claims in either forum. Accordingly, the proposed rule will not require customers (investors) to bifurcate their ineligible and eligible claims in different forums. If the Director determines that some of a customer's (investor's) claims are ineligible, paragraph (e) of the proposed rule gives the customer (investor) the option either to pursue the eligible claims in arbitration and the ineligible claims in court, thereby permitting customers (investors) to voluntarily bifurcate the claims,[16] or to consolidate all of the claims in court.

NASD Regulation is also concerned that if a customer (investor) files an action in court, members may attempt to bifurcate claims by selectively compelling only some of the claims to arbitration. In order to prevent such actions, NASD Regulation will be amending Rule 3110(f) to, among other things, require predispute arbitration agreements to include a provision prohibiting members from seeking to compel only some of a customer's court-filed claims.[17]

In addition, NASD Regulation is aware that some members may view the proposed rule change as limiting their ability to defend against a customer's court-filed action. Accordingly, NASD Regulation notes that it will not be a violation of this proposed rule if a member asks a court to dismiss some of a customer's court-filed claims on statute of limitations grounds prior to asking the court to compel arbitration. NASD Regulation believes that permitting members to seek such dismissals is consistent with the goal of judicial economy. There is no reason to force a member to seek to compel arbitration of a claim that could otherwise be dismissed by the court upon the application of the appropriate statute of limitation.

Paragraph (c) of the proposed rule provides that if the member firm asks that court to compel the arbitration of the claims, the member firm will be barred from challenging the eligibility of those claims once they reach arbitration. However, if the customer (investor) moves the claims to arbitration either by voluntarily withdrawing them and refiling in arbitration or by asking the court to order the claims to arbitration, or the court on its own motion orders the claims to arbitration, the member firm may challenge the eligibility of the claims once they reach arbitration.

The intended effect of these provisions is to give the customer (investor) control over whether claims are bifurcated. Member firms will be required to choose whether to challenge the eligibility of a claim in arbitration, recognizing that they may be forced to litigate eligible claims in court as a result of their challenge. Similarly, if a customer (investor) files an action in court first, member firms, in deciding whether to compel arbitration, will have to choose whether they want to litigate all of the claims in court or all of the claims in arbitration. If they choose to compel arbitration, they must seek to compel arbitration of all of the customers' (investors') claims, including claims that may be ineligible, and they will be precluded from challenging the eligibility of the claims once they reach arbitration.

Statutes of Limitation Defenses. Paragraph (d) of the proposed rule tolls any applicable statutes of limitation from the time the claim is filed in arbitration until forty-five days after the Director serves a decision on eligibility. For example, if the statute of limitations on a particular case would have run out the day after a claim was filed in arbitration, the statute will be tolled from the time the claim is filed. If the claim is eligible for arbitration and remains in arbitration, there is no statute of limitations defense because the claim was filed in time. If, however, the Director decides the claim is ineligible, the customer (investor) has forty-five days after the decision is served to refile the claim in court before the statute of limitations begins to run again.

In addition, the proposed rule provides that ''the parties agree that they will not assert a statute of limitations defense that is inconsistent with [the tolling provision].'' While NASD Regulation believes that all of the provisions of the Code are part of the ''agreement to arbitrate'' between the parties, it is especially important to preserve statute of limitation defenses for parties who are subject to the procedures specified in this rule. Therefore, the provision has been phrased as an express agreement between the parties and precludes the parties from asserting the defense in a manner that is inconsistent with the tolling provisions of this rule. NASD Regulation would regard a violation of this provision to be a violation of Rule 2110 of the NASD's Conduct Rules because it would violate and express agreement between the parties and, therefore, would be inconsistent with high standards of commercial honor and just and equitable principles of trade.

Finally, paragraph (d) provides that an eligibility decision does not affect the application of a statute of limitations to a claim. This provision is intended to establish clearly the difference between eligibility and statutes of limitation, a distinction that has occasionally been overlooked by courts, arbitrators, and other participants. Thus, even if a claim is found to be eligible for arbitration after a challenge under the proposed rule (i.e., it was filed less than six years after the transaction), it may have been filed after an applicable statute of limitations have expired (e.g., it was filed more than three years after the transaction and, therefore, too late under the absolute three-year limitation on claims under Section 10(b) of the Securities Exchange Act of 1934). Therefore, the arbitrators could dismiss the claim. Similarly, if a claim is found to be ineligible for arbitration and then is filed in court, it may have been filed in court within the time required by the applicable statute of limitations.

Election of remedies. As noted in the background discussion above, some courts have held under the current rule that, if a claim is ineligible for arbitration, the customer (investor) may not pursue the claim in court. The rationale for these decisions is that, by agreeing to arbitration, customers (investors) have ''elected'' arbitration as their sole remedy for resolving their disputes. NASD Regulation believes that this result may be unfair to public investors particularly because they often are required to arbitrate through predispute agreements in account opening documents. Paragraph (d) of the proposed rule provides that a customer (investor) may pursue a claim in court even if the Director or a court decides the claim is not eligible for arbitration, thereby eliminating the effect of the election of remedies doctrine.

Elimination of Other Tolling Provisions. Finally, NASD Regulation is proposing to repeal Rule 10307 to eliminate the tolling provisions contained therein. The tolling provisions in Rule 10307 are now contained in provisions of the amendments to Rule 10304.

NASD Regulations notes, however, that users of the arbitration forum should be aware that, with the elimination of Rule 10307(a), the filing of an executed Submission Agreement will no longer be sufficient to toll a statute of limitations. Under the proposed amendments to Rule 10304,

[16] Paragraph (d)(2) does not force a customer (investor) to litigate ineligible claims in court if the customer (investor) determines to arbitrate eligible claims. Rather, the customer (investor) could choose to abandon any ineligible claims.

[17] As noted in part 6 of this rule filing, the amendments to Rule 10304 proposed herein will not take effect until the SEC approves yet-to-be-filed amendments to Rule 3110 (f) of the NASD's Conduct Rules governing the provisions of predispute arbitration agreements.

only the filing of a Statement of Claim will toll a statute of limitations.

Effectiveness of Proposed Rule Change. NASD Regulation plans to make the proposed rule change effective thirty days after SEC approval.[18]

2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act[19] because it will eliminate many of the substantive and procedural issues that have cause eligibility issues to interfere with the fair, efficient, and cost effective resolution of disputes, and will improve the arbitration process for the benefit of public investors, broker/dealer members, and associated person who are the user of the process.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents,[20] the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–97–44 and should be submitted by January 27, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–162 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

[18] NASD Regulation consents to an extension of the time periods specified in Section (19)(b)(2) of the Act until the SEC is prepared to approve NASD Regulation's yet-to-be-filed rule filing proposing to amend Rule 3310(f) to revise the requirements for customer predispute arbitration agreements used by members. NASD Regulation intends to amend the rules governing customer predispute arbitration agreements to give effect to the eligibility rule proposed herein and the punitive damages rule proposed in SR–NASD–97–47. The purpose of the extension is to permit the SEC to act simultaneously on this rule filing, the yet-to-be-filed rule filing proposing to amend Rule 3310(f), and the punitive damages rule proposed in SR–NASD–97–47.

[19] U.S.C. 78*o*–3.

[20] See *supra* note 18.

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings, Agreements filed during the week of December 26, 1997

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. Section 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: OST—97—3281.

Date Filed: December 23, 1997.

Parties: Members of the International Air Transport Association.

Subject: PTC23/123 Telex Mail Vote 903, Australia-Europe excursion fares r1–071II r2–071oo. Intended effective date: January 15, 1998.

Docket Number: OST—97—3282.

Date Filed: December 23, 1997.

Parties: Members of the International Air Transport Association.

Subject: PTC COMP 0201 (Report) dated December 19, 1997, PTC COMP Fares 0114 dated December 19, l997, Resolution 015n—US-TC12/123 Add-on Amounts, (US-Europe (except UK), Africa, Middle East, TC3). Intended effective date: April 1, 1998.

Carol Kelley,

Documentary Services.

[FR Doc. 98–163 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Notice of Application for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending December 26, 1997

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–97–3275.

Date Filed: December 22, 1997.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 20, 1998.

Description: Application of Harlequin Air Corporation, pursuant to 49 U.S.C. 40102 and Subpart Q of the Regulations, for issuance of a Foreign Air Carrier permit to engage in charter foreign air transportation of persons, property and mail between points in Japan and points in the United States.

Docket Number: OST–97–3274.

Date Filed: December 22, 1997.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 20, 1998.

Description: Application of Britannia Airways, GmbH pursuant to 49 U.S.C. 41301 and Subpart Q of the Regulations to engage in charter foreign air carrier transportation of persons and their accompanying baggage, and property between a point or points in the Federal Republic of Germany and a point or points in the United States.

Carol Kelley,

Documentary Services.

[FR Doc. 98–164 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD08–97–48]

Houston/Galveston Navigation Safety Advisory Committee Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of meetings.

SUMMARY: The Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC) and its two Subcommittees (Waterways and Navigation) will meet to discuss waterway improvements, aids to navigation, current meters, and various other navigation safety matters affecting the Houston/Galveston area. All meetings will be open to the public.

DATES: The meeting of HOGANSAC will be held on Thursday, January 29, 1998 from 9 a.m. to approximately 1 p.m. The meeting of the Waterways Subcommittee will be held on Thursday, January 8, 1998 at 9:30 a.m. and immediately following, the Navigation Subcommittee will meet. Members of the public may present written or oral statements at the meetings.

ADDRESSES: The HOGANSAC meeting will be held in the conference room of the Houston Pilots Office, 8150 South Loop East, Houston, Texas. The subcommittee meetings will be held at the Coast Guard Group Galveston Blackthorn Room, 3000 Fort Point Road, Galveston, Texas. For directions, please contact Commander Carroll at the number below.

FOR FURTHER INFORMATION CONTACT: Captain Kevin Eldridge, Executive Director of HOGANSAC, telephone (713) 671–5199, or Commander Paula Carroll, Executive Secretary of HOGANSAC, telephone (713) 671–5164.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agendas of the Meetings

Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC). The tentative agenda includes the following:

(1) Opening remarks by the Executive Director (CAPT Eldridge) and chairman (Tim Leitzel).

(2) Approval of the November 19, 1997 minutes.

(3) Report from the Waterways Subcommittee.

(4) Report from the Navigation Subcommittee.

(5) ''State of the Waterway'' report by VTS Houston/Galveston.

(6) Status reports on Bayport Tunnel removal, Army Corps of Engineers' dredging projects, HL&P transmission tower protection, and comments and discussions from the floor.

Subcommittee on Waterways. The tentative agenda includes the following:

(1) Presentation by each work group of its accomplishments and plans for the future.

(2) Review and discussion the work completed by each work group.

Subcommittee on Navigation. The tentative agenda includes the following:

(1) Presentation by each work group of its accomplishments and plans for the future.

(2) Review and discuss the work completed by each work group.

Procedural

All meetings are open to the public. Members of the public may make oral presentations during the meetings.

Information on Services for the Handicapped

For information on facilities or services for the handicapped or to request special assistance at the meetings, contact the Executive Director at the number listed under **FOR FURTHER INFORMATION** above as soon as possible.

Dated: December 12, 1997.

T.W. Josiah,

Rear Admiral, United States Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 98–191 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent to Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Reno/Tahoe International Airport, Reno, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Reno/Tahoe International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before February 5, 1998.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261, or San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Robert C. White, Executive Director, Airport Authority of Washoe County at the following address: 2001 East Plumb Lane, Reno, NV 89502. Air carriers and foreign air carriers may submit copies of written comments previously provided to the Airport Authority of Washoe County under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Marlys Vandervelde, Airports Program Specialist, Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303, Telephone: (650) 876–2806. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from Reno/Tahoe International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On November 25, 1997, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Airport Authority of Washoe County was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than February 27, 1998.

The following is a brief overview of the impose and use application number 98–03–C–00–RNO:

Level of proposed PFC: $3.00.

Proposed charge effective date: May 1, 1998.

Estimated charge expiration date: June 30, 2000.

Total estimated PFC revenue: $22,855,013.

Brief description of proposed projects: Passenger Loading Bridges, Taxiway ''B'' Design and Reconstruction, Terminal Complex Schematic Design, Terminal Apron Construction—Phase I and II, North Perimeter Road Reconstruction/Overlay, Airport Rescue and Fire Fighting Truck, Terminal Building Doors, Fire Sprinkler System, and Taxiway ''A'' Reconstruction Design.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi/Commercial Operators (ATCO) filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Division located at: Federal Aviation Administration,

Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Airport Authority of Washoe County.

Issued in Hawthorne, California, on December 8, 1997.

Herman C. Bliss,

Manager, Airports Division, Western-Pacific Region.

[FR Doc. 98–196 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application to Impose and Use the Revenue From a Passenger Facility Charge (PFC) at the Quad City International Airport, Moline, Illinois

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at the Quad City International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before February 5, 1998.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Chicago Airports District Office, 2300 E. Devon Avenue, Room 260, Des Plaines, Illinois 60018.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Kent George, Airport Director at the following address: Quad City International Airport, P.O. Box 9009, Moline, Illinois 61265

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Metropolitan Airport Authority of Rock Island County under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Mark McClardy, Acting Assistant Manager, Chicago Airports District Office, 2300 E. Devon Avenue, Room 260, Des Plaines, IL 60018, (847) 294–7435. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at the Quad City International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On December 18, 1997, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Metropolitan Airport Authority of Rock Island County was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 27, 1998.

The following is a brief overview of the application.

PFC Application No.: PFC–98–02–C–00–MLI.

Level of the proposed PFC: $3.00.

Proposed charge effective date: April 1, 1998.

Proposed charge expiration date: June 30, 2015.

Total estimated PFC revenue: $6,045,254.

Brief description of proposed project(s):

Impose and Use: Multi User Flight Information Display System; Land Reimbursement; Signage; New Entrance Road and Entrance Road Improvements; Equipment Purchase (1) Runway Friction Testing Vehicle; (2) Broom/Blower Snow Removal Units, (1) Endloader.

Use Only: North Ramp Replacement Phase V; Taxiway Delta, Echo, and Kilo Improvements.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Part 135 Air Taxi Operators.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Metropolitan Airport Authority of Rock Island County.

Issued in Des Plaines, Illinois on December 29, 1997.

Benito De Leon,

Manager, Planning/Programming Branch, Airports Division, Great Lakes Region.

[FR Doc. 98–198 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent to Rule on Application (98–03–C–00–CRW) To Impose and use the Revenue From a Passenger Facility Charge (PFC) at the Yeager Airport, Charleston, West Virginia

AGENCY: Feeral Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Yeager Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before February 5, 1998.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Mr. Elonza Turner, Project Manager, Beckley Airports Field Office, 176 Airports Circle, Beaver, West Virginia 25813.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Timothy C. Murnahan, Assistant Airport Director for the Central West Virginia Regional Airport Authority at the following address: 100 Airport Road—Suite 175, Charleston, West Virginia 25311–1080.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Central West Virginia Regional Airport Authority under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Elonza Turner, Project Manager, Beckley Airports Field Office, 176 Airports Circle, Beaver, West Virginia, 25813 (Tel. (304) 252–6216). The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Yeager Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On December 23, 1997, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Central West Virginia

Regional Airport Authority was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 24, 1998.

The following is a brief overview of the application.

Level of the proposed PFC: $3.00

Proposed charge effective date: March 1, 1998

Proposed charge expiration date: April 1, 1999

Total estimated PFC revenue: $719,237

Brief description of proposed projects:

—Replace main terminal roof

—Install covered commuter walk system

—Replace Security Fence

—Overlay asphalt Helipad within General Aviation area

—Repair a slide in the hillside near Taxiway C (Impose Only)

—Rehabilitate Loop Road (Impose Only)

—Purchase Quick Dash Truck (Impose Only)

—Purchase new 1500 gallon fire truck (Impose Only)

—Install baggage handling system (Impose Only)

—Purchase Snow Broom (Impose Only)

—Rehabilitate concrete portion of runway 5/23 (Impose Only)

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Part 135 charter Operator for hire to the general public and Part 121 charter Operator for hire to the general public.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Fitzgerald Federal Building, John F. Kennedy International Airport, Jamaica, New York, 11430.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Central West Virginia Regional Airport Authority.

Issued in Jamaica, New York on December 29, 1997.

Thomas Felix,

Manager, Planning & Programming Branch, Airports Division, Eastern Region.

[FR Doc. 98–197 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury is soliciting comments concerning the Application for an Amended Federal Firearms License.

DATES: Written comments should be received on or before March 9, 1998 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8930.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Gail H. Davis, Firearms, Explosives & Arson Programs Division, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8053.

SUPPLEMENTARY INFORMATION:

Title: Application for an Amended Federal Firearms License.

OMB Number: 1512–0525.

Form Number: ATF F 5300.38.

Abstract: ATF F 5300.38 is used when a Federal firearms licensee makes application to change the location of the firearms business premises. The applicant must certify that the proposed new business premises will be in compliance with State and local law for that location, and forward a copy of the application to the chief law enforcement officer having jurisdiction over the new premises.

Current Actions: There are no changes to this information collection and it is being submitted for extension purposes only.

Type of Review: Extension.

Affected Public: Business or other for-profit, individuals or households.

Estimated Number of Respondents: 18,000.

Estimated Time Per Respondent: 1 hour and 15 min.

Estimated Total Annual Burden Hours: 22,500.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 29, 1997.

John W. Magaw,

Director.

[FR Doc. 98–212 Filed 1–5–98; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury is soliciting comments concerning the Implementation of Public Law 103–322, the Violent Crime Control and Law Enforcement Act of 1994.

DATES: Written comments should be received on or before March 9, 1998 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650

Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8930.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Nancy Cook, Firearms, Explosives & Arson Programs Division, 650 Massachusetts Avenue, NW., Washington, DC 20226, (202) 927–8056.

SUPPLEMENTARY INFORMATION:

Title: Implementation of Public Law 103–322, the Violent Crime Control and Law Enforcement Act of 1994.

OMB Number: 1512–0526.

Abstract: These regulations implement the provisions of Public Law 103–322 by restricting the manufacture, transfer, and possession of certain semiautomatic assault weapons and large capacity ammunition feeding devices. The recordkeeping requirements contained in these regulations are for a period of 5 years or until business operations are discontinued.

Current Actions: The only change to this information collection is a decrease in burden hours due to decrease in the number of respondents.

Type of Review: Extension.

Affected Public: Business or other for-profit, individuals or households.

Estimated Number of Respondents: 2,107,000.

Estimated Time Per Respondent: 2 hours and 42 minutes.

Estimated Total Annual Burden Hours: 458,942.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 29, 1997,

John W. Magaw,

Director.

[FR Doc. 98–213 Filed 1–5–98; 8:45 am]

BILLING CODE 4810–31–P

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition Determinations

Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, ''The Invisible Made Visible: Angels in the Vatican'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lender. I also determined that the exhibition or display of the listed exhibit objects at UCLA at the Armand Hammer Museum of Art and Cultural Center, Los Angeles, CA, from February 4, 1998, through April 12, 1998; Saint Louis Art Museum, Saint Louis, MO, from May 9, 1998, through August 2, 1998; Detroit Institute of Arts, Detroit, MI, August 23, 1998, through October 18, 1998; Walters Art Gallery, Baltimore, MD, November 8, 1998, through January 3, 1999; Norton Museum of Art, West Palm Beach, FL, January 23, 1999, through March 21, 1999, is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.[1]

Dated: December 31, 1997.

Les Jin,

General Counsel.

[FR Doc. 98–238 Filed 1–5–98; 8:45 am]

BILLING CODE 8230–01–M

[1] A copy of this list may be obtained by contacting Ms. Neila Sheahan, Assistant General Counsel, at 202/619–5030, and the address is Room 700, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547–0001.

federal register

Tuesday
January 6, 1998

Part II

United States Sentencing Commission

Sentencing Guidelines for United States Courts; Notice

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, and other provisions of law, the Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. The Commission seeks comment on the proposed amendments, alternative proposed amendments, and any other aspect of the sentencing guidelines, policy statements, and commentary. The Commission may submit amendments to the Congress not later than May 1, 1998.

The proposed amendments are presented in this notice in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates alternative proposals and that the Commission invites comment and suggestions for appropriate policy choices; for example, a proposed enhancement of [3–5] levels means a proposed enhancement of either three, four, or five levels. Similarly, a proposed enhancement of [4] levels indicates that the Commission is considering, and invites comment on, alternative policy choices. Second, the Commission has highlighted certain issues for comment and invites suggestions for specific guideline language.

DATES: Written public comment should be received by the Commission not later than March 12, 1998, in order to be considered by the Commission in the promulgation of amendments and in the possible submission of those amendments to the Congress by May 1, 1998.

The Commission has scheduled a public hearing on the proposed amendments for March 12, 1998, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002–8002. An additional public hearing focusing primarily on proposed amendments to the theft, fraud, and tax guidelines is scheduled for March 5, 1998, at the Parc Fifty-Five Hotel in San Francisco, CA, in conjunction with the American Bar Association's 1998 National Institute on White Collar Crime.

A person who desires to testify at the public hearing in Washington, D.C., should notify Michael Courlander, Public Information Specialist, at (202) 273–4590, not later than February 26, 1998. Written testimony for that hearing must be received by the Commission not later than March 5, 1998. Timely submission of written testimony is a requirement for testifying at the public hearing.

A person who desires to testify at the public hearing in San Francisco, CA, should notify Michael Courlander, Public Information Specialist, at (202) 273–4590, not later than February 19, 1998. Written testimony for that hearing must be received by the Commission not later than February 26, 1998. Timely submission of written testimony is a requirement for testifying at the public hearing.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2–500, Washington, D.C. 20002–8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Specialist, Telephone: (202) 273–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Authority: 28 U.S.C. 994(a), (o), (p), (x); Pub. L. 105–101, 2, Nov. 19, 1997, 111 Stat. 2202; Pub. L. 105–147, § 2(g), 111 Stat 2678, Dec. 16, 1997.

Richard P. Conaboy,

Chairman.

Fraud, Theft, Tax, and Related Offenses

Chapter Two

1. Synopsis of Proposed Amendment

During the 1997–98 amendment cycle, the Sentencing Commission has identified as a priority issue for consideration the definition of ''loss'' and the weight it is given in the theft, fraud, and tax guidelines. The following are two proposed options for revising the loss tables for the theft, fraud, and tax guidelines. The purpose of both options is to raise penalties for economic offenses that have medium to high dollar losses in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness. With the exception of the proposed tax tables at low dollar losses, each of the proposed tables uses two-level incremental increases in offense levels.

Option 1

(A) § 2B1.1 (Theft): The proposed loss table incorporates the two-level ''more than minimal planning'' (MMP) enhancement currently treated as a separate specific offense characteristic in the theft guideline. The first level from that enhancement is built in at amounts exceeding $10,000; the second level from that enhancement is built in at amounts exceeding $20,000. In addition, beginning at amounts exceeding $40,000, the severity of the offense levels in the proposed theft loss table is greater than the severity of the offense levels in the current theft loss table, plus an enhancement for MMP.

(B) § 2F1.1 (Fraud): The proposed change provides for an initial increase in the loss table from a base offense level of 6 to an offense level of 8 at more than $5,000, whereas the initial increase in the current fraud loss table is an increase from a base offense level of 6 to an offense level of 7 at more than $2,000. The proposed loss table incorporates the MMP enhancement currently treated as a separate specific offense characteristic in the fraud guideline. The first level of that enhancement is built in at amounts exceeding $10,000; the second level from that enhancement is built in at amounts exceeding $20,000. In addition, beginning at $40,000, the severity of the offense levels in the proposed fraud loss table is greater than the severity of the offense levels in the current fraud loss table, plus an enhancement for MMP.

