The Federal Energy Regulatory Commission (Commission) is proposing to revise its regulations regarding the horizontal market power analysis required for market-based rate sellers that study certain Regional Transmission Organization (RTO) or Independent System Operator (ISO) markets and submarkets therein. This proposed modification of the Commission’s horizontal market power analysis would relieve such sellers of the obligation to submit indicative screens when seeking to obtain or retain market-based rate authority. The Commission’s regulations would continue to require market-based rate sellers that study an RTO, ISO, or submarket therein, to submit indicative screens for authorization to make capacity sales at market-based rates in any RTO/ISO market that lacks an RTO/ISO-administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation. For those RTOs and ISOs lacking an RTO/ISO-administered capacity market, we propose that Commission-approved RTO/ISO monitoring and mitigation no longer be presumed sufficient to address any horizontal market power concerns for capacity sales where there are indicative screen failures.

DATES: Comments are due March 18, 2019.
to prevent the potential exercise of market power in RTO/ISO markets. 2. The Commission’s regulations would continue to require RTO/ISO sellers 2 to submit indicative screens for authorization to make capacity sales in any RTO/ISO markets that lack an RTO/ISO-administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation. We also propose to eliminate the rebuttable presumption that Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in RTOs/ISOs that do not have an RTO/ISO-administered capacity market.

II. Background

A. The Market-Based Rate Program

3. In Order No. 697,3 the Commission codified two indicative screens for assessing horizontal market power for market-based rate sellers: The pivotal supplier screen and the wholesale market share screen (with a 20 percent threshold), each of which serves as a cross check on the other to determine whether sellers may have market power and should be further examined.4 The Commission stated that passage of both indicative screens establishes a rebuttable presumption that the seller does not possess horizontal market power. Sellers that fail either indicative screen are rebuttably presumed to have market power and have the opportunity to present evidence through a delivered price test (DPT) analysis or other evidence demonstrating that, despite a screen failure, they do not have market power.5 The Commission uses a “snapshot in time” approach based on historical data for both the indicative screens and the DPT analysis.6

4. With the horizontal market power analysis, in traditional markets (outside RTO/ISO markets) the default relevant geographic market for purposes of the indicative screens is first, the balancing authority area(s) where the seller is physically located, and second, the markets directly interconnected to the seller’s balancing authority area (first-tier balancing authority areas).7 Generally, sellers that are located in and are members of an RTO/ISO may consider the geographic region under the control of the RTO/ISO as the default relevant geographic market for purposes of the indicative screens.8

5. In Order No. 697, the Commission created two categories of market-based rate sellers.9 Category 1 sellers are wholesale power marketers and wholesale power producers that own, control, or are affiliated with 500 megawatts (MW) or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888 10); that are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller’s generation assets; that are not affiliated with a franchised public utility in the same region as the seller’s generation assets; and that do not raise other vertical market power issues.11 Category 1 sellers are not required to file regularly scheduled updated market power analyses. Market-based rate sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses every three years.12 However, the Commission may require

2 RTO/ISO sellers are market-based rate sellers that have an RTO/ISO market as a relevant geographic market.
4 Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62.
6 Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 17.
7 The Commission also noted that “[w]here a generator is interconnecting to a non-affiliate owned or controlled transmission system, there is only one relevant balancing authority area in which the generator is located.” Id. P 232 n.217.
8 Where the Commission has made a specific finding that there is a submarket within an RTO/ISO, that submarket becomes a default relevant geographic market for market-based rate sellers located within the submarket for purposes of the horizontal market power analysis. See id. ¶ 15, 231.
9 Id. P 848.
12 Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.
13 Id. P 853.
14 In Order No. 697–A, FERC Stats. & Regs. ¶ 31,268 at P 111, the Commission stated that “to the extent a seller seeking to obtain or retain market-based rate authority is relying on existing Commission-approved [RTO] market monitoring and mitigation, we adopt a rebuttable presumption that the existing mitigation is sufficient to address any market power concerns.”
sellers may have. The Commission found that the existence of market monitoring and mitigation in an organized market generally results in transparent prices, which discipline forward and bilateral markets by revealing a benchmark price and keeping offers competitive. While the burdens of preparing theindicative screens are not necessarily greater for RTO/ISO sellers than for market-based rate sellers in other markets, in the Order No. 816 NOPR, the Commission noted that the submission of indicative screens yields little practical benefit because it has been the Commission’s practice to allow RTO/ISO sellers that fail the indicative screens to rely on RTO/ISO monitoring and mitigation to marginal trading power.9 Speciﬁcally, as relevant for the purposes of the instant NOPR, the Commission proposed in the Order No. 816 NOPR to allow market-based rate sellers in RTO/ISO markets to address horizontal market power issues in a streamlined manner that would not involve the submission of indicative screens if the seller relies on Commission-approved monitoring and mitigation to prevent the exercise of market power.10 Under that proposal, RTO/ISO sellers would state that they are relying on such monitoring and mitigation to address the potential for market power issues that they might have, provide an asset appendix, and describe their generation and transmission assets. The Commission would retain its ability to require a market power analysis, including indicative screens, from any market-based rate seller at any time.11

C. Comments on Order No. 816 Proposal

10. The Commission received numerous comments on its proposal to eliminate the need for RTO/ISO sellers to submit indicative screens as part of their market power analyses. As discussed below, some commenters supported the Commission’s proposal; other commenters requested that the Commission clarify aspects of its proposal, or extend the proposal to additional circumstances. However, some commenters opposed the Commission’s proposal, raising issues regarding the Commission’s legal authority to eliminate the requirement to submit indicative screens or the effectiveness of RTO/ISO monitoring and mitigation.12

