assets are transferred from one affiliate to another and both legal entities survive the transfer. EEI argues that if 18 CFR 33.1(c)(6) (authorization of internal reorganization not affecting a traditional public utility) were not interpreted so as to authorize the mergers of EWGs and other public utilities that do not have franchised territories simply because jurisdictional assets were transferred by operation of law in such mergers, there would be no practical distinction in the way the two types of reorganizations are treated under the 18 CFR 33.1(c)(6) blanket authorization.

Commission Determination

37. We grant EEI's request for clarification that the blanket authorization in 18 CFR 33.1(c)(6) applies to transactions involving the transfer of assets from one non-traditional utility subsidiary (*i.e.*, a public utility that does not have captive customers and does not own or control transmission facilities) to another non-traditional utility subsidiary when only one of the two non-traditional utility subsidiaries survives the transaction. We find that such a transaction will be consistent with the public interest and not entail cross-subsidization issues. Such a transaction would have no adverse effect on competition because market power is analyzed by the corporate family on an aggregate basis rather than on an individual corporate subsidiary basis (*e.g.*, the transfer of the ownership of a generator between wholly-owned subsidiaries has no effect on the potential market power of the parent corporation). Such a transaction would also have no adverse effect on rates, regulation, or inappropriate cross-subsidization because the participants in the transaction neither have captive customers nor own or control transmission facilities.

IV. Information Collection Statement

38. The Office of Management and Budget (OMB) regulations require that OMB approve certain information collection requirements imposed by an agency.[38] The Final Rule's information collections were approved under OMB control no. 1902–0082. While this rule clarifies aspects of the existing information collection requirements, it does not add to these requirements. Accordingly, a copy of this Final Rule will be sent to OMB for informational purposes only.

V. Document Availability

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

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

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

VI. Effective Date

42. These revisions in this order on rehearing are effective August 25, 2008.

List of Subjects in 18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

By the Commission.

Kimberly D. Bose,

Secretary.

■ In consideration of the foregoing, the Commission amends Part 33, Chapter I, Title 18, *Code of Federal Regulations,* to read as follows:

PART 33–APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

■ 1. The authority citation for part 33 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; Pub. L. 109–58, 119 Stat. 594.

■ 2. In 33.1, paragraph (c)(12) is revised and paragraph (c)(16) is added to read as follows:

§ 33.1 Applicability, definitions, and blanket authorizations.

* * * * *

(c) * * *

(12) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act to transfer its outstanding voting securities to:

(i) any holding company granted blanket authorizations in paragraph (c)(2)(ii) of this section if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility; or

(ii) any person other than a holding company if, after the transfer, such person and any of its associate or affiliate companies in aggregate will own less than 10 percent of the outstanding voting interests of such public utility.

* * * * *

(16) A public utility is granted a blanket authorization under section 203(a)(1) of the Federal Power Act for the acquisition or disposition of a jurisdictional contract where neither the acquirer nor transferor has captive customers or owns or provides transmission service over jurisdictional transmission facilities, the contract does not convey control over the operation of a generation or transmission facility, and the acquirer is a public utility.

[FR Doc. E8–16869 Filed 7–23–08; 8:45 am]

BILLING CODE 6717–01–P

[38] 5 CFR 1320.12.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM07–15–001; Order No. 707–A]

Cross-Subsidization Restrictions on Affiliate Transactions

Issued July 17, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission is granting rehearing and clarification, in part, of a final rule amending its regulations to codify restrictions on affiliate transactions between franchised public utilities that have captive customers, or that own or provide transmission service over jurisdictional transmission facilities, and their market-regulated power sales affiliates or non-utility affiliates.

DATES: *Effective Date:* This Final Rule; order on rehearing will become effective August 25, 2008.

FOR FURTHER INFORMATION CONTACT: Carla Urquhart (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8496,

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Mosby Perrow (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6498,
Valerie Gill (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8527,
Stuart Fischer (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8517.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

Cross-Subsidization Restrictions on Affiliate; Docket No. Transactions RM07–15–001:

Order on Rehearing

Order No. 707–A

Issued July 17, 2008.

1. Order No. 707 [1] amended the Federal Energy Regulatory Commission's (Commission) regulations to codify restrictions on affiliate transactions between franchised public utilities that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, and their market-regulated power sales affiliates or non-utility affiliates. These restrictions supplemented other restrictions the Commission has in place that apply to public utilities with market-based rates and to public utilities seeking merger approvals. In this order, we deny, in part, and grant, in part, the various requests for rehearing received by the Commission, and amend part 35 of our regulations accordingly.

I. Background

2. In the Affiliate Transactions Notice of Proposed Rulemaking, the Commission proposed to implement uniform affiliate restrictions that would be applicable to all franchised public utilities with captive customers and their market-regulated and non-utility affiliates and would address both power and non-power goods and services transactions between the utility and its affiliates.[2] The proposed restrictions were based on those already imposed by the Commission in the context of certain section 203 and 205 approvals, but expanded the transactions and entities to which they apply.

3. *Specifically, the Commission proposed to:* (1) Require the Commission's approval of all wholesale power sales between a franchised public utility with captive customers and a market-regulated power sales affiliate; (2) require a franchised public utility with captive customers to provide non-power goods and services to a market-regulated power sales affiliate or a non-utility affiliate at a price that is the higher of cost or market price; (3) prohibit a franchised public utility with captive customers from purchasing non-power goods or services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market price (with the exception of (4)); and (4) prohibit a franchised public utility with captive customers from receiving non-power goods and services from a centralized service company at a price above cost.

4. The Commission stated that the restrictions would help it to meet the requirement of amended section 203(a)(4) of the Federal Power Act (FPA) [3] that a transaction not result in the inappropriate cross-subsidization of a non-utility associate company. The Commission further stated that the restrictions would help assure just and reasonable rates and the protection of captive customers for all public utilities pursuant to sections 205 and 206 of the FPA,[4] irrespective of whether they needed approval of a section 203 transaction.

5. As the Commission stated in Order No. 707, its obligation to ensure that the rates, terms, and conditions of jurisdictional service are just, reasonable and not unduly discriminatory or preferential requires that it ensure that wholesale rates do not reflect costs that result from undue preferences granted to affiliates or that are imprudent or unreasonable as a result of affiliate transactions. The Commission described its long history of scrutinizing affiliate transactions for potential cross-subsidization and how in recent rulemakings and orders it has codified and expanded affiliate restrictions, both under its FPA section 205 and 206 rate authority (in the context of market-based rates) and under its FPA section 203 merger authority. The Commission then extended similar restrictions to all franchised public utilities that have captive customers, or that own or provide transmission service over jurisdictional transmission facilities.

In particular, the Commission articulated restrictions on affiliate sales of electric energy by prohibiting wholesale sales of electric energy between a franchised public utility with captive customers and a market-regulated power sales affiliate without prior Commission authorization for the transaction under section 205 of the Federal Power Act.[5] The Commission also promulgated three pricing restrictions on the sale of non-power goods and services.

6. First, the Commission provided that unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, including sales made to or through its affiliated exempt wholesale generators or qualifying facilities, to a market-regulated power sales affiliate or non-utility affiliate must be at the higher of cost or market price.

7. Second, the Commission provided that unless otherwise permitted by Commission rule or order, a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market.