(C) § 2T4.1 (Tax): For tax losses of $40,000 or less, the offense levels of the proposed tax loss table are the same as the current tax loss table. For losses of more than $40,000, the proposed increases in offense levels are the same as the increases in offense levels in the proposed theft and fraud loss tables for like monetary amounts.

Option 2

(A) § 2B1.1 (Theft): The proposed loss table incorporates the two-level MMP enhancement currently treated as a

separate specific offense characteristic in the theft guideline. The first level from that enhancement is built in at amounts exceeding $2,000; the second level from that enhancement is built in at amounts exceeding $5,000. (Because the proposed table also changes a ''cutting point'' from $10,000 to $12,500, only one level for more than MMP is built in for amounts between $10,000 and $12,500.) In addition, beginning at amounts exceeding $12,500, the severity of the offense levels in the proposed theft loss table is greater than the severity of the offense levels in the current theft loss table, plus an enhancement for MMP.

(B) § 2F1.1 (Fraud): The proposed loss table provides for an initial increase from a base offense level of 6 to an offense level of 8 at more than $2,000, whereas the initial increase under the current fraud loss table increases the base offense level of 6 to an offense level of 7 at more than $2,000. The proposed loss table incorporates the MMP enhancement currently treated as a separate specific offense characteristic in the fraud guideline. The first level of that enhancement is built in at amounts exceeding $2,000; the second level from that enhancement is built in at amounts exceeding $5,000. (Because the proposed table also changes a ''cutting point'' from $10,000 to $12,500, only one level for MMP is built in for amounts between $10,000 and $12,500.) In addition, beginning at $12,500, the severity of the offense levels in the proposed fraud loss table is greater than the severity of the offense levels in the current fraud loss table, plus an enhancement for MMP.

(C) § 2T4.1 (Tax): The proposed increases in offense levels are the same as the increases in offense levels in the proposed fraud loss tables for like monetary amounts.

Proposed Amendment:

[Option 1

[Section 2B1.1(b)(1) is amended by striking:

''Loss (Apply the Greatest)	Increase in Level
(A) $100 or less	no increase
(B) More than $100	add 1
(C) More than $1,000	add 2
(D) More than $2,000	add 3
(E) More than $5,000	add 4
(F) More than $10,000	add 5
(G) More than $20,000	add 6
(H) More than $40,000	add 7
(I) More than $70,000	add 8
(J) More than $120,000	add 9
(K) More than $200,000	add 10
(L) More than $350,000	add 11
(M) More than $500,000	add 12
(N) More than $800,000	add 13
(O) More than $1,500,000	add 14
(P) More than $2,500,000	add 15
(Q) More than $5,000,000	add 16
(R) More than $10,000,000	add 17
(S) More than $20,000,000	add 18
(T) More than $40,000,000	add 19
(U) More than $80,000,000	add 20.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $2,000 or less	no increase
(B) More than $2,000	add 2
(C) More than $5,000	add 4
(D) More than $10,000	add 6
(E) More than $20,000	add 8
(F) More than $40,000	add 10
(G) More than $80,000	add 12
(H) More than $200,000	add 14
(I) More than $500,000	add 16
(J) More than $1,200,000	add 18
(K) More than $2,000,000	add 20
(L) More than $7,500,000	add 22
(M) More than $20,000,000	add 24
(N) More than $50,000,000	add 26
(O) More than $100,000,000	add 28.''.

Section 2F1.1(b)(1) is amended by striking:

''Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18.''.

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4
(D) More than $20,000	add 6
(E) More than $40,000	add 8
(F) More than $80,000	add 10
(G) More than $200,000	add 12
(H) More than $500,000	add 14
(I) More than $1,200,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,500,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.''.

Section 2T4.1 is amended by striking:

''Tax Loss (Apply the Greatest)	Offense Level
(A) $1,700 or less	6
(B) More than $1,700	7
(C) More than $3,000	8
(D) More than $5,000	9
(E) More than $8,000	10
(F) More than $13,500	11
(G) More than $23,500	12
(H) More than $40,000	13
(I) More than $70,000	14
(J) More than $120,000	15
(K) More than $200,000	16
(L) More than $325,000	17
(M) More than $550,000	18
(N) More than $950,000	19
(O) More than $1,500,000	20
(P) More than $2,500,000	21
(Q) More than $5,000,000	22
(R) More than $10,000,000	23
(S) More than $20,000,000	24
(T) More than $40,000,000	25
(U) More than $80,000,000	26.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $1,700 or less	no increase
(B) More than $1,700	add 1
(C) More than $3,000	add 2
(D) More than $5,000	add 3
(E) More than $8,000	add 4
(F) More than $13,500	add 5
(G) More than $23,500	add 6
(H) More than $40,000	add 8
(I) More than $80,000	add 10
(J) More than $200,000	add 12
(K) More than $500,000	add 14
(L) More than $1,200,000	add 16
(M) More than $2,500,000	add 18
(N) More than $7,500,000	add 20
(O) More than $20,000,000	add 22
(P) More than $50,000,000	add 24
(Q) More than $100,000,000	add 26.''.]

[Option 2:

[Section 2B1.1(b)(1) is amended by striking:

''Loss (Apply the Greatest)	Increase in Level
(A) $100 or less	no increase
(B) More than $100	add 1
(C) More than $1,000	add 2
(D) More than $2,000	add 3
(E) More than $5,000	add 4
(F) More than $10,000	add 5
(G) More than $20,000	add 6
(H) More than $40,000	add 7

''Loss (Apply the Greatest)	Increase in Level
(I) More than $70,000	add 8
(J) More than $120,000	add 9
(K) More than $200,000	add 10
(L) More than $350,000	add 11
(M) More than $500,000	add 12
(N) More than $800,000	add 13
(O) More than $1,500,000	add 14
(P) More than $2,500,000	add 15
(Q) More than $5,000,000	add 16
(R) More than $10,000,000	add 17
(S) More than $20,000,000	add 18
(T) More than $40,000,000	add 19
(U) More than $80,000,000	add 20.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $100 or less	no increase
(A) More than $100	add 1
(C) More than $1,000	add 2
(D) More than $2,000	add 4
(E) More than $5,000	add 6
(F) More than $12,500	add 8
(G) More than $30,000	add 10
(H) More than $70,000	add 12
(I) More than $150,000	add 14
(J) More than $350,000	add 16
(K) More than $800,000	add 18
(L) More than $2,500,000	add 20
(M) More than $7,500,000	add 22
(N) More than $20,000,000	add 24
(O) More than $50,000,000	add 26
(P) More than $100,000,000	add 28.''.

Section 2F1.1(b)(1) is amended by striking.

''Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18.''.

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $2,000 or less	no increase
(B) More than $2,000	add 2
(C) More than $5,000	add 4
(D) More than $12,500	add 6
(E) More than $30,000	add 8
(F) More than $70,000	add 10
(G) More than $150,000	add 12
(H) More than $350,000	add 14
(I) More than $800,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,500,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.''.

Section 2T4.1 is amended by striking:

''Tax Loss (Apply the Greatest)	Offense Level
(A) $1,700 or less	6
(B) More than $1,700	7
(C) More than $3,000	8
(D) More than $5,000	9
(E) More than $8,000	10
(F) More than $13,500	11
(G) More than $23,500	12
(H) More than $40,000	13
(I) More than $70,000	14
(J) More than $120,000	15
(K) More than $200,000	16
(L) More than $325,000	17
(M) More than $550,000	18
(N) More than $950,000	19
(O) More than $1,500,000	20
(P) More than $2,500,000	21
(Q) More than $5,000,000	22
(R) More than $10,000,000	23
(S) More than $20,000,000	24
(T) More than $40,000,000	25
(U) More than $80,000,000	26.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $2,000 or less	no increase
(B) More than $2,000	add 2
(C) More than $5,000	add 4
(D) More than $12,500	add 6
(E) More than $30,000	add 8
(F) More than $70,000	add 10
(G) More than $150,000	add 12
(H) More than $350,000	add 14
(I) More than $800,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,500,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.''.]

Issues for Comment

(A) The Commission invites comment on suggested constructions of the loss tables for the theft, property damage and destruction, and fraud guidelines other than the options proposed by this amendment. Specifically, the Commission invites commentators to suggest alternative loss tables that contain different rates of increases and different increments from those set forth in the options proposed by this amendment.

(B) The Commission invites comment on whether, in conjunction with the above proposed amendments to build into the loss tables ''more than minimal planning,'' it should add an application note in §§ 2B1.1 (Theft), 2B1.3 (Property Damage and Destruction), and 2F1.1 (Fraud) that would prohibit a downward departure if the offense involved only minimal planning and prohibit an upward departure if the offense involved ''more than minimal planning.'' For a related proposal to address cases in which there is limited or insignificant planning, see Amendment 5(B), infra.

Guidelines that Refer to Theft/Fraud Loss Tables

Chapter Two

2. Synopsis of Proposed Amendment

The following proposed amendments indicate the changes that might be called for in several guidelines that refer to the loss tables in either § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2F1.1 (Fraud and Deceit) if the Commission were to adopt one of the proposed new loss tables (set forth in proposed Amendment 1, supra.) as well as an alternative monetary table that does not incorporate ''more than minimal planning'' (MMP).

The amendments are divided into Parts (A) through (G). Part (A) proposes an alternative monetary table that does not incorporate MMP. The amendments to the referring guidelines are presented in Parts (B) through (G) as follows:

(B) Those guidelines that arguably incorporate the concept of MMP into the base offense level or a specific offense characteristic.

(C) Certain pornography and obscenity guidelines.

(D) Certain copyright infringement and structuring guidelines, for which use of the proposed loss tables for fraud is also presented as an option.

(E) Trespass, for which use of the proposed theft and fraud loss tables starting at $2,000 is also presented as an option, as well as an issue for comment.

(F) Property destruction, which is proposed to be consolidated with the theft guideline (thereby mitigating the necessity for reference to the alternative monetary table).

(G) Bank gratuity, which is proposed to be consolidated with the principal gratuity guideline.

(A) The Reference Monetary Table

Synopsis of Proposed Amendment

This amendment proposes to add to the guidelines an alternative monetary

table for guidelines, other than those for theft and fraud, that currently refer to either the theft or fraud loss table and arguably incorporate a MMP type feature in either the base offense level or a specific offense characteristic. The proposed alternative monetary table does not build in MMP, but does incorporate the enhanced severity increases of the proposed fraud/theft tables (see Amendment 1, supra.) for amounts exceeding $40,000.

The use of the proposed monetary table for these guidelines in lieu of the proposed theft/fraud tables generally would (1) maintain proportionality with the proposed fraud/theft loss tables, across the range of monetary values, (2) achieve increases in severity for larger-scale referring guideline offenses, and (3) eliminate the need for a 2-level reduction in these referring guidelines to account for the fact that MMP has been incorporated into the proposed theft/fraud tables. The two options are presented to coordinate with the two loss table options in proposed Amendment 1, supra. (i.e., Option 1 presented below coordinates with Option 1 in Amendment 1, and Option 2 presented below coordinates with Option 2 in Amendment 1).

Proposed Amendment

[Option 1: Chapter Two, Part X is amended by adding at the end the following new subpart:

''6. REFERENCE MONETARY TABLE

§ 2X6.1. Reference Monetary Table

Amount (Apply the Greatest)	Increase in Level
[(A) $2, 000 or less] or	[no increase]
[(A) More than $2,000]or	[add 1]
[(A) $5,000 or less]	[no increase]
(B) More than $5,000	add 2
(C) More than $10,000	add 3
(D) More than $20,000	add 4
(E) More than $40,000	add 6
(F) More than $80,000	add 8
(G) More than $200,000	add 10
(H) More than $500,000	add 12
(I) More than $1,200,000	add 14
(J) More than $2,500,000	add 16
(K) More than $7,500,000	add 18
(L) More than $20,000,000 ...	add 20
(M) More than $50,000,000 ..	add 22
(N) More than $100,000,000	add 24.''.]

[Option 2: Chapter Two, Part X is amended by adding at the end the following new subpart:

''6. REFERENCE MONETARY TABLE

§ 2X6.1. Reference Monetary Table

Amount (Apply the Greatest)	Increase in Level
(A) $2, 000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $12,500	add 4
(E) More than $30,000	add 6
(F) More than $70,000	add 8
(G) More than $150,000	add 10
(H) More than $350,000	add 12
(I) More than $800,000	add 14
(J) More than $2,500,000	add 16
(K) More than $7,500,000	add 18
(L) More than $20,000,000 ...	add 20
(M) More than $50,000,000 ..	add 22
(N) More than $100,000,000	add 24.''.]

(B) Guidelines with MMP Built into the Base Offense Level or a Specific Offense Characteristic

Synopsis of Proposed Amendment

With respect to these guidelines, there are two issues: (1) the loss table to be referenced, and (2) whether the initial offense level increase from the referenced table should occur at $2,000 (the current status) or at $5,000. To be precise, the ''cutting points'' in the monetary tables occur when the monetary amount is ''more than $2,000'' or ''more than $5,000'', etc. For simplicity, this discussion generally will omit the ''more than'' modifier.

To avoid concerns about a MMP overlap, the Reference Monetary Table is used for all of these guidelines. Option 1 shows how the guideline might be amended if the Commission were to reference a monetary table for which the starting point is $5,000.

Alternatively, Option 1A shows how, even with a reference table starting at $5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the loss is more than $2,000 but not more than $5,000.

Option 2 shows how the guideline might be amended if the Commission were to adopt a reference monetary table for which the starting point is $2,000. To cover the possibility that the Commission might elect, for one or more of these guidelines, to reference the new fraud loss table in spite of an arguable MMP overlap, an issue for comment is added at the end of the amendments.

Proposed Amendment:

Section 2B5.1(b) is amended by striking:

''(1) If the face value of the counterfeit items exceeded $2,000, increase by the corresponding number of levels from the table at § 2F1.1 (Fraud and Deceit).'', and inserting:

''(1) If the face value of the counterfeit items exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B5.1(b) is amended by striking:

''(1) If the face value of the counterfeit items exceeded $2,000, increase by the corresponding number of levels from the table at § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the face value of the counterfeit items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B6.1(b) is amended by striking:

''(1) If the retail value of the motor vehicles or parts involved exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the motor vehicles or parts involved exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B6.1(b) is amended by striking:

''(1) If the retail value of the motor vehicles or parts involved exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the motor vehicles or parts (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2F1.2(b) is amended by striking:

''(1) Increase by the number of levels from the table in § 2F1.1 corresponding to the gain resulting from the offense.'',

and inserting:

''(1) If the gain resulting from the offense exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2F1.2(b) is amended by striking:

''(1) Increase by the number of levels from the table in § 2F1.1 corresponding to the gain resulting from the offense.'',

and inserting:

''(1) If the gain resulting from the offense (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B4.1(b) is amended by striking:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B4.1(b) is amended by striking:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B3.3(b) is amended by striking:

''(1) If the greater of the amount obtained or demanded exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the amount obtained or demanded exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B3.3(b) is amended by striking:

''(1) If the greater of the amount obtained or demanded exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the amount obtained or demanded (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2Q2.1(b)(3) is amended by striking:

''(A) If the market value of the fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1. (Fraud and Deceit); or'',

and inserting:

''(A) If the market value of the fish, wildlife, or plants exceeded [Option1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), [but in no event more than [18] levels]; or''.

[Option 1A

Section 2Q2.1(b)(3) is amended by striking:

''(A) If the market value of the fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or'',

and inserting:

''(A) If the market value of the fish, wildlife, or plants (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), [but in no event more than [18] levels]; or''.]

Section 2C1.1(b)(2) is amended by striking:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.1(b)(2) is amended by striking:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the gratuity exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the gratuity (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2C1.7(b)(1) is amended by striking:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or'',

and inserting:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.7(b)(1) is amended by striking:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or'',

and inserting:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2E5.1(b) is amended by striking:

''(2) Increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.'',

and inserting:

''(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater, exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2E5.1(b) is amended by striking:

''(2) Increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.'',

and inserting:

''(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

(C) Pornography and Obscenity

Synopsis of Proposed Amendment

Option 1 for the following pornography and obscenity guidelines references the guidelines to the alternative monetary reference table. Option 2 references the new fraud loss table. Option 3 deletes the reference to a monetary table altogether and adds invited upward departure language for large-scale commercial endeavors.

Note that, with respect to §§ 2G2.2 and 2G3.1, the floor (i.e., an increase of not less than [5] levels) for the amount of the material has been maintained. However, two effects of maintaining the floor should be mentioned: (1) The issue of the starting point for any of the proposed tables is no longer relevant (because the starting point simply does not come into play at such levels). (2) Under the current fraud loss table, the 5-level floor presupposes a retail value of at least $40,000; however, those values change depending on the particular table proposed to be used. For that reason, the 5-level enhancement is bracketed in the following options.

Proposed Amendment:

[Option 1

Section 2G2.2(b) is amended by striking:

''(2) If the offense involved distribution, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.'',

and inserting:

''(2) If the offense involved distribution, increase by the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than [5] levels.''.]

[Option 2

Section 2G2.2 (b)(2) is amended by striking ''corresponding to the retail value of the material, but in no event less than 5 levels'' and inserting ''(Fraud and Deceit) corresponding to the retail value of the material, but in no event less than [5] levels''.]

[Option 3

Section 2G2.2 (b)(2) is amended by striking ''the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels'' and inserting ''[5] levels''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended by adding at the end the following new note:

''4. Subsection (b)(2) provides a five-level enhancement if the offense involved distribution. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [$40,000])], an upward departure may be warranted.''.]

[Option 1

Section 2G3.1(b) is amended by striking:

''(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.'',

and inserting:

''(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than [5] levels.''.]

[Option 2

Section 2G3.1(b)(1) is amended by striking ''corresponding to the retail value of the material, but in no event less than 5 levels'', and inserting ''(Fraud and Deceit) corresponding to the retail value of the material, but in no event less than [5] levels''.]

[Option 3

Section 2G3.1(b)(1) is amended by striking ''the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels'' following ''increase by'', and inserting ''[5] levels''.

The Commentary to § 2G3.1 captioned ''Application Note'' is amended by adding at the end the following new note:

''2. Subsection (b)(1) provides a five-level enhancement if the offense involved an act related to distribution for pecuniary gain. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [$40,000])], an upward departure may be warranted.'';

and in the caption by striking ''Note'' and inserting ''Notes''.]

[Option 1

Section 2G3.2(b) is amended by striking:

''(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.'',

and inserting:

''(2) If 6 plus the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the

volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.''.]

[Option 2

Section 2G3.2(b) is amended by striking:

''(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.'',

and inserting:

''(2) If 6 plus the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.''.]

[Option 3

The Commentary to § 2G3.2 is amended by striking subsection (b)(2); and by strking:

''Background: Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large-scale 'dial-a-porn' or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.'';

and by inserting:

''Application Notes:

1. Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it.

2. If the offense involved communications or broadcasting operations by a large-scale commercial enterprise [(i.e., a commercial enterprise engaging in a volume of commerce having a value that is more than [$40,000])], an upward departure may be warranted.''.]

(D) Copyright Infringement and Structuring Transactions

Synopsis of Proposed Amendment

With respect to these guidelines, four options are presented. Option 1 shows how the guideline might be amended if the Commission were to reference an alternative monetary table for which the starting point is $5,000. Alternatively, Option 1A shows how, even with a reference table starting at $5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the monetary amount is more than $2,000 but not more than $5,000. Option 2 shows how the guideline might be amended if the Commission were to adopt an alternative reference monetary table for which the starting point is $2,000.

Option 3 shows how the guideline might be amended if the Commission were to reference a fraud loss table for which the starting point is $5,000. Alternatively, Option 3A shows how, even with a reference table starting at $5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the monetary amount is more than $2,000 but not more than $5,000. Option 4 shows how the guideline might be amended if the Commission were to adopt a fraud loss table for which the starting point is $2,000.

Proposed Amendment

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items exceeded [Option 3: $5,000][Option 4: $2,000], increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.]

[Option 3A

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.]

Section 2S1.3 is amended by striking:

''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), if the value of the funds exceeded [Option 1: $5,000][Option 2: $2,000].''.

[Option 1A

Section 2S1.3 is amended by striking:

''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus (1) 1 level, if the value of the funds exceeded $2,000 but did not exceed $5,000; or (2) the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), if the value of the funds exceeded $5,000.''.]

Section 2S1.3 is amended by striking:

''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit), if the value of the funds exceeded [Option 3: $5,000][Option 4: $2,000].''.]

[Option 3A

Section 2S1.3 is amended by striking: ''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus (1) 1 level, if the value of the funds exceeded $2,000 but did not exceed $5,000; or (2) the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit), if the value of the funds exceeded $5,000.''.]

(E) Trespass

Synopsis of Proposed Amendment

By virtue of an amendment effective November 1, 1997, the trespass guideline contains a reference to the fraud loss table to cover losses resulting from the invasion of a protected government computer. The fraud table, rather than the theft table, was chosen because it better fits with a guideline structure that provides an initial increase in offense level at $2,000. Under the proposed loss tables and accompanying reference monetary tables, a range of as many as six options are potentially viable. Those considered more likely are set forth below.

Among the issues specific to this guideline to be decided are: (1) Should the Commission maintain the $2,000 threshold for an initial increase in offense level? (2) Should the Commission treat these offenses comparably to computer offenses sentenced under the theft or fraud guidelines (which, under the proposed amendments, will be subject to a phased-in MMP enhancement)?

Options 1 and 1A assume that the Commission may elect to use the Reference Monetary Table because these computer trespass offenses may be simpler in nature than computer offenses referenced to the theft and fraud guidelines (and, thus, the additional MMP enhancement built into the theft and fraud loss tables would not be warranted). Option 1 shows how the guideline might be amended if the Commission were to refer to a Reference Monetary Table that provides an initial increase in offense level at $2,000. Alternatively, Option 1A shows how, even with a reference table starting at $5,000, the trespass guideline might be amended to provide a 1-level increase for cases in which the loss is more than $2,000 but not more than $5,000.

Options 2 and 3 assume that the Commission will (1) maintain the current $2,000 starting point for the referenced loss table, and (2) elect to use a loss table that incorporates the phased-in MMP enhancement. Option 2 references the proposed fraud loss table and assumes a Commission decision to use a loss table structure illustrated by the Option 2 loss tables. (Under this assumed choice, the fraud loss table, rather than theft, is referenced because the former starts at $2,000.) Option 3 references the proposed theft loss table and assumes a Commission decision to use a theft table that provides an initial increase at $2,000, as in the Option 1 theft loss table.

Proposed Amendment:

[Option 1

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded $2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

[Option 1A

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

[Option 2

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.]

[Option 3

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded $2,000, increase by the corresponding number of levels from the table in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).''.]

Issue for Comment: The Commission invites comment on the appropriate starting point for a loss table applicable to offenses sentenced under § 2B2.3 (Trespass) that involve the invasion of a protected computer described in 18 U.S.C. 1030(e)(2) (A) or (B). Specifically, should the Commission adopt a table for these offenses that starts at an amount that is lower or higher than $2,000? Since the current fraud loss table at § 2F1.1 (Fraud and Deceit) applicable to these offenses starts at $2,000, should the Commission account for any difference in offense levels that might occur between a lower or higher starting amount under a new loss table and the $2,000 starting amount under the current fraud loss table?

(F) Consolidation of Property Destruction and Theft Guidelines

Synopsis of Proposed Amendment

This amendment proposes to consolidate the property destruction guideline § 2B1.3 with the theft guideline, thereby mitigating the necessity for reference to the proposed alternative monetary table. (For a proposed amendment that consolidates the property destruction, theft, and fraud guidelines, see Amendment 3, infra.)

Proposed Amendment

Section 2B1.1 is amended in the title by adding at the end ''; Property Damage or Destruction''.

