

respect to protecting the confidentiality and security of nonpublic personal information.

*Sample Clause A-7*

We restrict access to nonpublic personal information about you to [provide an appropriate description, such as “those employees who need to know that information to provide products or services to you”]. We maintain physical, electronic and procedural safeguards that comply with federal standards to safeguard your nonpublic personal information.

[66 FR 21252, Apr. 27, 2001, as amended at 74 FR 62984, Dec. 1, 2009]

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**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

**18 CFR Part 366**

[Docket No. RM11-12-000; Order No. 771]

**Availability of E-Tag Information to Commission Staff**

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** In this Final Rule, the Federal Energy Regulatory Commission (the Commission) is amending its

regulations, pursuant to sections 222 and 307(a) of the Federal Power Act (FPA), to grant Commission access, on a non-public and ongoing basis, to the complete electronic tags (e-Tags) used to schedule the transmission of electric power interchange transactions in wholesale markets. This Final Rule will require e-Tag Authors (through their Agent Service) and Balancing Authorities (through their Authority Service) to take appropriate steps to ensure Commission access to the e-Tags covered by this Final Rule by designating the Commission as an addressee on the e-Tags. After the Commission is designated as an addressee, the Commission will access the e-Tags by contracting with a commercial vendor. The commercial vendor will provide data management services and receive e-Tags addressed to the Commission. The information made available under this Final Rule will bolster the Commission’s market surveillance and analysis efforts by helping the Commission to detect and prevent market manipulation and anti-competitive behavior. This information will also help the Commission monitor the efficiency of markets and better inform Commission policies and decision-making, thereby helping to ensure just and reasonable rates. In addition, this Final Rule will require

that e-Tag information be made available to regional transmission organizations and independent system operators and their Market Monitoring Units, upon request to e-Tag Authors and Authority Services, subject to appropriate confidentiality restrictions.

**DATES:** *Effective Date:* This Final Rule will become effective February 26, 2013.

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**SUPPLEMENTARY INFORMATION:**

**Order No. 771**

*Final Rule*

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*Before Commissioners:* Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, Cheryl A. LaFleur, and Tony T. Clark. Issued December 20, 2012.

1. In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations, pursuant to sections 222

and 307(a) of the Federal Power Act

(FPA),<sup>1</sup> to grant the Commission access, on a non-public and ongoing basis, to the complete electronic tags (e-Tags)<sup>2</sup> used to schedule the transmission of electric power interchange transactions in wholesale markets. This Final Rule will require e-Tag Authors<sup>3</sup> (through their Agent Service<sup>4</sup>) and Balancing Authorities<sup>5</sup> (through their Authority Service<sup>6</sup>) to take appropriate steps to ensure Commission access to the e-Tags covered by this Final Rule by designating the Commission as an addressee on the e-Tags.<sup>7</sup> After the Commission is designated as an addressee, the Commission will access the e-Tags by contracting with a commercial vendor. The commercial vendor will provide data management services and receive e-Tags addressed to the Commission. E-Tag Authors and Balancing Authorities will be required to ensure Commission access to e-Tag data under this Final Rule by no later than March 15, 2013.

2. In addition, this Final Rule requires that Regional Transmission

Organizations (RTOs), Independent System Operators (ISOs) and their Market Monitoring Units (MMUs) shall be afforded access to complete e-Tags, upon request to e-Tag Authors and Authority Services, subject to their entering into appropriate confidentiality agreements.

### I. Background

3. E-Tags, also known as Requests for Interchange, are used to schedule interchange transactions<sup>8</sup> in wholesale markets. E-Tags document the movement of energy across an interchange over prescribed physical paths, for a given duration, and for a given energy profile(s), and include information about those entities with financial responsibilities for the receipt and delivery of the energy. E-Tags may contain information about the different types of entities involved in moving power across interchanges, including generators, transmission system operators, energy traders, and Load Serving Entities. E-Tags are delivered to the Interchange Distribution Calculator (IDC) and webSAS, which are used in the TLR procedure IRO-006-4.1 and WECC Unscheduled Flow Standard IRO-STD-006-0 for the Eastern and Western Interconnection, respectively. Currently, the North American Electric Reliability Corporation (NERC) and the Western Electricity Coordinating Council (WECC) receive all e-Tag data in the Eastern and Western Interconnections, respectively, in near real-time, to assist Reliability Coordinators in identifying transactions that may need to be curtailed to relieve overloads when transmission constraints occur. At present, NERC and WECC contract with OATI, a commercial vendor, for data management services related to IDC and webSAS. E-Tags are also included in the business practice standards adopted by the North American Energy Standards Board (NAESB)<sup>9</sup> and incorporated by

reference into the Commission's regulations and public utility tariffs.

4. E-Tagging was first implemented by NERC on September 22, 1999, as a process to improve the speed and efficiency of the tagging process, which had previously been accomplished by email, facsimile, and telephone exchanges.<sup>10</sup> E-Tags require that, prior to scheduling transactions, one of the market participants involved in a transaction must submit certain transaction-specific information, such as the source and sink control areas (now referred to as Balancing Authority Areas) and control areas along the contract path, as well as the transaction's level of priority and transmission reservation Open Access Same-Time Information System (OASIS) reference numbers, to control area operators and transmission operators on the contract path.<sup>11</sup>

5. Communication, submission, assessment, and approval of an e-Tag must be completed before the interchange transaction is implemented.<sup>12</sup> The Interchange Scheduling and Coordination (INT) group of NERC Reliability Standards sets forth requirements for implementing interchange transactions through e-Tags. E-Tags are submitted pursuant to the business practices set forth by NAESB. Those business practices incorporate the protocols enumerated in the NAESB Electronic Tagging Functional Specifications for communicating and processing e-Tags. NAESB business practice standards for the wholesale electric industry are mandatory when they have been incorporated by reference by the Commission into its regulations.<sup>13</sup> Several of the incorporated business practice standards require processing e-

Sink BA's registered e-Tag authority service using protocols compliant with the Version 1.8.1 Electronic Tagging Functional Specification.") NAESB Wholesale Electric Quadrant (WEQ) Business Practice Standards (Version 003), published July 31, 2012.

<sup>10</sup> *Open-Access Same-Time Information System and Standards of Conduct*, 90 FERC ¶ 61,070, at 61,258-59 (2000).

<sup>11</sup> *Id.*

<sup>12</sup> See *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 795, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

<sup>13</sup> See *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676, FERC Stats. & Regs. ¶ 31,216, (2006), *reh'g denied*, Order No. 676-A, *final rule*, 116 FERC ¶ 61,255 (2006), *final rule*, Order No. 676-B, FERC Stats. & Regs. ¶ 31,246 (2007), *final rule*, Order No. 676-C, FERC Stats. & Regs. ¶ 31,274 (2008), *order granting clarification and denying reh'g*, Order No. 676-D, 124 FERC ¶ 61,317 (2008), *final rule*, Order No. 676-E, FERC Stats. & Regs. ¶ 31,299 (2009), *final rule*, Order No. 676-F, FERC Stats. & Regs. ¶ 31,309 (2010).

<sup>1</sup> 16 U.S.C. 824v, 825f (2006).

<sup>2</sup> For purposes of this rulemaking, "complete e-Tags" refers to: (1) e-Tags for interchange transactions scheduled to flow into, out of, or within the United States' portion of the Eastern or Western Interconnection, or into the Electric Reliability Council of Texas and from the United States' portion of the Eastern or Western Interconnection, or from the Electric Reliability Council of Texas into the United States' portion of the Eastern or Western Interconnection; and (2) information on every aspect of each such e-Tag, including all applicable e-Tag-IDs, transaction types, market segments, physical segments, profile sets, transmission reservations, and energy schedules.

<sup>3</sup> E-Tag Authors are typically Purchasing-Selling Entities. A Purchasing-Selling Entity is the entity that purchases or sells, and takes title to, energy, capacity, and Interconnected Operations Services. Purchasing-Selling Entities may be affiliated or unaffiliated merchants and may or may not own generating facilities. See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, at 15.

<sup>4</sup> The Agent Service provides the ability for initial creation of an e-Tag and the electronic transfer of that information to the appropriate Authority Service. E-Tag Authors are responsible for providing this service directly or by arranging with a third party to provide this service as their agent. See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, at 24.

<sup>5</sup> A Balancing Authority is responsible for integrating resource plans ahead of time, maintaining load-interchange-generation balance within a Balancing Authority Area and supporting Interconnection frequency in real-time. See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, at 10. Sink Balancing Authorities, defined as the Balancing Authority in which the load (sink) is located for an Interchange Transaction, use an Authority Service to electronically validate e-Tags and distribute them for approval by other entities. See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, at 17, 24.

<sup>6</sup> The Authority Service validates and distributes e-Tags for approval on behalf of the Sink Balancing Authority. See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, at 24.

<sup>7</sup> These steps are described in more detail below.

<sup>8</sup> NERC's *Glossary of Terms Used in Reliability Standards* (updated November 15, 2012) defines an interchange transaction as "[a]n agreement to transfer energy from a seller to a buyer that crosses one or more Balancing Authority Area boundaries." See [http://www.nerc.com/files/Glossary\\_of\\_Terms.pdf](http://www.nerc.com/files/Glossary_of_Terms.pdf).

<sup>9</sup> See, e.g., NAESB Wholesale Electric Quadrant (WEQ) Business Practice Standards (Coordinate Interchange) requirement 004-1 ("All requests to implement bilateral Interchange (excluding Interchange for emergency energy) between a Source BA and a Sink BA, where one or both BAs are located in either the Eastern Interconnection or Western Interconnection, shall be accomplished by the submission of a completed and accurate RFI) to the Sink BA's registered e-Tag Authority Service") and requirement 004-2 ("Until other means are adopted by NAESB, the primary method of submitting the RFI [Request for Interchange] shall be an e-Tag communicated to and managed by the

Tags in accordance with these specifications.<sup>14</sup>

6. In reviewing the data that currently are available to the Commission and its staff and necessary for conducting effective market surveillance and analysis, the Commission has determined that gaining access to the complete e-Tags used for interchange transactions will enhance the Commission's efforts to detect and prevent market manipulation and monitor market developments.