11. Numerous commenters supported the Commission’s proposal. AEP urged the Commission to adopt the proposal, stating that “[t]he nature of the current RTOs, with large markets, transparent pricing and vigorous, independent monitoring and mitigation measures, provides sellers with incentives to offer competitive prices” and noted that “[c]ustomers will not be harmed if the current reporting requirements are narrowed as proposed.”13 EPSA also agreed that the indicative screen requirement “yields little practical benefit because, according to current market power screen rules, if a seller in an RTO/ISO market does fail the indicative screens, the Commission has allowed such sellers to rely on Commission-approved market monitoring and mitigation as a default.”14 The Commission’s proposal was also supported by E.ON, SoCal Edison, Solemann/Arenchild, SunEdison, and NRG.15

12. Several other commenters supported the proposal and made additional proposals. For example, Golden Spread supported the proposal but requested that the Commission “afford RTO/ISO market participants or interested stakeholders that have concerns about market power the opportunity to come forward and present evidence that a speciﬁc market participant or market participants in a speciﬁc RTO/ISO generally have the ability to exercise generation market power.”16 FirstEnergy supported the proposal but also argued that a seller should no longer be required to ﬁle a change in status report based on increases in the amount of generating capacity that it owns or controls once it has made an afﬁrmaﬁve statement that it is selling electricity in RTO markets with Commission-approved market monitoring and mitigation practices.

13. In addition, EEI requested that the Commission “provide the same relief from undertaking the horizontal market power screens outside RTOs, to utilities that have accepted FERC-approved market power mitigation measures that are intended to address market power concerns in speciﬁc balancing authority areas [i.e., markets, or regions].” Similarly, El Paso, while not suggesting that third-party market monitoring sufﬁces to eliminate the indicative screen requirement, stated that, where a non-RTO market has third-party market monitoring of a size and scope comparable to that of an RTO (“i.e., with hourly testing of horizontal market power over the price of energy, accompanied by FERC-approved automatic mitigation”), and when public utility sellers with such Commission-approved measures in place are not seeking to reauthorize the Commission’s pre-existing presumption of market power or the associated Commission-approved measures, “it may be appropriate for the utilities to provide, in their triennial submissions, only the asset appendices and descriptions that would be required for sellers within RTOs, for the sake of comparability.”17

14. NextEra supported the proposal and asked the Commission to clarify...
that the Order No. 616 NOPR did not intend to eliminate the rebuttable presumption regarding Commission-approved RTO monitoring and mitigation that was developed in Order No. 697–A. Potomac Economics agreed with the proposed reforms, but recommended that the Commission “take steps to ensure that the market mitigation measures for each RTO are complete and effective.” SoCal Edison sought clarification that entities participating in the California Independent System Operator Corporation (CAISO) Energy Imbalance market must still perform screens for their “home” market and that such market has not been expanded to include CAISO.

15. Several commenters opposed the proposal citing legal, economic, or implementation issues. APPA/NRECA contended that the proposal represented a fundamental departure from the market-based rate scheme that the courts have previously upheld and objected on the following grounds: (1) The proposed rule provides no legal or factual analysis showing that RTO mitigation standing alone is legally sufficient to allow market-based pricing; (2) the proposed rule would effectively deregulate public utilities’ bilateral sales in RTO regions; and (3) the proposal would unlawfully subdelegte to private entities, i.e., RTOs, the Commission’s statutory responsibilities to ensure that wholesale electric rates of public utilities are just and reasonable. APPA/NRECA also argued that recent experience suggests that RTO mitigation has not been adequate to prevent the exercise of individual seller market power.

16. AAI stated that the proposal “would relinquish perhaps the most important tool the Commission has to prevent abusive conduct before it occurs—namely the ability to deny market-based rate authority based on an ex ante showing that a generator possesses market power.” AAI further contended that the Commission has “largely outsourced the oversight of monitoring and mitigation” to the RTO market monitors and that the proposal to eliminate the horizontal market power indicative screens “would seem to compound the Commission’s already significant distance from this crucial area of oversight.” AAI also stated that the information submitted as part of the screens provides information and insight that the Commission can use to improve and refine policies to prevent transmission owners from discriminating against rival generators and that “[c]easing to collect this critical information would do a disservice to competition and consumers.”

17. TAPS stated that, even if RTO monitoring and mitigation is effective to mitigate market power today, “that may not [be] true going forward, and the Commission should not be blind itself to the extent of seller market power in a particular RTO” and that “[t]he Commission should not and cannot properly rely on Commission-approved market monitoring and mitigation in organized markets or market forces to safeguard against the exercise of market power in bilateral and forward markets.” TAPS stated that “Order No. 697–A’s pronouncements with respect to bilateral and forward markets are a compelling reason to continue to require the submission of indicative screen data” and that if the Commission removes the requirement for RTO/ISO sellers to submit indicative screens, “the Commission will need to revisit Order No. 697’s treatment of [market-based rates] for forward and bilateral sales in RTO regions in light of the removal of an essential element of the support for that disposition.”

18. TAPS also stated that it is problematic for the Commission to rely on the “faulty presumption” that organized spot markets will discipline forward and bilateral markets by revealing benchmark prices “given the non-substitutable nature of the products.” TAPS contended that Order No. 697 relied on the Commission’s market power screening combined with Commission-approved monitoring and mitigation to support market-based rates in bilateral markets, pointing to the ability of customers to challenge the RTO mitigation in the context of “market-based rate authority based on an ex ante showing that a generator possesses market power.”