8. Third, and as an exception to the restriction set forth immediately above, the Commission provided that a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, may only purchase or receive non-power goods and services from a centralized service company at cost.[6]

9. The Commission also stated in Order No. 707 that the pricing rules would be prospective and would apply to any contracts, agreements or arrangements entered into on or after the effective date of the rule. The Commission explained that to the extent different pricing was in effect for any contract, agreement, or arrangement entered into prior to the effective date of Order No. 707, that pricing may

[1] *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 FR 11013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264, *granting extension of time*, 122 FERC ¶ 61,280 (2008).

[2] *Cross-Subsidization Restrictions on Affiliate Transactions*, Notice of Proposed Rulemaking, 72 FR 41644 (July 31, 2007), FERC Stats. & Regs. ¶ 32,618 (2007).

[3] 16 U.S.C. 824b(a)(4).

[4] 16 U.S.C. 824d, 824e.

[5] 18 CFR 35.44(a).

[6] *Id.*

remain in effect, but the Commission may on its own motion, or upon complaint, institute a section 206 proceeding to determine whether the costs incurred by a public utility under pre-existing contracts, agreements or arrangements are just, reasonable and not unduly discriminatory or preferential.

II. Discussion

A. Affiliate Transaction Pricing Standards

10. In Order No. 707, the Commission denied requests to permit franchised public utilities with captive customers to make sales of non-power goods and services at cost to market-regulated power sales affiliates or non-utility affiliates and instead required these sales to be at the higher of cost or market price. It reasoned that to adopt an at-cost pricing structure for these types of non-power transactions ''would require a franchised public utility to sell to an affiliate at cost even when market prices are higher, thereby foregoing profits that the utility otherwise could have obtained by selling to a non-affiliate at a market price.'' [7]

11. The Commission also prohibited a franchised public utility with captive customers from purchasing non-power goods or services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market price, with the exception of purchases from centralized service companies. In doing so, the Commission denied the New York State Public Service Commission's (New York Commission) request for a lower of cost or market standard for these types of transactions, finding that captive customers are not harmed by the franchised public utility paying above-cost charges if those charges are no higher than what they would pay non-affiliates for the same non-power goods and services. In this regard, the Commission noted that nothing in the standard requiring that these purchases not be above market prevents the franchised public utility from paying less than the market price.[8] The Commission further rejected requests that it defer to state utility commissions that apply different standards to intra-system transactions to avoid inconsistent standards.[9]

1. Shared Corporate General Management and Administrative Services

Requests for Rehearing or Clarification

12. Florida Power & Light Company and FPL Energy, LLC (FPL), Pacific Gas & Electric Company (PG&E), and Southern California Edison Company (SoCal Edison) each argue that Order No. 707 does not adequately address pricing for shared corporate general management and administrative services that a utility provides to other companies in a single-state holding company system without a centralized service company but that it does not offer to non-affiliates. The services in question are those akin to the services that a centralized service company provides in multi-state systems. PG&E identifies them as accounting, appraisal, call center, claims, computer, construction, communications, equipment, fleet, janitorial, legal, legislative, maintenance, payroll, personnel, realty, regulatory, supply, and technical services. FPL notes that the services in question are similar to those provided by a centralized service company, which the Commission has defined as one ''that provides services such as administrative, managerial, financial, accounting, recordkeeping, legal or engineering services, which are sold, furnished, or otherwise provided (typically for a charge) to other companies in the same holding company system.'' [10] FPL states that in its system, the services in question are information technology and management; corporate communications systems; engineering and construction; [11] finance and accounting; legal; human resources; auditing; environmental services; risk management; technical nuclear and power generation support services; and federal government affairs. FPL, PG&E and SoCal Edison maintain that intra-system sales of these services at cost should be permitted even when the system has no centralized service company.

13. FPL, PG&E and SoCal Edison first note that they do not make sales of these services to non-affiliates, and as a result market prices do not exist for them. SoCal Edison notes that the Commission acknowledged in Order No. 707 that it has recognized that defining a market price for these services is a ''speculative task'' when dealing with a centralized service company, but the Commission fails to recognize that the task is no less speculative where the system does not have a centralized service company. FPL states that many of the services at issue vary from location to location and provider to provider. In a system like its own, these services have been provided in-house for years, and the nature of the services as well as the manner in which they are provided reflect both the culture and technology choices made by the utility providing these services. Because the nature of a service is driven and structured primarily to meet the needs of the franchised public utility, it is virtually impossible to establish a market or a market price for it.

14. SoCal Edison challenges the reasoning underlying the Commission's denial of at-cost pricing for general administrative services a franchised public utility provides to system companies, *i.e.*, that this pricing standard would require a franchised public utility to sell to an affiliate at cost even when market prices are higher, thereby foregoing profits that the utility otherwise could have obtained by selling to a non-affiliate at a market price. SoCal Edison argues that where the utility is not making any market-based sales of these services, it is not ''foregoing'' any profits. It suggests that there is no evidence in the record for the Commission's assumption that utilities would forego profits if the Commission did not adopt a higher of cost or market standard, and thus, no basis for the Commission's rejection of an at-cost pricing structure. SoCal Edison contends that the Commission should acknowledge the distinction between goods and services developed for sale on the open market (for which affiliates should be charged the higher of cost or market price) and those services that are not intended for sale and can be provided to affiliates at their fully-loaded cost.[12]

15. FPL, PG&E and SoCal Edison argue that at-cost pricing in these circumstances (*i.e.*, where the franchised public utility is a member of a single-state holding company and provides services only to affiliates, but not on the open market, and operates in a single-state context) leads to significant economies of scale. SoCal Edison states that while Order No. 707

[7] Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 70.

[8] *Id.* P 71.

[9] *Id.* P 74.

[10] The language cited is drawn from the definition of a centralized service company found in 18 CFR 367.1(a)(7).

[11] FPL notes that in its case ''engineering and construction'' services do not refer to the intra-corporate provision of parts or labor. It refers rather to oversight and planning functions effectively as an owner's representative. Actual engineering and construction services with respect to new plants are provided by third-party engineering and construction companies at negotiated rates.

[12] SoCal Edison states that fully-loaded costs include the direct cost of each employee's time plus adders to cover indirect costs such as employee benefits and other overhead items.

recognizes the efficiencies and economies of scale that benefit captive customers when general administrative services are provided across an enterprise, instead of being duplicated by each separate entity within a holding company structure, the order fails to recognize similar efficiencies and economies of scale in a single-state context where the corporate structure does not include a formal centralized services company, but where a franchised utility often may provide similar in-house corporate administrative services to the rest of the corporate enterprise.

16. PG&E argues that at-cost provision of goods and services promotes economies of scale, and as long as the non-utility companies within a family are not charging more than the cost of the services, and the utilities involved are recovering their costs of providing any services they provide to others within the family, utility ratepayers will receive the cost advantages of the economies of scale from in-house services and will be insulated from cross subsidizing other companies and their customers.

17. FPL argues that customers will lose the benefit of established efficiencies, expertise, and economies of scale, with no real countervailing benefit if at-cost pricing cannot be used in these circumstances. FP&L asks the Commission to clarify that when companies in a holding company system supply to each other non-power goods or services comparable to those provided by a centralized service company, then those non-power goods and services may be provided at fully-loaded cost as a reasonable proxy for market price. FPL argues that a fully-loaded cost standard has avoided the time and expense of formal requests for proposal procedures to ''market test'' in theory every provision of regularized and ongoing support services. An at-cost standard allows immediate use of shared corporate technical expertise in the most efficient and cost-effective manner.