7. The need to gain access to e-Tag data led the Commission to issue a Notice of Proposed Rulemaking on April 21, 2011, proposing to require NERC to make the complete e-Tags used to schedule the transmission of electric power in wholesale markets available to Commission staff on an ongoing, non-public basis.<sup>15</sup> The E-Tag NOPR also invited comments on whether the Commission should require that complete e-Tags be made available to MMUs.

8. In response to the E-Tag NOPR, comments were filed by 14 commenters.<sup>16</sup> The comments expressed a variety of views, some supporting the Commission's proposal to require Commission access to complete e-Tag information used to schedule interchange transactions for market monitoring purposes,<sup>17</sup> and others opposing the Commission's proposal.<sup>18</sup> Some comments focused on whether NERC is the appropriate entity to provide access to the e-Tags and whether their data would serve market monitoring or reliability purposes. The Pa Commission points out that "any regulatory provision, adopted by the [Commission], that allows it to better perform its statutory function of preventing anti-competitive and/or market manipulative behavior at the wholesale level may have beneficial effects for state commissions, tasked with protecting their residents from such practices, at the retail level."<sup>19</sup> NERC commented that it has not owned or operated an e-Tag system and that it will not extend its contract with OATI for IDC operation services (which includes e-Tag information) after the current term expires in March 2013.<sup>20</sup>

The commenters were split as to whether they supported allowing MMUs for RTOs and ISOs to have access to complete e-Tag information, including access to e-Tags for transactions outside of the markets the MMUs monitor and whether such access would raise confidentiality issues.<sup>21</sup> Other commenters urged the Commission to grant access to e-Tags to the staffs of ISOs and RTOs.<sup>22</sup> Some commenters emphasized that market monitoring via e-Tags will be a complex and challenging enterprise.<sup>23</sup> In addition, some comments stated that, if the Commission proceeds with the proposal in the E-Tag NOPR, it would need to enlist the services of an outside contractor to provide database services to accomplish the creation and collection of e-Tag data as market participants usually only have access to data related to their own transactions.<sup>24</sup> Trade Associations disagreed with the burden estimate included in the E-Tag NOPR, arguing that it is understated.<sup>25</sup> Finally, several commenters argued that it would be helpful for the Commission to convene a technical conference or notice of inquiry before taking final action.<sup>26</sup>

9. The Commission also invited reply comments, so that interested persons would have an opportunity to comment on the ideas and proposals expressed in the comments that may not have been included as part of the proposals in the E-Tag NOPR.<sup>27</sup> Reply comments were filed by Trade Associations and NAESB. Trade Associations reiterated many of the arguments it raised in its initial comments. In its reply comments, NAESB stated that it does not take a position on the E-Tag NOPR, but notes that existing e-Tag mechanisms with some modification can support the distribution of e-Tag information to the Commission.

## II. Discussion

### A. Legal Authority To Require E-Tag Access

#### 1. E-Tag NOPR

10. In the E-Tag NOPR, the Commission proposed to require NERC to provide Commission staff with ongoing access to the e-Tags used to schedule interchange transactions in

wholesale markets on a non-public basis. The E-Tag NOPR stated that e-Tag information would help the Commission in its efforts to monitor markets, prevent market manipulation, assure just and reasonable rates, and ensure compliance with certain business practice standards adopted by NAESB and incorporated by reference into the Commission's regulations and the filed tariffs of public utilities.<sup>28</sup> In the E-Tag NOPR, the Commission stated that it has authority over public utilities that make wholesale power sales or that provide wholesale transmission service to report the details of their transactions, including complete e-Tag data.<sup>29</sup> The E-Tag NOPR also stated that, under FPA section 307(a), the Commission has, among its powers, authority to investigate any facts, conditions, practices, or matters it may deem necessary or proper to determine whether any person, electric utility, transmitting utility or other entity may have violated or might violate the FPA or the Commission's regulations, or to aid in the enforcement of the FPA or the Commission's regulations, or to obtain information about wholesale power sales or the transmission of power in interstate commerce.<sup>30</sup> Furthermore, the E-Tag NOPR stated that requiring NERC, rather than individual market participants, to provide access to e-Tag data would avoid burdening market participants with a requirement to file the same data with both NERC and the Commission and avoid burdening the Commission with developing and maintaining a new system to capture such data from individual market participants.<sup>31</sup>

#### 2. Comments

11. Many commenters focused on whether the Commission could use its reliability-related authority under FPA section 215 to require NERC to provide the Commission with access to e-Tags. In particular, NERC, MID, Trade Associations, and WECC assert that the Commission may not use its reliability-related jurisdiction over NERC (derived from NERC's status as the Commission-approved Electric Reliability Organization (ERO) under FPA section 215) to pursue market oversight matters that fall outside the scope of section 215.<sup>32</sup> NERC questions whether it should be implicated in subjects and activities that are outside the confines of

<sup>14</sup> See *supra* note 9.

<sup>15</sup> *Availability of E-Tag Information to Commission Staff*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,675 (2011) (E-Tag NOPR).

<sup>16</sup> In an appendix to this Final Rule, we identify all the commenters along with the abbreviations we are using in this Final Rule for these commenters.

<sup>17</sup> CAISO/DMM, DC Energy, Market Monitors, Pa Commission, PJM/SPP, Powerex, and SoCal Edison.

<sup>18</sup> EPSA, MID, NERC, Southern, Trade Associations, and WECC.

<sup>19</sup> Pa Commission at 4.

<sup>20</sup> NERC at 4.

<sup>21</sup> MMU access to E-Tags was supported by CAISO/DMM, DC Energy, Market Monitors, and PJM/SPP and was opposed by MID, Powerex, Southern.

<sup>22</sup> CAISO/DMM and PJM/SPP.

<sup>23</sup> SoCal Edison.

<sup>24</sup> EPSA at 3.

<sup>25</sup> Trade Associations at 8–9.

<sup>26</sup> NERC at 7; EPSA at 6.

<sup>27</sup> 77 FR 12760 (Mar. 2, 2012).

<sup>28</sup> E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 1.

<sup>29</sup> *Id.* P 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* P 10.

<sup>32</sup> NERC at 6–7, MID at 6–7, Trade Associations at 3–5, WECC at 3.

section 215.<sup>33</sup> WECC states that it accesses e-Tag data sought by the Commission for the Western Interconnection pursuant to its authorities and responsibilities as a Regional Entity under section 215.<sup>34</sup> WECC recognizes that NERC and the Commission may request e-Tag data from WECC under FPA section 215, because the WECC Interchange Tool is an activity funded in accordance with section 215, but WECC does not support the Commission's proposal to require NERC or WECC to provide e-Tag data for purposes other than those authorized in section 215.<sup>35</sup>

12. NERC states it is not clear that its involvement will be limited without additional information about how the Commission will collect and use e-Tag data.<sup>36</sup> MID contends that the proposal would allow the ERO to engage in activities not related to reliability standards, thereby "stepping onto a slippery slope of later being tasked with other, potential activity outside of the ERO's statutory mandate."<sup>37</sup> MID also indicates concern that the Commission's request for data may result in a greater amount of work on the part of the ERO than anticipated and distract the ERO from ensuring reliability of the grid.<sup>38</sup>

13. In addition, Trade Associations argue that FPA section 307(a) does not provide a sufficient basis for the Commission's proposal.<sup>39</sup> Trade Associations assert that section 307 is not a general grant of authority to collect information that may be interesting or potentially useful to the Commission.<sup>40</sup> Rather, contend Trade Associations, FPA section 307 pertains to the collection of information, such as through subpoenas or other processes, related to the investigation of particular matters.<sup>41</sup> According to Trade Associations, unless the Commission seeks access to e-Tags in the context of a "lawfully initiated investigation under the FPA,"<sup>42</sup> section 307 is not a separate or independent grant of information collection authority that may be used for general market oversight purposes by the Commission.

In reply comments, Trade Associations state that, if the Commission decides to collect or access e-Tag data, the Commission should do so selectively, on an as-needed basis for particular power flows, where the Commission has questions that only e-Tag data may help answer. Similarly, Southern contends that, if the Commission seeks e-Tag data, it should submit targeted requests to appropriate entities.<sup>43</sup>

### 3. Commission Determination

14. At the outset, the Commission notes that neither the E-Tag NOPR nor the Final Rule in this proceeding relies on the Commission's reliability authority under FPA section 215 to gain access to e-Tags. Therefore, any comments founded on concerns about the Commission's authority (or lack of authority) under FPA section 215 are off point. Rather, as discussed below, the Commission's anti-manipulation authority under FPA section 222, taken together with its investigative authority under FPA section 307(a), provides the basis for accessing e-Tag information related to wholesale electricity market transactions.

15. As part of the Energy Policy Act of 2005 (EPAAct 2005),<sup>44</sup> Congress granted the Commission authority over the prohibition of market manipulation in connection with the purchase or sale of electric energy and transmission subject to the Commission's jurisdiction in FPA section 222. In addition, FPA section 222 prohibits energy market manipulation by "any entity," including entities exempted from the Commission's rate-related jurisdiction by FPA section 201(f).<sup>45</sup> The application of this provision to "any entity" and not solely to public utilities is further evidenced by section 201(b)(2) of the FPA, which explicitly states that certain provisions, including section 222, shall apply to entities that fall within the scope of FPA section 201(f).<sup>46</sup> Commission access to the information contained in e-Tags will help the Commission determine whether market manipulation is taking place and, absent these data, the Commission will be more

limited in its ability to perform this function.

16. In turn, FPA section 307(a) grants the Commission authority to "obtain[] information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce." E-Tag data unquestionably provides "information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce." Moreover, as discussed below with regard to the Commission's need for e-Tag data, this information will help the Commission ascertain whether "any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provisions of this Act or any rule, regulation, or order thereunder." Thus, we conclude that obtaining e-Tag data from market participants or other entities is within the Commission's authority under FPA section 307(a). And the Commission's surveillance efforts are encompassed within its broad investigative authority as they are precisely what section 307 is designed to permit—i.e., "to determine whether any person [or entity] \* \* \* has violated or is about to violate any provisions of the [FPA] \* \* \* or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce."