APPAl and Potomac Economics. EPSA disagreed with APPA/NCREA’s assertion that relying on mitigation measures under the various RTO tariffs in lieu of market power analyses represents a departure from the market-based rate scheme that the courts have previously upheld, because the Commission adopted the rebuttable presumption in Order No. 697–A, if not earlier. EPSA also takes issue with APPA/NCREA’s argument that the proposed rule would effectively deregulate public utilities’ bilateral sales in RTO regions, arguing that the Commission in Order No. 697–A explained that RTO/ISO mitigation measures act as a disciplining force even with respect to sales negotiated on a bilateral basis, and further explained...
that “RTO/ISOs have Commission-approved market mitigation rules that govern behavior and pricing in those short-term markets,” and that “the RTO/ISOs have Commission-approved market monitoring, where there is continual oversight to identify market manipulation.”

20. EPSA also argued that the proposal would not unlawfully subdelegate to private entities, i.e., RTOs, the Commission’s statutory responsibilities to ensure that wholesale electric rates of public utilities are just and reasonable, as APPA/NRECA argued, noting that nothing in the proposed rule seeks any change to the Commission’s extensive oversight over RTO and ISO markets, and that the Commission will “continue to evaluate and approve or reject the proposed market rules for each RTO/ISO, monitor RTO/ISO implementation of such rules, and hear challenges regarding the effectiveness of RTO/ISO mitigation measures.”

21. EPSA disagreed with Potomac Economic’s recommendation that the Commission take steps to ensure that the market mitigation measures for each RTO are complete and effective, stating that like APPA and NRECA, “Potomac Economics appears to miss the point that the rebuttable presumption was adopted years ago in Order No. 697–A, and its objection to that presumption is an impermissible collateral attack on that order.”

22. When the Commission issued Order No. 816, it stated that it was not prepared at that time to adopt the proposal regarding RTO/ISO sellers, but that it would further consider the issues raised by commenters and transferred the record on that issue to Docket No. AD16–8–000 for possible consideration in the future as the Commission may deem appropriate.

23. After reviewing all of the comments received in response to the Order No. 816 NOPR, we believe that it is appropriate to relieve market-based rate sellers of the requirement to submit the indicative screens in certain circumstances. As discussed below, the proposal we make here differs in some material respects from the original proposal in the Order No. 816 NOPR.

Specifically, the Commission proposes to relieve market-based rate sellers, i.e., sellers seeking to obtain or retain authorization to make market-based rate sales, of the requirement to submit indicative screens for certain RTO/ISO markets and submarkets. This proposed modification of the Commission’s horizontal market power analysis would apply in any RTO/ISO market with RTO/ISO-administered energy, ancillary services, and capacity markets subject to Commission-approved RTO/ISO monitoring and mitigation. In addition, for RTOs and ISOs that lack an RTO/ISO-administered capacity market, market-based rate sellers would be relieved of the requirement to submit indicative screens if their market-based rate authority is limited to sales of energy and/or ancillary services.

24. Under this proposal, the Commission’s regulations would continue to require RTO/ISO sellers to submit indicative screens for authorization to make capacity sales in any RTO/ISO markets that lack an RTO/ISO-administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation.

Furthermore, we propose to eliminate the rebuttable presumption that Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in RTOs/ISOs that do not have an RTO/ISO-administered capacity market.

25. Although this proposal would eliminate the requirement to submit indicative screens in certain RTO/ISO markets, it would not eliminate other market-based rate regulatory reporting requirements. As discussed below, we believe that the RTO/ISO market power monitoring and mitigation provisions combined with the remaining market-based rate reporting requirements will enable the Commission to adequately address market power concerns in the RTO/ISO markets.

A. Overview of Existing RTO/ISO Market Power Monitoring and Mitigation

26. Both the horizontal market power analysis, including indicative screens, and RTO/ISO market power monitoring and mitigation provisions are designed to protect against the potential exercise of seller market power, and the Commission has found that both ensure just and reasonable rates. The indicative screens provide an up-front snapshot of the seller’s market power, using static and historical data aggregated from a specific year, which is part of the basis of the Commission’s determination of whether to grant that seller market-based rate authority. RTO/ISO market power mitigation is based on real-time data, and is triggered in response to specific resource offers or system characteristics and tailored to the market rules of each RTO/ISO.

27. Despite these differences, the market power analyses provided in the indicative screens and RTO/ISO market power mitigation both seek to prevent the exercise of seller market power and ensure just and reasonable rates. Given the Commission’s previous findings that RTO/ISO monitoring and mitigation adequately mitigate a seller’s market power and the availability of other data regarding horizontal market power, the indicative screens provide marginal additional market power protections and these protections will still be available with the proposed changes.

This suggests that the burden on sellers to provide indicative screens may outweigh the benefits in certain RTO/ISO markets.

28. RTO/ISO market power mitigation is ongoing and tailored to the specific RTO/ISO and uses more granular operational or market data than the indicative screens. This data is used to specifically tailor the RTO/ISO market power screens to the market interval (and sometimes a few subsequent intervals) for which prices are established.

Given the dynamic nature of binding transmission constraints and ever-changing market conditions, the RTO/ISO market power mitigation generally allows for a flexible and ongoing application of market power tests, which more accurately reflect system conditions that exist at the time and are better suited to preventing the exercise of market power in the RTO/ISO markets than the static indicative screens that are in many cases only filed every three years. In the event that a seller in an RTO/ISO market fails the RTO/ISO market power mitigation tests, that seller’s offer is mitigated to a reference level or cost-based offer.