Section 2B1.1(b)(3) is amended by striking ''taken, or'' and inserting ''taken or destroyed, (B)''; by striking ''of such item'' and inserting ''or destruction of undelivered United States mail''; and by striking ''(B)'' and inserting ''(C)''.

Section 2B1.1(c) is amended by adding at the end the following new subdivision:

''(2) If the offense involved arson or property destruction by use of explosives, apply § 2K1.4 (Arson; Property Destruction by Use of Explosives) if the resulting offense level is greater than that determined above.''.

Section 2B1.1(c) is amended by striking ''Reference'' and inserting ''References''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''1361, 1363,'' following ''664,''; by inserting ''1703,'' following ''1702,''; and by inserting '', 2321'' following ''2317''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''17. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a $500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, an upward departure may be warranted.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the first paragraph by inserting before the first sentence the following:

''This guideline covers offenses involving theft, stolen property, and property damage or destruction.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the third paragraph by striking ''Consistent with statutory distinctions, an'' and inserting ''An''; by inserting ''or destruction'' following ''for the theft''; and by inserting ''or destruction'' following ''Theft''.

Strike § 2B1.3 in its entirety.

(G) Consolidation of Bank Gratuity and Principal Gratuity Guidelines

Synopsis of Proposed Amendment

This amendment proposes to consolidate the bank gratuity guideline, § 2C1.6 with the principal gratuity guideline § 2C1.2, thereby mitigating the necessity for reference to the proposed alternative monetary table.

Proposed Amendment

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the unlawful payment exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the unlawful payment (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2C1.2(b)(2)(B) is amended by striking ''gratuity'' and inserting ''unlawful payment''.

The Commentary to § 2C1.2 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; by inserting ''§ '' following ''U.S.C. § ''; and by inserting '', 212–214, 217'' following ''(1)''.

The Commentary to § 2C1.2 captioned ''Application Notes'' is amended by adding at the end the following new note:

''5. An unlawful payment may be anything of value; it need not be a monetary payment.''.

The Commentary to § 2C1.2 captioned ''Background'' is amended by striking the second and third sentences as follows:

''A corrupt purpose is not an element of this offense. An adjustment is provided where the value of the gratuity exceeded $2,000, or where the public official was an elected official or held a high-level decision-making or sensitive position.'',

and inserting:

''It also applies to the offer to, or acceptance by, a bank examiner of any unlawful payment; the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve Bank; and the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.''.

Strike § 2C1.6 in its entirety.

Issues for Comment: (A) The Commission invites comment on whether any of the above guidelines proposed to be referenced to the Reference Monetary Table (§ 2X6.1) instead should be referenced to the loss table in § 2F1.1, as such table is proposed to be amended under Option 1 or Option 2 (see Amendment 1, supra.). Such an approach might be justified by an assessment that the higher penalties of this approach are warranted for a particular guideline/type of offense and/or by a determination that there is no substantial overlap in the incorporation of more-than-minimal planning into the structure of the guideline and the revised loss table.

(B) The Commission invites comment on whether, for any of the above guidelines, the increase in offense level resulting from reference to a particular monetary table should be capped at a certain number of levels. For example, in § 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), should the maximum increase in offense level resulting from use of the table in § 2X6.1 (Reference Monetary Table) to measure the market value of the fish, wildlife, or plants be limited to [18] levels? Capping the increase in offense level for any particular guideline might be justified in order to maintain proportionality in sentencing among various offenses and/or be required in order to maintain consistency with prevailing statutory maximum sentences for offenses covered by the guideline.

(C) The Commission invites comment on whether, for any of the above guidelines that are currently referenced to the fraud loss table in § 2F1.1, the Commission should continue to refer the guideline to the current fraud table if the Commission adopts one of the proposed loss tables for fraud offenses under § 2F1.1. Similar to the issue of capping increases in offense levels for certain guidelines (see issue for comment (B), supra.), such an approach might be justified in order to maintain proportionality in sentencing among various offenses and/or be required in order to maintain consistency with prevailing statutory maximum sentences for offenses covered by the guideline.

Sections 2B1.1 (Theft), 2B1.3 (Property Destruction), and 2F1.1 (Fraud)

3. Synopsis of Proposed Amendment

This amendment consolidates the three guidelines covering theft (§ 2B1.1), property destruction (§ 2B1.3), and fraud (§ 2F1.1). Consolidation of these guidelines is proposed in response to concerns raised at an October 15, 1997 Commission hearing on difficulties posed by having different commentary in the theft and fraud guidelines applicable to the calculation and definition of loss and related issues. Commentators have also noted that theft and fraud offenses are conceptually similar and that prosecutors' charging selection, rather than offense conduct, may determine which of the theft or

fraud guideline will apply in any given case. For these and other reasons the Commission is considering and invites comment on the consolidation proposal set forth below. There are several important points to note with respect to the proposal:

(A) A base offense level of level 6 has been bracketed to indicate that the Commission invites comment on alternative proposals. The current base offense level for theft and property destruction offenses is level 4, while for fraud it is level 6. The proposal provides, in subsection (b)(2), for a two-level decrease for theft and property destruction offenses in which the loss is less than $2,000.

(B) The floor of level 6 for the theft of undelivered United States mail in subsection (b)(6) will need to be deleted if the Commission decides on a base offense level of level 6 but does not include a decrease for small-scale theft and property destruction offenses.

(C) The document presents two options for the current enhancement on the violation of a judicial order, a factor that relates to a circuit conflict under consideration by the Commission. Option 1 retains the enhancement in subsection (b)(7)(B). Option 2 deletes the enhancement and substitutes an encouraged upward departure provision in Application Note 11 (in lieu of an enhancement). The encouraged upward departure is provided as an option because of the infrequency with which the current enhancement applies. In fiscal year 1996, the charitable organization enhancement and the violation of a judicial order enhancement, combined, applied in only 153 cases (3% of all fraud cases in that fiscal year).

(D) Place holders have been noted for the loss table, the loss definition, and a sophisticated concealment enhancement, all of which are dependent on other policy choices.

(E) The current application note in § 2B1.1 dealing with theft and embezzlement from unions and employee benefit or pension plans has been moved to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) where it appears to more appropriately fit.

(F) An additional cross reference to the bribery and gratuity guidelines has been added to address situations in which a fraud statute may be used (perhaps for jurisdictional reasons) to prosecute conduct the essence of which involves bribery. An issue for comment also has been included to serve as a placeholder, and invite comment on, the concept of a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute (e.g., 18 U.S.C. § 1001) is used to reach conduct that is more specifically addressed in another Chapter Two guideline.

(G) The enhancement in subsection (b)(9) involving conscious or reckless risk of serious bodily injury contains two proposed substantive changes. First, it proposes to insert the bracketed language ''of death'' prior to the term ''serious bodily injury'' because, as a practical matter, a risk of serious bodily injury is likely to also entail a risk of death. Second, an increase in the ''floor'' offense level is proposed.

(H) The enhancement in subsection (b)(10), relating to ''chop shops,'' contains two options. Option 1 would add a two-level enhancement for this conduct, in addition to the existing ''floor'' offense level of level 14. Option 2 would retain the current policy (i.e., minimum offense level of 14).

It should also be noted that the order in which the enhancements under the consolidation are placed may affect the ultimate offense level in any given case, because of the multiple offense level ''floors'' that are involved (e.g., the enhancements in subsections (b)(3) through (5) may not have an additive effect in cases affected by one of the enhancements in (b)(7) through (12), that imposes a minimum or ''floor'' offense level).

In addition to combining the theft and fraud guidelines and the above-mentioned substantive changes, this amendment also reorganizes and updates the applicable commentary. Definitions of terms, other than the definition of loss, are collected under application note 1 and are presented in alphabetical order. Otherwise, application notes generally appear in the same sequential order as the relevant enhancements appear in the guideline.

Finally, this amendment makes a number of stylistic and grammatical changes in the language of the current affected guidelines to enhance clarity and consistency (e.g., in subsection (b)(3), the language is changed from ''if the theft was from the person of another'' to ''if the offense involved theft from the person of another''. These changes are intended to be non-substantive, but it is always possible that the change will produce an unintended substantive effect.

Proposed Amendment

Chapter Two, Part B is amended in the title by inserting ''Economic'' before ''Offenses''; and by striking ''Property'' and inserting ''Theft, Property Destruction, or Fraud''.

Chapter Two, Part B, Subpart 1 is amended in the title by striking ''AND''; and by inserting at the end '', AND FRAUD''.

The Commentary to Chapter Two, Part B captioned ''Introductory Commentary'' is amended by striking ''the most''; and by inserting ''fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States),'' following ''embezzlement,''.

Chapter Two is amended by striking sections 2B1.1, 2B1.3 and 2F1.1 and inserting:

''§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: [6]

(b) Specific Offense Characteristics

(1) LOSS TABLE—TO BE INSERTED]

[(2) If (A) the offense involved theft, embezzlement, transactions in stolen property, or property damage or destruction; and (B) the total amount of the [loss] involved in the offense was less than [$2,000], decrease by 2 levels.]

(3) If the offense involved theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

[(6) If (A)(i) undelivered United States mail was taken or destroyed, or the taking or destruction of such item was an object of the offense; or (ii) the property stolen, destroyed, received, transported, transferred, transmitted, or possessed was undelivered United States mail; and (B) the offense level as determined above is less than level 6, increase to level 6.]

[Option 1 for judicial process

(7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; or (B) a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If

the resulting offense level is less than 10, increase to level 10.]

[Option 2 for judicial process

(7) If the offense involved a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency, increase by 2 levels. If the resulting offense level is less than 10, increase to level 10.]

[(8) PLACE HOLDER FOR SOPHISTICATED CONCEALMENT ENHANCEMENT TO REPLACE FRAUD SOC ON USE OF FOREIGN BANK ACCOUNTS OR TRANSACTIONS]

(9) If the offense involved (A) the conscious or reckless risk [of death] or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm), increase by 2 levels. If the resulting offense level is less than level [13][14], increase to level [13][14].

(10) If (A) the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, [Option 1: increase by 2 levels. If the resulting offense level as determined above is less than level 14, increase to level 14.] [Option 2: and (B) the offense level as determined above is less than level 14, increase to level 14.]

(11) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(12) If (A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level as determined above is less than level 24, increase to level 24.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

(2) If the offense involved arson or property destruction by use of explosives, apply § 2K1.4 (Arson: Property Destruction by Use of Explosives), if the resulting offense level is greater than that determined above.

[(3) If the offense involved (A) commercial bribery, or (B) bribery, gratuity, or a related offense involving a public official, apply § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) or a guideline from Chapter Two, part C (Offenses Involving Public Officials), as appropriate, if the resulting offense level is greater than that determined above.]

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b–6, 1644, 1983–1988, 1990c; 18 U.S.C. §§ 225, 285–289, 471–473, 500, 510, 511, 553(a)(1), (2), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025–1028, 1029, 1030(a)(5), 1031, 1341–1344, 1361, 1363, 1702, 1703, 1708, 1831, 1832, 2113(b), 2312–2317, 2321; 29 U.S.C. §§ 439, 461, 501(c), 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. For purposes of this guideline—

'Financial institution' means (A) any institution described in 18 U.S.C. §§ 20, 656, 657, 1005–1007, and 1014; (B) any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; (C) any health, medical or hospital insurance association; (D) brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; (E) futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and (F) any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'health, medical, or hospital insurance association,' primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

'Firearm,' and 'destructive device' are defined in the Commentary to § 1B1.1 (Application Instructions).

'Foreign instrumentality,' 'foreign agent,' and 'trade secret' have the meaning given those terms in 18 U.S.C. 1839 (1), (2), and (3), respectively.

'Gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.

'Theft from the person of another' means the taking, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

['Undelivered United States mail' means mail, including mail that is in the addressee's mailbox, that has not been received by the addressee or the addressee's agent.]

[2. DISCUSSION OF LOSS [including downstream damages discussion from property destruction guideline]—TO BE INSERTED]

3. Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.

4. For purposes of subsection (b)(10), a [Option 1: two-level enhancement and a] minimum measure of loss [are/is] provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or 'chop shop') to steal vehicles or vehicle parts or to receive stolen vehicles or vehicle parts. 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft.

5. For purposes of subsection (b)(11), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit,

payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of experiencing any of the conditions described in subdivisions (A) through (D) of this note.

6. For purposes of subsection (b)(12), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

7. Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.

8. [Option 1 for judicial process: The enhancements in subsection (b)(7) are alternative rather than cumulative; however, if both of the enumerated factors apply in a particular case, an upward departure may be warranted.]

9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to § 2X1.1.

10. Sometimes offenses involving fraudulent statements are prosecuted under 18 U.S.C. 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 would be more apt, and false statements to a customs officer, for which § 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense in which a fraudulent insurance claim was mailed might be prosecuted as mail fraud. [In certain other cases, an offense involving fraudulent statements or documents, or failure to maintain required records, may be committed in furtherance of the commission or concealment of another offense, such as embezzlement or bribery.]

Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. 1028 and 1029, are also covered by this guideline. If the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply § 2L2.1 or § 2L2.2, as appropriate, rather than this guideline. [In the case of an offense involving false identification documents or access devices, an upward departure may be warranted if the actual loss does not adequately reflect the seriousness of the conduct.]

If the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than this guideline. Otherwise, in such cases, this guideline is to be applied, but a departure may be warranted.

11. If the defendant is convicted under 18 U.S.C. 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the continuing financial crimes enterprise.

[Option 2 for judicial process

12. If the offense involved a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, an upward departure may be warranted. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release, addressed in § 2J1.7 (Offense Committed While on Release), or a violation of probation, addressed in § 4A1.1 (Criminal History Category)) is not authorized under this note.]

13. In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2) (A) or (B), an upward departure may be warranted if the defendant sought the stolen property to further a broader criminal purpose.

Background

This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics [and cross references] contained in this guideline are designed with these considerations in mind.

[**Note**: Depending on decisions made with respect to 'loss', background commentary on loss can be added.]

Consistent with statutory distinctions, an increased minimum offense level is provided for the theft of undelivered mail. Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).

A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the

value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of ''organized scheme'' is used as an alternative to 'loss' in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Subsection (b)(9)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322. Subsection (b)(11) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73. Subsection (b)(12) implements the instruction to the Commission in section 2507 of Public Law 101–647. Subsection (d)(2) implements the instruction to the Commission in section 805(c) of Public Law 104–132.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) by striking the second paragraph as follows:

'' 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.'';

by striking the fifth and sixth paragraphs as follows:

''In a theft, going to a secluded area of a store to conceal the stolen item in one's pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.''.

Section 2K1.4(a)(4) is amended by striking ''§ 2B1.3 (Property Damage or Destruction)'' and inserting:

''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

(A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. 'Fiduciary of the benefit plan' is defined in 29 U.S.C. 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

(B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. 501(a)), an adjustment under this section for an abuse of a position of trust will apply.''.

Issues for Comment

(A) The Commission invites comment on whether Application Note 10 in the proposed amendment should be alternatively stated in the guideline as an explicit cross reference to apply the most applicable guideline, if the resulting offense level is greater than the offense level obtained under the proposed guideline.

(B) The Commission invites comment on whether any of the specific offense characteristics in this proposed consolidated guideline should be eliminated because of infrequency of use or other good reason. If any such factor should be eliminated, should it be replaced with commentary encouraging departure?

§§ 2B1.1 (Theft) and 2F1.1 (Fraud)

4. Synopsis of Proposed Amendment

The Sentencing Commission has identified the definition of loss in fraud and theft offenses as an issue for consideration during the 1997–98 amendment cycle. The genesis of Commission interest in many of the issues raised about the definition of loss is summarized in the Loss Issues Working Paper (10–14–97) that is part of the Commission meeting materials generated in connection with the October 15, 1997 public hearing on clarifying the definition of loss. This paper and the transcript of the public hearing on the definition of loss are available on the Commission's website (http://www.ussc.gov/) or from the Commission. Following are two proposed options for revising the definition of loss for fraud and theft offenses. Both options envision one definition of loss for both fraud and theft offenses.

Option 1 provides a dramatically simplified and shortened definition of loss that has the same core principles as those found in Option 2, but without the additional rules and guidance found in Option 2. The formulation in Option 1 arguably provides maximum discretion to sentencing judges and minimal guidance as to what should be included in, or excluded from, actual loss. Option 2 attempts to provide more guidance to courts on how to resolve issues that have arisen in the case law and elsewhere about the current definition of loss.

Both options propose adoption of a general definition that loss is the greater of the actual or intended loss, and that actual loss is defined to include ''reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).'' Adoption of this provision would provide an explicit causation standard for the determination of actual loss. Option 2 raises the possibility of limiting the

relevant harm (both actual and intended) to ''economic'' harm.

Both options provide that intended loss is the ''harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)'', with Option 2 raising the issue as to whether intended loss should be limited to those consequences ''that realistically could have occurred.''

The balance of the language proposed in Option 1 also appears in Option 2 but, again, without additional rules or guidance. Language is proposed to be added to the background commentary that provides an operating principle for the use of the amount of loss, namely, that it ''serves as a measure of the seriousness of the offense and the defendant's relative culpability.'' Additional language is proposed for the commentary in both options that emphasizes the fact-based nature of the determination of loss and the importance of giving appropriate deference to the sentencing court's determinations, and that invites departure where loss ''substantially understates or overstates the seriousness of the offense or the culpability of the defendant.''

In addition to the provisions summarized above, Option 2 provides added specificity in a number of areas: (A) Departures; (B) estimation of loss; (C) time of measuring loss and credits against loss; (D) interest; (E) special rules.

(A) Departures

In addition to the general language inviting departure where loss ''substantially understates or overstates the seriousness of the offense or the culpability of the defendant'', Option 2 lists a number of grounds for invited departures, most of which can be found in the current commentary. Option 2 also provides an option for including selected non-economic factors as specific offense characteristics instead of only as possible departure grounds.

(B) Estimation of Loss

Option 2 provides a nonexclusive listing of factors (most of which are in the current commentary) that a court may use in estimating loss. Two options are provided for how gain might be fashioned as such a factor: either provide for the use of gain as any other factor, or provide that it may be used if gain exceeds loss or the loss is difficult or impossible to calculate.

(C) Time of Measuring Loss and Credits Against Loss

This provision raises the issue of whether there needs to be an applicable or limiting time frame on what is to be included in loss (such as, ''at the time the offense is detected''). This provision provides, in effect, that loss is a ''net'' concept, for both fraud and theft offenses, in contrast to the current rule that expressly uses such a concept only for certain fraud-type offenses. The determination of loss is a ''net'' concept under this proposed rule in the sense that the loss amount shall be reduced by the value of certain items, including money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim before detection of the offense, valued as of the time of pledging or transfer (unless the defendant causes the reduction in the value of the collateral after pledging or the increase in the loss, after detection). Valuation as of the time of detection would eliminate the effect of most fluctuations in value of collateral from affecting the offense level.

(D) Interest

Option 2 provides two options for dealing with interest. One would respond to the circuit court decisions that allow use of, for example, bargained-for interest, and explicitly exclude interest from the determination of loss, except as a possible departure ground. The other would continue the exclusion of opportunity-cost interest but provide for inclusion of interest if it ''was bargained for by a victim as part of a transaction which is the subject of the criminal case'' or if the victim ''transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.''

(E) Special Rules

This provision provides rules for special cases, including retaining the current rules for stolen credit cards, diversion of government program benefits (proposed for modification or elimination), and Davis-Bacon Act cases. This provision proposes adding rules on sting operations (to respond to case law that excludes from intended loss amounts that were unlikely or impossible because informants or government agents were the only ''victims'') and Ponzi schemes (to choose from divergent precedent a rule that provides that loss in such cases shall be based on ''the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of this principal investment as a result of the fraudulent scheme'').

Proposed Amendment

[Option One

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking the first through fourth paragraphs of Note 2 and inserting the following:

''2. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3. Loss need not be determined precisely but may be based on a reasonable estimate.

Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).

There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Notes 3, 4, 5, and 15; and by redesignating Notes 6, 7, 8, 9, 10, 11, 12, 13, 14, and 16 as Notes 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, respectively.

The Commentary to § 2B1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Note 7 and inserting the following:

''7. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3. Loss need not be determined precisely but may be based on a reasonable estimate.

Because of the fact-based nature of the determinations, the sentencing judge is

in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).

There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Notes 8 and 10; and by redesignating Notes 9, 11, 12, 13, 14, 15, 16, 17, and 18 as Notes 8, 9, 10, 11, 12, 13, 14, 15, and 16, respectively.

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.]

[Option Two

[Non-economic Factors, Option A:

Section 2B1.1(b) is amended by adding at the end the following new subdivision:

[''(8) If the offense involved one of the following aggravating factors: (A) the primary objective of the offense was non-monetary; (B) the offense caused or risked substantial non-monetary harm; (C) the offense was committed for the purpose of facilitating another felony offense, other than an offense covered by this guideline; (D) reasonably foreseeable (i) bodily injury, or (ii) psychological harm or emotional trauma that is substantial and severe; or (E) a reasonably foreseeable risk of substantial loss in addition to the loss that actually occurred, increase by [2] levels. If the offense involved more than one of these aggravating factors, increase by [4] levels.''.]

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking the first through the fourth paragraphs of Note 2 and inserting the following:

''2. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable [economic] harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3 [and that realistically could have occurred].

(A) Estimation of Loss. For the purposes of subsection (b)(1), the loss need not be determined precisely. The court need only make a reasonable estimate of the loss, given the available information and considering, as appropriate under the circumstances, measuring factors such as the following:

(1) the fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, damaged, or destroyed;

(2) the cost to the victim of replacing property taken, damaged, or destroyed;

(3) the cost of repairs, not to exceed the replacement cost had the property been destroyed;

(4) the approximate number of victims and an estimate of the average loss to each victim;

(5) the scope and duration of the offense, or revenues generated by similar operations;

[Gain, Option A

[(6) the gain to criminally responsible participants from committing the offense.]

[Gain, Option B

[(6) if the gain exceeds the loss or if the loss is difficult or impossible to calculate, the gain to criminally responsible participants from committing the offense.]

(B) [Time of Measuring Loss,] Credits Against Loss. [In general, loss is to be measured at the time the offense is detected (i.e., when either a victim or law enforcement first develops a reasonable suspicion that an offense has occurred, or is occurring).]

Money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim(s) (including services performed) before detection of the offense shall be valued at the time of pledging, return, transfer, or performance, as the case may be, and shall be credited in determining the amount of loss.

Payments, property transfers, pledges of collateral, or services performed after detection of the offense shall not be credited. Amounts recovered, or readily recoverable, through civil processes after detection of the offense also shall not be credited.

However, if acts or omissions for which the defendant is accountable diminish the value of pledged assets after pledging, or otherwise increase the economic harm after detection of the offense, the loss shall reflect that increased net harm.

[Interest, Option A

[(C) Interest Not Included. For the purposes of subsection (b)(1), loss does not include interest of any kind; however, in an appropriate case (e.g., if interest was bargained for as part of a transaction that is the subject of the criminal case), an upward departure may be warranted based upon the loss of interest.]

[Interest, Option B

[(C) Interest. Loss shall not include interest the victim could have earned had the offense not occurred (i.e., 'opportunity-cost interest'). Interest shall be included if: [(i)] interest was bargained for by a victim as part of a transaction which is the subject of the criminal case[, or (ii) the victim transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.]

(D) Special Rules. The following special rules are to be used in determining loss in the situations indicated:

(1) Sting Operations

In cases involving the participation of an informant or undercover government agent, intended loss includes economic harms the defendant intended, even if accomplishment of the defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

(2) Ponzi Schemes

In a Ponzi-type scheme, loss is the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of his principal investment as a result of the fraudulent scheme.