18. These commenters also argue that customers of franchised public utilities are protected from affiliate abuse when general administrative services are shared at their fully-loaded costs, *i.e.*, costs designed to reflect the total corporate costs of providing a service. FP&L states that fully-loaded cost reflects the total cost to provide a particular service, including corporate overhead and other general expenses.[13] Edison Electric Institute (EEI) argues that there should at least be a strong presumption that the at-cost standard is appropriate when dealing with services of this type, barring a Commission or ratepayer concern, which can be explored on a case-by-case basis. It states that otherwise the new rules could be read to preclude even utility-to-centralized service company provision of such services at cost, requiring the services to be priced higher than at cost by one utility to the detriment of the customers of another utility that is a client of the centralized service company.

19. SoCal Edison states that when affiliates are charged fully-loaded cost for such services, the ability to leverage these services and gain economies of scale ultimately benefits the utility's customers.

20. EEI states that there is an array of services that companies within the family can provide to one another at a substantial savings because of economies of scale and by keeping the services in-house rather than having to obtain the services in the market, where additional overhead and rates of return must be covered. EEI argues that the at-cost provisions of Order No. 707 should apply broadly to companies within a family of companies that provide services to each other of the type provided by centralized service companies, even where the system does not have a formal centralized service company. EEI states that there should be no distinction between utility and non-utility affiliates to this extent. It maintains that a market price standard should apply only in cases where the seller makes external sales of these non-power services.

21. EEI and PG&E also argue that the Commission has failed to address or to resolve the potential for conflict between the Commission's rules and state affiliate transaction and cross subsidy requirements that may apply to the same transactions.[14] EEI argues that many states already have affiliate transaction provisions in place, and those provisions are specifically aimed at protecting captive retail customers. It maintains that the Commission should more fully accommodate the state provisions in this instance, as the Commission's final rule is aimed at protecting the same customers that state requirements seek to protect. EEI and PG&E argue that the states have a special interest in, and responsibility for, overseeing costs affecting these customers, and states have been fulfilling that role for many years.

22. PG&E argues that the Commission should defer to state reviews and approvals of affiliate transactions in order to avoid unnecessary conflict. It argues that the Commission's approach to affiliate transactions fails to address or to resolve the potential for conflict between Commission requirements and state affiliate transaction and cross subsidy requirements that may apply to the same transactions. PG&E argues that to avoid conflict, the Commission should grant a blanket waiver of the final rule's requirements applicable within any state that already oversees affiliate transactions to protect against cross-subsidization, and the waiver should apply to company operations covered by the state provisions. PG&E maintains that waivers of this type would be consistent with waivers the Commission has authorized for single-state utilities in Order No. 667. EEI supports these waivers also. National Grid argues that if the Commission does not defer to state regulation, it should provide a process for public utilities to get a waiver of the Commission's regulations' for certain transactions based on a showing that those transactions are already subject to adequate regulation at the state level.

Commission Determination

23. As discussed further below, we find the arguments in favor of permitting companies within a single-state holding company system that does not have a centralized service company to provide each other general administrative and management services at cost to be persuasive, and we will therefore grant rehearing on this

[13] FPL states that these expenses include (1) salaries, incentives, commissions, bonuses, rewards; (2) insurance; (3) paid time off such as vacation, etc., (4) FICA and miscellaneous taxes; (5) retirement planning/401k; (6) office infrastructure (office space, furniture, utilities); (7) office equipment (computer, software, FAX, Printer, UPS, Copier, etc.); (8) telecom & internet; (9) operational/functional management and oversight; (10) human resources and administration; (11) finance and payroll; (12) miscellaneous fringe and welfare benefits; (13) training and education; and (14) travel expenses. FP&L states that it organizes costs into three categories: (a) ''direct costs,'' *i.e.*, costs of resources used exclusively to provide services that are readily identifiable to an activity and used to indicate work that directly benefits a business unit other than the provider; (b) ''assigned costs'' or the costs of resources used jointly to provide both regulated and non-regulated activities that are apportioned using direct measures of cost causation; and (c) ''unattributable'' costs or costs of resources shared by both regulated and non-regulated activities for which no causal relationship exists. The costs in this final category are accumulated and allocated to both regulated and non-regulated activities using an affiliate management fee based on the ''Massachusetts Formula,'' which FPL says is a long-recognized regulatory methodology of cost allocation.

[14] National Grid USA (National Grid) makes a similar argument which we discuss separately below.

issue. Accordingly, we are revising our rules to permit affiliates within a single-state holding company system, as defined by our rules,[15] that does not have a centralized service company to provide ''at cost'' to other affiliates in the system the kinds of services typically provided by centralized service companies and the goods to support those services.[16] We stress that this permission applies only to internal general administrative and management services and only to services in that category that are not provided to unaffiliated third parties. While our grant of rehearing necessarily applies also to charges for a limited set of goods in the form of supplies and equipment acquired to support administrative and management functions, as well as office space and other general overhead items, we note in particular that it does not apply to inputs to utility operations such as fuel supply, construction, or real estate [17] that have a clearly identifiable market price,[18] nor does it apply to the implementation of major projects that are easily susceptible to competitive bidding, such as construction projects.

24. There are several reasons why the Commission has concluded that it is appropriate to expand the use of at-cost pricing beyond the context of centralized service companies to also allow at-cost pricing for the provision of general and administrative services and the goods to support those services between members of a single-state holding company system where those members do not sell such goods or services to non-affiliates. First, as we stated in Order No. 707 with respect to the same types of services being provided by centralized service companies in multi-state systems, defining a market price for general and administrative services is a speculative task.[19] The task is no more speculative in the context of a multi-state holding company with a centralized service company than in the context of a single-state holding company without a centralized service company. Thus, we agree that, when dealing with general administrative and management services, as a general matter the critical issue is the type of service involved, not whether it is supplied through a centralized service company or through a different type of system company.

25. Second, SoCal Edison points to our statement in Order No. 707 that at-cost pricing ''would require a franchised public utility to sell to an affiliate at cost even when market prices are higher, thereby foregoing profits that the utility otherwise could have obtained by selling to a non-affiliate at a market price.'' [20] We recognize that this statement concerning foregone profits does not apply where the utility does not provide those goods or services to non-affiliates. We therefore agree with SoCal Edison that where a utility is not making sales of a service to a non-affiliate, it cannot be said with certainty to be foregoing any profit.

26. Third, we recognize that efficiencies and economies of scale associated with providing these types of services and the goods to support those services between members within the single-state holding company system can benefit captive customers because the goods and services often can be provided less expensively, at cost, than if they were purchased from outside the system by individual system members. As a related matter, we do not believe it would serve the public interest to have rules that create an incentive for a single-state holding company to incur additional costs to set up a separate centralized service company (that would be allowed to use the at-cost pricing) to provide the very same services and the goods to support those services that could be provided more inexpensively, *e.g.*, through the investor-owned utility, without a centralized service company. While we believe that centralized service companies can facilitate regulatory oversight and generally favor their use, we also recognize that they may not be the most efficient or least-cost structure for some holding companies.

27. Finally, we give weight to the fact that where services are provided within a single-state holding company context, there may be greater state regulatory authority to oversee these types of services transactions and the goods to support those services than in the multi-state context, and this state oversight will serve to complement that of the Commission in protecting customers against inappropriate cross-subsidization. We recognize that one of the risks of at-cost pricing is the potential for prices to be imposed that are substantially higher than the market price.[21] As we stated in Order Nos. 667 and 707, the Commission will entertain complaints that at-cost pricing exceeds the market price.