54 The Commission can still require a market-based rate seller to file indicative screens in individual cases.

55 For example, five minutes in the real-time market, one hour in the day-ahead market, and the length of the capacity delivery period for the capacity market. In ISO New England Inc. (ISO–NE), Midcontinent Independent System Operator, Inc. (MISO), and PJM Interconnection, L.L.C. (PJM), the delivery period in the capacity market is one year. In New York Independent System Operator, Inc. (NYISO), the delivery period in the capacity market is one month or six months.

RTO/ISO sellers are market-based rate sellers that have an RTO/ISO market as a relevant geographic market.
which represents the resource’s short-run marginal cost.

29. CAISO and PJM use a structural approach to market power mitigation, imposing mitigation when a resource’s offer fails a market power screen that relies on the three pivotal supplier test to measure competition. In contrast, ISO–NE, MISO, NYISO, and Southwest Power Pool, Inc. (SPP) employ a conduct and impact approach to market power mitigation, using a two-part market power screen that includes (1) a conduct test, which compares a resource’s offer to its reference level, and (2) an impact test, which examines the extent to which that offer affects clearing prices, mitigating an offer if it fails both tests.

30. Identification of constrained areas is a fundamental aspect of RTO/ISO market power mitigation. For example, the RTO/ISOs with conduct and impact mitigation generally use more stringent conduct and impact tests in areas that are more significantly or frequently constrained. The definition of a constraint, or its treatment as static or dynamic, and the conduct and impact thresholds vary by RTO/ISO. PJM uses a three pivotal supplier test to evaluate whether sellers are likely to be able to exercise market power and applies this test any time a resource is committed from an offline state to relieve a binding transmission constraint. In CAISO, a resource’s energy supply offer is subject to market power mitigation if that resource’s offer affects a transmission constraint deemed by CAISO to be non-competitive.

31. The Commission also requires the RTO/ISO independent market monitors to evaluate market monitoring and mitigation efforts on an ongoing basis. Market monitors are required to periodically report on the performance of market power mitigation practices, evaluate tariff inadequacies or proposals, and report on the general competitiveness of their respective markets. Market monitors report information on how the competitiveness of the RTO/ISO market or any relevant sub-markets is affected by transmission constraints and report a variety of competition metrics, including the Herfindahl-Hirschman Index (HHI), supply-side and demand-side concentration measurements, pivotal supplier tests, the residual supplier index, and the Lerner index.

32. We summarize below the specific market power mitigation provisions used today by RTO/ISOs to prevent the exercise of market power in energy, ancillary services, and capacity markets.

1. Energy

33. All RTOs/ISOs have mitigation provisions for energy offers, which generally are employed when there are binding constraints on the system. Energy supply offers, which include both physical and financial offer components, are screened for potential market power. Financial offer components are denominated in dollars. The most important financial offer components are the start-up, no-load, and incremental energy offers, all of which are subject to mitigation. Physical offer components are denominated in non-dollar units, such as MW, time, or some combination thereof (e.g., minimum run time, economic minimum operating level, ramp rate). When a resource’s offer fails the applicable market power screens, that offer is mitigated.

34. Market power mitigation often involves replacing the seller’s offer with an appropriate reference level to determine the locational market price. Reference levels for financial offer components are based on an estimate of a resource’s short-run marginal cost, and reference levels for physical offer components are based on an estimate of the physical capability of a resource. Reference levels are determined either by the seller of the resource pursuant to guidelines and review (e.g., SPP) or by the market monitor, potentially after consultation with the seller (e.g., CAISO). In many cases, the market monitors help create the resource-specific reference levels with the seller.

35. In addition to market power mitigation provisions, resource offers in energy markets are subject to an offer cap. PURA flow to Order No. 831, 160 the RTO/ISO or market monitor must verify energy supply offers above $1,000/MWh prior to those offers being used to calculate locational marginal prices (LMPs). Order No. 831 also requires each RTO/ISO to limit energy supply offers to $2,000/MWh (known as the “hard cap”) when calculating LMPs.

36. Resources with capacity supply obligations in RTOs/ISOs also are subject to must-offer requirements, which are designed to address physical withholding.

2. Ancillary Services

37. Unlike the market-based rate indicative screens, which do not specifically analyze market power for ancillary services, RTO/ISO market power mitigation provisions are designed to address the specific ancillary service products that are sold in the RTO/ISO. The market power mitigation provisions for ancillary services in four RTOs/ISOs (NYISO, PJM, MISO, and SPP) are similar to market power mitigation provisions for energy and employ either conduct and impact screens or structural market power screens to identify and potentially mitigate offers of ancillary services that raise market power concerns.

38. Although CAISO and ISO–NE do not have market power mitigation provisions in place for ancillary services, as noted above, ancillary...
service prices typically are based on the opportunity cost of not generating energy, so concerns about market power in ancillary service offers in these RTOs/ISOs are alleviated through the mitigation of energy offers. In addition, these markets are still monitored by their respective independent market monitors, enabling the CAISO and ISO–NE market monitors to evaluate the competitiveness of their respective ancillary service markets and submit a filing at the Commission to seek changes if they deem them necessary.