(3) Stolen Credit Cards, Access Devices

In cases involving stolen credit cards or access devices, the loss includes any unauthorized charges made with the stolen credit cards (or purloined numbers), but in no event less than $100 per card.

(4) Diversion of Government Program Benefits

[Option A

[In a case involving diversion of government program benefits, loss is the value of the benefits derived from intended recipients or uses.]

[Option B

[In a case involving diversion of government program benefits, use the gain to the criminally responsible participants as the loss. In the case of a grant, the loss is the amount of the grant. In the case of a loan, the minimum loss is the savings in interest over the life of the loan compared with alternative loan terms for which the defendant would have qualified.]

(5) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

[Non-Economic Factors, Option A

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) the offense endangered national security or military readiness;

(2) the offense caused a loss of confidence in an important institution;

(3) the offense endangered the solvency or financial security of one or more victims;

(4) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(5) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(6) the offense involved [ten or more victims][a large number of victims;]

(7) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(8) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

[Non-Economic Factors, Option B

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) a primary objective of the offense was non-monetary;

(2) the offense caused or risked substantial non-monetary harm;

(3) false statements were made for the purpose of facilitating some other crime;

(4) the offense caused physical or psychological harm or severe emotional trauma;

(5) the offense endangered national security or military readiness;

(6) the offense caused a loss of confidence in an important institution;

(7) the offense endangered the solvency or financial security of one or more victims;

(8) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(9) the offense created a serious risk of substantially greater economic harm than the loss that actually occurred;

(10) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(11) the offense involved [ten or more victims][a large number of victims;]

(12) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(13) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

(F) Appropriate Deference. Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and approximate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742 (e) and (f).''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Notes 3, 4, 5, and 15; and by redesignating Notes 6, 7, 8, 9, 10, 11, 12, 13, 14, and 16 as Notes 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, respectively.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new notes:

[Non-Economic Factors, Option A

[''17. If the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted.]

[18. Under subsection (b)(7)(D)(ii), psychological harm or emotional trauma shall be considered to be substantial and severe if it is of prolonged duration and, as a result of such harm, the victim received medical treatment or other professional assistance.

Under subsection (b)(7)(E), a risk of additional loss shall be considered 'substantial' if the court determines that the additional risked loss would have increased the actual loss, as determined under subsection (b)(1), by at least 4 levels, had the risked loss actually occurred. If the risk of loss was greater than 4 levels, an upward departure may be warranted.''.]

The Commentary to § 2B1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.

[Non-economic Factors, Option A

Section 2F1.1(b) is amended by adding at the end the following new subdivision:

[''(7) If the offense involved one of the following aggravating factors: (A) the primary objective of the offense was non-monetary; (B) the offense caused or risked substantial non-monetary harm; (C) the offense was committed for the purpose of facilitating another felony offense, other than an offense covered by this guideline; (D) reasonably foreseeable (i) bodily injury, or (ii) psychological harm or emotional trauma that is substantial and severe; or (E) a reasonably foreseeable risk of substantial loss in addition to the loss that actually occurred, increase by [2] levels. If the offense involved more than one of these aggravating factors, increase by [4] levels.''.] The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Note 7 and inserting the following:

''7. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable [economic] harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3 [and that realistically could have occurred].

(A) Estimation of Loss. For the purposes of subsection (b)(1), the loss need not be determined precisely. The court need only make a reasonable estimate of the loss, given the available information and considering, as appropriate under the circumstances, measuring factors such as the following:

(1) the fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, damaged, or destroyed;

(2) the cost to the victim of replacing property taken, damaged, or destroyed;

(3) the cost of repairs, not to exceed the replacement cost had the property been destroyed;

(4) the approximate number of victims and an estimate of the average loss to each victim;

(5) the scope and duration of the offense, or revenues generated by similar operations;

[Gain, Option A

[(6) the gain to criminally responsible participants from committing the offense.]

[Gain, Option B

[(6) if the gain exceeds the loss or if the loss is difficult or impossible to calculate, the gain to criminally responsible participants from committing the offense.]

(B) [Time of Measuring Loss,] Credits Against Loss. [In general, loss is to be measured at the time the offense is detected (i.e., when either a victim or law enforcement first develops a reasonable suspicion that an offense has occurred, or is occurring).]

Money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim(s) (including services performed) before detection of the offense shall be valued at the time of pledging, return, transfer, or performance, as the case may be, and shall be credited in determining the amount of loss.

Payments, property transfers, pledges of collateral, or services performed after detection of the offense shall not be credited. Amounts recovered, or readily recoverable, through civil processes after detection of the offense also shall not be credited.

However, if acts or omissions for which the defendant is accountable diminish the value of pledged assets after pledging, or otherwise increase the economic harm after detection of the offense, the loss shall reflect that increased net harm.

[Interest, Option A

[(C) Interest Not Included. For the purposes of subsection (b)(1), loss does not include interest of any kind; however, in an appropriate case (e.g., if interest was bargained for as part of a transaction that is the subject of the criminal case), an upward departure may be warranted based upon the loss of interest.]

[Interest, Option B

[(C) Interest. Loss shall not include interest the victim could have earned had the offense not occurred (i.e., 'opportunity-cost interest'). Interest shall be included if: [(i)] interest was bargained for by a victim as part of a transaction which is the subject of the criminal case[, or (ii) the victim transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.]

(D) Special Rules. The following special rules are to be used in determining loss in the situations indicated:

(1) Sting Operations

In cases involving the participation of an informant or undercover government agent, intended loss includes economic harms the defendant intended, even if accomplishment of the defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

(2) Ponzi Schemes

In a Ponzi-type scheme, loss is the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of his principal investment as a result of the fraudulent scheme.

(3) Stolen Credit Cards, Access Devices

In cases involving stolen credit cards or access devices, the loss includes any unauthorized charges made with the stolen credit cards (or purloined numbers), but in no event less than $100 per card.

(4) Diversion of Government Program Benefits

[Option A

[In a case involving diversion of government program benefits, loss is the value of the benefits derived from intended recipients or uses.]

[Option B

[In a case involving diversion of government program benefits, use the gain to the criminally responsible participants as the loss. In the case of a grant, the loss is the amount of the grant. In the case of a loan, the minimum loss is the savings in interest over the life of the loan compared with alternative loan terms for which the defendant would have qualified.]

(5) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. 276a, criminally prosecuted under 18 U.S.C. 1001), the loss is the difference between the legally required and actual wages paid.

[Non-Economic Factors, Option A

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) the offense endangered national security or military readiness;

(2) the offense caused a loss of confidence in an important institution;

(3) the offense endangered the solvency or financial security of one or more victims;

(4) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(5) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(6) the offense involved [ten or more victims][a large number of victims;]

(7) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(8) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

[Non-Economic Factors, Option B

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) A primary objective of the offense was non-monetary;

(2) The offense caused or risked substantial non-monetary harm;

(3) False statements were made for the purpose of facilitating some other crime;

(4) The offense caused physical or psychological harm or severe emotional trauma;

(5) The offense endangered national security or military readiness;

(6) The offense caused a loss of confidence in an important institution;

(7) The offense endangered the solvency or financial security of one or more victims;

(8) The defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(9) The offense created a serious risk of substantially greater economic harm than the loss that actually occurred;

(10) But for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(11) The offense involved [ten or more victims][a large number of victims];

(12) The loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(13) The loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

(F) Appropriate Deference. Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and approximate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Notes 8 and 10; and by redesignating Notes 9, 11, 12, 13, 14, 15, 16, 17, and 18 as Notes 8, 9, 10, 11, 12, 13, 14, 15, and 16, respectively.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new notes:

[Non-Economic Factors, Option A

[''19. If the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted.]

[20. Under subsection (b)(7)(D)(ii), psychological harm or emotional trauma shall be considered to be substantial and severe if it is of prolonged duration and, as a result of such harm, the victim received medical treatment or other professional assistance.

Under subsection (b)(7)(E), a risk of additional loss shall be considered 'substantial' if the court determines that the additional risked loss would have increased the actual loss, as determined under subsection (b)(1), by at least 4 levels, had the risked loss actually occurred. If the risk of loss was greater than 4 levels, an upward departure may be warranted.''.]

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.

Issues for Comment

The following issues for comment solicit input on possible changes to the definition of loss in §§ 2B1.1 and 2F1.1 to clarify the Commission's intent, resolve issues raised by case law, and aid in consistency of application.

(A) Standard of Causation

The current definition of loss in §§ 2B1.1 and 2F1.1 does not specify any standard governing the causal relationship between the offense conduct and the harm caused. The proposed definition does include such a standard, using the concept of ''reasonable foreseeability'' as the touchstone. The Commission invites comment on whether such a standard is needed and, if so, whether the proposed ''reasonable foreseeability'' standard is preferable to other alternatives, such as a ''but-for'' causation or ''proximate cause'' standard.

The Commission also invites comment on what, if any, limitations should be placed on loss amounts that are included using the new causation standard, such as whether to limit the inclusion of ''consequential damages.'' The current loss definition provides for inclusion of such damages only in contract procurement, product substitution, and certain computer crime cases. Would the creation of a causation standard obviate the need for commentary governing consequential damages? If not, in what cases, if any, should consequential damages be included, and how should they be defined and determined? For example, should language be added that specifies whether loss includes or excludes the costs of investigation and prosecution?

(B) Fair Market Value

The current definition of loss in theft and fraud uses the concept of fair market value as an important factor in determining loss. The Commission invites comment on whether this concept should be clarified to specify, for example, whether retail, wholesale, or black market value is intended, depending on the nature of the offense. In addition, the Commission invites comment on what value should be used when the black market price is different from the price on the legitimate market. See, e.g., *United States* v. *Ellerbee*, 73 F.3d 105, 108–09 (6th Cir. 1996) (using retail price of stolen compact disks instead of lower price for which thief acquired and sold them); *United States* v. *Mount*, 966 F.2d 262, 265–67 (7th Cir. 1992) (using black market price of stolen postseason baseball tickets instead of lower face value).

(C) Interest

Although the definition of loss in the theft and fraud guidelines excludes interest ''that could have been earned had the funds not been stolen,'' some courts have interpreted the definition of loss to permit inclusion in loss of the interest that the defendant agreed to pay in connection with the offense. Compare *United States* v. *Hoyle*, 33 F.3d 415, 419 (4th Cir. 1994) (''[I]nterest shall not be included to determine loss for sentencing purposes.''), cert. denied, 513 U.S. 1133 (1995), with *United States* v. *Gilberg*, 75 F.3d 15, 18–19 (1st Cir. 1996) (including in loss interest on fraudulently procured mortgage loan) and *United States* v. *Henderson*, 19 F.3d 917, 928–29 (5th Cir.) (''Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction.''), cert. denied, 513 U.S. 877 (1994). The Commission invites comment on whether the definition of loss should be clarified to (1) exclude all forms of interest in all cases, (2) permit inclusion of bargained-for interest and/or interest that was lost because the victim(s) removed money from an investment vehicle or instrument to provide funds to the defendant, or (3) allow consideration of interest either in all loss calculations or as a departure factor. If lost opportunity cost interest should be included, how should such interest be calculated?

(D) Credits Against Loss—Benefit Received By Victims

The current loss definition instructs the courts to reduce the loss figure by the value of payments made and collateral pledged in fraudulent loan cases, and by the value of substituted products in product substitution cases. Some courts have extended this concept to other types of cases. See, e.g., *United States* v. *Maurello*, 76 F.3d 1304, 1311–12 (3d Cir. 1996) (calculating loss by subtracting value of satisfactory legal services from amount of fees paid to bogus lawyer); *United States* v. *Reddeck*, 22 F.3d 1504, 1513 (10th Cir. 1994) (reducing loss by value of education received from bogus university). The Commission invites comment on what credits should be applied in determining an appropriate loss figure where the victim was given something of value in connection with the offense, and how such a crediting principle might be articulated. For example, what payments, if any, made by a defendant should be credited against loss? The Commission further invites comment on whether the crediting principle should be used and similarly applied in both theft and fraud offenses.

Furthermore, the current commentary also credits only those payments on a loan that have been made ''at the time the offense is discovered.'' The Commission invites comment on whether this is the most appropriate ''cutoff point'' for crediting such payments. Should the commentary include a definition of ''at the time the offense is discovered'' that would specify, for example, discovery ''by whom'' (such as by the victim or law enforcement)?

The Commission invites comment on whether there should be an adjustment or an invited departure for situations in which a defendant demonstrated the intent to make additional payments but was apprehended before he could do so.

The Commission also invites comment on whether funds that a defendant has ''misapplied'' to an account but not withdrawn should count as loss. Compare *United States* v. *Johnson*, 993 F.2d 1358, 1358–59 (8th Cir. 1993) (no), with *United States* v. *Strozier*, 981 F.2d 281, 283–85 (7th Cir. 1992) (yes).

The current loss definition calculates the value of collateral based on the net proceeds of the sale of the collateral, or if the sale has not been accomplished prior to sentencing, based on the market value of the collateral reduced by the expected cost of the sale. The Commission invites comment on whether fluctuations in the value of collateral after it is pledged should affect the loss figure, as is the case with the current rule, or whether the Commission should change the rule to value collateral as of the time of pledging, so changes in the value of collateral do not affect the loss determination. See, e.g., *United States* v. *Barrett*, 51 F.3d 86, 90–91 (7th Cir. 1995) (including in loss the drop in value of property securing fraudulently obtained loans).

The Commission also invites comment on whether special rules are necessary to govern loss calculation for Ponzi schemes, and, if so, what those rules should be.

(**Note:** a Ponzi scheme is defined as ''a fraudulent investment scheme in which money placed by later investors pays artificially high dividends to the original investors, thereby attracting even larger investments.'' Bryan A. Garner, A Dictionary of Modern Legal Usage 671 (2d ed. 1995)).

See, e.g., *United States* v. *Holiusa*, 13 F.3d 1043, 1048 (7th Cir. 1994) (holding that loss does not include ''amounts that [the defendant] both intended to and indeed did return to investors''). Compare *United States* v. *Orton*, 73 F.3d 331, 334 (11th Cir. 1996) (holding defendant accountable only for ''the net losses of all victims who lost all or part of the money they invested'') with *United States* v. *Carrozzella*, 105 F. 3d 796, 805 (2d Cir. 1997) (holding that defendant should not be credited with amounts repaid to victims of a Ponzi scheme ''as part of a meretricious effort to maintain [the victims'] confidences.''

(E) Diversion of Government Benefits

The Commission invites comment on how loss should be determined in fraud cases involving the diversion or misuse of government program benefits and kickbacks. For example, what is the loss in a case in which a doctor acquires a patient by paying a kickback in return for a referral, provides necessary medical care, and is then paid for his services using Medicare funds? Does the current or proposed commentary adequately cover such cases?

(F) Gain

Courts have disagreed about when the current loss definition allows an offender's gain to be used in lieu of loss. Compare *United States* v. *Kopp*, 951 F.2d 521, 530 (3d Cir. 1991) (holding that gain cannot be used if loss is measurable even if loss is zero), with *United States* v. *Haddock*, 12 F.3d 950, 960 (10th Cir. 1993) (allowing gain to be used as alternative at all times). The Commission invites comment on whether and in what circumstances gain should be used in lieu of loss, whether gain should play a part in the loss calculation, and whether there should be some adjustment or departure if gain differs significantly from the loss figure. The Commission also invites comment on how gain might be calculated; e.g., should there be a ''net gain'' concept, or a distinction between a defendant's personal gain and the gain resulting from all offense conduct?

(G) Intended loss: Under the current loss definition, intended loss is used when it is greater than actual loss. The proposed definition extends this concept to theft cases as well. The Commission invites comment on whether the current rules should be changed to provide that loss is to be based on actual loss, with intended loss available only as a possible ground for departure, or whether some downward adjustment for defendants whose actual loss is greater than their intended loss is warranted.

Furthermore, courts have disagreed over whether intended loss should be limited by concepts of ''economic reality'' or impossibility. Compare *United States* v. *Moored*, 38 F.3d 1419, 1425 (6th Cir. 1994) (focusing on loss that defendant ''realistically intended''), with *United States* v. *Lorenzo*, 995 F.2d 1448, 1460 (9th Cir.) (''[T]he amount of [intended] loss * * * does not have to be realistic.''), cert. denied, 510 U.S. 881 (1993). The Commission invites comment on whether, if the substance of the current rule is to be retained, intended loss should be limited by concepts of ''economic reality'' or impossibility, such as in a government sting operation where there can be no loss, or in a false insurance claims case in which the defendant submits a claim for an amount in excess of the fair market value of the item.

(H) Risk of Loss

Under the current loss definition, a defendant might obtain a loan by fraudulent means but be accountable for zero loss because of pledged collateral and payments made prior to discovery. A defendant in an investment scam might likewise be accountable for zero loss because the risky investments he made were fortuitously profitable. The Commission invites comment on whether the definition of loss should be revised to include the concept of risk of loss, or, alternatively, whether the guideline should be amended to provide a higher minimum offense level (e.g., a floor offense level of [12 to 16]) or an added enhancement (e.g., an enhancement of [2–4] levels), so as to ensure higher punishment levels for defendants who expose their victims to the possibility of a loss, although their offenses may result in low actual loss figures. If any such amendments are warranted, what role should risk of loss play in determining the offense level? See § 2F1.1, comment. (n. 7(b)).

(I) Loss Amounts That Over- or Understate the Significance of the Offense

The Commission invites comment on whether to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense. See § 2F1.1, comment. (n. 10). More specifically, the Commission invites comment on whether to specify that where the loss amount included through § 1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived (or intended) by the defendant, the court might depart down to an offense level corresponding to the loss amount that more appropriately measures the defendant's culpability. Alternatively, the Commission invites comment on whether to provide a specific offense characteristic (e.g., calling for a reduction of [2–4] levels) or special rule in the definition of loss to reduce the offense level in such cases.

(J) Additional Special Rules

The Commission invites comment on whether there is any unique category of cases, other than those mentioned above, for which a special rule for determining loss is necessary or desirable. For example, the current loss definition in § 2F1.1 has a special rule for Davis-Bacon Act cases. Should that rule be maintained, and, similarly, are there other types of cases for which a special loss determination is warranted?

Theft, Fraud and Tax Related Issues

5. Synopsis of Proposed Amendment

The following amendments (described in Parts (A) through (D)) address issues related and subsidiary to the revisions of the theft, fraud, and tax loss tables that increase penalties and build in the more-than-minimal planning (MMP) enhancement.

(A) Deletion of More-than-Minimal-Planning (MMP) Enhancement

Synopsis of Proposed Amendment

Deletion of the MMP enhancement involves the following issues and guideline modifications:

i. Removal from § 1B1.1 (Application Instructions) of certain commentary describing features of MMP that are no longer applicable in view of the proposed amendments to the theft and fraud loss tables.

The language to be deleted is principally that which describes the ''repeated acts'' and ''concealment'' prongs of MMP. The definitional commentary for the ''planning'' prong of MMP needs to be retained because a MMP enhancement will continue to be a specific offense characteristic under the Aggravated Assault and Burglary guidelines. The example in the last sentence of Application Note 4, which currently refers to the cumulative application of the MMP adjustment from the fraud guideline and an aggravating role adjustment, could be replaced with a similar illustration from, e.g., the Burglary guideline, or the sentence could be deleted entirely. The amendment language shown below deletes the sentence.

ii. Removal of the MMP enhancement from the Theft and Property Destruction guidelines, with conforming commentary changes.

The two-level MMP enhancement exists in the Theft guideline (§ 2B1.1) as an alternative to a four-level enhancement for being in the business of receiving and selling stolen property. The latter enhancement is assumed to incorporate MMP. Hence, when the two-level MMP factor is deleted (and incorporated into the loss table), the remaining enhancement for fencing stolen property needs to be adjusted from a four-level to a two-level enhancement. This particular specific offense characteristic (SOC) was applied in 57 (1.8%) of the 1996 theft cases and 40 (1.2%) of the 1995 theft cases.

iii. Removal of the MMP enhancement from the Fraud guideline, with conforming commentary changes in § 2F1.1 and the Multiple Count guidelines.

The MMP enhancement in the Fraud guideline currently exists as an alternative to a comparable, two-level enhancement for ''a scheme to defraud more than one victim.'' In carrying through the decision to delete a separate MMP enhancement and fold it into the loss table, the Commission conceivably could elect to retain the enhancement for multiple victims. According to the Commission's Intensive Study Sample (ISS) assessment, an estimated 10 percent of all fraud cases involve more than one victim. However, because victim information currently is not well identified in the sentencing documents the Commission customarily receives, it is likely that the actual number of multiple victim cases is substantially higher. Thus, retention of the multiple victim enhancement may effectively retain the MMP enhancement in a substantial number of cases.

The background commentary also is modified to reflect the view that loss is a better measure of offense seriousness than whether the offense involved minimal or greater planning.

Proposed Amendment: The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) in the first paragraph by striking the last sentence as follows:

'' 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) by striking the second paragraph as follows:

'' 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.''

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) by striking the last two paragraphs as follows:

''In a theft, going to a secluded area of a store to conceal the stolen item in one's pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 4 in the second paragraph by striking the last sentence as follows:

''For example, the adjustments from § 2F1.1(b)(2) (more than minimal planning) and § 3B1.1 (Aggravating Role) are applied cumulatively.''.

Section 2B1.1(b)(4) is amended by striking subdivision (A) as follows:

''(A) If the offense involved more than minimal planning, increase by 2 levels; or''.

Section 2B1.1(b)(4)(B) is amended by striking ''(B)''; and by striking ''4'' and inserting ''2''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by striking '' 'More than minimal planning,' ''; and by striking '' 'firearm' '' and inserting '' 'Firearm' ''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Note 13 as follows:

''13. If subsection (b)(6) (A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.' ''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by redesignating Notes 14, 15, and 16 as Notes 13, 14, and 15, respectively.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the first paragraph by striking the last sentence as follows:

''Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by striking the second paragraph as follows:

''The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.''.

Section 2B1.3(b) is amended by striking subdivision (3) as follows:

''(3) If the offense involved more than minimal planning, increase by 2 levels.''.

The Commentary to § 2B1.3 captioned ''Application Notes'' is amended by striking Note 1 as follows:

''1. 'More than minimal planning' is defined in the Commentary to § 1B1.1 (Application Instructions).'';

and by redesignating Notes 2 through 4 as Notes 1 through 3, respectively.

Section 2F1.1(b) is amended by striking subdivision (2) as follows:

''(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Notes 2 and 3 as follows:

''2. 'More than minimal planning' (subsection (b)(2)(A)) is defined in the Commentary to § 1B1.1 (Application Instructions).

3. 'Scheme to defraud more than one victim,' as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, 'victim' refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.'';

by striking Note 18 as follows:

''18. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.' '';

and by redesignating Notes 4 through 17 as Notes 2 through 15, respectively.

The Commentary to § 2F1.1 captioned ''Background'' is amended by striking the second and third paragraphs as follows:

''Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.'',

and inserting:

''The Commission has determined that, ordinarily, the sentences of defendants convicted of fraud offenses should reflect the nature and magnitude of the economic harm caused by their crimes. Accordingly, the amount of loss caused by an offense is a principal factor in determining the offense level under this guideline.''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended in Note 3 by striking the last sentence as follows:

''In addition, the adjustment for 'more than minimal planning' frequently will apply to multiple count convictions for property offenses.''.

The ''Illustrations of the Operation of the Multiple-Count Rules'' after guideline 3D1.5 is amended in illustration 2 by striking ''$2,000'' wherever it appears and inserting ''$3,000''; and in the fourth sentence by striking ''$4,800'' and inserting ''$5,800''.

The ''Illustrations of the Operation of the Multiple-Count Rules'' after guideline 3D1.5 is amended in illustration 2 by striking in the sixth sentence by striking ''; 1 level is'' and inserting ''[Option 1: and 2 levels are]; [Option 2: and 4 levels are]''; and by striking ''; and 2 levels are added because the conduct involved repeated acts with some planning (§ 2F1.1(b)(2)(A))''.