28. We recognize that many of the above considerations would also apply to general and administrative goods and services provided between members in multi-state holding companies that do not have centralized service companies. However, we are reluctant to grant a broad generic exception for those circumstances. The detailed accounting and reporting requirements applicable to centralized service companies greatly assists the Commission in regulating those entities in a multi-state context where individual states may have less authority to help oversee affiliate transactions. We are willing, however, to consider requests for waiver on a case-by-case basis for at-cost pricing in the multi-state context, under the same circumstances as for single state holding companies (i.e., only for general and administrative services and the goods to support those services and only where members of the holding company do not sell such goods and services outside the holding company).[22] This will allow the Commission to examine each situation to ensure that adequate regulatory oversight and protections are in place. The Commission acknowledges that many of the arrangements for the intrasystem sharing of administrative and management services under discussion here are long standing and, in part, have developed in response to state regulatory requirements. The Commission agrees with EEI, PG&E and others that the states have a special interest in these matters, and, as discussed above, that it is appropriate to take into account such state regulation in developing our policies in this area. Accordingly, the existence of state oversight and the desire to avoid conflict with state requirements is an important consideration in granting

[15] 18 CFR 366.3(c)(1) (defining a single-state holding company as a holding company that derives no more than 13 percent of its public-utility company revenues from outside a single state). The definition exempts revenues derived from exempt wholesale generators, foreign utility companies, and qualifying facilities for these purposes.

[16] Section 367.1(a)(7) of the Commission's regulations defines a centralized service company as ''a service company that provides services such as administrative, managerial, financial, accounting, recordkeeping, legal or engineering services, which are sold, furnished, or otherwise provided (typically for a charge) to other companies in the same holding company system.'' This definition also states that ''[c]entralized service companies are different from other service companies that only provide a discrete good or service.''

[17] *See* Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 62 n.57.

[18] We discuss the issue of fuel adjustment clauses further below.

[19] Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 72.

[20] *Id.* P 70.

[21] See Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 73.

[22] We do not anticipate that there would be very many multi-state holding companies in this category since most, if not all, of the current multi-state holding companies are former registered holding companies under the Public Utility Holding Company Act of 1935 that had centralized services companies and still have them.

rehearing and revising our rules as described above and in our willingness to consider case-by-case exceptions involving general and administrative services and the goods to support those services provided in the multi-state context. We do not want to require significant changes to settled practices when these practices are already subject to state oversight and where there is no showing that suggests these practices are leading to improper cross-subsidization. We believe that our grant of rehearing eliminates the potential for conflict between the Commission's rules and state affiliate transaction and cross subsidy requirements that may apply to the same transactions involving general and administrative services and the goods to support those services in a single-state holding company system. However, to the extent that any conflicts do arise, companies or state regulatory authorities may bring this to our attention on a case-by-case basis, and we will determine whether case-specific waivers are appropriate.

29. Commenters have described procedures they use to ensure that customers of franchised public utilities are protected from affiliate abuse when general administrative and management services are shared among system companies. Our grant of rehearing is premised on the assumption that the at-cost sharing of general administrative and management services in single-state holding company systems will be conducted using rigorous accounting and cost-allocation procedures. It is also premised on the assumption that the at-cost standard will be applied in conjunction with measures for the fair and reasonable allocation of costs across system companies. In granting rehearing, we note that when at-cost principles are applied (whether in the context of multi-state holding companies or in the context of single-state holding company systems), the Commission historically has acted, and will continue to act, under sections 205 and 206, whether on an application, a complaint, or on our own motion, to ensure that inappropriate costs are not flowed through in jurisdictional rates.

30. Accordingly, we will amend our regulations to provide that a company in a single-state holding company system, as defined in 18 CFR 366.3(c)(1), may provide general administrative and management non-power goods and services to, or receive such goods and services from, other companies in the same holding company system, at cost, provided that the only parties to transactions involving these non-power goods and services are affiliate or associate companies, as defined in 18 CFR 366.1, of a holding company in the holding company system.

31. We deny FPL's request for clarification that fully-loaded cost is a reasonable proxy for market price. First of all, we see no need to do so in light of our grant of rehearing above. Secondly, making fully-loaded cost a proxy for market price unnecessarily clouds the distinction between at-cost and market pricing embodied in our rules.

2. Pricing Standards for Particular Affiliate Arrangements Requests for Rehearing or Clarification

32. A number of requests for rehearing or clarification relate to the treatment of specific transactions or arrangements under our rules.

33. PG&E argues that a ''no higher than the market price'' standard is inoperable for certain types of entities. It refers specifically to bankruptcy-remote special-purpose entities used to raise funds through a securitized financing. PG&E states that these entities are structured to operate independently and at arm's length from their parent so that their assets and liabilities would not be consolidated with those of the parent in the event of the parent's or utility's bankruptcy. PG&E argues that this approach lowers the cost of utility financing, but that the special-purpose entities must be fully reimbursed for their costs in order to secure a legal opinion in support of their bankruptcy remote status. PG&E also believes that the use of special-purpose entities to obtain accounts receivable financing might be inconsistent with the Commission's rules. These entities also must be able to recover their costs fully.

34. Two holding companies with franchised public utility operations in more than one state seek clarification or rehearing on transactions specific to their individual operations. Xcel Energy Services Inc. (Xcel) argues that Order No. 707 does not expressly deal with the pricing for transactions between franchised public utilities. It states that its franchised operating companies entered into an umbrella agreement in 2000 that allows for incidental transactions in goods and services between the operating companies, such as short-term leases of coal rail cars done at cost. Xcel states that this at-cost arrangement was consistent with that at-cost principle mandated by the Securities and Exchange Commission (SEC) at the time. Xcel requests that its operating companies be allowed to continue these incidental transactions.

35. Xcel and National Grid each argue that certain transactions between their respective franchised public utilities that are accomplished through their respective centralized service companies should be subject to at-cost principles. Xcel notes that the Commission's regulations do not account for non-power goods and services that a utility operating company provides to its centralized service company and whose costs may then be re-allocated to other franchised public utility operating companies. Xcel states that its franchised public utilities share certain information system assets in this way at cost and were permitted to do so at cost by the SEC. Xcel seeks clarification that it and its operating companies may request a waiver from the Order No. 707 rules to continue at-cost arrangements like this that pre-date EPAct 2005 and Order No. 707.

36. National Grid argues that in Order No. 707 the Commission mischaracterized its comments as supporting at-cost pricing for all transactions among affiliates within a holding company system. National Grid states that it only proposed symmetrical pricing between franchised public utilities and centralized service companies—meaning all transactions involving centralized service companies would be priced at cost, no matter their direction. It contends that this pricing structure would comply with the affiliate rules included in the New York Commission's order on the merger between National Grid and Keyspan.

37. National Grid argues that the same rationale for justifying at-cost pricing for centralized service companies selling non-power goods and services to a franchised public utility should apply when a franchised public utility sells non-power goods and services to the centralized service company, *i.e.*, economies of scale, difficulty defining market value, and the Commission's authority to find at-cost pricing unreasonable in specific instances. National Grid states that the Commission's decision to treat centralized service companies like other non-utility affiliates when purchasing goods or services from a utility affiliate creates accounting requirements that are much more difficult to implement than symmetrical pricing.

38. National Grid maintains that while the Commission stated in Order No. 707 that ''stricter'' state standards would apply to affiliate transactions, the Commission's approach involves a narrow reading of that term that focuses entirely on price levels.[23] National Grid

[23] In Order No. 707, the Commission stated that ''to the extent a state has affiliate-pricing standards

Continued

argues that a state's restrictions on affiliate transactions may be considered highly strict if they require all transactions involving regulated affiliates to be settled at fully-loaded cost. National Grid states that its operations currently are subject to strict at-cost requirements at the state level that apply to all companies deemed regulated, which includes service companies. It argues that inserting Commission price standards into this situation will upset arrangements made at the state level in merger proceedings and rate cases. National Grid thus maintains that applying the Commission's rules to transactions among regulated affiliates will depend on how the term ''strict'' is to be interpreted in this context.