41. CAISO and SPP do not operate centralized capacity markets currently; thus, they do not have mitigation in place for capacity sales. We note that the California Public Utilities Commission plays an active role in reviewing the majority of bilateral capacity contracts (i.e., Resource Adequacy contracts) in CAISO because the costs of these contracts are recovered in retail electric rates. Similarly, capacity costs in the SPP footprint are reviewed by state regulators and recovered through cost-of-service rates. As such, the market for capacity as a standalone product in SPP is very small. Although the CAISO and SPP capacity contracts are subject to state oversight, as explained above, at this time we propose that the requirement to submit the indicative screens be retained for market-based rate sellers studying RTO/ISO markets that do not include RTO/ISO-administered capacity markets, including CAISO and SPP, unless the seller is only making energy and/or ancillary service sales and not capacity sales.

B. Proposal Implementation

42. We propose two modifications to §35.37(c) of the Commission’s regulations to exempt certain market-based rate sellers from the requirement to submit the indicative screens as part of their horizontal market power analyses of RTO/ISO markets, whether as part of an initial application for market-based rate authority, a change in status filing, or an updated market power analyses.

43. First, entities seeking to sell into RTO/ISO-administered energy, ancillary services, and capacity markets, a market-based rate seller could state that it is relying on Commission-approved RTO/ISO market monitoring and mitigation, which is presumed to address any potential horizontal market power that the seller might have in such markets. This modification would apply equally to sellers that study an RTO/ISO market as a first-tier market. A power marketer likewise could represent that it is relying on RTO/ISO market monitoring and mitigation in any RTO/ISO market that is a relevant geographic market for the power marketer. To implement this proposal, we propose to insert a new paragraph in §35.37(c) specifying that, in lieu of submitting the indicative market power screens, sellers studying RTO/ISO markets that operate RTO/ISO-administered energy, ancillary services, and capacity markets may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power sellers may have in those markets.

44. Second, we also propose that sellers in RTOs and ISOs that lack an RTO/ISO-administered capacity market would be relieved of the requirement to submit the indicative screens if their market-based rate authority is limited to wholesale sales of energy and ancillary services. To implement this proposal, we propose to insert a second new paragraph in §35.37(c) specifying that, in lieu of submitting the indicative market power screens, sellers studying RTO/ISO markets that operate RTO/ISO-administered energy and ancillary services markets, but not capacity markets, may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power that sellers may have in energy and ancillary services. To implement this proposal, we propose to insert a new paragraph in §35.37(c) specifying that, in lieu of submitting the indicative market power screens, sellers studying RTO/ISO markets that operate RTO/ISO-administered energy and ancillary services, but not capacity markets, may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power that sellers may have in those markets.
monitoring and mitigation.\textsuperscript{79} Given the Commission’s presumption that RTO/ISO market monitoring and mitigation adequately mitigate any potential seller market power, the submission of the indicative screens yields little practical benefit when compared to the associated burden on industry. This burden is not trivial; over the three-year period 2015–2018, market-based rate sellers in RTOs/ISOs filed approximately 130 indicative screens in updated market power studies for RTOs/ISOs on average per year.\textsuperscript{80} We provide more detail by information on the burden associated with filing indicative screens for updated market power studies in the Information Collection Statement section below.

46. However, market-based rate sellers still would be required to file initial applications, changes in status, and triennial updates, including all of the information currently required, except the seller would not need to submit indicative screens for any RTO/ISO markets subject to the above-proposed exemption. Specifically, to address the horizontal market power in an RTO/ISO market, a seller’s initial application for market-based rate authorization and any subsequent updated market power analyses would include, among other things: (1) A statement that the seller is relying on Commission-approved RTO/ISO market monitoring and mitigation to address any potential market power it might have in that market; (2) identification and description of it and its affiliates’ generation and transmission assets and other inputs to electric power production; and (3) an asset appendix as required in 18 CFR 35.37(a)(2).\textsuperscript{81} The Commission believes that the continued submission of information, such as the asset appendix and Electric Quarterly Reports (EQR),\textsuperscript{82} will help us to maintain effective oversight of RTO/ISO markets. Moreover, under this proposal, the Commission would retain the ability to require an updated market power analysis, including indicative screens, from any market-based rate seller at any time.

47. In addition, the Commission proposes to continue requiring RTO/ISO sellers to submit change in status filings consistent with current requirements. While we received comments from the Order No. 816 NOPR that called for eliminating the change in status requirement for RTO/ISO sellers, we believe the change in status requirement is an important tool that the Commission uses to identify new potential market power concerns, which will assist the Commission in ensuring that rates continue to be just and reasonable. Under this proposal, we would still require an RTO/ISO seller to submit a new status filing if it would reflect a departure from the characteristics that the Commission relied upon in granting it market-based rate authority, as required under § 35.42 of the Commission’s regulations. Therefore, consistent with current policy, where the change in status concerns pertinent assets held by that seller or its affiliates, the seller must still submit a new asset appendix.\textsuperscript{83}

48. Although market-based rate sellers are not required to provide indicative screens in their horizontal market power analyses when submitting change in status filings,\textsuperscript{84} sellers often submit indicative screens in order to determine the effect of the change on their market power, particularly when a change in status filing has created the likelihood that they would fail an indicative screen. We clarify that, with this proposed streamlined approach, an RTO/ISO seller subject to the proposed exemption in this NOPR also would not need to submit indicative screens with its change in status filing even where it may have market power. Instead, the seller may state that it is relying on Commission-approved monitoring and mitigation to mitigate any potential market power it may have.