The ''Illustrations of the Operation of the Multiple-Count Rules'' after guideline 3D1.5 is amended in illustration 2 in the last sentence by striking ''9'' and inserting ''[Option 1: 8]; [Option 2: 10]''.

(B) Reduction for Cases Involving Limited or Insignificant Planning

Synopsis of Proposed Amendment

The Commission's Practitioners' Advisory Group has suggested the following 2-level reduction in the theft and fraud guideline for cases that involve only limited or insignificant planning in the event that the more than minimal planning enhancement is built into the theft and fraud loss tables. For a related proposal, see Amendment 1(C), supra.

Proposed Amendment: Section 2B1.1(b) is amended by adding at the end the following new subdivision:

''(8) If the offense involved (A) limited or insignificant planning, or (B) simple efforts at concealment, reduce by 2 levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''17. The term 'limited or insignificant planning' means planning that is necessary for commission of the offense in a simple form.''.

Section 2F1.1(b) is amended by adding at the end the following new subdivision:

''(7) If the offense involved (A) limited or insignificant planning, or (B) simple efforts at concealment, reduce by 2 levels.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''19. The term 'limited or insignificant planning' means planning that is necessary for commission of the offense in a simple form.''.

(C) Sophisticated Concealment Enhancement.

Synopsis of Proposed Amendment

This amendment adds an enhancement in the fraud and theft guidelines similar to the existing ''sophisticated means'' enhancement in the tax guidelines. This amendment also entails some modification of the existing sophisticated means enhancement in the tax guidelines and the addition of a ''floor'' offense level of 12 to both the new and existing enhancements.

i. Addition of ''Sophisticated Concealment'' enhancement to Theft and Fraud guidelines.

Two options are proposed to add an enhancement for sophisticated concealment to the theft and fraud guidelines. Option 1 treats ''committing the offense from outside the United States'' as a separate and alternative enhancement to other forms of sophisticated concealment. Option 2 treats ''committing the offense from outside the United States'' as one form of sophisticated concealment.

ii. Modification of ''Sophisticated Means'' enhancement in tax guidelines.

This amendment modifies the tax guidelines' sophisticated means SOC. In April, 1997, the Commission considered modifications that were designed to provide a floor offense level of 12, enhance the precision of the language, and address a circuit conflict. The conflict involved the issue of whether the sophisticated means enhancement applies based on the personal conduct of the defendant (see *United States* v. *Kraig,* 99 F.3d 1361 (6th Cir. 1996)), or the overall offense conduct for which the defendant is accountable (see *United States* v. *Lewis,* 93 F.3d 1075 (2d Cir. 1996)). The modifications take into account the latter view because that

view appears more consistent with the usual relevant conduct attribution rules.

The sophisticated means enhancement was applied in 103 (16.6%) tax evasion (§ 2T1.1) cases sentenced in FY 1996 and 82 (16.1%) of such cases sentenced in FY 1995. The identical enhancement in the other two tax guidelines (§§ 2T1.4, 2T3.1) was not applied in FY 1995 or FY 1996.

Two options are presented. Option 1 is substantially similar to the modifications considered by the Commission in April, 1997, with minor, non-substantive modifications in the commentary. Option 2 eliminates the element of ''greater planning than a routine tax-evasion case'' and generally conforms the SOC to the ''sophisticated concealment'' language prepared for the theft and fraud guidelines. However, the definition of ''sophisticated concealment'' does not include ''committing the offense from outside the United States'' because it seems unlikely that a tax offense would be perpetrated from outside the United States to avoid detection or prosecution. Under this option, the planning concept is deleted because that element arguably would be built into the offense level if the Commission adopts one of the proposed loss table amendments, both of which propose using a tax loss table that is the same as, or substantially similar to, the fraud loss table that is amended to phase in more than minimal planning. Without the planning element, the ''harm'' that is sought to be captured is the complex scheme designed to make the offense difficult to detect. Finally, Option 2 retains the floor offense level of 12.

Proposed Amendment: Section 2B1.1(b) is amended by redesignating subdivisions (5) through (7) as subdivisions (6) through (8); and by inserting the following new Note 5:

''(5) If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''17. For purposes of subsection (b)(5), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.

[Option 1

Section 2F1.1(b)(5) is amended by striking:

''If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.'',

and inserting:

''If (A) any part of the offense was committed from outside the United States, or (B) the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

19. For purposes of subsection (b)(5)(A), United States'' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

''For purposes of subsection (b)(5)(B), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.]

[Option 2

Section 2F1.1(b)(5) is amended by striking:

''If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.'',

and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''19. For purposes of subsection (b)(5), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, commission of the offense from outside the United States, or the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.]

[Option 1

Section 2T1.1(b)(2) is amended by striking ''existence'' and inserting ''offense''; by inserting ''its'' following ''or''; by striking ''of the offense''; and by adding at the end the following new sentence:

''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 4 by striking ''An'' and inserting ''The''; by striking ''be applied'' and inserting ''apply''; by striking ''where the defendant used offshore'' and inserting ''if the offense involved the use of foreign''; by inserting ''or foreign transactions'' following ''accounts''; and by inserting '', to conceal the offense or its extent'' following ''entities''.

Section 2T1.4(b)(2) is amended by striking ''existence'' and inserting ''offense''; by inserting ''its'' following ''or''; by striking ''of the offense'' following ''extent''; and by adding at the end the following new sentence:

''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T1.4 captioned ''Application Notes is amended in Note 3 by striking ''§ 2T1.4(b)(2)'' and inserting ''subsection (b)(2)''; by striking ''An'' and inserting ''The''; by striking ''be applied'' and inserting ''apply''; by striking ''where the defendant used offshore'' and inserting ''if the offense involved the use of foreign''; by inserting ''or foreign transactions'' following ''accounts''; and by inserting '', to conceal the offense or its extent'' following ''entities''.

Section 2T3.1(b)(1) is amended by striking ''nature or existence of the offense'' and inserting ''offense or its extent''; and by adding at the end the following new sentence:

''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T3.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. 'Sophisticated means,' as used in subsection (b)(1), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine

duty-evasion case. The enhancement would apply, for example, if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.''.]

[Option 2

Section 2T1.1(b)(2) is amended by striking ''If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.'',
and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. 'Sophisticated means,' as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.'',
and inserting:

''4. For purposes of subsection (b)(2), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.

Section 2T1.4(b)(2) is amended by striking ''If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.'',
and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T1.4 captioned ''Application Notes'' is amended by striking Note 3 as follows:

''3. 'Sophisticated means,' as used in § 2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.'',
and inserting:

''3. For purposes of subsection (b)(2), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.

Section 2T3.1(b)(1) is amended by striking ''If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels.'' and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T3.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. For purposes of subsection (b)(1), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.]

(D). Financial Institution, Personal Profit Enhancement

Synopsis of Proposed Amendment

Proposals considered by the Commission in April, 1997 would have modified an enhancement for defendants who personally and substantially profit from financial institution fraud. This enhancement is contained in the theft, commercial/bank bribery, and fraud guidelines. In view of the substantial increases in the loss table for large-scale offenses, it is proposed to adhere somewhat more closely to the minimum dictates of this congressionally-directed enhancement, which requires a minimum offense level of 24 (approximately a five-year sentence) for defendants who derive more than $1 million in ''gross receipts'' from specified financial institution offenses. Thus, the amendment would delete the four-level increase currently required under the enhancement while retaining the minimum offense level of 24. This would avoid unwarranted double counting for offenses involving loss amounts in excess of $2.5 million (equivalent to level 24 under the new loss table options). Although the effect of the enhancement would be moderated somewhat, it would continue to apply to a broader spectrum of cases than required under the congressional directive.

The amendment also addresses significant interpretive problems regarding the meaning of the current guideline phrase ''affected a financial institution and the defendant derived more than $1 million in gross receipts from the offense.'' The proper interpretation of this language has been the subject of a number of hotline calls and some litigation (although no circuit conflict has yet resulted).

The amended commentary would address the confusion about the meaning of the phrase ''affected a financial institution'' by deleting that problematic language. The new language would make clear that the enhancement applies when the offense is perpetrated against, and the money is derived from, one or more financial institutions.

Additionally, the definition for ''gross receipts'' would be amended to clarify that ''gross receipts from the offense'' includes property under the control of, or in the custody of, the financial institution for a second party, e.g., a depositor. The background commentary would also be amended to reflect the Commission's intent to implement the congressional directive in a broader fashion than required.

Because this SOC exists in the alternative to another SOC (regarding causing or threatening the institution's solvency), it is not possible to ascertain from the monitoring data exactly how frequently it has been applied. However, the data indicate that one or the other SOC was applied in 8 (.2%) FY 1995 theft cases, and 12 (.4%) of FY 1996 theft cases; with respect to fraud cases, the SOC was applied in 38 (.6%) of FY 1995 cases and in 50 (.8%) of FY 1996 cases. The SOC was not applied in any commercial/bank bribery cases during either fiscal year.

Proposed Amendment: Section 2B1.1(b)(6) is amended by striking ''—'' after ''offense''; by striking ''(A)'' before ''substantially''; by striking ''; or (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,'', and inserting a comma; by redesignating subdivision (7) as subdivision (8); and by inserting the following as new subdivision (7):

''(7) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by inserting before the first sentence the following:

''For purposes of subsection (b)(7), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by striking ''from the offense,'' before ''as used in''; by striking ''(6)(B)'' and inserting ''(7)''; by striking ''generally'' before ''means''; and by striking the last sentence as follows:

'' 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the sixth paragraph by striking ''Subsection'' and inserting ''Subsections''; by striking ''(A)'' and inserting ''and (7)''; by striking ''implements'' and inserting ''implement''; by striking ''instruction'' and inserting ''instructions''; and by inserting at the end before the period ''and Section 2507 of Public Law 101–647, respectively''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by striking the last paragraph as follows:

''Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101–647.''.

Section 2F1.1(b)(6) is amended by striking ''—'' after ''offense''; by striking ''(A)'' before ''substantially''; by striking ''; or (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,'' and inserting a comma; and by adding at the end the following new subdivision:

''(7) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2F1.1 captioned ''Aplication Notes'' is amended in Note 16 by inserting before the first sentence the following:

''For purposes of subsection (b)(7), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 16 by striking ''from the offense,'' before ''as used in''; by striking ''(6)(B)'' and inserting ''(7)''; by striking ''generally'' before ''means''; and by striking the last sentence as follows:

'' 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the seventh paragraph by striking ''Subsection'' and inserting ''Subsections''; by striking ''(A)'' and inserting ''and (7)''; by striking ''implements'' and inserting ''implement''; by striking ''instruction'' and inserting ''instructions''; and by inserting at the end before the period ''and Section 2507 of Public Law 101 647, respectively''.

The Commentary to § 2F1.1 captioned ''Background'' is amended by striking the last paragraph as follows:

''Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101–647.''.

Section 2B4.1(b)(2) is amended by striking ''—'' after ''offense''; by striking ''(A)'' before ''substantially''; by striking ''; or (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,'' and inserting a comma; and by adding at the end the following new subdivision:

''(3) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2B4.1 captioned ''Application Notes'' is amended in Note 5 by inserting before the first sentence the following:

''For purposes of subsection (b)(3), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.''.

The Commentary to § 2B4.1 is captioned ''Application Notes'' is amended in Note 5 by striking ''from the offense,'' before ''as used in'' ; by striking ''(2)(B)'' and inserting ''(3)''; by striking ''generally'' before ''means''; and by striking the last sentence as follows:

'' 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).''.

The Commentary to § 2B4.1 captioned ''Background'' is amended in the seventh paragraph by striking ''Subsection'' and inserting ''Subsections''; by striking ''(A)'' and inserting ''and (3)''; by striking ''implements'' and inserting ''implement''; by striking ''instruction'' and inserting ''instructions''; and by inserting at the end before the period ''and Section 2507 of Public Law 101 647, respectively''.

The Commentary to § 2B4.1 captioned ''Background'' is amended by striking the last paragraph as follows:

''Subsection (b)(2)(B) implements the instruction to the Commission in Section 2507 of Public Law 101–647.''.

Telemarketing Fraud

6. Issue for Comment

The Commission is examining the characteristics of telemarketing fraud offenses, the statutory enhancement for telemarketing fraud at 18 U.S.C. 2326, and whether current adjustments in § 2F1.1 (Fraud), § 3A1.1 (Hate Crime Motivation or Vulnerable Victim), and the policy statements in § 5K2.0–§ 5K2.18 (Other Grounds for Departures) provide adequate punishment for defendants convicted of telemarketing fraud offenses.

In conjunction with its examination, the Commission invites comment on the following issues:

(A) Telemarketing Fraud Generally

Should telemarketing fraud offenses be treated differently from other types of fraud offenses involving comparable numbers and nature of victims and comparable monetary loss? What types of harms unique to telemarketing fraud are not adequately addressed by the guidelines? Should § 2F1.1 be amended to provide an increase of [2–8] levels to correspond to the application of the statutory enhancement in 18 U.S.C. 2326?

(B) Multiple Victims

Do the guidelines adequately address fraud offenses that impact multiple victims? If not, how should they be amended to address this concern? Should, for example, the fraud guideline include a table providing tiered offense level increases that correspond to the

number of victims involved in the offense? If so, what are the appropriate offense level increases and corresponding ranges of number of victims? Should such an enhancement be based on the total number of victims or the number of vulnerable victims? If the enhancement is based on vulnerability, is it more appropriate to amend § 3A1.1 to reflect multiple victims?

(C) Revictimization

Commission analysis indicates that telemarketing fraud often involves repeat victimization of persons previously victimized, typically through ''reloading'' (a process in which a telemarketing offender targets victims whose names are included on lists of individuals previously contacted and victimized) or ''recovery services'' schemes (a process in which an offender poses as a government agent or other individual in a position to help the victim recover, for a fee, the losses incurred as a result of the initial telemarketing scheme). Commission analysis further indicates that district courts often enhance the sentence under § 3A1.1 (Vulnerable Victim) in these cases. Does § 3A1.1 adequately address revictimization concerns? To ensure consistent application of this enhancement, should the Commission amend the guideline or commentary to ensure that § 3A1.1 is applicable when the offense involves an individual susceptible to the offense because of prior victimization? Alternatively, should the Commission promulgate additional specific offense characteristics addressing this aspect of telemarketing fraud?

(D) Departures

Currently, Application Note 10 of § 2F1.1 encourages upward departures when monetary loss inadequately measures the harm and seriousness of fraudulent conduct. Should some of the listed departure factors be converted into specific offense characteristics? For example, should the fact that ''the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma'' (subsection (c)), or ''the offense involved the knowing endangerment of the solvency of one or more victims''(subsection (f)), or other factors be made into specific enhancements under the fraud guideline? Is so, what offense level weight should be assigned to these factors? In addition, should the Commission promulgate any currently specified grounds for departure listed in Chapter 5K as specific offense characteristics? If so, what weight should be given these factors?

(E) Sophisticated means. Elsewhere in these proposed amendments, the Commission has (1) included, on a phased-in basis, an enhancement for more-than-minimal planning in proposed revisions of the loss table applicable for fraud offenses, and (2) proposed a new enhancement for ''sophisticated concealment'' conduct (defined to include perpetrating an offense from outside U.S. borders). In this regard, the Senate-passed version of a telemarketing fraud bill (H.R. 1847, 105th Cong., 1st Sess.) directs the Commission to ''provide an additional appropriate sentencing enhancement if [sic] offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States.'' The Commission invites comment on whether the proposed amendments adequately address concerns expressed in the congressional directive. If not, how should the enhancement be augmented to most effectively implement such a potential directive?

(F) Other Factors

Are there additional factors that the Commission should address, either by specific offense characteristics, guideline commentary, or departure provisions, to provide appropriate punishment for telemarketing offenses?

7. Circuit Conflicts

Synopsis of Proposed Amendment

The Commission has identified the resolution of several circuit conflicts for consideration this year. Parts (A) through (J) present particular circuit conflicts under consideration.

(A) Aberrant Behavior

Synopsis of Proposed Amendment

The amendment addresses the circuit conflict regarding whether the aberrant behavior departure is limited to only spontaneous and thoughtless acts. Compare *United States* v. *Marcello*, 13 F.3d 752 (3d Cir. 1994); *United States* v. *Glick*, 946 F.2d 335 (4th Cir. 1991); *United States* v. *Williams* 974 F.2d 25 (5th Cir. 1991), cert. denied, 507 U.S. 934 (1993); *United States* v. *Carey*, 895 F.2d 318 (7th Cir. 1990) with *United States* v. *Grandmaison*, 77 F.3d 555 (1st Cir. 1996); *United States* v. *Takai*, 941 F.2d 738 (9th Cir. 1991). The proposal removes the departure from Chapter One and creates a guideline in Chapter Five that limits the departure to a spontaneous and thoughtless act.

Proposed Amendment

Chapter One, Part A, is amended in subdivision 4(d) in the last paragraph by striking the last sentence as follows:

''The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.''.

Chapter Five, Part K, is amended by adding at the end the following new policy statement:

''§ 5K2.19 Single Act of Aberrant Behavior (Policy Statement). If the offense consisted of a single act of aberrant behavior, a downward departure may be warranted. A 'single act of aberrant behavior' means a spontaneous and thoughtless act. This definition does not include a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender.''.

(B) Misrepresentation with respect to Charitable Organizations

Synopsis of Proposed Amendment

The amendment addresses the circuit conflict regarding whether an employee of a charity or governmental agency who misapplies or embezzles funds misrepresents that he was acting ''on behalf of the agency'' within the meaning of the two-level enhancement under § 2F1.1(b)(3)(A). Compare *United States* v. *Frazier*, 53 F.3d 1105 (10th Cir. 1995) with *United States* v. *Marcum*, 16 F.3d 599 (4th Cir.) cert. denied, 513 U.S. 845 (1994). The proposed amendment provides enhancements for both (1) the legitimate employee of a charitable, educational, religious or political organization, or government agency who commits a fraud by misrepresenting to an individual outside the organization or agency that the defendant is acting on behalf of the employer organization or agency; and (2) the defendant who commits a fraud by pretending to be an employee or authorized agent of a charitable, educational, religious or political organization, or government agency.

Proposed Amendment

Section 2F1.1(b)(3) is amended by striking:

''the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, education, religious or political organization, or a government agency,'', and inserting:

''(A)(i) the defendant is an employee or authorized agent of a charitable, education, religious or political organization, or a government agency, who used that employment or position

as an authorized agent under false pretenses to victimize an individual who is not an employee of that organization or agency; (ii) the offense involved a misrepresentation that the defendant was an employee or authorized agent of a charitable, educational, religious or political organization, or a government agency;'';

and by inserting ''the offense involved a'' following ''(B)''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. Subsection (b)(3)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.'',

and inserting a new Note 4 as follows:

''4. Subsection (b)(3)(A) provides enhancements for a defendant's use of false pretenses to take advantage of a victim's charitable motives, or trust in government agencies. The enhancement in (b)(3)(A)(i) applies if (a) the defendant is a legitimate employee of a charitable, educational, religious or political organization, or a government agency, (b) the false pretense was that the defendant was acting for the interest or benefit of the organization or agency when, in fact, the defendant was acting for personal gain; and (c) the offense victimizes an individual who is not an employee of that organization or agency. For example, this enhancement would apply in a case in which the president of a charitable organization skims proceeds from a public bingo game which the president conducts under the false pretenses of raising money solely for the charitable organization. [If this enhancement applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).]

The enhancement in (b)(3)(A)(ii) applies if (A) the defendant is not a legitimate employee of a charitable, education, religious or political organization or a government agency, and (B) the misrepresentation was that the defendant was an employee or authorized agent of an organization or agency referred to in (a).

Because the enhancements in (b)(3)(A) apply in the case in which a defendant uses false pretenses to take advantage of charitable motives or trust in government agencies, clauses (i) and (ii) do not apply if the defendant simply embezzles money from the employer organization or agency or otherwise commits a fraud directed at the organization or agency. However, such a defendant who holds a position of public or private trust will be subject to an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the first, second, and third sentences as follows:

''Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm.''.

(C) Violation of Judicial Process

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether filing fraudulent forms with bankruptcy and probate courts violates a judicial order or process within the meaning of the two-level enhancement under § 2F1.1(b)(3)(B). Two options are presented. Option One adopts the majority view and defines the scope of the enhancement to include fraudulent court filings. See *United States* v. *Michalek*, 54 F.3d 325 (7th Cir. 1995); *United States* v. *Lloyd*, 947 F.2d 339 (8th Cir. 1991)(per curiam); *United States* v. *Welch*, 103 F.3d 906 (9th Cir. 1996)(per curiam); *United States* v. *Messner*, 107 F.3d 1448 (10th Cir. 1997); *United States* v. *Bellew*, 35 F.3d 518 (11th Cir. 1994)(per curiam). In Option One, ''violation of a judicial order'' is interpreted broadly to mean an abuse of judicial proceedings (presented as both an enhancement and an upward departure provision in coordination with the consolidation of theft and fraud proposal, see Proposed Amendment 3, supra.) Option Two adopts the minority view and defines the scope of the enhancement to exclude fraudulent court filings. See *United States* v. *Shadduck*, 112 F.3d 523 (1st Cir. 1997); *United States* v. *Carrozella*, 105 F.3d 796 (2d Cir. 1997). In this option, ''violation of a judicial order'' is interpreted narrowly to mean a violation of a command or order issued to a specific person or party (presented as both an enhancement and an upward departure provision in coordination with the consolidation of theft and fraud proposal, see Proposed Amendment 3, supra.)

Proposed Amendment

[Option (1)(a) Enhancement provision:

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 by striking:

''This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and by adding at the end the following new paragraphs:

''This enhancement also applies if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor's protection from creditors and gives the defendant an undeserved advantage in the proceeding.

This enhancement does not apply to conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by adding at the end the following new sentence:

''Similarly, a defendant who violates a special judicial process deserves additional punishment because the defendant is taking advantage of a judicial proceeding to gain an undeserved advantage.''.]

[Option (1)(b) Upward departure provision: Section 2F1.1(b)(3) is amended by striking ''(A)''; and by striking ''or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 by striking:

''Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and inserting:

''If the defendant committed a violation of any judicial or administrative order, injunction, decree, or process, an upward departure may be warranted. If it is established that an entity the defendant controlled was a party to the prior proceeding and the defendant had knowledge of that prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)) is not authorized under this note.

An upward departure pursuant to this note also may be warranted if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor's protection from creditors and gives the defendant an undeserved advantage in the proceeding.''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the last sentence as follows:

''A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.''.]

[Option (2)(a) Enhancement provision: The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 in the by striking:

''Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and inserting:

''Subsection (b)(3)(B) provides an enhancement if the defendant commits a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such an official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative warning, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply to conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the last sentence as follows:

''A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.''.]

[Option 2(b) Upward departure provision: Section 2F1.1(b)(3) is amended by striking ''(A)''; and by striking ''or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 in the by striking:

''Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and inserting:

''An upward departure may be warranted if the defendant commits a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. The failure to comply with such a warning demonstrates aggravated criminal intent that may deserve a sentence outside the guideline range. If it is established that an entity

the defendant controlled was a party to the prior proceeding and the defendant had knowledge of the prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines(e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)) is not authorized under this note.''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the last sentence as follows:

''A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.''.]