17. Contrary to Trade Associations' assertion that the Commission's investigative authority under FPA section 307 is limited solely to investigations of particular matters, FPA section 307(a) allows the Commission to investigate more broadly, i.e., to obtain information about the activities of entities participating in wholesale energy markets.<sup>47</sup> Moreover, the cases

<sup>47</sup> Indeed, the Commission has previously relied on its authority under FPA section 307(a) to collect data not linked to an investigation of a specific entity. See, e.g., *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery from Regional Transmission Organizations and Independent System Operators*, Order No. 760, FERC Stats. & Regs. ¶ 31,330 (2012) (where the Commission relied on FPA sections 301(b) and 307(a) for ongoing collections of data from RTOs and ISOs for use in its surveillance of those markets); *New Reporting Requirements Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibilities under the Energy Policy Act of 1992, and Conforming and Other Changes to Form No. FERC-714*, Order No. 558, FERC Stats. & Regs. ¶ 30,980 (1993), *reh'g denied*, Order No. 558-A, 65 FERC ¶ 61,324 (1993), *final rule*, Order No. 558-B, FERC Stats. & Regs. ¶ 30,993 (1994) (where the Commission relied on its "general information collection authorities" under FPA section 307(a), among other provisions, to require the collection of certain data from transmitting utilities in Form Nos. 714 and 715).

<sup>33</sup> NERC at 7.

<sup>34</sup> WECC at 4.

<sup>35</sup> *Id.* at 4–5.

<sup>36</sup> NERC at 7.

<sup>37</sup> MID at 6.

<sup>38</sup> *Id.* at 8.

<sup>39</sup> Trade Associations at 4.

<sup>40</sup> *Id.* at 6 (citing *Federal Power Commission v. Metropolitan Edison Co., et al.*, 304 U.S. 375 (1938) (*FPC v. Metropolitan Edison*); *Mississippi Power & Light Co. v. Federal Power Commission*, 131 F.2d 148 (5th Cir. 1942) (*Mississippi Power & Light v. FPC*); *Survey on Operator Training Practices*, 110 FERC ¶ 61,050 n.3 (2005)).

<sup>41</sup> Trade Associations at 6.

<sup>42</sup> *Id.* (citing 18 CFR Part 1b).

<sup>43</sup> Southern at 2.

<sup>44</sup> EPAAct 2005, Public Law 109–58, 119 Stat. 594 (2005).

<sup>45</sup> 16 U.S.C. 824(f).

<sup>46</sup> In particular, FPA section 201(b)(2) provides: "Notwithstanding section 201(f), the provisions of section[] \* \* \* 222 shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act with respect to such provisions." 16 U.S.C. 824(b)(2).

cited by the Trade Associations do not support their contention that section 307 only pertains to collecting information, such as through subpoenas or other process, in connection with investigating particular matters. Specifically, in *FPC v. Metropolitan Edison* and *Mississippi Power & Light v. FPC*, the issue before the courts was whether the courts could review orders issued by the Federal Power Commission, pursuant to its authority under FPA section 307 to institute investigations that required the production of company records and the examination of witnesses. In both cases, the courts allowed the Commission's investigations to go forward.<sup>48</sup> Trade Associations also cite to an order in which the Commission noted that compliance with a survey may be compelled by subpoenas issued under FPA section 307.<sup>49</sup> Although FPA section 307(b) enables the Commission to use subpoenas (or other formal processes) when necessary in connection with an investigation, it does not follow that all Commission investigations initiated under section 307(a) are limited to particular matters and cannot be used to collect information more broadly.

18. The Supreme Court has also recognized that an administrative agency's investigative authority is not limited to a particular case. For example, in referring to investigations conducted by the Federal Trade Commission (FTC), the Court held in *Morton Salt* that, when an administrative agency is given investigative duties by Congress, the agency has the power to obtain information not only within the context of a particular case or controversy, but to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."<sup>50</sup> The same principle applies here with respect to the investigative powers that Congress has given the Commission under FPA section 307.

19. Furthermore, we disagree with Trade Associations' suggestion that an investigation initiated by the

Commission under FPA section 307(a) must follow the procedures set forth in Part 1b of the Commission's regulations<sup>51</sup> in order to be considered "lawful." FPA section 307(a) permits the Commission to investigate to obtain information about the wholesale sale and transmission of electric energy, but this provision does not prescribe the manner in which the Commission must obtain such information, and the Commission has not previously applied its Part 1b regulations to every proceeding instituted under FPA section 307(a).<sup>52</sup> Furthermore, we note that section 307(a) of the FPA was initially enacted in 1935, well before the enactment of Part 1b of the Commission's regulations, and section 307(a) makes no reference to Part 1b. In response to Trade Associations' comment that the Commission should limit its e-Tag access to particular power flows, we note that limiting Commission access in such a way will not provide the Commission with sufficient data to properly understand the transactional activity taking place in wholesale electric markets and will impede its efforts to perform effective market surveillance and analysis.

20. Finally, in the Order No. 676 series of orders,<sup>53</sup> the Commission incorporated by reference into its regulations, at 18 CFR 38.2, business practice standards applicable to public utilities and certain non-public utilities. By incorporating these business practice standards by reference, the Commission made these standards mandatory and enforceable. Given that the use and format of e-Tags is governed by the NAESB business practice standards and by e-Tag protocols and specifications referenced in those standards, Commission access to this information is necessary to determine whether these requirements are being met.<sup>54</sup>

## B. Need for Commission Access to E-Tag Information

### 1. E-Tag NOPR

21. In the E-Tag NOPR, the Commission stated that obtaining access to complete e-Tag data will help the Commission to detect anti-competitive or manipulative behavior or ineffective

market rules, monitor the efficiency of the markets, and better inform Commission policies and decision-making.<sup>55</sup> The E-Tag NOPR explained that, by using e-Tag data in coordination with other data, the Commission will be better able to identify interchange schedules that appear anomalous or inconsistent with rational economic behavior.<sup>56</sup> The E-Tag NOPR stated that access to e-Tag data would allow the Commission's staff to examine more effectively situations where interchange schedules are absent, even when transmission capacity is available and pricing differences between the two locations ought to be sufficient to encourage transactions between those locations, thereby signaling a market issue or other problem.<sup>57</sup> The E-Tag NOPR also noted that, in cases where e-Tags are relevant, access to e-Tags would provide the Commission with more complete information for use in conducting audits or investigations.<sup>58</sup>

### 2. Comments

22. Some commenters support the Commission's proposal to require Commission access to complete e-Tag information used to schedule interchange transactions for market monitoring purposes.<sup>59</sup> Other commenters oppose the Commission's proposal.<sup>60</sup> Trade Associations argue that it is unclear why the Commission believes e-Tag information would enhance the Commission's efforts to monitor market developments and prevent market manipulation, assure just and reasonable rates, and monitor compliance with certain NAESB business practices.<sup>61</sup> Trade Associations argue that the data collected cannot be translated into useful information without detailed explanations of each transaction that an e-Tag relates to and that providing these explanations would be burdensome.<sup>62</sup> In particular, Trade Associations state that many power sales do not have e-Tags; e-Tags often include multiple transactions; power sales are often recorded across multiple e-Tags; e-Tags get revised and replaced on a regular basis; and a single e-Tag can represent multiple transactions among numerous parties.

<sup>48</sup> See *FPC v. Metropolitan Edison Co.*, 304 U.S. at 385–86; *Mississippi Power & Light Co. v. FPC*, 131 F.2d at 149 (citing *FPC v. Metropolitan Edison Co.*, 304 U.S. 375 (1938)).

<sup>49</sup> Trade Associations at 6 (citing *Survey on Operator Training Practices*, 110 FERC ¶ 61,050, at n.3 (2005)). The Commission stated in this footnote: "If necessary, compliance with the survey may be compelled pursuant to section 307 of the FPA, 16 U.S.C. 825f (2000), which authorizes the Commission to issue subpoenas in support of the Commission obtaining information to serve as a basis for recommending legislation.")

<sup>50</sup> *United States v. Morton Salt*, 338 U.S. 632, 642 (1950) (*Morton Salt*).

<sup>51</sup> 18 CFR part 1b.

<sup>52</sup> See, e.g., *Reporting on North American Energy Standards Board Public Key Infrastructure Standards*, 140 FERC ¶ 61,066 (2012) (where the Commission instituted a proceeding under FPA section 307(a) to investigate the facts and practices surrounding the implementation of certain NAESB standards by requiring entities, including those not otherwise subject to the Commission's jurisdiction as a public utility, to submit a report).

<sup>53</sup> See *supra* note 13.

<sup>54</sup> See *supra* note 9.

<sup>55</sup> E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 15.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> CAISO/DMM, DC Energy, Market Monitors, PJM/SPP, Powerex, and SoCal Edison.

<sup>60</sup> EPSA, MID, NERC, Southern, Trade Associations, and WECC.

<sup>61</sup> Trade Associations at 6.

<sup>62</sup> *Id.* at 7.

23. Powerex comments that it agrees with the Commission's goals, but suggests that the Commission should obtain e-Tag and EQR information concerning all market participants, including utilities typically outside Commission jurisdiction, and must ensure that the data obtained are consistent and unambiguous.<sup>63</sup> Powerex also argues that the Commission should direct NERC and NAESB to adopt standardized generation product codes under the e-Tagging protocols and develop a method to ensure these standards are used consistently and enforced.<sup>64</sup> Powerex urges the Commission to consider requiring all transmission providers to post additional e-Tag scheduling information on their OASIS sites, including the generation product code and the entity that is responsible for holding the necessary reserves for each schedule and relevant information associated with curtailing an e-Tag.<sup>65</sup> Powerex also asks the Commission to review and perhaps reconsider the waivers it has granted to some transmission providers exempting them from posting scheduling information on OASIS.<sup>66</sup>

24. SoCal Edison supports requiring the ERO to provide access to the e-Tag data but emphasizes that market monitoring via e-Tags will be a complex and challenging enterprise because e-Tags are not designed as market monitoring tools.<sup>67</sup> SoCal Edison states that a thorough understanding of the energy markets and expertise in analyzing such data is often required to distinguish between a legitimate business transaction and an illegitimate business transaction that could potentially look the same or very similar.<sup>68</sup> EPSA states that third party vendors, such as OATI, provide services to accomplish the creation and collection of e-Tag data and market participants usually do not have the data. EPSA argues that to ask for the data from either NERC or market participants would require a massive overhaul of data collection systems.