39. National Grid proposes that, because of the special status of centralized service companies, it may be preferable to distinguish between regulated and non-regulated companies rather than between utilities and non-utilities, in that centralized service companies are regulated at both the state and federal levels. National Grid maintains that this would be consistent with the Commission's position that its policies should not preempt state rules.

40. FirstEnergy Service Company (FirstEnergy) argues that the Commission should clarify that public utilities subject to regulation under Order No. 707 are free to request a waiver of one or more, but not all, of the Order No. 707 affiliate cross-subsidization restrictions. It maintains that this clarification will provide additional certainty when determining how best to comply with Commission regulation of affiliate cross-subsidization restrictions.

Commission Determination

41. The Commission will defer responding to the issues raised by PG&E with respect to the implications of our affiliate pricing rules for special-purpose entities created for financing purposes, such as bankruptcy-remote entities. It appears from PG&E's brief discussion that this is a generic issue and that there may be a lack of clarity with respect to whether the Commission considers bankruptcy-remote entities to be providing ''services'' covered by the Order No. 707 pricing restrictions. Accordingly, consistent with our goals of trying to clarify areas of confusion with respect to our regulations and providing greater regulatory certainty to the regulated community where possible, the Commission intends to obtain additional input from industry and others regarding the activities of bankruptcy-remote entities and their relationship to franchised public utilities, and thereafter to issue a guidance order with respect to whether the Commission considers these entities to be providing services covered by the rule and any related issues. In the interest of finalizing this rule, however, we will undertake such inquiries outside the context of this particular rulemaking.

42. With respect to Xcel and National Grid's concerns, we will address on a case-by-case basis issues regarding transactions between affiliated franchised public utilities or between franchised public utilities that include intermediate transactions with centralized service companies. First, we will consider whether pricing or other restrictions need to be imposed on transactions between two or more franchised public utilities on a case-by-case basis. Such transactions are not covered by this rule, which applies only to transactions between franchised public utilities and either a market-regulated power sales affiliate or a non-utility affiliate.[24] Second, to the extent that the requirements of this rule may be implicated because transactions for goods and services between franchised public utilities include intermediate transactions with a centralized service company, we clarify in response to National Grid and Xcel that a holding company and its operating companies may seek a waiver of the requirements of this rule on a case-by-case basis.

43. In response to FirstEnergy, we clarify that public utilities subject to regulation under Order No. 707 are free to request a waiver of the Order No. 707 affiliate cross-subsidization restrictions.

3. Materiality Threshold

Request for Rehearing or Clarification

44. EEI argues that, to avoid imposing an inappropriate burden while achieving the Commission's policy and regulatory goals, Order No. 707 should incorporate materiality thresholds per class of transactions per provider of either $1 million or 1 percent of utility gross revenues, whichever is less, before the affiliate transaction preapproval and pricing requirements apply. It notes that the Commission recently proposed using thresholds in its notice of proposed rulemaking on FERC Form 1, 1–F, and 3–Q, and their use here will allow companies to avoid scrutinizing thousands of relatively minor transactions.

Commission Determination

45. We will deny EEI's request for a materiality threshold for the application of the Order No. 707 rules. While we agree in principle that a materiality threshold may be appropriate, EEI has not fully explained how its proposal would function when applied. In particular, EEI has not explained what it means by a ''class'' of transactions, and the degree to which the threshold would apply in practice appears to depend, in part, on how broadly or narrowly a category is drawn. However, it may be appropriate for the Commission to revisit this issue after gaining additional experience with these rules.

B. Relationship of Pricing Restrictions to Other Commission Regulations

46. A number of commenters argue that the rules adopted in Order No. 707 may conflict with other Commission regulations. We address each potential conflict raised by commenters.

1. PURPA Regulations

Request for Rehearing or Clarification

47. EEI argues that the power transaction restrictions implemented in Order No. 707 should not apply to mandatory purchase obligation sales from qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA).[25] It maintains that prohibiting affiliate power sales that are not first approved under FPA section 205 [26] could, if taken literally, require pre-authorization for energy sales made by a QF with market-based rate authority to an affiliated utility with captive customers. EEI asserts that this could be the case even where the utility has a mandatory obligation under PURPA to purchase the energy. EEI believes that the Commission did not intend this result because there is no reason for additional review of sales

that are 'stricter' than the Commission's then the stricter standard applies, as long as there is no conflict in complying with both the state's pricing standard and this Commission's pricing standard.'' *Id.* P 74.

[24] Transactions involving only two or more franchised public utilities may raise a different type of cross-subsidization issue (involving whether the customers of one franchised public utility would be subsidized at the expense of the customers of the other franchised public utility). The Commission will address such issues on a case-by-case basis, as appropriate, in the context of a section 205 filing, a section 206 complaint, or a section 203 merger application.

[25] 16 U.S.C. 824a–3.

[26] 18 CFR 35.44(a) (''*Restriction on affiliate sales of electric energy.* No wholesale sale of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the Federal Power Act'').

under a mandatory purchase agreement that is subject to Commission review.

Commission Determination

48. The Commission agrees with EEI that it did not intend that the pre-authorization requirement in question would apply to QF sales under contracts based on a mandatory purchase obligation under PURPA where the QF has market-based rate authority. Accordingly, we clarify that the pre-authorization requirement does not apply to those sales.

2. Fuel Adjustment Clause Regulations

Request for Rehearing or Clarification

49. EEI argues that to avoid conflicts, the non-power transaction provisions in the regulations implemented by Order No. 707 should be amended to exclude fuel purchases covered by the Commission's fuel adjustment clause regulations at 18 CFR 35.14(a)(7). It asserts that the new requirement could be read to apply to a purchase subject to the fuel adjustment clause regulations regardless of prior approval of the fuel price by a regulatory body. The new § 35.44(b) applies a ''no higher than market'' ceiling to purchases of goods and services that may differ from fuel prices already authorized by a regulatory body and currently allowed for use under § 35.14(a)(7). EEI argues that if § 35.44(b) controls in such circumstances, it could require utility fuel subsidiaries to accept a lower price even if a higher price has been approved by a state regulatory body. EEI also argues that determining the market price for a specific, delivered fuel can be very difficult because differences in quality and transportation costs affect the price.

Commission Determination

50. The Commission clarifies that the regulations issued under Order No. 707 pertaining to sales of non-power goods and services do not apply to fuel purchases covered by the Commission's fuel adjustment clause regulations. Those regulations incorporate extensive oversight measures, including a provision that fuel charges by affiliated companies that do not appear to be reasonable may result in the suspension of the fuel adjustment clause or an investigation under FPA section 206. Accordingly, we will amend our regulations to exempt from our affiliate pricing restrictions transactions for fuel where the price of fuel from a company-owned or controlled source is found or presumed under 18 CFR 35.14 to be reasonable and includable in the adjustment clause.

3. Market-Based Rate Regulations

Requests for Rehearing

51. FirstEnergy notes that under Order No. 707, a public utility that received a waiver of the market-based rate affiliate restrictions based on a finding that it had no captive customers can be exempted from the new affiliate cross-subsidization restrictions by making an informational filing referencing that finding. FirstEnergy argues that there is no need to impose on public utilities that have received waivers of the market-based rate affiliate restrictions the additional burden of making an informational filing in order to avoid the application of duplicative Order No. 707 affiliate cross-subsidization restrictions.