(D) Grouping Failure to Appear Count with Underlying Offense

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether the guideline procedure of grouping the failure to appear count of conviction with the underlying offense violates the statutory mandate of imposing a consecutive sentence. Compare *United States* v. *Agoro,* 996 F.2d 1288 (1st Cir. 1993); *United States* v. *Flores,* 23 F.3d 408 (6th Cir. 1994)(unpublished) with *United States* v. *Packer,* 70 F.3d 357 (5th Cir. 1995), cert. denied, 117 S.Ct. 75 (1996). The proposal maintains the current grouping rules for failure to appear and obstruction of justice, but addresses internal inconsistencies in the guidelines. Specifically, the proposal (1) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. 3146 (Penalty for failure to appear) and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (2) adds a paragraph stating that the method outlined for determining sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; and (3) adds departure provision if offense conduct involves multiple obstructive behavior.

Proposed Amendment

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended in Note 3 in paragraph two by striking:

''Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under § 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under § 3D1.2(c). Note that although 18 U.S.C. 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a 'total punishment' that satisfies the requirements both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30–37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.'',

and inserting:

''Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under § 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under § 3D1.2(c). (Note that 18 U.S.C. 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§ 3D1.1–3D1.5 apply. See § 3D1.1(b), comment. (n.1), and § 3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a 'total punishment' that satisfies the requirements both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. 3146(b)(2).)''.

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended by redesignating Note 4 as Note 5 and inserting the following as new Note 4:

''4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under § 3C1.1 (Obstruction of Justice) is made because of the operation of the rules set out in Application Note 3.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 6 by striking ''Where'' and inserting ''If''; and by striking ''where'' both places it appears and inserting ''if''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 7 in the first sentence by striking ''Where'' and inserting ''If''; by striking ''both of the'' and inserting ''both of an''; by inserting ''e.g., 18 U.S.C. 3146 (Penalty for failure to appear); 18 U.S.C. 1621 (Perjury generally))'' following ''obstruction offense''; and by striking ''the underlying'' and inserting ''an underlying''.

Section 3D1.1(b) is amended by striking the first sentence as follows:

''Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§ 3D1.2–3D1.5.'',

and inserting:

''Exclude from the application of §§ 3D1.2–3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment.''.

The Commentary to § 3D1.1 captioned ''Application Notes'' is amended in Note 1 by striking the following:

''1. Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A conviction for 18 U.S.C. 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Example: The defendant is convicted of one count of bank robbery (18 U.S.C. 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See § 5G1.2(a).'',

and inserting:

''1. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. 924(c) (requiring mandatory term of five years to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under USSG § 2B3.1 is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. 924(c), the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See § 5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. 3146 (Penalty for failure to appear); 18 U.S.C. 924(a)(4) (regarding penalty for 18 U.S.C. 922(q)(possession or discharge of a firearm in a school zone)). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.''.

The Commentary to § 3D1.2 captioned ''Application Notes'' is amended in Note 1 by striking ''mandates imposition of a consecutive sentence'' and inserting ''(A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment''; and by inserting ''; id., comment.(n.1)'' following ''§ 3D1.1(b)''.

Section 5G1.2(a) is amended by striking ''mandates imposition of a consecutive sentence'' and inserting ''(1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment''; and by inserting ''by the statute'' following ''determined''.

The Commentary to § 5G1.2 is amended in the last paragraph by striking:

''Counts for which a statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the particular offense of conviction. That sentence then runs consecutively to the sentences imposed on the other counts.'',

and inserting:

''Subsection (a) applies if a statute (a) specifies a term of imprisonment to be imposed; and (b) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. 924(c) (requiring mandatory term of five years to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count.'';

by inserting '', e.g.,'' following ''See''; and by adding at the end the following:

''Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to § 2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.''.

(E) Imposters and the Abuse of Trust Adjustment

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether the abuse of position of trust adjustment in § 3B1.3 applies to imposters. The majority view defines the scope of the adjustment to include imposters. See *United States* v. *Gill*, 99 F.3d 484 (1st Cir. 1996); *United States* v. *Queen*, 4 F.3d 925 (10th Cir. 1993), cert. denied, 510 U.S. 1182 (1994). The minority view defines the scope of the enhancement to exclude imposters. See *United States* v. *Echevarria*, 33 F.3d 175 (2d Cir. 1994). The proposed amendment provides that the abuse of position of trust adjustment applies to the imposter who indicates that he legitimately holds a position of trust when in fact he does not and gives two examples of such circumstances.

Proposed Amendment

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended in Note 1 in the third sentence by inserting ''public or private'' following ''position of''; in the fourth sentence by striking ''would apply'' and inserting ''applies''; and in the last sentence by striking ''would'' and inserting ''does.''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended by redesignating Note 2 as Note 3 and inserting the following as new Note 2:

''2. This enhancement also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the enhancement applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.''.

The Commentary to § 3B1.3 captioned ''Background'' is amended by inserting after the first sentence the following:

''The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold

a position of public or private trust when, in fact, they do not.''.

Issue for Comment: The Commission invites comment on whether, in reference to the above proposed amendment, it should amend § 3B1.3 to provide that the adjustment does not apply to an imposter (i.e., an individual who poses as an individual in a position of public or private trust).

(F) Instant Offense and Obstruction of Justice

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether the term ''instant offense'', as used in the obstruction of justice guideline, § 3C1.1, includes obstructions that occur in cases closely related to the defendant's case or only those specifically related to the ''offense of conviction''. Three options are presented. Option One (a), the majority view, defines the scope of the adjustment broadly to apply to obstructions of justice in closely related cases. See *United States* v. *Powell*, 113 F.3d 464 (3d Cir.), cert. denied, 118 S.Ct. 454 (1997); *United States* v. *Walker*, 119 F.3d 403 (6th Cir.), cert. denied, __ S. Ct. __, 1997 WL 739733, (U.S., Dec. 15, 1997); *United States* v. *Acuna*, 9 F.3d 1442 (9th Cir. 1993); *United States* v. *Bernaugh*, 969 F.2d 858 (10th Cir. 1992). Option One (b) is a variation of the majority view, which (1) clarifies the temporal element of the obstruction guideline (that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction); and (2) instructs that the obstruction must relate to either the defendant's offense of conviction or to a closely related case, such as that of a co-defendant. Option Two, the minority view, defines the scope of the adjustment narrowly to apply only to obstructions of justice directly connected to the offense of conviction. See *United States* v. *Perdomo*, 927 F.2d 111 (2d Cir. 1991); *United States* v. *Partee*, 31 F.3d 529 (7th Cir. 1994).

Proposed Amendment

[Option 1(a): The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 8 as Notes 2 through 9, respectively; and by inserting the following as new Note 1:

''1. For purposes of this guideline—

'Instant offense' means the offense of which the defendant is convicted and any state or federal offense committed by the defendant or another person that is closely related to the offense of conviction.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4(b), as redesignated, by inserting before the semicolon the following:

''during the investigation, prosecution, or sentencing of the defendant's instant offense (see definition in Application Note 1)''.]

[Option 1(b): Section 3C1.1 is amended by inserting ''(A)'' following ''justice''; by inserting ''the course of'' following ''during'' and by inserting ''of conviction, and (B) the obstructive conduct related to the defendant's offense of conviction or a closely related offense'' following ''instant offense''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 8 as Note 2 through 9, respectively; and by inserting the following as new Note 1:

''1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to the defendant's offense of conviction or a closely related case, such as that of a co-defendant.''.]

[Option 2: Section 3C1.1 is amended by inserting ''of conviction'' following ''instant offense''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 8 as Note 2 through 9, respectively; and by inserting the following as new Note 1:

''1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related solely to the defendant's instant offense of conviction.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4, as redesignated, in the last paragraph by striking ''where'' and inserting ''of conviction if''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 5(a), as redesignated, by inserting ''of conviction'' after ''instant offense''.]

(G) Failure to Admit Drug Use While on Pretrial Release

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether lying to a probation officer about drug use while out on bail warrants the obstruction of justice adjustment. Compare *United States* v. *Belletiere*, 971 F.2d 961 (3d Cir. 1992); *United States* v. *Thompson*, 944 F.2d 1331 (7th Cir. 1994), cert. denied, 502 U.S. 1097 (1992) with *United States* v. *Garcia*, 20 F.3d 670 (6th Cir. 1994), cert. denied, 513 U.S. 1159 (1995). The amendment adopts the majority view and excludes from application of § 3C1.1 a defendant's denial of drug use while on pre-trial release.

Proposed Amendment

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 in the first sentence of the first paragraph by striking ''enhancement'' and inserting ''adjustment''; and by inserting ''or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility))'' following ''guideline range''; in the second sentence by striking ''enhancement'' and inserting ''adjustment''; and by adding at the end the following new subdivision:

''(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).''.

(H) Meaning of ''Incarceration'' for Computing Criminal History

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release qualifies as ''incarceration'' in determining the defendant's subsequent criminal history score. Two options are presented. Option One (the Sixth Circuit view) includes confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release in the definition of incarceration in determining the defendant's subsequent criminal history score. See *United States* v. *Rasco*, 963 F.2d 132 (6th Cir.), cert denied, 506 U.S. 883 (1992). Option Two (the Ninth Circuit view) excludes confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release from the definition of incarceration in determining the defendant's subsequent criminal history score. See *United States* v. *Latimer*, 991 F.2d 1509 (9th Cir. 1992).

Proposed Amendment

[Option 1: The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 8 by striking ''Section'' and inserting ''Sections''; by striking ''establishes'' and inserting

''establish''; by inserting ''the offense of conviction and'' following ''includes''; by striking ''. See'' and inserting ''within the scope of''; by striking ''(Relevant Conduct)'' following ''§ 1B1.3'' and by adding at the end the following new paragraph:

''Consistent with subsection (k) and Application Note 11 of this guideline, a term of imprisonment imposed upon revocation of probation, parole, or supervised release is considered part of the original sentence of imprisonment, even if the term of imprisonment imposed upon revocation was served in home detention, a community treatment center, or a halfway house. For example, for purposes of determining the applicable time period under § 4A1.2(e)(1), a prior sentence of imprisonment that is not within the 15-year time period nevertheless will be countable if the defendant (A) was placed on probation, parole, or supervised release for that offense and (B) was sentenced to a term of imprisonment for revocation of the probation, parole, or supervised release within 15 years of the defendant's commencement of the instant offense.''.]

[Option 2: The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 8 by striking ''Section'' and inserting ''Sections''; by striking ''establishes'' and inserting ''establish''; and by adding at the end the following new paragraphs:

''For purposes of subsection (d)(2), home detention and confinement in a halfway house or community treatment center, when imposed upon revocation of probation, parole, or supervised release, are not within the meaning of 'sentence to confinement.'

For purposes of subsection (e), home detention and confinement in a halfway house or community treatment center, when imposed upon revocation or probation, parole, or supervised release, are not with the meaning of 'sentence of imprisonment.' ''.]

(I) Diminished Capacity

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether a diminished capacity departure is precluded if the defendant committed a ''crime of violence'' as that term is defined in the career offender guideline. Four options are presented.

Option One (the majority view) defines the scope of the departure narrowly to exclude all offenses that would be crimes of violence under the career offender guideline. See *United States* v. *Poff,* 926 F.2d 588 (7th Cir.)(en banc), cert. denied, 502 U.S. 827 (1991); *United States* v. *Maddelena,* 893 F.2d 815 (6th Cir. 1989), cert. denied, 502 U.S. 882 (1991); *United States* v. *Mayotte,* 76 F.3d 887 (8th Cir. 1996); *United States* v. *Borrayo,* 898 F.2d 91 (9th Cir. 1989); *United States* v. *Rosen,* 896 F.2d 789 (3d Cir. 1990); *United States* v. *Dailey,* 24 F.3d 1323 (11th Cir. 1994). Option Two (the minority view) defines the scope of the departure broadly to allow consideration of the facts and circumstances surrounding the commission of the crime in determining whether a defendant is dangerous. See *United States* v. *Chatman,* 986 F.2d 1446 (D.C. Cir. 1993); *United States* v. *Weddle,* 30 F.3d 532 (4th Cir. 1994). Option Three (a variation of the minority view) defines the scope of the departure to exclude cases that involve actual violence or a serious threat of violence. Option Four defines the scope of the departure broadly by removing the ''nonviolent offense'' limitation.

Proposed Amendment

[Option 1: Section 5K2.13 is amended by striking ''a non-violent offense'' and inserting ''an offense other than a crime of violence''; by striking ''lower'' before ''sentence''; and by inserting ''below the applicable guideline range'' following ''sentence''.

Section 5K2.13 is amended by adding at the end the following new Commentary:

Commentary

Application Note

1. 'Crime of violence' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).''.]

[Option 2: Section 5K2.13 is amended by striking ''lower'' before ''sentence''; by inserting ''below the applicable guideline range'' following ''sentence''; and by striking:

''to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need to protect the public'',

and inserting:

''In determining whether an offense is non-violent, the court should consider the totality of the facts and circumstances of the offense. If the facts and circumstances of the offense or the defendant's criminal history indicate the defendant is dangerous such that there is a need for incarceration to protect the public, a departure under this policy statement is not warranted. If a departure is warranted, the departure should reflect the extent to which reduced mental capacity contributed to the commission of the offense.''.]

[Option 3: Section 5K2.13 is amended by striking the text in its entirety as follows:

''If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.'',

and inserting:

''A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note

1. For purposes of this policy statement—

'Significantly reduced mental capacity' means the defendant is unable to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.''.]

[Option 4: Section 5K2.13 is amended by striking ''a non-violent'' and inserting ''the''; by striking ''lower'' before ''sentence''; by inserting ''below the applicable guideline range'' following ''sentence''; by striking ''provided that the defendant's criminal history does not'' and inserting ''unless the nature and circumstances of the offense or the defendant's criminal history''.]

Issue for Comment: The Commission invites comment on whether Policy Statement 5K2.0 (Grounds for Departure) should be amended to

incorporate the analysis and holding of the United States Supreme Court decision in Koon v. United States, 116 S.Ct. 2035 (1996). If so, how should the policy statement be amended to accomplish this objective?

Homicide

Chapter Two, Part A

8. Issue for Comment (Homicide)

In 1997, the Commission undertook an in-depth examination of the manslaughter guidelines, § 2A1.3 (Voluntary Manslaughter), and § 2A1.4 (Involuntary Manslaughter), and the statutory penalties for these offenses, to determine whether the guideline and/or statutory penalties need to be adjusted. The Commission formed a staff working group to analyze data on manslaughter cases sentenced under the guidelines, to review how states have sentenced manslaughter cases, and to assess the appropriate relationship (particularly with respect to offense levels) of the manslaughter guidelines to the other homicide guidelines; i.e., those for first and second degree murder, §§ 2A1.1 and 2A1.2. The Commission also held a public hearing on November 12, 1997, to address the issue of appropriate sentences for manslaughter offenses. As a consequence of that hearing and the preliminary analyses of the Working Group, the Commission has expanded the investigation to include the sentencing guidelines applicable to other forms of homicide.

In connection with its further review and possible amendment of the homicide guidelines, the Commission requests comment on the following issues:

(A) Second Degree Murder (§ 2A1.2)

(1) Are the guideline penalties for this offense appropriate relative to those for voluntary manslaughter, assault, and other violent offenses? Specifically, should the base offense level under § 2A1.2 be increased from level 33 and, if so, by what amount?

(2) Should § 2A1.2 be amended to add specific offense characteristics for any aggravating or mitigating factors and, if so, what factors? Alternatively, should an application note encouraging departure be added for any such factors?

(B) Voluntary Manslaughter (§ 2A1.3)

(1) Are the guideline penalties for this offense appropriate relative to those for second degree murder, aggravated assault, assault with intent to kill, and other violent offenses?

Specifically, should the base offense level under § 2A1.3 be increased and, if so, by what amount? For example, one option would be to increase the base offense level from level 25 (i.e., a guideline range of 57–71 months for a defendant in criminal history category I with no adjustments) to level 28 (i.e., a guideline range of 78–97 months for such a defendant).

(2) Should a specific offense characteristic, or an application note encouraging an upward departure, be added to account for prior violent conduct, such as a pattern of domestic abuse?

(3) Should an application note be added requiring a minimum period of supervised release and a condition of participation in a substance abuse program in a case in which alcohol or drug abuse was involved in the offense?

(C) Involuntary Manslaughter (§ 2A1.4)

(1) The Commission's examination of sentencing data indicate that the heartland of involuntary manslaughter is alcohol-related vehicular homicide. Currently under the guideline, a base offense level of level 14 (i.e., 15–21 months for a defendant in criminal history category I with no adjustments) applies to such reckless conduct. The Commission invites comment on whether the guideline penalties for this and other forms of involuntary manslaughter are appropriate relative to those for other offenses.

Specifically, should the base offense level applicable to reckless conduct or, alternatively, vehicular homicides, be increased and, if so, by what amount? For example, one option would be to increase the base offense level for reckless conduct to level 17 (i.e., 24–30 months for a defendant in criminal history category I with no adjustments).

(2) Should specific offense characteristics be added for (i) prior offenses for driving under the influence of alcohol that are not counted in criminal history; (ii) driving without a license (in a jurisdiction where a license is required), or driving with a revoked or suspended license; (iii) multiple deaths; (iv) causing a substantial risk of harm to innocent ''bystanders''; or (v) ''road rage'' that proximately resulted in the vehicular homicide? Alternatively, should an application note be added encouraging upward departure for any of these factors?

(3) Should an application note be added requiring a minimum period of supervised release and a condition of participation in a substance abuse program in a case in which alcohol or drug abuse was involved in the offense?

(4) In addition to, or in lieu of, proposed amendments to the Involuntary Manslaughter guideline, the Commission invites comment on alternative approaches that, arguably, may be more effective in preventing vehicular homicide offenses. For example, should steps be taken to punish more severely and/or uniformly the underlying conduct of driving under the influence of alcohol or drugs (DUI)? What actions might the Commission take that would most effectively address these contributing problems?

(D) Closely Related Guidelines:

If the Commission amends any of the guidelines referenced above in the manner indicated, should it also amend other homicide or closely related guidelines (e.g., § 2A1.5 (Conspiracy or Solicitation to Commit Murder), § 2A2.1 (Assault With Intent to Commit Murder; Attempted Murder)) in order to maintain proportionality among penalties for the offenses covered by these guidelines? If so, how should such guidelines be amended?

Legislative Amendments

Electronic Copyright Infringement

9. Issue for Comment

The No Electronic Theft Act, Public Law 105–147, was recently enacted to provide a statutory basis to prosecute and punish persons who, without authorization and without realizing financial gain or commercial advantage, electronically access copyrighted materials or encourage others to do so. The Act includes a directive to the Commission to (A) ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (B) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed.

Each of the statutes mentioned in the congressional directive currently are referenced to § 2B5.3 (Criminal Infringement of Copyright or Trademark). That guideline provides for incrementally greater punishment when the retail value of the infringing items exceeded $2,000. However, when copyrighted materials are infringed upon by electronic means, there is no ''infringing item'', as would be the case with counterfeited goods. Therefore, the Commission must determine how to value the infringed upon items in order to implement the congressional directive to take into account the retail value and quantity of the items with respect to which the offense was

committed. The Commission invites comment on how § 2B5.3 (Criminal Infringement of Copyright or Trademark) should be amended to best effectuate the congressional directives.

An approach suggested by the Department of Justice is set forth below. The Commission invites comment on this and alternative proposals.

Department of Justice Proposed Amendments to § 2B5.3:

The text of § 2B5.3 is amended to read as follows: ''(a) Base offense level: [6]

(b) Specific Offense Characteristic

(1) If the loss to the copyright or trademark exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.

The Commentary to § 2B5.3 captioned ''Application Note'' is amended in Note 1 by striking:

'' 'Infringing items' means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).'',

and inserting:

''A court may calculate the 'loss to the copyright or trademark owner' in any reasonable manner. In determining 'loss to the copyright or trademark owner,' the court may consider lost profits, the value of the infringed upon items, the value of the infringing items, the injury to the copyright or trademark owner's reputation, and other associated harms.''.

The Commentary to § 2B5.3 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; and by adding at the end the following new note:

''2. In some cases, the calculable loss to the victim understates the true harm caused by the offense. For example, a defendant may post copyrighted material to an electronic bulletin board or similar online facility, making it easy for others to illegally obtain and further distribute the material. In such an instance, it may not be possible to determine or even estimate how many copies were downloaded, or how much damage the defendant's conduct ultimately caused. In such cases, an upward departure may be warranted. See Chapter Five, Part K (Departures).''.

The Commentary to § 2B5.3 captioned ''Background'' is amended in the first paragraph by striking ''value of the infringing items'' and inserting ''loss to the copyright or trademark owner''; and by striking ''loss or''.

Offenses Against Property of National Cemetery

10. Synopsis of Proposed Amendment

This amendment implements the directive to the Commission in the Veteran's Cemetery Protection Act of 1997. That Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery.

Proposed Amendment

Section 2B1.1(b) is amended by adding at the end the following new subdivision:

''(8) If the offense involved theft of property from a national cemetery, increase by [2] levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'' 'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by adding at the end the following new paragraph:

''Subsection (b)(8) implements the instruction to the Commission in Section 2 of Public Law 105 101.''.

Section 2B1.3(b) is amended by redesignating subdivision (3) as subdivision (4) and inserting the following as the new subdivision (3):

''(3) If property of a national cemetery was damaged or destroyed, increase by [2] levels.''

The Commentary to § 2B1.3 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'' 'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.''.

The Commentary to § 2B1.3 captioned ''Background'' is amended by inserting the following as the first paragraph:

''Subsection (b)(3) implements the instruction to the Commission in Section 2 of Public Law 105–101.''.

Section 2K1.4 (b) is amended by striking ''Characteristic'' and inserting ''Characteristics'' and by adding at the end the following new subdivision:

''(2) If the base offense level is not determined under (a)(4), and the offense occurred on a national cemetery, increase by [2] levels.''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended by adding at the end the following new note and background commentary:

''4. 'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

Background: Subsection (b)(2) implements the directive to the Commission in Section 2, Public Law 105–101.''.

Issue for Comment: The Commission invites comment on whether, in addition to the increases provided in the proposed amendments to guidelines § 2B1.1, 2B1.3, and 2K1.4, these guidelines also should be amended to provide a minimum or ''floor'' offense level for a crime that involves theft, vandalism, or destruction of property of a national cemetery.

Expansion of Prohibited Person in Firearm Guideline

11. Synopsis of Proposed Amendment

This is a two part amendment. First, this amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, 1997 (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists what a person not licensed under 18 U.S.C. 923 must include in a statement to the handgun importer, manufacturer, or dealer, is amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence. Section 658 also amended 18 U.S.C. 921(a) to define ''misdemeanor crime of domestic violence''.

Violations of 18 U.S.C. 922(d) and (g) are covered by the firearms guideline, § 2K2.1. The new provisions at section 922(d) (sale of a firearm to a ''prohibited person'') and section 922(g) (transporting, possession, and receipt of a firearm by a ''prohibited person'') affect Application Note 6 of § 2K2.1, which defines ''prohibited person''. The proposed amendment amends Application Note 6 to include a person convicted of a misdemeanor crime of domestic violence within the scope of ''prohibited person''. It also defines ''misdemeanor crime of domestic violence'' by reference to the new statutory definition of that term.

Second, this amendment increases the base offense level for a defendant who knowingly sells to a prohibited person. This proposal is presented in response to a proposed directive contained in juvenile justice legislation approved by the Senate Judiciary Committee early in 1997. That legislation is likely to be considered by the Senate early in 1998. The House of Representatives passed two juvenile justice bills in 1997; however, no House passed bill includes this specific proposal, which originated with the Department of Justice. The legislative provision would require the Commission to increase the base offense level for offenses subject to the firearms guideline, § 2K2.1, to assure that a person who transferred a firearm and who knew that the transferee was a prohibited person is subject to the same base offense level as the transferee.

This proposal amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline to carry out the legislative provision described above. The pertinent base offense level structure under the current firearms guideline is as follows:

(1) A base offense level of 14 applies if the defendant is a prohibited person.