25. NERC and EPSA suggest that the Commission should convene a technical conference to discuss the issues raised by the E-Tag NOPR. Southern urges the Commission to withdraw the E-Tag NOPR and supports Trade Associations'

recommendation that the Commission initiate a new rulemaking proceeding if it decides to collect e-Tag data through any means other than NERC.

26. Mr. Ronald Rattey states that the Commission's access to complete e-Tags should allow the data to be accessed on a real-time basis and should include adding additional data elements, such as generation and transmission contract IDs, to ensure that it can be linked to EQR transaction data and transmission rights.<sup>69</sup> Mr. Rattey states his belief that the proposals in the E-Tag NOPR and the NOPR on Electricity Market Transparency<sup>70</sup> are unlikely to give the Commission the capability to prevent, monitor, or stop market abuses that have occurred since the late 1990s.<sup>71</sup>

### 3. Commission Determination

27. Access to e-Tag data will help the Commission in its efforts to detect market manipulation and anti-competitive behavior, monitor the efficiency of markets, and better inform Commission policies and decision-making. The Commission needs e-Tag data covering all the transactions involving the interconnected entities listed on the e-Tag because the information is necessary to understand the use of the interconnected electricity grid, and particularly those transactions occurring at interchanges. Due to the nature of the electricity grid, an individual transaction's impact on an interchange cannot be assessed adequately in all cases without information from all connected systems, which is included in the e-Tags. Having available the details of the physical path of a transaction included in the e-Tags will help the Commission monitor, in particular, interchange transactions effectively, prevent price manipulation over interchanges, and ensure the efficient and orderly use of the transmission grid. At this time, no entity, including NERC, is monitoring all interchange transactions.

28. Regular access to e-Tags for power flows across interchanges will make it possible for the Commission to identify or analyze various behaviors by market participants to determine if they are part of a potentially manipulative scheme(s). For example, e-Tag information can enable the Commission to investigate whether entities may be engaging in manipulative schemes involving the

circular scheduling of imports and exports into a market to benefit other positions held by these entities, as demonstrated by recent investigations by the Commission's Office of Enforcement.<sup>72</sup> Without access to the e-Tags, it is more difficult, and, at times, the Commission may even be unable to assess whether manipulative schemes are taking place.

29. In addition, e-Tag access will help the Commission to understand, identify and address instances where interchange pricing methodologies or scheduling rules result in inefficiencies and increased costs to market participants collectively. As an example, Staff identified one cause of increased Lake Erie loop flows to be changes made by the New York Independent System Operator (NYISO) in 2007 in its pricing methodology for the proxy bus between NYISO and PJM.<sup>73</sup> Following these pricing changes, market participants modified their transmission service scheduling practices and thus increased loop flows, and transmission service schedules and loop flows that do not follow pricing signals increase costs to markets and decrease efficiencies. Using e-Tag data, the Commission would be in a better position to identify and understand, and when necessary, to address, instances when market pricing methodologies and rules become unjust and unreasonable as a result of inefficient transmission service scheduling. Moreover, access to e-Tag information will allow the Commission to determine whether the requirements of the mandatory business practice standards related to e-Tags have been met.

30. Trade Associations express concern that e-Tag data cannot be translated into useful information without detailed explanations of each transaction related to the e-Tag. Although we recognize that e-Tag data are complex, the Commission has expertise and may be able to use the e-Tag data without the need for detailed explanations of each transaction associated with an e-Tag. Furthermore, the Commission has undertaken efforts

<sup>72</sup> See, e.g., *Gila River Power, LLC*, 141 FERC ¶ 61,136 (2012) (where the Commission approved a settlement with Gila River Power related to its violations of the Commission's Anti-Manipulation Rule, the Commission's regulation prohibiting submission of inaccurate information, and similar provisions in the CAISO tariff by submitting transactions designated as wheel-through transactions).

<sup>73</sup> See *New York Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,049 (2009) and attached Office of Enforcement Staff Report on the Non-Public Investigation into Allegations of Market Manipulation in Connection with Lake Erie Loop Flows at 4-7.

<sup>63</sup> Powerex at 4.

<sup>64</sup> *Id.* at 7-9.

<sup>65</sup> *Id.* at 5, 12.

<sup>66</sup> For example, Powerex suggests that the Commission may want to consider whether to require e-Tag data regarding schedules on interties into organized markets, such as those into CAISO, to be posted on OASIS. Powerex at 12.

<sup>67</sup> SoCal Edison at 2.

<sup>68</sup> *Id.*

<sup>69</sup> Ronald Rattey at 14-16.

<sup>70</sup> See *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,676 (2011). A Final Rule in that proceeding was issued on October 11, 2012. See Order No. 768, FERC Stats. & Regs. 31,336 (2012).

<sup>71</sup> Ronald Rattey at 3.

to obtain interchange transaction data from other sources that, when used in conjunction with the e-Tag data obtained under this Final Rule, will provide additional information for understanding the transactional context related to e-Tags.<sup>74</sup>

31. The Commission agrees with certain commenters that using e-Tag data for market monitoring purposes will require expertise in analyzing such data, and we believe that we have such expertise. In addition, as discussed below,<sup>75</sup> the Commission will not require NERC or individual market participants to provide complete e-Tag data directly to the Commission. The Commission will instead require that e-Tag Authors, through their Agent Service, and Balancing Authorities, through their Authority Service, ensure that the Commission is included as an entity on an e-Tag with view-only rights on the e-Tags. This approach minimizes any burden on market participants, because they already have the capability to designate entities with view-only rights on the e-Tags, and will not require any further changes in their data collection systems. Moreover, this approach places no burden on NERC. Finally, as recognized in the E-Tag NOPR, the Commission will directly access e-Tag data that is currently being collected and stored in databases.<sup>76</sup>

32. The Commission finds that there is sufficient information on the record in this proceeding to make the determinations in this Final Rule and, therefore, we reject the requests for a technical conference. Additionally, we reject those comments suggesting that the Commission should initiate a new rulemaking proceeding if it decides not to access e-Tag data through NERC. The Commission has provided interested parties with sufficient notice and opportunity for comment on the matters addressed in this rulemaking proceeding, including the Final Rule's determination to not involve NERC in the Commission's access to e-Tag data. In particular, comments filed in response to the E-Tag NOPR suggested an alternative method for the Commission to obtain e-Tag information consistent with the approach taken in this Final Rule.<sup>77</sup> In addition, on February 23, 2012, the Commission issued a notice providing interested parties the opportunity to file reply comments on the E-Tag NOPR. In that

notice, the Commission specified that these reply comments may also address whether the Commission should require entities that create e-Tags or distribute them for approval to provide the Commission with viewing rights to the e-Tags. Furthermore, the Commission finds the Final Rule's approach for implementing the E-Tag NOPR's objective of allowing access to e-Tags to the Commission satisfies the notice requirement under the Administrative Procedure Act<sup>78</sup> because the content of this Final Rule is a "logical outgrowth" of the proposal in the E-Tag NOPR.<sup>79</sup>

### C. Implementing the Commission's E-Tag Access

#### 1. E-Tag NOPR

33. In the E-Tag NOPR, the Commission proposed to require NERC rather than individual market participants to provide access to e-Tag data to avoid burdening market participants with submitting the same data to both NERC and the Commission.<sup>80</sup> The E-Tag NOPR also noted that this proposal would avoid burdening the Commission with developing and maintaining a new system to capture such data from individual market participants.<sup>81</sup>

#### 2. Comments

34. NERC states that it has not owned or operated an e-Tag system, but instead has facilitated the creation of the e-Tag specifications and schema used by software vendors to develop e-Tagging tools.<sup>82</sup> NERC adds that it transferred responsibility for the e-Tag specifications and schema to NAESB effective October 27, 2009.<sup>83</sup> Further, NERC states that it gave OATI formal notice on April 29, 2011 that it will no longer be a party to the IDC Extension Agreement after March 2013.<sup>84</sup> According to NERC and Trade Associations, the e-Tag data provided to the IDC is jointly owned by NERC and the Operating Reliability Entities (i.e., Balancing Authorities, Reliability Coordinators and Transmission Service Providers), so NERC alone cannot grant rights to the data without prior

authorization from the Operating Reliability Entities.<sup>85</sup> Therefore, argues NERC, the Commission must seek approval from the Operating Reliability Entities to have access to the e-Tag data and then work directly with OATI to determine how to access the data and pay any related costs.<sup>86</sup>

35. NERC asserts that it does not have access to e-Tag data in the Western Interconnection, except to the extent it can request e-Tag information as it performs its compliance-related duties as to Reliability Standards, or to the extent that data is shared with the Eastern Interconnection, as may be the case for transactions scheduled between Interconnections.<sup>87</sup> NERC comments that WECC contracts directly with OATI for its WECC Interchange Tool as the Tagging Authority Service for the Western Interconnection.<sup>88</sup> WECC recommends that the Commission seek e-Tag data from individual market participants under statutory authorities other than FPA section 215.<sup>89</sup>

36. By contrast, Market Monitors contend that obtaining such data from individual market participants, rather than NERC, would be extremely burdensome and infeasible.<sup>90</sup> PJM/SPP assert that the Commission should have access to complete information about wholesale energy market transactions that the Commission may find useful in discharging its responsibilities under the FPA. They also argue that the Commission should be given access to information (such as e-Tag data) that supports transparency in wholesale energy market transactions.<sup>91</sup>

37. PJM/SPP and CAISO/CAISO's Department of Market Monitoring (CAISO/DMM) contend that creating and maintaining any new system to capture and access the e-Tag information that market participants are already providing to NERC would be costly, redundant, and inefficient.<sup>92</sup> SoCal Edison asserts that there may be some jurisdictional issues that prevent the Commission from requesting e-Tag data directly from NERC, but urges the Commission to review other legal options for doing so because NERC is already the repository of such information.<sup>93</sup>

38. EPSA argues that e-Tag information is collected by a third-party

<sup>78</sup> 5 U.S.C. 553(b)(3).