49. However, in RTOs/ISOs that do not operate an RTO/ISO-administered capacity market with Commission-approved monitoring and mitigation, we propose to continue to require the submission of the indicative screens for any seller seeking to make market-based sales of capacity. CAISO and SPP currently are the RTO/ISO markets without an RTO/ISO-administered capacity market. Therefore, we propose to require any seller seeking to sell capacity at market-based rates in CAISO or SPP, either as a bundled or unbundled product or on a short-term or long-term basis, to submit the indicative screens.

50. We recognize that there is state regulatory oversight of the capacity costs and/or prices incurred in CAISO and SPP. However, we do not believe that it is appropriate to exempt sellers from filing the indicative screens (i.e., submitting a horizontal market power study) in markets that lack Commission-approved monitoring and mitigation programs. Capacity markets are distinct from energy markets (unlike several ancillary services, capacity is not co-optimized with energy),\textsuperscript{85} so monitoring and mitigation of energy prices in day-ahead and real-time markets does not ensure that capacity prices will be just and reasonable. Therefore, we believe that the indicative screens remain an important tool for determining whether a seller has market power in RTO/ISO markets that lack Commission-approved monitoring and mitigation for capacity sales.

51. Thus, we are proposing that indicative screen failures in RTO/ISO markets that do not have RTO/ISO-administered capacity markets (currently, CAISO and SPP) will no longer be presumed to be adequately addressed by RTO/ISO market monitoring and mitigation. We propose that any market-based rate seller that


\textsuperscript{80} On average per year, approximately 20 indicative screens from this total studied the CAISO and SPP markets.

\textsuperscript{81} Market-based rate sellers would also continue to submit other information, such as ownership and affiliate information. See Order No. 697–A, FERC 35.37(a)(2).

\textsuperscript{82} See 18 CFR 35.10b. EQRs are discussed in more detail below.

\textsuperscript{83} See 18 CFR 35.42(c).

\textsuperscript{84} Order No. 697–A, FERC Stats. & Regs. ¶ 31.268 at P 506 (“We will not require entities to automatically file an updated EQR base market power analysis with their change in status filings . . . . Furthermore, regardless of the seller’s representation, if the Commission has concerns with a change in status filing (for example, market shares are below 20 percent, but are relatively high nonetheless), the Commission retains the right to require an updated market power analysis at any time.”).

\textsuperscript{85} As discussed above, the price of several ancillary services reflects the opportunity cost of not selling energy, so mitigation of energy prices will affect the price of such ancillary services offered in the day-ahead and real-time markets.
fails the indicative screens in those markets and seeks to rebut the presumption of horizontal market power may submit a DPT or alternative evidence or propose other mitigation for capacity sales in these markets.

52. In contrast, we do not propose to disturb the rebuttable presumption in RTOs/ISOs with RTO/ISO-administered energy, ancillary services, and capacity markets. In addition, we do not propose to disturb the rebuttable presumption for market-based sales of energy and ancillary services in RTO/ISO markets that have monitoring and mitigation for these two services. In those RTOs/ISOs, Commission-approved monitoring and mitigation is currently presumed to adequately address market power concerns presented by indicative screen failures. To the extent that commenters are arguing that it is inappropriate for the Commission to rebuttably presume that market monitoring and mitigation is sufficient to mitigate any market power a seller may have in an RTO/ISO market, we believe that it is a collateral attack on the Commission’s creation of the rebuttable presumption in Order No. 697–A.86

53. As noted above, we propose to maintain the rebuttable presumption that Commission-approved monitoring and mitigation is currently presumed to adequately address market power concerns. By its terms, the rebuttable presumption established in Order No. 697–A that existing RTO/ISO monitoring and mitigation is sufficient to address market power concerns is not immune to challenge. The Commission and intervenors can rebut this presumption in a particular case using information market-based rate sellers provide in accordance with § 35.37 in their initial applications, change in status filings and triennial updated market power analyses.87 The challenging party would bear the burden of proof to demonstrate that the seller has market power and that such market power is not addressed by existing Commission-approved RTO/ISO market monitoring and mitigation.

54. We seek comment as to whether CAISO or SPP currently have adequate additional safeguards in place that prevent the exercise of horizontal market power in sales of capacity. Commenters who argue that adequate safeguards are present should explain in detail why the Commission should find the requirement to submit indicative screens to be unnecessary for capacity sales in either of these markets. If either CAISO or SPP adopts an RTO/ISO-administered capacity market with Commission-approved monitoring and mitigation in the future, the Commission could revisit the requirement that sellers of capacity submit the indicative screens.

55. We are not proposing to relieve market-based rate sellers of the requirement to submit the indicative screens in any market outside of an RTO/ISO, even a market that may have an alternative form of mitigation. As explained above, RTO/ISO monitoring and mitigation is comprehensive and specifically tailored to each RTO/ISO market. Such mitigation, particularly the ability to mitigate prices on an ongoing basis, does not exist in any non-RTO/ISO market.

C. Bilateral Transactions

56. Market-based rate sellers may enter into bilateral transactions for energy, capacity, and ancillary services within RTO/ISO footprints. Although such transactions are not monitored or mitigated by RTOs/ISOs, the proposal will not give rise to market power concerns with respect to bilateral transactions, as discussed below.

57. Wholesale buyers and sellers of energy and capacity enter into various types of bilateral financial and physical instruments, including forward contracts that settle on day-ahead and real-time electricity prices. An electricity forward contract represents the obligation to buy or sell a fixed amount of electricity at a pre-specified contract price, i.e., the forward price, at a certain time in the future.88 Forward contracts involve a transaction between a specific buyer and seller, unlike the day-ahead and real-time RTO/ISO energy markets which are bid- and offer-based markets that are centrally cleared.