(2) A base offense level of 12 applies to a defendant who transferred a firearm to a prohibited person (and to a variety of other firearms offenses).

(3) A base offense level of 20 applies if the defendant is a prohibited person and the offense involved certain modified shotguns, other unusual weapons, or semiautomatic assault weapons.

(4) A base offense level of 18 applies to a defendant who transferred such a weapon to a prohibited person.

The proposed amendment makes level 14 (instead of level 12) applicable to a defendant who knowingly transfers a firearm to a prohibited person and makes level 20 (instead of level 18) applicable to a defendant who transfers a weapon described in paragraph (3) above to a prohibited person.

Note that the pending legislative directive would require the specified offense level increases only in those cases in which the defendant transferor knew that the transferee was a prohibited person. The draft amendment presented below also raises the policy option, shown in brackets, of whether the same, heightened offense levels should apply if the transferor lacked actual knowledge but did have ''reasonable cause to believe'' that the transferee was a prohibited person. The latter, less demanding mental state suffices for conviction under the relevant statute (18 U.S.C. 922(d)).

Proposed Amendment

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 6 by striking ''or'' before ''(vi)''; and by inserting the following before the period:

''; or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33)''.

Section 2K2.1(a)(4) is amended by striking ''the defendant''; by inserting ''the defendant'' after ''(A)''; by striking ''is a prohibited person, and'' after ''(B)''; and in subdivision (B) by inserting the following before the semicolon:

''; and the defendant (i) is a prohibited person; or (ii) transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person''.

Section 2K2.1(a)(6) is amended by inserting ''(A)'' after ''defendant''; and by inserting ''; or (B) transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person'' before ''; or''.

Conditions of Probation and Supervised Release

12. Synopsis of Proposed Amendment

This is a three-part amendment that corrects a number of omissions arising out of the 1996–97 reworking of the guidelines related to conditions of probation, § 5B1.3, and supervised release, § 5D1.3.

First, the amendment adds to § 5B1.3 a condition of probation regarding deportation, in response to § 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. That section amended 18 U.S.C. 3563(b) to add a new discretionary condition of probation, reflected in the amendment below, with respect to deportation.

Second, this amendment deletes the reference in the supervised release guideline to ''just punishment'' as a reason for the imposition of curfew as a condition of supervised release. The need to provide ''just punishment'' is not included in 18 U.S.C. 3583(c) as a factor to be considered in imposing a term of supervised release.

Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are policy statements of the Commission, not binding guidelines.

Proposed Amendment

Section 5B1.3(d) is amended by adding at the end the following new subdivision:

''(6) Deportation

A condition ordering deportation by a United States district court or a United States magistrate judge if (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(d)(5) of the Immigration and Nationality Act; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable.''.

Section 5D1.3(d) is amended by adding at the end the following new subdivision:

''(6) Deportation

A condition ordering deportation by a United States district court or a United States magistrate judge if (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(d)(5) of the Immigration and Nationality Act; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable.''.

Section 5D1.3(e)(5) is amended by striking ''to provide just punishment for the offense,''.

Section 5B1.3(c) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5B1.3(d) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5B1.3(e) is amended in the title by adding at the end ''(Policy Statement)''.

Section 5D1.3(c) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5D1.3(d) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5D1.3(e) is amended in the title by adding at the end ''(Policy Statement)''.

[FR Doc. 98–91 Filed 1–5–98; 8:45 am]

BILLING CODE 2210–40–P

federal register

Tuesday
January 6, 1998

Part III

Department of Education

Fund for the Improvement of Education: Partnerships in Character Education Pilot Projects; Notice

DEPARTMENT OF EDUCATION

[CFDA No.: 84.215V]

Fund for the Improvement of Education: Partnerships in Character Education Pilot Projects; Notice Inviting Applications for New Awards for Fiscal Years (FY) 1998 and 1999

Purpose of Program: The purpose of the Fund for the Improvement of Education (FIE) is to support nationally significant programs to improve the quality of education, assist all students to meet challenging State content standards, and contribute to the achievement of the National Education Goals. The purpose of this competition is to support pilot projects that design and implement character education programs as a way to address the broader FIE objectives.

Eligible Applicants: Only State educational agencies, in partnership with one or more local educational agencies, may apply for grants under this program.

Deadline for Transmittal of Applications: 3/16/98.

Applications Available: 1/20/98.

Available Funds: Up to $4,000,000.

Estimated Range of Awards: $100,000–$1,000,000.

Estimated Number of Awards: Up to 10.

Maximum Award: The Secretary will not consider an application that proposes a budget exceeding a total of $1,000,000.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) 34 CFR Parts 74, 75, 77, 79, 80, 81, 82, 85, and 86; and (b) the regulations in 34 CFR Parts 98, 99, 700, and 299 (General Provisions, Elementary and Secondary Education Act, published on May 22, 1997, in the **Federal Register** (62 FR 28247).

SUPPLEMENTARY INFORMATION: It is the Department's intent to fund two cycles of awards from this competition. The first cycle of awards will be made from FY 1998 funds. If applications of high quality remain unfunded, additional awards will be made in the second cycle in FY 1999, pending availability of FY 1999 funds.

The statute governing the Partnerships in Character Education Pilot Projects program, limits the amount awarded to any State to $1,000,000 and limits the funding period to five years. Within those parameters, for the previous funding cycles for this program, the Secretary established a ceiling of $250,000 per year for up to four years. However, based on the experiences of previous grantees, and on suggestions made by State educational agency officials who have not participated in this program, the Secretary has decided to offer a more flexible funding structure for this competition. Therefore, in designing character education activities, each applicant may determine the combination of funding and time that is most appropriate. The total funding requested for the entire grant period may not exceed $1,000,000; the total project period may not exceed five years; and not more than one year may be used for planning and program design. For example, one applicant may request $500,000 per year for two years, while another may request $100,000 for the first year, $400,000 for the second and third years, and $100,000 for the fourth year.

In preparing an application, each applicant should take special care to provide a timeline and a narrative that explains the costs requested for each budget period.

Under the Character Education program, State educational agencies provide technical and professional assistance to local educational agencies in the development and implementation of curriculum materials, teacher training, and other activities related to character education. Applicants must propose projects designed to develop character education programs that incorporate the following elements of character:

(a) Caring.
(b) Civic virtue and citizenship.
(c) Justice and fairness.
(d) Respect.
(e) Responsibility.
(f) Trustworthiness.
(g) Any other elements deemed appropriate by the members of the partnership.

Other program requirements are described in the application package.

FOR APPLICATIONS OR INFORMATION CONTACT: To request an application: *Facsimile machine:* 202–219–2053; *Voice Mail:* 202–219–2116; *E-Mail:* Judy__Collins@ed.gov; or *Mail:* OERI/FIE Application, 555 New Jersey Avenue, NW, Washington, DC 20208–5645. Individuals who use a telecommunications device for the deaf (TDD), may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

Individuals with disabilities may obtain a copy of the application package in an alternate format, also, by contacting that person. However, the Department is not able to reproduce in an alternate format the standard forms included in the application package.

Electronic Access to This Document

Anyone may view this document, as well as all other Department of Education documents published in the **Federal Register,** in text or portable document format (pdf) on the World Wide Web at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
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To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1–888–293–6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219–1511 or, toll free, 1–800–222–4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of a document is the document published in the **Federal Register**.

Program Authority: 20 U.S.C. 8003.

Dated: December 30, 1997.

Ricky T. Takai,

Acting Assistant Secretary, Office of Educational Research and Improvement.

[FR Doc. 98–178 Filed 1–5–98; 8:45 am]

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federal register

Tuesday
January 6, 1998

Part IV

Environmental Protection Agency

40 CFR Part 68

List of Regulated Substances and Thresholds for Accidental Release Prevention; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 68

[FRL–5940–4]

RIN 2050–AE35

List of Regulated Substances and Thresholds for Accidental Release Prevention; Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is modifying the rule listing regulated substances and threshold quantities under section 112(r) of the Clean Air Act as amended. EPA is deleting the category of Division 1.1 explosives (as listed by DOT) from the list of regulated substances. Regulated flammable substances in gasoline used as fuel and in naturally occurring hydrocarbon mixtures prior to initial processing are exempted from threshold quantity determinations, and the provision for threshold determination of flammable substances in a mixture is clarified. The definition of stationary source is modified to clarify the exemption of transportation and storage incident to transportation and to clarify that naturally occurring hydrocarbon reservoirs are not stationary sources or parts of stationary sources. In addition, EPA is clarifying that the Chemical Accident Prevention Provisions do not apply to sources located on the Outer Continental Shelf. EPA believes these changes will better focus accident prevention activities on stationary sources with high hazard operations and reduce duplication with other similar requirements.

DATES: This rule is effective January 6, 1998.

ADDRESSES: Docket: The docket for this rulemaking is A–96–O8. This rule amends a final rule, the docket for which is A–91–74. The docket may be inspected between 8:00 a.m. and 5:30 p.m., Monday through Friday, at EPA's Air Docket, Room M1500, Waterside Mall, 401 M St., SW, Washington, DC 20460; telephone (202) 260–7548. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Vanessa Rodriguez, Chemical Engineer, (202) 260–7913, Chemical Emergency Preparedness and Prevention Office, U.S. Environmental Protection Agency, MC–5101, 401 M St. SW, Washington, DC 20460, or the Emergency Planning and Community Right-to-Know Hotline at 1–800–424–9346.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially affected by this action are those stationary sources that have more than a threshold quantity of a regulated substance in a process. Regulated categories and entities include:

Category	Examples of regulated entities
Chemical Manufacturers	Industrial organics & inorganics, paints, pharmaceuticals, adhesives, sealants, fibers.
Petrochemical	Refineries, industrial gases, plastics & resins, synthetic rubber.
Other Manufacturing	Electronics, semiconductors, paper, fabricated metals, industrial machinery, furniture, textiles.
Agriculture	Fertilizers, pesticides.
Public Sources	Drinking and waste water treatment works.
Utilities	Electric and Gas Utilities.
Others	Oil and gas exploration and production, natural gas processing, food and cold storage, propane retail, warehousing and wholesalers.
Federal Sources	Military and energy installations.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table also could be affected. To determine whether a stationary source is affected by this action, carefully examine the provisions of today's notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

The following outline is provided to aid in reading this preamble:

Table of Contents

I. Introduction and Background
A. Statutory Authority
B. Regulatory History
C. List Rule Litigation
II. Discussion of the Final Rule and Public Comments
A. Explosives
B. Regulated Flammable Substances in Gasoline and in Naturally Occurring Hydrocarbon Mixtures
C. Clarification of Threshold Determination of Regulated Flammable Substances in Mixtures
D. Definition of Stationary Source
E. Applicability to Outer Continental Shelf
III. Summary of Revisions to the Rule
IV. Judicial Review
V. Required Analyses
A. Executive Order 12866
B. Regulatory Flexibility
C. Paperwork Reduction
D. Unfunded Mandates Reform Act
E. Submission to Congress and the General Accounting Office
F. National Technology Transfer and Advancement Act

I. Introduction and Background

A. Statutory Authority

This final rule is being issued under sections 112(r) and 301 of the Clean Air Act (CAA or Act) as amended.

B. Regulatory History

The CAA, section 112(r), requires EPA to promulgate an initial list of at least 100 substances (''regulated substances'') that, in the event of an accidental release, are known to cause or may be reasonably expected to cause death, injury, or serious adverse effects to human health and the environment. The CAA also requires EPA to establish a threshold quantity for each chemical at the time of listing. Stationary sources that have more than a threshold quantity of a regulated substance are subject to accident prevention regulations promulgated under CAA section 112(r)(7), including the requirement to develop risk management plans.

On January 31, 1994, EPA promulgated the list of regulated substances and thresholds that identify stationary sources subject to the accidental release prevention regulations (59 FR 4478) (the ''List Rule''). The listed substances included 77 acutely toxic substances, 63 flammable gases and volatile flammable liquids, and Division 1.1 high explosive substances as listed by the United States Department of Transportation (DOT) in 49 CFR 172.101. EPA subsequently promulgated a rule requiring owners

and operators of stationary sources with listed substances above their threshold quantities to develop programs addressing accidental releases and to make publicly available risk management plans (''RMPs'') summarizing these programs (61 FR 31668, June 20, 1996) (the ''RMP Rule''). For further information on these regulations, section 112(r), and related statutory provisions, see these notices. These rules can be found in 40 CFR part 68, ''Chemical Accident Prevention Provisions,'' and collectively are referred to as the accidental release prevention regulations.

C. List Rule Litigation

The American Petroleum Institute (API) and the Institute of Makers of Explosives (IME) filed petitions for judicial review of the List Rule (American Petroleum Institute v. EPA, No. 94–1273 (D.C. Cir.) and consolidated cases). On March 28, 1996, EPA made available for public comment under CAA section 113(g) proposed settlement agreements with API and IME (61 FR 13858, March 28, 1996). Consistent with these agreements, EPA proposed amendments to the List Rule on April 15, 1996 (61 FR 16598). On June 20, 1996, EPA promulgated a stay of certain provisions of the List Rule that were affected by the proposed amendments (61 FR 31730). EPA is today taking final action on the amendments proposed in April 1996.

II. Discussion of the Final Rule and Public Comments

In this final rule, EPA is taking the following actions to amend the List Rule: delisting explosives; exempting from threshold determination regulated flammable substances in gasoline and in naturally occurring hydrocarbon mixtures prior to initial processing; clarifying the provision for threshold determination of flammable substances in mixtures to exempt mixtures that do not have a National Fire Protection Association (NFPA) flammability hazard rating of 4; modifying the definition of stationary source to clarify the exemption of transportation and storage incident to transportation and to clarify that naturally occurring hydrocarbon reservoirs are not stationary sources or parts of stationary sources; and clarifying that the chemical accident prevention provisions do not apply to sources located on the Outer Continental Shelf (''OCS sources''). These amendments were proposed on April 15, 1996. EPA received 37 letters commenting on the proposal. Major comments are discussed below. Summaries of all comments and the Agency's responses can be found in the summary and response to comments document in the docket.

A. Explosives

EPA is amending the List Rule to delete the category of high explosives from the list of regulated substances. Explosives were initially listed because of their potential to cause offsite effects from blast waves. In addition, EPA believed that there existed potential gaps in emergency planning and response communication that made risk management planning appropriate for sources with explosives. In accordance with the Settlement Agreement, IME has developed and will implement safety practices that will provide additional information and enhance the coordination between explosives facilities and the emergency planners and responders. As discussed in the preamble to the proposed rule of April 15, 1996, EPA concluded that current regulations and current and contemplated industry practices promote safety and accident prevention in storage, handling, transportation, and use of explosives. As a result, these regulations and practices adequately protect the public and the environment from the hazards of accidents involving explosives. The Agency believes these actions effectively close the remaining gap in emergency planning and response communications. Therefore, EPA is taking final action to delist explosives from the list of regulated substances under section 112(r).

EPA received six comment letters on the proposal to delist explosives. All the commenters supported EPA's proposal, citing current regulations, current and contemplated industry practices, and the regulatory burden imposed by listing explosives.

B. Regulated Flammable Substances in Gasoline and in Naturally Occurring Hydrocarbon Mixtures

EPA is taking final action to provide specific exemptions from threshold determination for regulated flammable substances in gasoline used as fuel for internal combustion engines and for regulated substances in naturally occurring hydrocarbon mixtures prior to initial processing in a petroleum refining process unit or a natural gas processing plant. These exemptions reflect EPA's original intent to exempt flammable mixtures that do not meet the criteria for a National Fire Protection Association (NFPA) flammability hazard rating of 4 and clarify the regulatory status of gasoline and naturally occurring hydrocarbon mixtures. Naturally occurring hydrocarbon mixtures would include any or any combination of the following: natural gas condensate, crude oil, field gas, and produced water. This rule includes definitions of these substances as well as definitions of natural gas processing plant and petroleum refining process unit.

EPA is making minor changes to the definitions proposed for natural gas processing plant and petroleum refining process unit. The North American Industrial Classification System (NAICS) code has been added to the definition for natural gas processing plant in this final rule. In addition, part of the proposed definition has been dropped, because it included the term being defined and, as a result, potentially could cause confusion. The NAICS code also has been added to the definition of petroleum refining process unit. The proposed definition of petroleum refining process unit included the Standard Industrial Classification (SIC) code (which is still cited in the definition); however, SIC codes have been replaced by NAICS codes.

EPA received 12 letters in support of the gasoline exemption. No comments were submitted opposing this exemption. Several of the commenters who supported the exemption also suggested broadening the exemption to include blendstocks, natural gasolines, and other fuels. Several suggestions were made for clarifying the gasoline exemption.

EPA does not believe the exemption should be broadened. Individual flammable substances that do not meet the criteria for NFPA 4 for flammability were not considered for listing as flammables in development of the list of regulated substances. Although substances such as blendstocks and natural gasoline are not specifically exempted, any flammable mixtures, including blendstocks and natural gasoline, that do not meet the criteria for an NFPA rating of 4 for flammability are exempt from threshold determination (see Clarification of Threshold Determination of Regulated Flammable Substances in Mixtures, discussed below). EPA believes that substances and mixtures that meet the criteria for NFPA 4, including blendstocks and fuels, should be covered by the rule, regardless of their use. EPA believes such substances have the same intrinsic hazards whether they are used as gasoline blendstocks, as fuels, or for other purposes. EPA's analysis indicates that risks associated with the storage and handling of flammable substances are a function of the properties of the materials, not their end use. EPA is

exempting gasoline because it does not meet the NFPA 4 criteria, and EPA believes it does not represent a significant threat to the public of vapor cloud explosions.

EPA received 16 letters supporting the exemption of naturally occurring hydrocarbons prior to initial processing. One commenter suggested modifying the exemption to incorporate site-specific factors because conditions conducive to vapor cloud explosions might exist at some facilities with exempted flammable substances, particularly in the case of oil and gas production facilities located adjacent to chemical production facilities. EPA recognizes that there may be cases where a facility may not be subject to the RMP requirements because of this exemption, but where the potential for vapor cloud explosions may exist. Neither Congress nor EPA intended the List Rule to capture every substance that may pose a hazard in particular circumstances. Instead, the statute required EPA to select the chemicals posing the greatest risk of serious effects from accidental releases. To implement these criteria, EPA focused primarily on chemicals that posed the most significant hazards because site-specific factors vary too greatly to be considered at the listing stage of regulation. EPA believes the hazards of naturally occurring hydrocarbon mixtures prior to entry into a natural gas processing plant or petroleum refining process unit do not warrant regulation. The general duty clause of section 112(r)(1) would apply when site-specific factors make an unlisted chemical extremely hazardous. Also, the particular risk cited by the commenter probably would be addressed by the RMP Rule even with the exemption as promulgated today. In the case of a chemical facility located adjacent to an oil and gas production facility, the owner or operator of the chemical facility is likely to have processes covered due to other regulated substances and would have to consider site-specific conditions such as the presence of an adjacent oil and gas production facility. Therefore, it is inappropriate to condition this exemption on site-specific factors.

C. Clarification of Threshold Determination of Regulated Flammable Substances in Mixtures

To clarify threshold determination for regulated flammable substances in mixtures, EPA is taking final action to provide that, for mixtures that have one percent or greater concentration of a regulated flammable substance, the entire weight of the mixture shall be treated as the regulated substance unless the owner or operator can demonstrate that the mixture does not have an NFPA flammability hazard rating of 4, as defined in the NFPA Standard System for the Identification of Fire Hazards of Materials, NFPA 704–1996.

In its proposed rule, to define NFPA 4, EPA cited and proposed to incorporate by reference NFPA 704, Standard System for the Identification of Fire Hazards of Materials (1990 edition). For the definition and determination of boiling point and flash point, EPA cited and proposed to incorporate by reference NFPA 321, Standard on the Basic Classification of Flammable and Combustible Liquids (1991 edition). In this final rule, EPA is updating these references and incorporating by reference the 1996 edition of NFPA 704 and the 1996 edition of NFPA 30, Flammable and Combustible Liquids Code, which replaces NFPA 321.

Nine comments were submitted supporting this clarification. No opposing comments were submitted.

D. Definition of Stationary Source

EPA is promulgating the amendments to the definition of stationary source that were proposed on April 15, 1996. First, EPA is clarifying that the exemption for regulated substances in transportation, or in storage incident to such transportation, is not limited to pipelines. In addition, EPA is modifying the definition of stationary source to clarify that naturally occurring hydrocarbon reservoirs are not stationary sources or parts of stationary sources. Finally, EPA is modifying the definition of stationary source to clarify that exempt transportation shall include, but not be limited to, transportation activities subject to regulation or oversight under 49 CFR parts 192, 193, or 195, as well as transportation subject to natural gas or hazardous liquid programs for which a state has in effect a certification under 49 U.S.C. section 60105.

EPA considers the transportation exemption to include storage fields for natural gas where gas taken from pipelines is stored during non-peak periods, to be returned to the pipelines when needed. Such storage fields include, but are not limited to, depleted oil and gas reservoirs, aquifers, mines, and caverns (e.g., salt caverns). For purposes of this regulation, this type of storage is incident to transportation and, therefore, is not subject to the RMP rule. The transportation exemption also applies to liquefied natural gas (LNG) facilities subject to oversight or regulation under 49 CFR parts 192, 193, or 195, or a state natural gas or hazardous liquid program for which the state has in effect a certification to DOT under 49 U.S.C. section 60105. These facilities include those used to liquefy natural or synthetic gas or used to transfer, store, or vaporize LNG in conjunction with pipeline transportation.

EPA believes there still may be potential for confusion regarding the jurisdiction and regulatory responsibility of EPA and DOT for pipelines and for transportation containers at stationary sources. ''Transportation in commerce'' is defined by DOT pursuant to Federal Hazardous Materials Transportation Law (Federal HAZMAT Law, 49 U.S.C. sections 5107–5127). As a result of continued questions regarding the scope of Federal HAZMAT Law and the applicability of the regulations issued thereunder, the DOT is currently working to better delineate and more clearly define the applicability of its regulations. DOT currently contemplates clarifying its jurisdiction through the rulemaking process. As a result, there may be a future need for EPA to further amend the definition of stationary source to better comport with DOT clarifications or actions. The Agency will continue to work closely with DOT to minimize confusion regarding transportation containers and will coordinate with DOT to ensure that compatible interpretations about regulatory coverage are provided to the regulated community.

EPA received 15 letters in support of the exemption of transportation activities from the definition of stationary source. No one opposed this exemption. A number of commenters, however, believed the modifications would not eliminate overlap and confusion between EPA and DOT rules. A number of commenters also favored exempting from the stationary source definition transportation containers no longer under active shipping papers and transportation containers connected to equipment for purposes of temporary storage, loading, or unloading. Some commenters stated that EPA would be undermining DOT's authority by regulating activities that are under DOT jurisdiction. Four commenters recommended exempting all containers that are suitable for transportation.

EPA developed the transportation exemptions discussed here in consultation with DOT. EPA's regulations do not supersede or limit DOT's authorities and, therefore, are in compliance with CAA section 310. EPA believes these provisions are consistent with other EPA regulations, such as the Emergency Planning and Community

Right-to-Know Act (EPCRA) regulations under parts 355 and 370. EPA disagrees that suitability for transportation should be the criterion for determining whether a container should be considered part of the stationary source. For example, EPA believes that a railroad tank car containing a regulated substance could be considered a stationary source or part of a stationary source, even though the tank car is ''suitable for transportation.'' Such a tank car could remain at one location for a long period of time, serving as a storage container, and could pose a hazard to the community. EPA considers a container to be in transportation as long as it is attached to the motive power that delivered it to the site (e.g., a truck or locomotive). If a container remains attached to the motive power that delivered it to the site, even if a facility accepts delivery, it would be in transportation, and the contents would not be subject to threshold determination. As stated earlier, EPA will continue to work with DOT to avoid regulatory confusion.