<sup>79</sup> See *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 446 (D.C. Cir. 1991) (referencing *United Steel Workers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980)).

<sup>80</sup> E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 10. Under the proposal, the Commission's staff would gain access to the e-Tag data that is currently being collected and stored in databases by private vendors under contract with NERC. E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 7, note 10.

<sup>81</sup> *Id.*

<sup>82</sup> NERC at 4.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 5, Trade Associations at 8.

<sup>86</sup> NERC at 5.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> WECC at 3.

<sup>90</sup> Market Monitors at 9.

<sup>91</sup> PJM/SPP at 3–4 (citing 16 U.S.C. 824, 824d, 824e, 824o).

<sup>92</sup> PJM/SPP at 4, CAISO/DMM at 2.

<sup>93</sup> SoCal Edison at 3.

<sup>74</sup> See Order No. 760, FERC Stats. & Regs. ¶ 31,330; Order No. 768, FERC Stats. & Regs. ¶ 31,336.

<sup>75</sup> See *infra* P 39.

<sup>76</sup> See E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 7 note 9.

<sup>77</sup> See Market Monitors at 10.

vendor who works with NERC to provide inputs to NERC's congestion management tools.<sup>94</sup> EPSA states that no single Commission-jurisdictional entity collects the information *en masse* for a complete market snapshot.<sup>95</sup>

### 3. Commission Determination

39. Based on NERC's statement that it is not extending its IDC Extension Agreement beyond March 2013,<sup>96</sup> this Final Rule is modifying the E-Tag NOPR proposal, as suggested in comments outlining an alternative method for the Commission to obtain e-Tag information,<sup>97</sup> to adopt a means for the Commission to access complete e-Tag data that does not entail any involvement by NERC or WECC.<sup>98</sup> This Final Rule will require that e-Tag Authors, through their Agent Service, and Balancing Authorities, through their Authority Service, take appropriate steps to ensure that the Commission is included as an addressee on the e-Tags covered by this Final Rule.<sup>99</sup>

40. Currently, when an e-Tag Author creates an e-Tag through its Agent Service, it can designate entities on the e-Tag with view-only rights to the e-Tag.<sup>100</sup> The Agent Service electronically transfers the e-Tag to the Authority Service used by the Sink Balancing Authority to validate the e-Tag data elements.<sup>101</sup> In addition to this validation function, the Authority Service compiles a distribution list for each e-Tag that includes the entities specified by the e-Tag Author as having view-only rights along with entities identified by the Authority Service as

having approval rights in connection with the interchange schedule outlined in the e-Tag.<sup>102</sup> The Authority Service then electronically delivers comprehensive e-Tag data to the addresses registered by the entities included on the distribution list. After the e-Tag data is delivered to the registered address, the addressee can access the data directly or by contracting with a commercial vendor that provides data management services.

41. The Commission anticipates that existing procedures for processing and communicating e-Tags, which are largely automated, will be used to facilitate Commission access to e-Tags. The Commission will require that the Agent Service used by e-Tag Authors include the Commission on the CC list of entities with view-only rights to the e-Tags covered by this Final Rule.<sup>103</sup> In addition, the Commission will require that the Authority Service used by the Sink Balancing Authority (located within the United States) validate the inclusion of the Commission on the CC list of the e-Tags before those e-Tags are electronically delivered to an address specified by the Commission. After the e-Tags are delivered to that registered address, the Commission will gain electronic access by contracting with a commercial vendor that provides data management services.<sup>104</sup> Because existing procedures can allow for Commission access to e-Tags, the Commission expects that any burden on e-Tag Authors and Balancing Authorities associated with this Final Rule will be minimal. E-Tag Authors and Balancing Authorities are required to ensure Commission access to e-Tag data under this Final Rule by no later than March 15, 2013.

#### D. Providing E-Tag Access to MMUs, RTOs and ISOs

##### 1. E-Tag NOPR

42. The E-Tag NOPR invited comment on whether e-Tag information should be made available to MMUs.<sup>105</sup> The E-Tag NOPR also asked whether making the

data available to MMUs would raise confidentiality concerns or require specific confidentiality provisions.<sup>106</sup>

##### 2. Comments

43. Some commenters express support for allowing MMUs to gain access to complete e-Tag information, including data about transactions outside of the markets they monitor,<sup>107</sup> while other commenters oppose allowing such access.<sup>108</sup> Certain commenters also submitted comments in support of allowing RTOs and ISOs and/or Reliability Coordinators to gain access to complete e-Tag information.<sup>109</sup>

44. SoCal Edison expresses support for MMUs having access to complete e-Tag data on a non-public basis, as long as this access does not impose excessive costs on market participants, the ERO, or any other entity involved in providing such information to the MMUs.<sup>110</sup> DC Energy states that the quicker the MMUs have access to e-Tag data, the quicker they can react to prevent the potential for market manipulation and/or abuse.<sup>111</sup>

45. CAISO/DMM states that MMUs play a key role in market analysis, design and monitoring and therefore should have access to the data.<sup>112</sup> CAISO/DMM states that it currently has access to e-Tag information for all schedules with a source, sink, or contract path through the CAISO system and the E-Tag NOPR would expand data available to DMM to include complete e-Tag information on any e-Tag associated with these transactions.<sup>113</sup>

46. Market Monitors urge the Commission to require that e-Tag information be made available to MMUs.<sup>114</sup> Market Monitors state that they need access to information that is as complete as possible and in a form that allows efficient assessment and analysis to effectively identify and refer instances of market manipulation to the Commission.<sup>115</sup> In particular, Market Monitors argue that loop flows (i.e., the difference between actual and scheduled power flows at one or more specific interfaces) cannot be understood without complete data covering all scheduled and actual paths.<sup>116</sup> Market Monitors explain that

<sup>94</sup> EPSA at 4.

<sup>95</sup> *Id.* at 5.

<sup>96</sup> See NERC at 5.

<sup>97</sup> See Market Monitors at 10 ("An additional method for FERC and market monitors to obtain tag information is to require that all tags contain the registered FERC and MMUs within the market path of all tags. By doing so, all tags would automatically be forwarded to the FERC and the MMUs, but would not grant the Commission or the MMUs approval rights.")

<sup>98</sup> We note that the Commission provided public notice and an opportunity to comment on this alternative method for the Commission to obtain access to e-Tags when we invited reply comments. 77 FR 12760 (Mar. 2, 2012).

<sup>99</sup> As noted above, these e-Tags are e-Tags for interchange transactions scheduled to flow into, out of, or within the United States' portion of the Eastern or Western Interconnection, or into the Electric Reliability Council of Texas from the United States' portion of the Eastern or Western Interconnection; or from the Electric Reliability Council of Texas into the United States' portion of the Eastern or Western Interconnection.

<sup>100</sup> E-Tag Authors may include a "Carbon Copy List" (CC list) on their e-Tags specifying the entities that will be provided with a copy of the e-Tag without being given approval rights. See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, section 1.4.11, at p. 37.

<sup>101</sup> See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, section 3.5, at 64.

<sup>102</sup> The Authority Service must determine the distribution list for an e-Tag, which includes all entities contained in the CC list created by the e-Tag Author. Entities with approval rights include the Transmission Service Providers, Balancing Authorities and Reliability Coordinators associated with that interchange schedule. See NAESB Electronic Tagging Functional Specifications, Version 1.8.1.1, section 3.6.1.1.1, at 66.

<sup>103</sup> Following issuance of this Final Rule and the Commission's registration in the OATI webRegistry, the Commission will issue a notice specifying which entity code should be used to ensure that the Commission is an addressee on the e-Tags.

<sup>104</sup> The Commission reserves the right to arrange for direct electronic delivery at some future date.

<sup>105</sup> E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P. 18.

<sup>106</sup> *Id.* P. 18.

<sup>107</sup> CAISO/DMM, DC Energy, Market Monitors, and PJM/SPP.

<sup>108</sup> MID, Powerex, and Southern.

<sup>109</sup> CAISO/DMM, Market Monitors and PJM/SPP.

<sup>110</sup> SoCal Edison at 5.

<sup>111</sup> DC Energy at 3.

<sup>112</sup> CAISO/DMM at 2.

<sup>113</sup> *Id.*

<sup>114</sup> Market Monitors at 1.

<sup>115</sup> *Id.* at 2.