58. The price of a forward contract represents the willingness of buyers and sellers to exchange electricity in the future and should largely reflect expectations of future demand and supply conditions in RTO/ISO markets if markets are liquid and competitive. Thus, if RTO/ISO energy (e.g., day-ahead and real-time) markets and capacity markets are competitive, and Commission-approved monitoring and mitigation sufficiently protects against the exercise of market power in these markets, then bilateral markets for the same product should also be competitive. Moreover, the structure of RTO/ISO markets enhances competition in the forward markets because entities that do not have physical assets or load (e.g., marketers) can rely on the RTO/ISO to physically deliver the power while settlement prices in RTO/ISO markets enable financial transactions.89

59. RTO/ISO day-ahead and real-time energy markets and capacity markets also can provide an alternative to bilateral sales,90 thereby helping to discipline prices on bilateral contracts for energy and capacity. For these reasons, the existence of competitive RTO/ISO markets is expected to provide a strong incentive for sellers in bilateral markets to offer at competitive prices.

60. Contrary to some comments received in the Order No. 816 proceeding, we believe that the proposal will retain sufficient Commission oversight of bilateral sales in RTO/ISO markets. As the Commission previously has explained, the existence of market power mitigation in an organized market generally results in a market where prices are transparent, which disciplines forward and bilateral markets by revealing a benchmark price, keeping offers competitive.91 In addition, as the Commission has previously found, buyers seeking bilateral transactions in RTO/ISO footprints “have access to centralized, bid-based short-term markets which will discipline a seller’s attempt to exercise market power in long-term contracts because the would-be buyer can always purchase from the short-term market if a seller tries to charge an excessive price.”92 The Commission also retains the ability to require the submission of indicative screens should evidence of market power in the bilateral markets materialize.

86 Financial transactions can provide buyers and sellers a hedge against uncertain and volatile day-ahead energy prices and typically are settled against the energy prices published by RTOs/ISOs.

87 We recognize that challenging parties would have to provide evidence that a seller had market power before arguing that RTO/ISO mitigation was insufficient to address the seller’s alleged market power. In addition to the information provided by a seller in its market-based rate filings, a challenging party could rely on other sources to present evidence that a seller has market power. Moreover, a challenging party is not limited to the type of tests or other evidence it submits to make such a demonstration.

88 Short-term forward contracts (e.g., of daily or weekly duration) typically are standardized contracts, whereas long-term contracts (defined as one year or longer) often are negotiated, tailored contracts between the buyer and seller.
D. The Commission Will Continue To Ensure That Market-Based Rates Are Just and Reasonable

Supra 61. Notwithstanding concerns raised in response to the Order No. 816 NOPR, we believe that the Commission’s market-based rate program and its broader oversight of RTO/ISO markets, including its enforcement authority, is sufficiently robust to check the potential exercise of market power without the need for the indicative screens addressed in this NOPR. As discussed in Order No. 697, “the Commission’s market-based rate program includes many ongoing regulatory protections designed to ensure that rates are just and reasonable and not unduly discriminatory or preferential.” Exempting sellers from submitting screens for RTO/ISO markets will not eliminate the other requirements set forth in § 35.37 of the Commission’s regulations.

62. Such protections include the requirement for sellers with market-based rate authority to submit EQRs, notices of change in status, and the requirement to submit a market power analysis, which would still include an asset appendix, affiliate information, and a demonstration regarding vertical market power. We believe that the asset appendix provides comprehensive information relevant to a determination of a seller’s market power, including information on: generators owned or controlled by seller and its affiliates; long-term firm power purchase agreements of seller and its affiliates; and electric transmission assets, natural gas intrastate pipelines, and intrastate natural gas storage facilities owned or controlled by seller and its affiliates. The asset appendix information on generation and power purchase agreements are important parts of any assessment of horizontal market power and the information on electric transmission and intrastate gas facilities support the analysis of vertical market power. Thus, we do not believe that eliminating the requirement that sellers submit indicative screens in certain RTO/ISO markets would mean that the Commission and others would lack information necessary to assess a seller’s horizontal market power. In addition, under this proposal, the Commission would continue to reserve the right to require submission of complete horizontal market power analysis, including indicative screens, at any time.

63. Asset and ownership information would also continue to be collected as part of initial applications, as well as change in status filings in which sellers report, among other things, changes with respect to their and their affiliates: (1) Ownership or control of generation capacity or long-term firm purchases of capacity and/or energy that result in a cumulative net increase in 100 MW or more of capacity in any relevant geographic market (including an RTO/ISO market); (2) ownership or control of inputs to electric power production or ownership, operation or control of transmission facilities; and (3) affiliation with any entity that: (a) Owns or controls generation facilities or has long term firm purchases of capacity or energy that results in cumulative net increases of 100 MW or more in a relevant geographic market; (b) owns or controls inputs to electric power production; (c) owns, operates, or controls transmission facilities; or (d) has a franchised service area.

64. In addition, the Commission’s regulations require public utilities to file EQRs, which summarize transaction information for cost-based and market-based rate sales and contractual terms and conditions in the public utility’s agreements for jurisdictional services.

Information provided in the indicative screens does not support the analysis of vertical market power. Thus, the screens do not provide insight into the ability of a vertically-integrated company to use its transmission assets to favor its generation assets.

See Order No. 697, FERC Stats. & Regs. § 31.252 at P 963.

See Order No. 697, FERC Stats. & Regs. § 31.252 at PP 301, 304; Order No. 697–A, FERC Stats. & Regs. § 31.268 at P 126.