EPA agrees with commenters who stated that active shipping papers may not be a suitable criterion for determining whether a container is in transportation. EPA is aware that shipping papers are not always generated, nor are they required under DOT rules. Therefore, EPA has modified the definition of stationary source to remove the reference to active shipping papers. EPA also has modified the definition to remove the reference to temporary storage. This reference may have been confused with storage incident to transportation.

EPA has received questions regarding the statement in the stationary source definition that properties shall not be considered contiguous solely because of a railroad or gas pipeline right-of-way. In response to these questions, EPA is clarifying this statement by deleting the word ''gas.'' EPA always intended that neither a railroad right-of-way nor any pipeline right-of-way should cause properties to be considered contiguous.

E. Applicability to Outer Continental Shelf

EPA is providing an applicability exception for sources on the outer continental shelf (OCS sources) to clarify that Part 68 does not apply to these sources. This exception is consistent with CAA section 328, which precludes the applicability of EPA CAA rules to such sources when such rules are not related to attaining or maintaining ambient air quality standards or to the ''prevention of significant deterioration'' provisions of the CAA. Eleven commenters supported this exception, and no one opposed it.

III. Summary of Revisions to the Rule

EPA is amending several sections of part 68 of title 40 of the Code of Federal Regulations.

In § 68.3, the definition of stationary source is revised. The revised definition specifically states that naturally occurring hydrocarbon reservoirs are not stationary sources or parts of stationary sources. The definition states that exempt transportation includes, but is not limited to, transportation activities subject to oversight or regulation under 49 CFR parts 192, 193, or 195, as well as transportation subject to natural gas or hazardous liquid programs for which a state has in effect a certification under 49 U.S.C. section 60105. In addition, the agency has made non-substantive wording changes to improve the clarity of this definition.

Several new definitions are added for § 68.3, for condensate, crude oil, field gas, natural gas processing plant, petroleum refining process unit, and produced water.

Section 68.10 is amended to clarify that part 68 does not apply to OCS sources.

Several revisions are made to § 68.115 on threshold determination. Section 68.115(b)(2) is modified to state that the entire weight of the mixture containing a regulated flammable substance shall be treated as the regulated substance unless the owner or operator can demonstrate that the mixture does not have an NFPA flammability hazard rating of 4. Another modification to § 68.115(b)(2) exempts from threshold determination regulated flammable substances in gasoline used as fuel in internal combustion engines. Regulated substances in naturally occurring hydrocarbon mixtures (including condensate, crude oil, field gas, and produced water), prior to entry into a natural gas processing plant or a petroleum refining process unit, also are exempt from threshold determination. Section 68.115(b)(3), on concentrations of a regulated explosive substance in a mixture, is deleted, and §§ 68.115(b)(4), 68.115(b)(5), and 68.115(b)(6) are redesignated as §§ 68.115(b)(3), 68.115(b)(4), and 68.115(b)(5), respectively.

Section 68.130 is modified by the deletion of (a), explosives listed by DOT as Division 1.1. Section 68.130(b) is redesignated as §§ 68.130(a), and §§ 68.130(c) as 68.130(b).

IV. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of the actions taken by this final rule is available only on the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this action. Under section 307(b)(2) of the CAA, the requirements that are subject to today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

V. Required Analyses

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must judge whether the regulatory action is ''significant,'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal government or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and, therefore, is not subject to OMB review.

B. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant negative economic impact on a substantial number of small entities. This final rule will not have a significant negative impact on a substantial number of small entities because it reduces the number of substances that would be used to identify stationary sources for regulation and provides exemptions that will reduce the number of stationary sources subject to the accidental release prevention requirements.

C. Paperwork Reduction

This rule does not include any information collection requirements for OMB to review under the provisions of the Paperwork Reduction Act.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's rule will reduce the number of sources subject to part 68. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

F. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act (''NTTAA''), the Agency is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practice, etc.) which are developed or adopted by voluntary consensus standard bodies. Where available and potentially applicable voluntary consensus standards are not used by EPA, the Act requires the Agency to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards.

EPA developed its list of regulated flammable substances for this rule based on analysis of the hazards of flammable substances conducted in a review of the EPCRA section 302 list. As part of this analysis, EPA identified and evaluated existing listing and classification systems, including listing and classification systems developed for voluntary consensus standards. This final rule incorporates, by reference, the use of a voluntary consensus standard to identify the chemicals which are covered according to their flammability, namely NFPA 704, ''Standard System for the Identification of the Hazards of Materials for Emergency Response.'' EPA identified no other potentially applicable voluntary consensus standards.

List of Subjects in 40 CFR Part 68

Environmental protection, Chemicals, Chemical accident prevention, Clean Air Act, Extremely hazardous substances, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 18, 1997.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, subchapter C, part 68 of the Code of Federal Regulations is amended as follows:

PART 68—CHEMICAL ACCIDENT PREVENTION PROVISIONS

The authority citation for part 68 continues to read as follows:

Authority: 42 U.S.C. 7412(r), 7601(a)(1), 7661–7661f.

Subpart A—General

2. Section 68.3 is amended by adding the following definitions in alphabetical order and revising the definition of ''stationary source'' to read as follows:

§ 68.3 Definitions.

* * * * *

Condensate means hydrocarbon liquid separated from natural gas that condenses due to changes in temperature, pressure, or both, and remains liquid at standard conditions.

* * * * *

Crude oil means any naturally occurring, unrefined petroleum liquid.

* * * * *

Field gas means gas extracted from a production well before the gas enters a natural gas processing plant.

* * * * *

Natural gas processing plant (gas plant) means any processing site engaged in the extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both, classified as North American Industrial Classification System (NAICS) code 211112 (previously Standard Industrial Classification (SIC) code 1321).

* * * * *

Petroleum refining process unit means a process unit used in an establishment primarily engaged in petroleum refining as defined in NAICS code 32411 for petroleum refining (formerly SIC code 2911) and used for the following: Producing transportation fuels (such as gasoline, diesel fuels, and jet fuels), heating fuels (such as kerosene, fuel gas distillate, and fuel oils), or lubricants; Separating petroleum; or Separating, cracking, reacting, or reforming intermediate petroleum streams. Examples of such units include, but are not limited to, petroleum based solvent units, alkylation units, catalytic hydrotreating, catalytic hydrorefining, catalytic hydrocracking, catalytic reforming, catalytic cracking, crude distillation, lube oil processing,

hydrogen production, isomerization, polymerization, thermal processes, and blending, sweetening, and treating processes. Petroleum refining process units include sulfur plants.

* * * * *

Produced water means water extracted from the earth from an oil or natural gas production well, or that is separated from oil or natural gas after extraction.

* * * * *

Stationary source means any buildings, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur. The term stationary source does not apply to transportation, including storage incident to transportation, of any regulated substance or any other extremely hazardous substance under the provisions of this part. A stationary source includes transportation containers used for storage not incident to transportation and transportation containers connected to equipment at a stationary source for loading or unloading. Transportation includes, but is not limited to, transportation subject to oversight or regulation under 49 CFR parts 192, 193, or 195, or a state natural gas or hazardous liquid program for which the state has in effect a certification to DOT under 49 U.S.C. section 60105. A stationary source does not include naturally occurring hydrocarbon reservoirs. Properties shall not be considered contiguous solely because of a railroad or pipeline right-of-way.

* * * * *

3. Section 68.10 is amended by adding a paragraph (f) to read as follows:

§ 68.10 Applicability.

* * * * *

(f) The provisions of this part shall not apply to an Outer Continental Shelf (''OCS'') source, as defined in 40 CFR 55.2.

Subpart F—Regulated Substances for Accidental Release Prevention

4. Section 68.115 is amended by revising paragraph (b) introductory text and paragraph (b)(2); removing paragraph (b)(3); and by redesignating paragraphs (b)(4) through (b)(6) as (b)(3) through (b)(5) to read as follows:

§ 68.115 Threshold determination.

* * * * *

(b) For the purposes of determining whether more than a threshold quantity of a regulated substance is present at the stationary source, the following exemptions apply:

* * * * *

(2) *Concentrations of a regulated flammable substance in a mixture.* (i) *General provision.* If a regulated substance is present in a mixture and the concentration of the substance is below one percent by weight of the mixture, the mixture need not be considered when determining whether more than a threshold quantity of the regulated substance is present at the stationary source. Except as provided in paragraph (b)(2) (ii) and (iii) of this section, if the concentration of the substance is one percent or greater by weight of the mixture, then, for purposes of determining whether a threshold quantity is present at the stationary source, the entire weight of the mixture shall be treated as the regulated substance unless the owner or operator can demonstrate that the mixture itself does not have a National Fire Protection Association flammability hazard rating of 4. The demonstration shall be in accordance with the definition of flammability hazard rating 4 in the NFPA 704, Standard System for the Identification of the Hazards of Materials for Emergency Response, National Fire Protection Association, Quincy, MA, 1996. Available from the National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02269–9101. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be inspected at the Environmental Protection Agency Air Docket (6102), Attn: Docket No. A–96–O8, Waterside Mall, 401 M. St. SW., Washington D.C.; or at the Office of Federal Register at 800 North Capitol St., NW, Suite 700, Washington, D.C. Boiling point and flash point shall be defined and determined in accordance with NFPA 30, Flammable and Combustible Liquids Code, National Fire Protection Association, Quincy, MA, 1996. Available from the National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02269–9101. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be inspected at the Environmental Protection Agency Air Docket (6102), Attn: Docket No. A–96–O8, Waterside Mall, 401 M. St. SW., Washington D.C.; or at the Office of Federal Register at 800 North Capitol St., NW, Suite 700, Washington, D.C. The owner or operator shall document the National Fire Protection Association flammability hazard rating.

(ii) *Gasoline.* Regulated substances in gasoline, when in distribution or related storage for use as fuel for internal combustion engines, need not be considered when determining whether more than a threshold quantity is present at a stationary source.

(iii) *Naturally occurring hydrocarbon mixtures.* Prior to entry into a natural gas processing plant or a petroleum refining process unit, regulated substances in naturally occurring hydrocarbon mixtures need not be considered when determining whether more than a threshold quantity is present at a stationary source. Naturally occurring hydrocarbon mixtures include any combination of the following: condensate, crude oil, field gas, and produced water, each as defined in § 68.3 of this part.

* * * * *

§ 68.130 [Amended]

5. Section 68.130 is amended by removing paragraph (a) and redesignating paragraphs (b) and (c) as paragrpahs (a) and (b). The tables to the section remain unchanged.

[FR Doc. 98–267 Filed 1–5–98; 8:45 am]

BILLING CODE 6560–50–P

federal register

Tuesday
January 6, 1998

Part V

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 53 and 44

Federal Acquisition Regulation; Corrections; Final Rule

Federal Acquisition Regulation; Contractor Purchasing System Review Exclusions; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 53

[FAC 97–03 Correction]

Federal Acquisition Regulation; Corrections

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Corrections.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are issuing corrections to FAC 97–03 published in the **Federal Register** at 62 FR 64912, December 9, 1997, to correct FAR Case 96–022, Item XIII.

EFFECTIVE DATE: February 9, 1998.

FOR FURTHER INFORMATION CONTACT: Ms. Laurie Duarte at (202) 501–4225, General Services Administration, FAR Secretariat, Washington, DC 20405.

Corrections

At 62 FR beginning on page 64936, remove ''FAC 97–05'' and insert ''FAC 97–03'' in the following places:

1. On page 64936, right column, following ''49 CFR Part 53''.
2. On page 64936, right column, in the last sentence of the paragraph which begins **FOR FURTHER INFORMATION CONTACT**.
3. On page 64937, left column, 4th line from the top, within the parenthetical.

Dated: December 31, 1997.

Jack O'Neill,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 98–249 Filed 1–5–98; 8:45 am]

BILLING CODE 6820–EP–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 44

[FAR Case 97–016]

RIN 9000–AH82

Federal Acquisition Regulation; Contractor Purchasing System Review Exclusions

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to eliminate unnecessary contractor purchasing system reviews (CPSRs). This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before March 9, 1998 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: farcase.97–016@gsa.gov.

Please cite FAR case 97–016 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Klein, Procurement Analyst, at (202) 501–3775. Please cite FAR case 97–016.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends (1) FAR 44.302 to exclude competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts for the dollar amount used to determine if a contractor's level of sales to the Government warrants the conduct of a CPSR; and (2) FAR 44.303 to exclude subcontracts awarded by a contractor exclusively in support of competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts from evaluation during a CPSR.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule only applies to a contractor if its sales to the Government (excluding competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjusted contracts) are expected to exceed $25 million during the next year. and no small entities meet this criteria. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 97–016), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 44

Government procurement.

Dated: December 30, 1997.

Linda Klein,

Acting Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Part 44 be amended as set forth below:

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

1. The authority citation for 48 CFR Part 44 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 44.302 is revised to read as follows:

44.302 Requirements.

(a) The ACO shall determine the need for a CPSR based on, but not limited to, the past performance of the contractor, and the volume, complexity and dollar value of subcontracts. If a contractor's sales to the Government (excluding competitively awarded firm-fixed price and competitively awarded fixed-price with economic price adjustment contracts) are expected to exceed $25 million during the next year, perform a review to determine if a CPSR is needed. Sales include those represented by prime contracts, subcontracts under Government prime contracts, and modifications. Generally, a CPSR is not performed for a specific contract. The head of the agency responsible for contract administration may raise or lower the $25 million review level if it is considered to be in the Government's best interest.

(b) Once an initial determination has been made under paragraph (a) of this section, at least every 3 years the ACO shall determine whether a purchasing system review is necessary. If necessary, the cognizant contract administration office will conduct a purchasing system review.

3. Section 44.303 is amended by revising the introductory paragraph to read as follows:

44.303 Extent of review.

A CPSR requires an evaluation of the contractor's purchasing system. Unless segregation of subcontracts is impracticable, this evaluation shall not include subcontracts awarded by the contractor exclusively in support of competitively awarded firm-fixed price or competitively awarded fixed-price with economic price adjustment Government contracts. The considerations listed in 44.202–2 for consent evaluation of particular subcontracts also shall be used to evaluate the contractor's purchasing system, including the contractor's policies, procedures, and performance under that system. Special attention shall be given to—

* * * * *

[FR Doc. 98–250 Filed 1–5–98; 8:45 am]

BILLING CODE 6820–EP–U

federal register

Tuesday
January 6, 1998

Part VI

The President

Notice of January 2, 1998—Continuation of Libyan Emergency

Federal Register
Vol. 63, No. 3
Tuesday, January 6, 1998

Presidential Documents

Title 3—

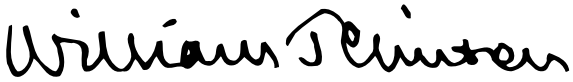
The President

Notice of January 2, 1998

Continuation of Libyan Emergency

On January 7, 1986, by Executive Order 12543, President Reagan declared a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of the Government of Libya. On January 8, 1986, by Executive Order 12544, the President took additional measures to block Libyan assets in the United States. The President has transmitted a notice continuing this emergency to the Congress and the **Federal Register** every year since 1986.

The crisis between the United States and Libya that led to the declaration of a national emergency on January 7, 1986, has not been resolved. The Government of Libya has continued its actions and policies in support of terrorism, despite the calls by the United Nations Security Council, in Resolutions 731 (1992), 748 (1992), and 883 (1993), that it demonstrate by concrete actions its renunciation of terrorism. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Libya. This notice shall be published in the **Federal Register** and transmitted to the Congress.



THE WHITE HOUSE,
January 2, 1998.

[FR Doc. 98–430
Filed 1–5–98; 11:21 am]
Billing code 4810–25–M

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Federal Register

Vol. 63, No. 3

Tuesday, January 6, 1998

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FEDERAL REGISTER PAGES AND DATES, JANUARY

1–138 2
139–398 5
399–654 6

CFR PARTS AFFECTED DURING JANUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Administrative Orders:
Notice of January 2, 1998 653

5 CFR

Proposed Rules:
890 446

7 CFR

301 1
930 399
966 139
980 139
Proposed Rules:
610 446

9 CFR

3 1
94 406
96 406
145 2
147 2
319 147

10 CFR

Proposed Rules:
708 374

12 CFR

Proposed Rules:
309 29

14 CFR

39 4
119 4
121 4
135 4
Proposed Rules:
39 .....167, 169, 171, 172, 174
91 126
121 126
125 126
129 126

15 CFR

902 290

16 CFR

Proposed Rules:
303 .....447, 449

17 CFR

Proposed Rules:
Ch. II 451

20 CFR

Proposed Rules:
200 34

21 CFR

510 408
520 .....148, 408
558 408
Proposed Rules:
201 176

23 CFR

1327 149

26 CFR

1 .....6, 409, 411
40 24
48 24
602 6
Proposed Rules:
1 .....35, 39, 42, 453

30 CFR

Proposed Rules:
56 290
57 290
62 290
70 290
71 290
Ch. II 185
936 454

35 CFR

Proposed Rules:
133 186
135 186

38 CFR

3 .....412, 413

39 CFR

111 153

40 CFR

51 414
52 .....26, 414, 415
60 414
61 414
68 640
180 .....156, 416, 417
Proposed Rules:
52 456

42 CFR

413 292
440 292
441 292
489 292
Proposed Rules:
1001 187

45 CFR

Proposed Rules:
302 187
303 187
304 187

47 CFR

54.....162
73.....164, 160

Proposed Rules:

1.....460
73.....193, 194

48 CFR

53.....648
1535.....418
1552.....418

Proposed Rules:

44.....649
922.....386
952.....386
970.....386

49 CFR

571.....27
653.....418
654.....418

Proposed Rules:

232.....195
571.....46

50 CFR

600.....419
622.....290, 443
648.....444
660.....419

Proposed Rules:

648.....466

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT JANUARY 6, 1998

ENVIRONMENTAL PROTECTION AGENCY

Air programs:
- Clean Air Act—
  - Accidental release prevention requirements; regulated substances and thresholds; amendments; published 1-6-98

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
- Sodium bicarbonate, etc.; correction; published 1-6-98
- Zinc phosphide; correction; published 1-6-98

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Animal drugs, feeds, and related products:
- Sponsor name and address changes—
  - Alpharma Inc.; correction; published 1-6-98

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:
- Aerospace Technologies of Australia Pty Ltd.; published 11-24-97

VETERANS AFFAIRS DEPARTMENT

Adjudication; pensions, compensation, dependency, etc.:
- Minimum income annuity; published 1-6-98

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Raisins produced from grapes grown in California; comments due by 1-12-98; published 11-13-97

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:
- Alaska; fisheries of Exclusive Economic Zone—
  - Bering Sea and Aleutian Islands and Gulf of Alaska groundfish; comments due by 1-12-98; published 11-12-97
  - Bering Sea and Aleutian Islands groundfish; comments due by 1-14-98; published 12-15-97
  - Bering Sea and Aleutian Islands groundfish; correction; comments due by 1-14-98; published 12-23-97
  - Gulf of Alaska groundfish; comments due by 1-14-98; published 12-15-97
  - Pacific halibut; comments due by 1-14-98; published 12-15-97
- West States and Western Pacific fisheries—
  - Northern anchovy; comments due by 1-16-98; published 12-17-97

Marine mammals:
- Commercial fishing authorizations—
  - Take reduction plan and emergency regulations; hearings; comments due by 1-14-98; published 12-12-97

DEFENSE DEPARTMENT

Civilian health and medical program of uniformed services (CHAMPUS):
- TRICARE program; reimbursement; comments due by 1-13-98; published 11-14-97

ENVIRONMENTAL PROTECTION AGENCY

Air programs; approval and promulgation; State plans for designated facilities and pollutants:
- North Dakota; comments due by 1-14-98; published 12-15-97

Air quality implementation plans; approval and promulgation; various States:
- Arizona; comments due by 1-16-98; published 12-17-97
- Colorado; correction; comments due by 1-16-98; published 12-17-97
- Montana; comments due by 1-14-98; published 12-15-97
- Texas; comments due by 1-16-98; published 12-17-97

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:
- Alabama et al.; comments due by 1-12-98; published 12-2-97

Television broadcasting:
- Cable television systems—
  - Inside wiring; comments due by 1-13-98; published 11-14-97

FEDERAL HOUSING FINANCE BOARD

Federal home loan bank system:
- Federal Home Loan Bank bylaws; approval authority; comments due by 1-12-98; published 12-11-97

FEDERAL RESERVE SYSTEM

Depository institutions; reserve requirements (Regulation D):
- Weekly reporters requirements; move to lagged reserve maintenance system; comments due by 1-12-98; published 11-12-97

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and threatened species:
- Gray Wolf; comments due by 1-12-98; published 12-11-97

INTERIOR DEPARTMENT

National Park Service

Special regulations:
- Delaware Water Gap National Recreation Area; designation of bicycle routes; comments due by 1-12-98; published 11-13-97

INTERIOR DEPARTMENT

Surface Mining Reclamation and Enforcement Office

Permanent program and abandoned mine land reclamation plan submissions:
- Oklahoma; comments due by 1-14-98; published 12-15-97

Surface coal mining and reclamation operations:
- Ownership and control, permit application process, and improvidently issued permits; comments due by 1-16-98; published 11-26-97

LABOR DEPARTMENT

Mine Safety and Health Administration

Program policy letters:
- Occupational illnesses of miners, including retired or inactive miners; reporting requirements; comments due by 1-12-98; published 11-12-97

NATIONAL CREDIT UNION ADMINISTRATION

Freedom of Information Act and Privacy Act; implementation; comments due by 1-12-98; published 11-13-97

INTERIOR DEPARTMENT

National Indian Gaming Commission

Indian Gaming Regulatory Act:
- Indian gaming operations; annual fees; comments due by 1-15-98; published 12-16-97

NUCLEAR REGULATORY COMMISSION

Production and utilization facilities; domestic licensing:
- Nuclear power plants—
  - Nuclear power reactors; permanent shutdown financial protection requirements; comments due by 1-13-98; published 10-30-97

Rulemaking petitions:
- Crane, Peter G.; comments due by 1-16-98; published 12-17-97

TRANSPORTATION DEPARTMENT

Coast Guard

Ports and waterways safety:
- Vessels bound for ports and places; international safety management code verification status; comments due by 1-12-98; published 12-11-97

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:
- Airbus; comments due by 1-12-98; published 12-11-97
- Dassault; comments due by 1-12-98; published 12-11-97
- Dornier; comments due by 1-12-98; published 12-11-97
- McDonnell Douglas; comments due by 1-16-98; published 11-17-97
- Saab; comments due by 1-12-98; published 12-11-97

Class E airspace; comments due by 1-12-98; published 12-10-97

TREASURY DEPARTMENT

Customs Service

Customs relations with Canada and Mexico:
- Designation of land border crossing locations for certain conveyances; comments due by 1-16-98; published 11-17-97

Trademarks, trade names, and copyrights:

Anticounterfeiting Consumer Protection Act; disposition of merchandise bearing counterfeit American trademarks; civil penalties; comments due by 1-16-98; published 11-17-97

TREASURY DEPARTMENT

Internal Revenue Service

Procedure and administration:

Internal revenue law violations; rewards for information; cross reference; comments due by 1-12-98; published 10-14-97

TREASURY DEPARTMENT

Currency and foreign transactions; financial reporting and recordkeeping requirements:

Bank Secrecy Act; implementation—

Exemptions from currency transactions reporting; comments due by 1-16-98; published 11-28-97

LIST OF PUBLIC LAWS

The List of Public Laws for the 105th Congress, First Session, has been completed. It will resume when bills are enacted into Public Law during the second session of the 105th Congress, which convenes on January 27, 1998.

Note: A Cumulative List of Public Laws was published in the **Federal Register** on December 31, 1997.

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