<sup>116</sup> *Id.* at 4.



loop flows can have negative impacts on the efficiency of markets with explicit locational pricing, including impacts on locational prices, revenue adequacy of financial transmission rights, and system operations.<sup>117</sup>

47. According to Market Monitors, loop flows can also provide evidence of attempts to game such markets. They note that the explicit choice of a scheduled path that is profitable only on the scheduled path and not on the actual path is a trading strategy that reduces efficiency and is difficult for market monitors or the Commission to evaluate without adequate information.<sup>118</sup> Market Monitors state that the inconsistency between electricity schedules and actual flows can allow participants to engage in acts that may constitute market rule violations but that cannot be detected without more detailed and accurate information on the schedules that are contained in e-Tag data.<sup>119</sup>

Market Monitors state that they currently obtain some e-Tag data via a set of “Tag Dump” files, but that these files exclude key data items, including complete market path and loss provision information.<sup>120</sup> They argue that access to e-Tag data should exceed the basic Tag Dump files, and include all e-Tag data, to provide the means to monitor transactions in real time from the initial submission of the requests through implementation.<sup>121</sup> In addition, Market Monitors state that access to the data should be provided at reasonable cost in a manner that can be imported into databases for easy querying and analysis.<sup>122</sup> Market Monitors state that the Commission should provide them with access to additional data from Balancing Authorities in the Eastern Interconnection to enable complete loop flow analysis, including Area Control Error data, market flow impact data, and generation and load data.<sup>123</sup>

48. PJM/SPP and CAISO/DMM also support access to e-Tags for MMUs. Southern cautions that the e-Tag data will not readily translate into information that can be used to monitor markets and, therefore, it would not improve an MMU’s ability to monitor loop flows and corresponding market impacts.<sup>124</sup> Southern also argues that to the extent MMUs need this information they should get it through individual

requests on a case-by-case basis from the market participants who hold the information and have the authority to disclose it.<sup>125</sup>

49. CAISO/DMM and PJM/SPP also support making complete e-Tag information available to RTOs and ISOs. CAISO/DMM states that the comprehensive e-Tag information should be made available to the ISO or RTO staff for use in the analysis and design of its markets, as well as in enforcement of applicable market rules.<sup>126</sup> CAISO/DMM also states that complete e-Tag information, including ultimate physical locational specific source and sink information for transactions outside of a Balancing Authority, can be critical for assessing the impact of loop flows and more effectively incorporating these impacts into market modeling assumptions, design features and scheduling rules.<sup>127</sup> According to CAISO/DMM, any Final Rule should require that e-Tag information be provided to RTOs and ISOs in the same manner as provided to the Commission and the MMUs of RTOs and ISOs.<sup>128</sup> CAISO/DMM also recommends that the Commission consider a method for RTOs and ISOs to identify the geographic scope of the e-Tags the RTO or ISO in question would require to serve these purposes.<sup>129</sup>

50. PJM/SPP state that, under the E-Tag NOPR, the Commission would gain a greater degree of ready access to e-Tag information than the system operators who could utilize this data to enhance system operations and market efficiency.<sup>130</sup> According to PJM/SPP, Reliability Coordinators, including RTOs and ISOs, receive limited e-Tag information that only covers interchange transactions into, out of, or through their operating footprints.<sup>131</sup> PJM/SPP assert that access to e-Tag data for external transactions would allow them to better visualize and analyze the remote sources of the energy flows that may impact the area of the system they have responsibility to maintain reliably.<sup>132</sup> PJM/SPP state that ISOs, RTOs and Reliability Coordinators could use this information to better predict and react to situations when system conditions result in transmission limitations impacted by flows to and from areas of the interconnection

outside of their Control Areas.<sup>133</sup> PJM/SPP also contend that the current limitations on the ability of RTOs, ISOs and Reliability Coordinators to analyze and address big picture considerations is the type of problem that the Commission identified in its analysis of the April 14, 2003 electricity blackout.<sup>134</sup>

51. PJM/SPP assert that providing e-Tag data to RTOs, ISOs and Reliability Coordinators is consistent with Congress’ and the Commission’s directives under FPA section 215 because it would help Reliability Coordinators to discharge their responsibilities to ensure reliable operation of their areas.<sup>135</sup> Furthermore, PJM/SPP argue that granting RTOs and ISOs access to complete e-Tags would allow RTOs and ISOs to better fulfill their Order No. 2000 obligations by enabling them to better evaluate the availability of transmission service through a more accurate determination of the impacts of transactions occurring elsewhere in the interconnection.<sup>136</sup> In addition, PJM/SPP note that access to complete e-Tags will allow RTOs and ISOs to more effectively manage transmission congestion by providing greater visibility into the dispatch and transactions in other surrounding systems.<sup>137</sup> Additionally, PJM/SPP comment that such access would allow RTOs and ISOs to more efficiently and effectively identify market design flaws, monitor the behavior of market participants, and ensure the integration of reliability practices within an interconnection.<sup>138</sup> Finally, PJM/SPP argue that access to complete e-Tags would allow RTOs and ISOs to deal more effectively with intraregional and interregional parallel path flows, or loop flows, which could potentially jeopardize the reliability of the bulk power system.<sup>139</sup>

### 3. Commission Determination

52. The Commission will require e-Tag Authors and Balancing Authorities to make available to an RTO, ISO or MMU access to complete e-Tags, upon request to the e-Tag Author and Balancing Authority. Currently, RTOs

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 6.

<sup>119</sup> *Id.* at 9.

<sup>120</sup> *Id.* at 12. Order No. 2000 set forth minimum characteristics and functions that RTOs are required to satisfy. *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 30,993–94 (1999), *order on reh’g*, Order No. 2000–A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (DC Cir. 2001).

<sup>121</sup> PJM/SPP at 14.

<sup>122</sup> *Id.* at 16.

<sup>123</sup> *Id.* at 16–18.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* at 7.

<sup>121</sup> *Id.* at 8.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 6.

<sup>124</sup> Southern at 2.

<sup>125</sup> *Id.*

<sup>126</sup> CAISO/DMM at 3.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> In this regard, CAISO/DMM states it is not advocating that it receive e-Tag information from the Eastern Interconnection. CAISO/DMM at 3.

<sup>130</sup> PJM/SPP at 1–2.

<sup>131</sup> *Id.* at 4.

<sup>132</sup> *Id.* at 5.

and ISOs receive e-Tag information only for those interchange transactions that flow into, out of, or across their operating footprints. However, transactions scheduled outside of these entities' footprints can physically flow into their footprints and result in loop flows that impact both the reliability of their systems and the markets that they administer. And, due to congestion and other market impacts caused by loop flows, such transactions can have significant financial consequences. Thus, providing e-Tag information to RTOs and ISOs can assist them in more efficiently operating their systems and their markets.

53. Moreover, as discussed above, when market participants engage in conduct that constitutes market violations that cannot be detected without e-Tag information, access to the data shown on e-Tags can assist MMUs in identifying behavior that may constitute market manipulation under FPA section 222 and allow them to refer instances of such conduct to the Commission. Sharing e-Tag information with MMUs that monitor markets within the United States can aid the Commission with its own market surveillance activities because the MMUs may provide additional insights to the Commission about potential market violations and market issues. Similarly, providing complete e-Tag data to RTOs and ISOs may also assist them in identifying and referring to the Commission behavior that may constitute market manipulation under section 222 and aid the Commission in its market surveillance activities. As the Commission has previously recognized, effective market monitoring is enhanced by close collaboration between the MMUs, RTOs/ISOs, and the Commission's Office of Enforcement during the referral process and during investigations.<sup>140</sup> Currently, as part of such collaboration, the Office of Enforcement may elect to share investigative information with MMUs, RTOs and ISOs, including information from third parties, as long as appropriate measures are taken to ensure that such information is not further disclosed and remains non-public.<sup>141</sup> Consistent with the Commission's ability to share investigative information with MMUs, RTOs, and ISOs, this Final Rule requires that MMUs, RTOs, and ISOs be provided with access to complete e-Tag

data, upon request to e-Tag Authors and Authority Services, subject to appropriate confidentiality restrictions.

54. Market Monitors argue that access to e-Tag data should exceed the basic "Tag Dump" files. We note that the access to complete e-Tag data that we are requiring in this Final Rule will exceed the information contained in basic "Tag Dump" files and must contain information on every aspect of the e-Tag, including all applicable e-Tag IDs, transaction types, market segments, physical segments, profile sets, transmission reservations, and energy schedules. We decline the Market Monitors' suggestions to prescribe the cost or format for e-Tag data because price and formatting can vary depending on the commercial data management services provided to users of e-Tag data. Market Monitors also suggest that the Commission should require Balancing Authorities to make other information available to them apart from e-Tags to allow for complete loop flow analysis. Although we recognize that there may be data in addition to e-Tag data that may be useful for performing complete loop flow analyses, the focus of this proceeding is on e-Tag data and we find that requiring access to other data is beyond the scope of this proceeding.

### E. Confidentiality of Data

#### 1. E-Tag NOPR

55. In the E-Tag NOPR, the Commission proposed to keep the e-Tag information confidential and not make it publicly available, except as directed by the Commission, or by a court with appropriate jurisdiction.<sup>142</sup> The E-Tag NOPR also sought comment on whether making data available to MMUs would raise confidentiality issues or require specific confidentiality provisions.<sup>143</sup>

#### 2. Comments

56. Southern argues that the e-Tag data should not be provided to MMUs or other entities because the data includes proprietary, confidential information that, if disclosed to third parties, could result in irreparable harm to Southern Companies and other market participants.<sup>144</sup> Conversely, Market Monitors assert that making e-

Tag data available to MMUs would not raise confidentiality issues or require any specific confidentiality provisions beyond those that already exist.<sup>145</sup> Market Monitors explain that the NERC Tag Dump Data is published on the Reliability Coordinator Information System (RCIS) page of the NERC Web site and to access such data, entities must sign a confidentiality agreement with NERC to obtain access to this secure portion of the NERC Web site.<sup>146</sup> Market Monitors state affording them with access to NERC Tag Dump Data would help them study market impacts and work to improve market efficiency. To ensure that the market monitors have access to this needed information, Market Monitors advocate that the Commission issue a clear policy directive finding that MMU access to NERC's Tag Dump Data is needed to improve market efficiency, competitiveness, operations and design.<sup>147</sup> EPSA states that vendors have confidentiality contracts with market participants and, thus, if the Commission finds e-Tag data necessary to its market monitoring and enforcement efforts, it will be necessary to explore the legal proprietary issues associated with getting the information from third party vendors like OATI.<sup>148</sup>

57. DC Energy states that additional confidentiality provisions are not necessary and that e-Tag data should be made available to the public in a manner similar to Electric Quarterly Report (EQR) data.<sup>149</sup> SoCal Edison comments that, if the Commission decides to make e-Tag information available to the public, there should be at least a three-month delay.<sup>150</sup> SoCal Edison states that the general public may not have the requisite knowledge to analyze and understand e-Tag data and not publicly disclosing e-Tags would avoid misinterpretations of the data.<sup>151</sup>

#### 3. Commission Determination

58. The Commission recognizes that some of the information contained in the e-Tags is likely commercially sensitive.<sup>152</sup> Disclosure of such data as directed in this Final Rule could result in competitive harm to market participants and the market as a whole

<sup>145</sup> Market Monitors Comments at 9.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> EPSA at 6.