52. FirstEnergy also notes that while the Commission may have waived a public utility's market-based rate affiliate restrictions, the Commission may not have made an express ''finding'' as to whether the relevant public utility served captive customers, and it is thus unclear whether those public utilities will be entitled to rely on the Commission's waiver of market-based rate affiliate restrictions for purposes of the Order No. 707 affiliate restrictions. FirstEnergy maintains that the difficulty will be compounded by the unlikelihood of a Commission order in response to the informational filing or some other confirmation that the Commission has accepted or approved that filing.

53. FirstEnergy argues that to the extent that affiliate cross-subsidization compliance issues arise, it will be unclear whether the Commission's market-based rate affiliate restrictions, Order No. 707's affiliate cross-subsidization restrictions, or both, apply to a given transaction and to what effect. FirstEnergy argues that the Commission should delete the new restriction on affiliate sales of electric energy and rely instead on its existing market-based rate affiliate regulations to govern relevant wholesale sales of electric energy at market-based rates. In the alternative, FirstEnergy requests that the Commission clarify the relation between these two requirements.

Commission Determination

54. We disagree with FirstEnergy that it is unnecessary to require public utilities that have received waivers of the market-based rate affiliate restrictions to make informational filings referencing that filing for purposes of the Order No. 707 regulations. The minimal burden this requirement might create does not outweigh the benefit in terms of administrative efficiency and transparency that would accrue to the industry and the Commission through this procedure.

55. FirstEnergy expresses general concerns about the effect a Commission waiver of a public utility's market-based rate affiliate restrictions would have for purposes of Order No. 707. As the Commission explained in Order No. 697, ''where a seller demonstrates and the Commission agrees that it has no captive customers, the affiliate restrictions will not apply.'' [27] We clarify that the informational filing with respect to Order No. 707 need only consist of a copy of, and a citation to, the Commission order finding that the public utility does not serve captive customers.[28] Further Commission action on the issue thus would be unnecessary, absent any change in the facts on which the Commission's finding was based. This clarification that the informational filing consists of a copy of, and a citation to, the Commission's finding should adequately address FirstEnergy's concern that there might be an instance in which the Commission has not made an express finding on whether the public utility serves captive customers.

56. The Commission denies FirstEnergy's requests to delete the new regulations and rely on existing pricing restrictions under its market-based rate regulations. FirstEnergy has misinterpreted the scope and applicability of the regulations adopted in Order No. 707. As the Commission stated in Order No. 707, the restrictions imposed there are prophylactic and based on restrictions already imposed by the Commission in the context of certain section 203 and 205 approvals, but expand the transactions and entities to which they apply. The Commission recognized a regulatory gap and acted to expand the range of entities and transactions to which those restrictions apply to ensure that captive customers of franchised public utilities do not inappropriately cross-subsidize the activities of non-utility affiliates.

4. Order No. 667 Requirements

Requests for Rehearing

57. FirstEnergy argues that Order No. 707 duplicates requirements set forth in the rules on Commission review of affiliate transactions and protection of

[27] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 FR 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 552 (2007), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697–A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268.

[28] The Commission does not intend to set these informational filings for notice and comment, or issue orders on them.

captive customers implemented in Order No. 667, which promulgates the Commission's regulations under the Public Utility Holding Company Act of 2005 (PUHCA 2005).[29] It maintains that this could result in confusion and uncertainty. It will, for example, be unclear whether the new Order No. 707 regulations, the existing Order No. 667 pricing policy, or both will apply to issues arising in connection with centralized service companies. FirstEnergy also argues that it is unclear whether the Commission's grant of waiver of the Order No. 707 regulations, including the regulation pertaining to service companies, would affect the regulatory requirements set forth in Order No. 667.

58. FirstEnergy argues that to prevent confusion, the Commission should delete centralized service company at-cost requirements set forth in Order No. 707 and rely instead on its existing pricing policy set forth in Order No. 667 to regulate transactions with centralized service companies. Any codification of pricing policy for centralized service companies should be done in the Commission's regulations under PUHCA 2005. In the alternative, FirstEnergy requests that the Commission clarify the relation between the policies set forth in Order No. 667 and the regulations issued under Order No. 707 expressly applicable to centralized service companies.

Commission Determination

59. We deny FirstEnergy's request that we delete centralized service company at-cost requirements set forth in Order No. 707 and rely instead on the existing pricing policy set forth in Order No. 667 to regulate transactions with centralized service companies. While the Commission discussed service company issues at length in Order No. 667 and Order No. 667–A, and stated that it would accept the use of an ''at-cost'' standard for centralized service company non-power goods and services, it did not codify the standard in the PUHCA 2005 requirements themselves. While the Commission's PUHCA 2005 regulations allow for Commission review of holding company system cost allocation for non-power goods and services, which is highly relevant to the general issue of cross-subsidization, those regulations do not codify affiliate pricing standards. Moreover, to the extent there is overlap between this rule and the pricing policy we announced in the preamble of Order No. 667 and Order No. 667–A, our regulations here are consistent because they apply the standard that was announced in Order No. 667. We therefore do not agree that Order No. 707 and Order No. 667 are inappropriately duplicative, and we do not see the potential for conflict to which FirstEnergy alludes.

C. Captive Customers

60. The regulations issued in Order No. 707 apply to franchised public utilities that have captive customers or that own or provide transmission service over jurisdictional transmission facilities. These regulations define captive customers as any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

Requests for Rehearing

61. EEI argues that Order No. 707 should not treat wholesale customers that purchase electricity under competitive conditions as ''captive customers.'' It states that the Commission's transmission open access rules generally provide competitive choice. EEI argues that given the widespread availability of choice at the wholesale level, it should be unusual for a wholesale customer to be captive and require the affiliate transaction pre-approval and pricing protections set out in Order No. 707. EEI states that while the Commission may want to allow individual wholesale customers to raise concerns in individual rate proceedings, it encourages the Commission not to treat all wholesale customers as presumptively captive, but instead to treat them as presumptively non-captive.

Commission Determination

62. We do not agree with EEI's request in this regard. As stated in Order No. 707 and Order 697–A, wholesale customers may have choice, but the Commission will ''err on the broad side of the definition of captive customers.''[30] As the Commission noted, although we are erring on the side of a broad definition of captive customers, we recognize that there may be circumstances where customers fall within our definition but nevertheless there are sufficient protections in place to protect such customers against any risk of harm from transactions between the franchised public utility and its affiliates. We noted that it is possible that wholesale customers with fixed rate contracts would be adequately protected, but we explained that we are not prepared at this time to generically exclude such customers from the definition of captive customers. Instead, we will allow franchised public utilities, on a case-by-case basis, to seek a waiver of the affiliate restrictions if they feel that adequate protections are in place to protect any customers that fall under the ''captive customer'' definition. We see no reason to change this approach.

D. Transmission Facilities

63. In Order No. 707, the Commission made its restrictions on non-power goods and services transactions applicable to franchised public utilities that own or provide transmission service over transmission facilities subject to the Commission's jurisdiction.

Requests for Rehearing

64. National Grid and EEI argue Order No. 707 should not apply to franchised public utility companies that do not have captive customers simply because the utility companies own or provide service over jurisdictional transmission facilities. They argue that this issue did not receive proper notice and the Commission did not sufficiently explain what EEI claims is a dramatic expansion in the scope of the rule that was not discussed in the proposed rule. They also argue that the Commission already has oversight of such companies under FPA sections 205 and 206, and the expansion is therefore unnecessary.

65. EEI encourages the Commission to delete the provision that makes the new regulations applicable to public utilities that do not have captive customers but simply own or provide service over jurisdictional transmission facilities. EEI asserts that if the Commission does not do this, it should discuss the reasons for not doing so and invite further public comment.

66. Similarly, EEI argues that franchised public utilities that have received a waiver of the market-based rate affiliate restrictions because they have no captive customers but that own, or provide service over, jurisdictional transmission facilities should not have to seek a waiver or make an informational filing to avoid Order No. 707 pricing restrictions. EEI states if a further waiver or informational filing is required, the Commission should clarify the showing required to secure a waiver

[29] Energy Policy Act of 2005, Public Law No. 109–58, secs. 1261 *et seq.*, 119 Stat. 594 (2005); *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g*, Order No. 667–A, FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667–B, FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g*, Order No. 667–C, 118 FERC ¶ 61,133 (2007).

[30] Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 43; *see also* Order No. 697–A, FERC Stats. & Regs. ¶ 31,268 at P 199.

or what the informational filing must contain.

Commission Determination

67. We deny EEI's request to delete the provision. As a preliminary matter, we disagree that there has been insufficient notice that these rules would apply to franchised public utility companies providing service over jurisdictional transmission facilities. While due process and the Administrative Procedure Act impose an obligation on agencies to provide adequate notice of issues to be considered,[31] that obligation is satisfied in this rulemaking by providing the terms or substance of the proposed rule and a description of the subjects and issues involved.[32] The coverage in Order No. 707 of franchised public utilities that provide service over jurisdictional transmission facilities was a logical outgrowth of the Affiliate Transactions Notice of Proposed Rulemaking and its purpose, *i.e.*, to expand the coverage of the affiliate restrictions established in the context of blanket market-based rate authorizations and our merger proceedings and to codify them in our regulations. Indeed, the American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) specifically raised the issue in response to the Affiliate Transactions Notice of Proposed Rulemaking, arguing that the Commission should clarify the regulatory text in the final rule to ensure that, consistent with existing Commission affiliate cross-subsidization policy and the Commission's existing FPA section 203 and PUHCA 2005 regulations, the new generic cross-subsidization regulation explicitly protects transmission customers.[33] The Administrative Procedure Act ''does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule,'' and this is particularly true when proposals are adopted in response to comments from participants in the rulemaking proceeding.[34] Order No. 707 thus does not unduly change the scope of this proceeding. In any event, the parties' ability to seek rehearing resolves any due process issues.

68. Regarding the substance of the commenters' arguments, as noted in Order No. 707, some franchised public utilities do not have captive customers, but own or provide transmission service over jurisdictional transmission facilities,[35] and customers of such franchised public utilities are entitled to the same customer protection as those that are considered captive customers. Transmission customers should not have to bear the costs of inappropriate cross-subsidization. This provision was added to the Exhibit M requirement in Order No. 669–A, protecting customers of such franchised public utilities from cross-subsidization in the merger context. The addition of the language here allows for the continued protection of these customers beyond the confines of our decisions under FPA section 203. Finally, while we recognize that the Commission oversees transmission rates under sections 205 and 206, the affiliate pricing rules are preventative in nature, allowing for greater protection of such customers. Thus, in order to grant waiver of the Order No. 707 regulations, the Commission would need to be assured that the transmission customers of these franchised public utilities that do not have captive customers do not bear the costs of inappropriate cross-subsidization.

69. In response to EEI's request that we specify what further action would be required to obtain a waiver, the public utility would need to demonstrate that the transmission customers of a franchised public utility that does not have captive customers do not bear the costs of inappropriate cross-subsidization.

E. Reporting Requirements

70. In the Affiliate Transactions Notice of Proposed Rulemaking, the Commission asked whether it should adopt any after-the-fact reporting requirements for transactions covered by the proposed regulations. In Order No. 707, the Commission concluded that its current reporting regulations are adequate to ensure compliance with the new regulations. The Commission also noted that in addition to the information gathered through Form No. 1, it already collects affiliate power sales information from franchised public utilities through EQRs and market-based rate requirements. In addition, the Commission's existing record retention requirements in Parts 125 and 225 of its regulations already apply to transactions involving non-power goods and services.

Request for Rehearing

71. APPA and NRECA maintain that Order No. 707 inappropriately relies on existing record-retention requirements that do not mandate any reporting. APPA and NRECA note that Order No. 667 requires centralized service companies in holding company systems to file annual reports on FERC Form No. 60 that contain certain information on affiliate transactions. But they contend that neither Order No. 667 nor new Order No. 707 requires filings by single-purpose service companies or other associate companies. They argue that this leaves the Commission, state regulators, wholesale and transmission customers, and the public with a significant information gap when it comes to evaluating whether cross-subsidization is in fact occurring.

Commission Determination

72. The Commission continues to believe that no additional reporting requirements are necessary at this time. We note that the Commission's regulations already provide that, unless otherwise exempted or granted a waiver, every service company in a holding company system, including a special-purpose company (*e.g.*, a fuel supply company or a construction company), that does not file a FERC Form No. 60 must instead file a narrative description of the service company's functions during the prior calendar year.[36] Moreover, the Commission has a longstanding practice of relying on its section 205 and 206 ratemaking reviews to disallow passing non-power goods and services costs through jurisdictional rates if those costs are not just and reasonable or are inappropriately allocated. It relies on section 205 rate reviews and on its audit function to deter inappropriate allocation of costs. This is the longstanding, traditional approach to this issue and the reason why record retention requirements are important. There is no evidence that existing practices are not effective. Finally, given the potential scope of the information in question, the Commission is not prepared to impose new reporting requirements without a demonstrated need for such reporting and a record to support a finding that a reporting system would not create unnecessary burdens.

F. Grandfathered Agreements

73. The Commission clarified in Order No. 707 that the new pricing rules are prospective and will apply to any contracts, agreements or arrangements entered into on or after the effective date

[31] *Public Service Commission of the Commonwealth of Kentucky* v. *FERC*, 397 F.3d 1004 (DC Cir. 2005), *citing Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54 (DC Cir. 1999); *see* 5 U.S.C. 554(b)(3).

[32] *See* 5 U.S.C. 553(b)(3).

[33] APPA/NRECA Sept. 6, 2007 Comment at 5–7.

[34] *Daniel Int'l Corp.* v. *OSHA*, 656 F.2d 925, 932 (4th Cir. 1981).

[35] Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 48.

[36] 18 CFR 366.23 (describing FERC–61).

of the order. To the extent different pricing was in effect for any contract, agreement or arrangement entered into prior to the effective date, the Commission stated it may remain in effect. But the Commission also stated that it could on its own motion, or upon complaint, institute a section 206 proceeding to determine in specific instances whether costs incurred by a public utility under grandfathered contracts, agreements or arrangements are just, reasonable and not unduly discriminatory or preferential.

Request for Rehearing

74. FPL asks the Commission to clarify that the Commission's position on this issue covers all existing arrangements where affiliates provide non-power goods and services equivalent to those that would be provided by a centralized service company. FPL argues that the Order No. 707 restrictions do not by their terms supersede the Order No. 697 restrictions on affiliate transactions, and the Commission should seek consistency in its regulations on these matters. FPL argues that the Commission should clarify that the grandfathering language in Order No. 707 also applies with respect to the requirements of Order No. 697 where existing inter-affiliate transactions involving non-power goods and services are comparable to those provided by a centralized service company.