<sup>149</sup> DC Energy at 3.

<sup>150</sup> SoCal Edison at 3.

<sup>151</sup> *Id.* at 4.

<sup>152</sup> Market participants currently treat e-Tags as confidential because they contain potentially commercially sensitive information. See NAESB Electronic Tagging Functional Specifications, section 1.4.2.1, Version 1.8.1.1, at 26.

<sup>140</sup> See *Southwest Power Pool, Inc.*, 129 FERC ¶ 61,163 (2009), order on reh'g, 137 FERC ¶ 61,046, at P 20 (2011).

<sup>141</sup> See *Southwest Power Pool, Inc.*, 137 FERC ¶ 61,046 at P 20.

<sup>142</sup> The Commission noted its view that this data would be covered by exemption 4 of the Freedom of Information Act (FOIA), which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 16 (citing 5 U.S.C. 552(b)(4) (2006), amended by OPEN Government Act of 2007, Public Law 110-175, 121 Stat. 2524 (2007)).

<sup>143</sup> E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 18.

<sup>144</sup> Southern at 2.

if disclosed without reasonable confidentiality restrictions.<sup>153</sup> Accordingly, the Commission will not make complete e-Tags publicly available, as suggested by certain commenters. Furthermore, to the extent persons file requests to obtain data from the Commission under the Freedom of Information Act (FOIA), we expect that any commercially-sensitive data would be protected from disclosure if it satisfies the requirements of FOIA's exemption 4.<sup>154</sup> In response to EPSA, we note that, after the e-Tag Authors and Balancing Authorities designate the Commission as an addressee, the Commission will access the e-Tags by contract with a commercial vendor, subject to confidentiality restrictions.

59. While the Commission finds that e-Tag data should be made available to RTOs, ISOs, and MMUs, this should be done subject to appropriate confidentiality restrictions. Furthermore, the Commission notes that such information may be shared among RTOs, ISOs and MMUs as part of an investigation of possible market violations or market design flaws as long as reasonable measures are taken to ensure that the information remains non-public.<sup>155</sup>

<sup>152</sup> Market participants currently treat e-Tags as confidential because they contain potentially commercially sensitive information. See NAESB Electronic Tagging Functional Specifications, section 1.4.2.1, Version 1.8.1.1, at 26.

<sup>153</sup> The Commission has granted requests for privileged or confidential treatment of similar non-public data. See, e.g., *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,169, at P 15 (2010) (granting such treatment for data relating to specific generator or other equipment details, transmission system information, bidding strategies, generator reference levels, generator costs, guarantee payments, and the associated relevant time periods); see also *S. Cal. Edison Co.*, 135 FERC ¶ 61,201, at P 20 (2011); *Hydrogen Energy Cal. LLC*, 135 FERC ¶ 61,068, at P 25 (2011); *New York Indep. Sys. Operator, Inc.*, 130 FERC ¶ 61,029, at P 3 (2010).

<sup>154</sup> FOIA exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. 552(b)(4) (2006), amended by Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007); accord 18 CFR 338.107(d).

### III. Information Collection Statement

60. The Office of Management and Budget's (OMB) regulations require approval of certain information collection requirements imposed by agency rules.<sup>156</sup> Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

61. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act of 1995.<sup>157</sup> The Commission solicited comments in the E-Tag NOPR on the need for and purposes of the information and the corresponding burden on the public. Several commenters filed comments related to the need for and purposes of the information. These comments are addressed in the body of this rule. Trade Associations filed the sole comment challenging the burden estimate in the E-Tag NOPR, arguing that the burden estimate was understated.

62. The Commission has modified burden estimates in this Final Rule, relative to the E-Tag NOPR, to reflect that now e-Tag Authors and Balancing Authorities, rather than NERC, will provide Commission access to e-Tags.

63. The Commission expects that e-Tag Authors and Balancing Authorities will use existing, largely automated procedures<sup>158</sup> to provide Commission access to e-Tags. Commission access to e-Tag data can be accomplished by the Agent Service simply including the Commission on the list of entities with view-only rights to the e-Tags and the Authority Service validating the

<sup>156</sup> 5 CFR 1320.11.

<sup>157</sup> 44 U.S.C. 3507(d).

<sup>158</sup> Existing e-Tag procedures are designed to be largely automated. For example, the specifications state that the Authority Service "is primarily an automated manager of data that should require little manual intervention." See NAESB Electronic Tagging Functional Specifications, Version 1.8.1, section 3.3, at 62.

inclusion of the Commission on the e-Tags before they are delivered to a Commission-designated address. Thus, existing procedures can allow for ready Commission access to e-Tags.

64. We have provided burden estimate calculations that assume a manual process for the e-Tag Author to list the Commission as an addressee on applicable e-Tags. These burden estimate calculations consider how long it would take for each e-Tag Author to manually select the Commission, as an addressee and the Balancing Authority to similarly validate the inclusion of the Commission, as an addressee. We have estimated these tasks would take four seconds and one second for each new e-Tag request, respectively.

65. But we believe the burden estimates we have provided, in fact, overstate the total burden associated with this rule. Rather than relying on a process in which e-Tag Authors manually select the Commission as an addressee, we anticipate the limited number of e-Tag service providers will in practice opt to incorporate a one-time change to existing e-Tag software, enabling the Commission, to be included automatically. However, we will use the estimates provided below in our submittal to OMB for approval. We will consider whether to modify the burden estimates to reflect automation when the information collection is reviewed again to extend OMB approval.

*Public Reporting Burden:* Our estimate below regarding the number of respondents is based on data from the NERC TSIN registry.<sup>159</sup> The TSIN registry was used to list entities eligible to be listed on an e-Tag as well as specify a delivery address for these possible addressees. Using the TSIN registry, Commission staff identified 1,540 possible e-Tag Authors and 163 Balancing Authorities. The Commission estimates the number of new e-Tag submission requests to be around six million per year.

<sup>159</sup> The NERC TSIN Registry was recently replaced by the OATI webRegistry.

| Final Rule in RM11-12                              | Number of Respondents (1) | Average Number of Responses Per Respondent (2) | Average Burden Hours Per Response (3) | Total Annual Burden Hours (1)X(2)X(3)= (4) | Average Cost Per Hour (5) | Total Annual Cost (4)X(5) |
|--|---------------------------|--|---------------------------------------|--|---------------------------|---------------------------|
| <b>Purchasing-Selling Entities (e-Tag Authors)</b> | 1,540                     | 3,896  | 4 seconds (1/900 hour)                | 6,667                                      | \$ 59.76                  | \$ 398,400                |
| <b>Balancing Authorities</b>                       | 163                       | 36,810   | 1 second (1/3600 hour)                | 1,667                                      | \$ 59.76                  | \$ 99,600                 |
| <b>Total</b>                                       | <b>1,703</b>              |  |                                       | <b>8,333</b>                               |                           | <b>\$ 498,000</b>         |

*Total Net Annual Cost:* The Commission has assumed that e-Tag Authors and Balancing Authorities rely on a mix of operations managers, computer information systems managers, compliance officers, and other operations specialists who are involved in creating and validating e-Tags.<sup>160</sup> Based on this personnel assumption, we used data from the U.S. Bureau of Labor Statistics and calculated an hourly compliance cost for this Final Rule. The hourly figure we arrived at was \$59.76/hour, placing total annual compliance around \$498,000 per year for all e-Tag Authors and Balancing Authorities.<sup>161</sup> Again, this estimate assumes a manual process, which leads to a larger burden than would likely occur in practice.

*Title:* FERC-740, Availability of E-Tag Information to Commission Staff.

*Action:* New collection.

*OMB Control No.:* 1902-0254.

*Respondents:* Businesses or other for-profit institutions, not-for-profit institutions.

*Frequency of Responses:* On occasion.

*Necessity of the Information:* This Final Rule will provide the Commission, MMUs, RTOs, and ISOs with information that will allow them to perform market surveillance and analysis more effectively. This

<sup>160</sup> Only occupation data from May 2011 under NAICS code 221100 (Electric Power Generation, Transmission and Distribution) was relied upon. We looked at the following occupations, which are followed, in parenthesis, by their Standard Occupational Classification code, hourly mean wage, and our assigned weighting: General and Operations Managers (111021, \$59.15, 1/6); Computer and Information Systems Managers (113021, \$54.18, 1/6); Compliance Officers (131041, \$35.76, 1/3); and, Business Operations Specialist All Other (131199, \$33.79, 1/3).

<sup>161</sup> We also adjust hourly wage information to reflect employer costs not related to wages and salaries. That adjustment is based on BLS data, citing that wages represent 70.4 percent of employer costs for the private industry, see <http://www.bls.gov/news.release/cecc.nr0.htm>.

information is necessary to understand the use of the interconnected electricity grid, particularly transactions occurring at interchanges. Due to the nature of the electricity grid, an individual transaction's impact on an interchange cannot be assessed adequately in all cases without information from all connected systems, which is included in the e-Tags. The details of the physical path of a transaction included in the e-Tags will help the Commission to monitor, in particular, interchange transactions effectively, detect and prevent price manipulation over interchanges, and ensure the efficient and orderly use of the transmission grid. Moreover, access to e-Tag data will allow MMUs, RTOs and ISOs to better identify behavior that may constitute market manipulation under FPA section 222 and allow them to refer instances of such conduct to the Commission. Sharing e-Tag information with MMUs, RTOs and ISOs also can aid the Commission in its own market surveillance, by bringing to the Commission's attention problems identified by these entities.

*Internal Review:* The Commission has reviewed the information collection requirements and has determined, as discussed above, that its action in this proceeding is necessary to implement the Commission's responsibilities under the Federal Power Act.

66. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, email: [DataClearance@ferc.gov](mailto:DataClearance@ferc.gov), phone: (202) 502-8663, fax: (202) 273-0873].

67. For submitting comments concerning the collection of information and the associated burden estimate, please send your comments to the Office of Management and Budget, Office of

Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395-4718, fax: (202) 395-7285]. For security reasons, comments to OMB should be submitted by email to: [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). Comments submitted to OMB should include Docket Number RM11-12 and OMB Control Number 1902-0254.

#### IV. Regulatory Flexibility Act

68. The Regulatory Flexibility Act of 1980 (RFA)<sup>162</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.<sup>163</sup> The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.<sup>164</sup> Trade Associations argue that any burden estimate must also consider the burden on entities submitting the data, a number of which may be considered small entities for purposes of the Regulatory Flexibility Act of 1980.

69. The Final Rule provides the Commission with access to e-Tag data. It will be applicable to e-Tag Authors and Balancing Authorities. The

<sup>162</sup> 5 U.S.C. 601-612.

<sup>163</sup> 13 CFR 121.101.

<sup>164</sup> 13 CFR 121.201, Sector 22, Utilities & n.1.

Information Collection Statement above provides information about the number of registered e-Tag Authors and Balancing Authorities. However, a given company, and indeed a given holding company, may have multiple e-Tag Author registrations. Likewise, e-Tag registration data do not contain company size information and are not readily comparable to other data that do. That said, using 2011 data submitted to the Energy Information Administration on Form EIA-861, the Commission estimates that there are 503 holding companies that could have one or more registered e-Tag Authors. Of those 503 holding companies, the Commission estimates that perhaps as many as 353 are small entities because their total annual sales are less than 4,000,000 MWh. Comparison of the NERC compliance registry with data submitted to the Energy Information Administration on Form EIA-861 indicates that perhaps as many as 18 small entities are registered as Balancing Authorities. As estimated above, total annual compliance costs, which we believe are overstated, amount to about \$498,000 per year for all e-Tag Authors and Balancing Authorities. When spreading those costs across many entities, both small and otherwise, the Commission does not anticipate that significant costs will be borne by any small entity. Accordingly, the Commission certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

**V. Document Availability**

70. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

71. From the Commission'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.

72. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

**VI. Effective Date and Congressional Notification**

73. These regulations are effective February 26, 2013. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

**List of Subjects in 18 CFR Part 366**

Electric power, and reporting and recordkeeping requirements.

By the Commission.  
**Nathaniel J. Davis, Sr.**,  
*Deputy Secretary.*

In consideration of the foregoing, the Commission amends Part I, Title 18, Part 366 of the Code of Federal Regulations, as follows:

**PART 366—BOOKS AND RECORDS**

■ 1. The authority citation for part 366 continues to read as follows:

**Authority:** 15 U.S.C. 717 *et seq.*, 16 U.S.C. 791a *et seq.*, and 42 U.S.C. 16451-16463.

■ 2. In § 366.2, redesignate paragraph (d) as paragraph (e), and add new paragraph (d), to read as follows:

**§ 366.2 Commission access to books and records.**

\* \* \* \* \*

(d) *E-Tag Authors and Balancing Authorities.* E-Tag Authors and Balancing Authorities must take appropriate steps to ensure Commission view-only access to complete electronic tags (e-Tags), or any successor to e-Tags, used to schedule the transmission of electric power in wholesale markets, by designating the Commission as an addressee on the e-Tags. E-Tag Authors must include the Commission on the list of entities with view-only rights to the e-Tags. Balancing Authorities located within the United States must validate the inclusion of the Commission on the e-Tag before those e-Tags are electronically delivered to an address specified by the Commission. The complete e-Tag data to be made available under this section shall consist of:

(1) e-Tags for interchange transactions scheduled to flow into, out of or within the United States' portion of the Eastern or Western Interconnections, or into the Electric Reliability Council of Texas from the United States' portion of the Eastern or Western Interconnection; or from the Electric Reliability Council of Texas into the United States' portion of the Eastern or Western Interconnection; and

(2) Information on every aspect of the e-Tag, including all applicable e-Tag IDs, transaction types, market segments, physical segments, profile sets, transmission reservations, and energy schedules. In addition, e-Tag Authors and Balancing Authorities must also make available, upon request to the e-Tag Authors and Balancing Authorities, access to the complete e-Tags, or any successor to e-Tags, used to schedule the transmission of electric power in wholesale markets, to Regional Transmission Organizations, Independent System Operators, and their Market Monitoring Units, on an ongoing basis, subject to appropriate confidentiality restrictions.

\* \* \* \* \*

**Note:** Appendix will not be published in the Code of Federal Regulations.

**Appendix**

**LIST OF COMMENTERS\***

| Commenter  | Short name or acronym |
|--|-----------------------|
| 1 American Public Power Association, Edison Electric Institute, Large Public Power Council, National Rural Electric Cooperative Association. | Trade Associations    |
| 2 California Independent System Operator Corporation and California Independent System Operator Corporation Department of Market Monitoring. | CAISO/DMM             |
| 3 DC Energy, LLC   | DC Energy             |
| 4 Electric Power Supply Association  | EPSA                  |
| 5 Modesto Irrigation District  | MID                   |
| 6 North American Reliability Corporation   | NERC                  |

LIST OF COMMENTERS\*—Continued

| Commenter   | Short name or acronym |
|---|-----------------------|
| 7 Monitoring Analytics, LLC, Potomac Economics, Ltd, Internal Market Monitor for ISO—New England, Market Monitoring and Analysis for Southwest Power Pool, Inc., Market Assessment and Compliance for Independent Electricity System Operator, Market Surveillance Administrator. | Market Monitors**     |
| 8 PJM Interconnection, L.L.C. and Southwest Power Pool, Inc   | PJM/SPP               |
| 9 Pennsylvania Public Utility Commission  | Pa Commission         |
| 10 Powerex Corp   | Powerex               |
| 11 Ronald Rattey  | Ronald Rattey         |
| 12 Southern California Edison Company   | SoCal Edison          |
| 13 Southern Company Services, Inc   | Southern              |
| 14 Western Electricity Coordinating Council   | WECC                  |

\* In addition, Public Service Electric and Gas Company and PSEG Energy Resources & Trade LLC filed a motion to intervene without comments.

\*\* Market Monitors filed motion for leave to file reply comments and reply comments in support of access to e-Tags by Reliability Coordinators comparable to that for Commission and MMUs. Reply comments were also filed by the North American Energy Standards Board.

[FR Doc. 2012–31087 Filed 12–27–12; 8:45 am]

BILLING CODE 6717–01–P

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

[TD 9607]

RIN 1545–BJ37

**Partner’s Distributive Share**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations regarding the application of the substantiality de minimis rule. In the interest of sound tax administration, this rule is being made inapplicable. These final regulations affect partnerships and their partners.

**DATES:** *Effective Date:* The final regulations are effective on December 28, 2012.

*Applicability Date:* The final regulations under § 1.704–1(b)(2)(iii)(e)(1) are applicable for partnership taxable years beginning after May 19, 2008 and beginning before December 28, 2012. The final regulations under § 1.704–1(b)(2)(iii)(e)(2)(i) are applicable beginning on or after December 28, 2012, and the final regulations under § 1.704–1(b)(2)(iii)(e)(2)(ii) are applicable for partnership taxable years beginning on or after December 28, 2012.

**FOR FURTHER INFORMATION CONTACT:** Rebecca Kahanel, at (202) 622–3050 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

These final regulations contain amendments to the Income Tax Regulations (26 CFR Part 1) under section 704 of the Internal Revenue Code (Code). On October 25, 2011, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–109564–10) (the proposed regulations) in the **Federal Register** to remove the de minimis rule in § 1.704–1(b)(2)(iii)(e) (the de minimis partner rule). The proposed regulations provide that the final regulations are effective on the date they are published in the **Federal Register**.

The Treasury Department and the IRS did not hold a public hearing because there were no requests to speak at a hearing. However, the Treasury Department and the IRS received comments in response to the proposed regulations.

**Explanation of Provisions and Summary of Comments**

After consideration of the comments, the final regulations adopt the proposed regulations as modified by this Treasury decision. The comments are discussed in this preamble.

*1. Elimination of the Current De Minimis Partner Rule*

Commenters generally agreed that the current de minimis partner rule is too broad, is easily abused, and/or is inconsistent with sound tax policy. The Treasury Department and the IRS agree with these commenters that the current de minimis partner rule should no longer be applicable.

*2. Alternative Approaches*

The preamble to the proposed regulations requests comments on “how to reduce the burden of complying with the substantial economic effect rules, with respect to look-through partners, without diminishing the safeguards the

rules provide.” In response to this request, some of the commenters requested that future guidance in regulations amend the current de minimis partner rule, and other commenters suggested alternative approaches for de minimis partners and look-through partners. These alternative approaches are discussed in Part 2.a through 2.e of this preamble.

*a. Modification of Current De Minimis Partner Rule*

A commenter suggested amending the current de minimis partner rule by providing that the de minimis partner rule applies only if: (i) de minimis partners own less than a specified aggregate percentage (for example, 25 percent, 50 percent, or 80 percent) of the partnership; and (ii) the partnership has at least two non-de minimis partners.

*b. Reasonable Assumptions Approach*

One commenter suggested adopting a “reasonable assumptions rule” for de minimis partners and indirect partners. This commenter noted that a partnership must know the tax attributes of its partners in order to determine whether a partnership’s allocations are substantial. However, this commenter also explained that many partnerships are comprised of partners that are passthrough entities and it is difficult for these partnerships to obtain information about the tax attributes of their ultimate partners. Thus, this commenter recommended that the Treasury Department and the IRS permit a partnership to make reasonable assumptions about: (1) The tax attributes of any partner that owns (directly, indirectly, and through attribution) not more than a 5 percent interest in the capital or profits of the partnership (each, a de minimis partner); and (2) the identity and tax attributes of any person that owns an interest in the partnership indirectly