75. APPA and NRECA contend that the new rules should be applied prospectively to all transactions occurring after the effective date of Order No. 707. They state that the Commission undermined the purpose and effect of Order No. 707 by generically exempting all affiliate transactions occurring under contracts, agreements, and arrangements made before the rule's effective date. They argue that this will permit transactions that violate the new regulations to continue for the entire term of a long-term affiliate contract, delaying the rule's effectiveness for years, in some cases. APPA and NRECA also maintain that a public utility otherwise covered by the new restrictions can move quickly to execute prior to the effective date a new long-term agreement with its affiliates that violates the new restrictions.

76. APPA and NRECA maintain that the Commission's sole justification for its action was that it would be unjust and detrimental to the financial integrity of holding companies to void pricing arrangements retroactively. APPA and NRECA argue that the Commission offered no evidence to support this claim, and this absence of evidence stands in contrast to the extensive and explicit justification of the need for pricing restrictions to protect the captive customers and transmission customers of public utilities. They thus argue that the Commission's action is arbitrary and capricious because the Commission failed to provide a rational connection between the facts found and the choice made.

77. APPA and NRECA maintain that grandfathering existing agreements violates the Commission's statutory mandate under section 206. They argue that, to the extent the Commission's position rests on a finding that pre-existing affiliate contacts are not ''unjust, unreasonable, unduly discriminatory or preferential,'' Order No. 707 does not support such a finding with any evidence, or explain how such a finding squares with the Commission's basic findings on the need for the new rules.

Commission Determination

78. In response to FPL's request that the Commission clarify that the grandfathering language in Order No. 707 also applies with respect to the requirements of Order No. 697, we do not believe that this proceeding is the proper place to address the requirements of Order No. 697. We note that Order No. 697 establishes its own procedures seeking waivers of its requirements. As the Commission stated in its order of March 25, 2008 in this docket, the Commission's grandfathering of preexisting contracts, agreements and arrangements was only for purposes of compliance with this rule.[37] The Commission noted that to the extent public utilities were required to comply with the same or similar pricing restrictions pursuant to a merger order or in conjunction with a market-based rate authorization, our action to make Order No. 707 compliance prospective only did not change any such obligations under other orders or rules. In other words, pricing restrictions imposed pursuant to a merger order, a market-based rate authorization order or the Commission's market-based rate rules are not within the scope of Order No. 707 and, consequently, the Order No. 707 grandfathering provision does not relieve a public utility of its obligations under other orders and rules with respect to contracts, agreements or arrangements entered into prior to March 31, 2008.

79. We disagree with APPA and NRECA that our new rules should be applied prospectively to all transactions (as opposed to all agreements) entered into after the effective date of Order No. 707. Many or most of the agreements in question were approved or sanctioned by the SEC and/or state commissions, and the Commission will not lightly modify previously approved contracts or arrangements. To the extent such action is appropriate, we will act pursuant to FPA section 206 on a case-by-case basis. We are not permitting improper cross-subsidization by permitting existing contracts to remain in effect. Issues that may arise under these contracts will always be subject to our authority under FPA section 206. We reject the claim that the continuing effect of these pre-existing contracts violates our mandate under section 206. Nothing in the new rules limits or qualifies our powers and duties under that section, and the Commission's position on preexisting agreements in no way rests on a generic finding that these agreements are not unjust, unreasonable, unduly discriminatory or preferential.

80. We also disagree that we are facilitating abuse by allowing companies to enter into potentially abusive contracts before the effective date of these regulations and that would remain in effect after the effective date. Our powers with respect to these contracts are no different than they are with respect to contracts that already exist. As we stated in Order No. 707, the Commission on its own motion, or upon complaint, may on a case-by-case basis institute a section 206 proceeding to determine whether the costs incurred by a public utility under such pre-existing contracts, agreements or arrangements are just, reasonable and not unduly discriminatory or preferential. As we further noted in Order No. 707, many public utilities already have the same pricing restrictions in effect as a result of Commission orders approving mergers or market-based rates; these restrictions remain in place.

III. Document Availability

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

[37] *Cross-Subsidization Restrictions on Affiliate Transactions,* 122 FERC ¶ 61,280 at n.5 (2008).

Street, NE., Room 2A, Washington DC 20426.

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

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

IV. Effective Date and Congressional Notification

84. Changes to Order No. 707 adopted in this order on rehearing will become effective August 25, 2008.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

Kimberly D. Bose,

Secretary.

■ In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18, Code of Federal Regulations, to read as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 35.44 as follows:

■ A. Amend paragraph (a) to add a sentence at the end of the paragraph;

■ B. Revise paragraphs (b)(1) and (b)(2); and

■ C. Add paragraph (b)(4) and paragraph (c).

§ 35.44. Protections against affiliate cross-subsidization.

(a) * * * This requirement does not apply to energy sales from a qualifying facility, as defined by 18 CFR 292.101, made under market-based rate authority granted by the Commission.

(b) * * *

(b)(1) Unless otherwise permitted by Commission rule or order, and except as permitted by paragraph (b)(4) of this section, sales of any non-power goods or services by a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, including sales made to or through its affiliated exempt wholesale generators or qualifying facilities, to a market-regulated power sales affiliate or non-utility affiliate must be at the higher of cost or market price.

(2) Unless otherwise permitted by Commission rule or order, and except as permitted by paragraphs (b)(3) and (b)(4) of this section, a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market.

* * * * *

(4) A company in a single-state holding company system, as defined in § 366.3(c)(1) of this chapter, may provide general administrative and management non-power goods and services to, or receive such goods and services from, other companies in the same holding company system, at cost, provided that the only parties to transactions involving these non-power goods and services are affiliates or associate companies, as defined in § 366.1 of this chapter, of a holding company in the holding company system.

(c) *Exemption for price under fuel adjustment clause regulations.* Where the price of fuel from a company-owned or controlled source is found or presumed under § 35.14 to be reasonable and includable in the adjustment clause, transactions involving that fuel shall be exempt from the affiliate price restrictions in § 35.44(b).

[FR Doc. E8–16870 Filed 7–23–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9408]

RIN 1545–BD01

Dependent Child of Divorced or Separated Parents or Parents Who Live Apart; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations; correction.

SUMMARY: This document contains corrections to final regulations (TD 9408) that were published in the **Federal Register** on Wednesday, July 2, 2008 (73 FR 37797), relating to a claim that a child is a dependent by parents who are divorced, legally separated under a decree of separate maintenance, or separated under a written separation agreement, or who live apart at all times during the last 6 months of the calendar year.

DATES: This correction is effective July 24, 2008, and is applicable to taxable years beginning after July 2, 2008.

FOR FURTHER INFORMATION CONTACT: Victoria Driscoll, (202) 622–4920 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of this document are under section 152 of the Internal Revenue Code.

Need for Correction

As published, final regulations (TD 9408) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (TD 9408), which were the subject of FR Doc. E8–15044, is corrected as follows:

1. On page 37798, column 2, in the preamble, under the paragraph heading ''a. Custodial Parent's Failure To Release Exemption'', first paragraph, lines 8 thru 11, the language ''6 months of the taxable year, (2) the child was in the custody of one or both parents for more than one-half of the taxable year, and (3) the child received'' is corrected to read ''6 months of the calendar year, (2) the child was in the custody of one or both parents for more than one-half of the calendar year, and (3) the child received''.

2. On page 37798, column 3, in the preamble, under the paragraph heading ''a. Custodial Parent's Failure To Release Exemption'', first paragraph of the column, line 4, the language ''6 months of the taxable year, (2) the'' is corrected to read ''6 months of the calendar year, (2) the''.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E8–16921 Filed 7–23–08; 8:45 am]

BILLING CODE 4830–01–P