See 18 CFR 35.7(a)(2), 35.37(d). While the requirement to submit an organizational chart is currently stayed, market-based rate sellers still must provide information regarding their affiliates and corporate structure or upstream ownership. Sellers seeking market-based rate authority must trace upstream ownership until all upstream owners are identified. In addition, market-based rate sellers must identify all of their affiliates and, when seeking market-based rate authority, state the basic activities of its owners and state whether such owners are in any way involved in the energy industry. See Order No. 697–A, FERC Stats. & Regs. § 31.268 at P 181 n.258.


The data collected in EQRs provide information that the Commission needs to perform its regulatory functions and “provide[s] greater price transparency, promote[s] competition, enhance[s] confidence in the fairness of the markets, and provide[s] a better means to detect and discourage discriminatory practices.” The EQR also “strengthens the Commission’s ability to identify potential exercises of market power or manipulation and to better evaluate the competitiveness of interstate wholesale electric markets.” Nothing in the Commission’s proposal here affects the EQRs; thus, EQRs would remain available for the Commission and others to use to detect the potential exercise of market power. Indeed, the EQR data is a critical component of the Commission’s market oversight activities, which aim, among other things, to identify potential opportunities for the exercise of market power.

65. Furthermore, nothing in this proposal would prevent the Commission or others from initiating a proceeding under Federal Power Act section 206 if concerns are identified about a seller’s market power or the ability of RTO/ISO market monitoring and mitigation to address any such market power.

66. Although it is true that the Commission would not receive the indicative screens for market-based rate sellers in certain RTO/ISO markets under this proposal, we do not believe that this would affect the Commission’s ability to prevent and deter abusive conduct. In fact, the Commission-approved RTO/ISO market monitoring and mitigation in large part is designed to do just that—prevent the exercise of market power before it happens. As discussed above, the RTOs/ISOs screen for potential market power using either a structural test such as the three pivotal supplier screen or a conduct and impact


test, which first compares a resource’s offer to its reference level and then examines the extent to which the offer affects market clearing prices.

67. RTO/ISO market power mitigation often involves replacing the offer with an appropriate reference level, which is based on an estimate of the resource’s short run marginal cost. Thus, RTO/ISO market power mitigation is intended to prevent the exercise of market power before it can occur, and does so using mitigation that is similar to the Commission’s default mitigation for sellers that fail the Commission’s market power screens—cost-based mitigation.104

68. The Commission’s market-based rate regulations also provide that a seller that has been found to have horizontal market power “may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power.”105 In many ways, RTO/ISO market monitoring and mitigation is just an alternative method that the Commission has approved to mitigate market power that a seller may have in an RTO/ISO market, and this mitigation functions to prevent an exercise of market power before it occurs.

69. We do not believe that the Commission has subdelegated its responsibility with respect to the RTO/ISO markets; to the contrary, it has approved RTO/ISO proposed rules that help ensure that rates for sales in RTO/ISO markets are just and reasonable.106 As the Commission has previously explained, “Commission-approved RTOs and ISOs run real-time energy markets under Commission-approved tariffs. These single price auction markets set clearing prices on economic

dispatch principles, to which various safeguards have been added to protect against anomalous bidding.”107 Thus, one way in which the Commission ensures just and reasonable rates is through approval of RTO/ISO tariffs.108

70. Furthermore, the Commission retains RTO/ISO market oversight through proceedings under Federal Power Act section 206. Specifically, the Commission retains the right to consider whether to institute separate Federal Power Act section 206 proceedings that would be open to all interested entities to investigate whether the existing RTO/ISO mitigation continues to be just and reasonable and, if not, how such mitigation should be revised.109 In addition, affected parties may argue, in the context of a specific market-based rate application or triennial review, that changed circumstances have rendered such mitigation no longer just, reasonable and not unduly discriminatory. Thus, the Commission takes an ongoing role in ensuring the justness and reasonableness of rates in the RTO/ISO markets.110

IV. Information Collection Statement

71. The Paperwork Reduction Act (PRA)111 requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB’s regulations112 require approval of certain information collection requirements imposed by agency rules. 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 an agency 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.

72. The revisions proposed in this NOPR would clarify and update the requirements specified above for sellers seeking to obtain or retain market-based rate authority that study certain RTOs, ISOs, or submarkets therein, as discussed above. The Commission anticipates that the revisions, once effective, would reduce regulatory burdens.113 The Commission will submit the proposed reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act.114

73. While the Commission expects that the regulatory revisions proposed herein will reduce the burdens on affected entities, the Commission nonetheless solicits public comments regarding the Commission’s need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents’ burden, including the use of automated information techniques. Specifically, the Commission asks that any revised burden or cost estimates submitted by commenters be supported by sufficient detail to understand how the estimates are generated.

74. Section 35.37 of the Commission’s regulations currently requires market-based rate sellers to submit a horizontal market power analysis when seeking to obtain or retain market-based rate authority.115 We propose to implement a streamlined procedure that will eliminate the requirement to file the indicative screens as part of a horizontal market power analysis for any market-based rate seller that studies any RTO/ISO market with RTO/ISO-administered energy, ancillary services, and capacity markets subject to Commission-approved RTO/ISO monitoring and mitigation. Market-based rate sellers that study an RTO, ISO, or submarket therein, would continue to be required to submit indicative screens for authorization to make energy, capacity, or ancillary services sales at market-based rates in any RTO/ISO market that lacks an RTO/ISO-administered energy, capacity, or ancillary services market subject to Commission-approved RTO/ISO monitoring and mitigation. Eliminating the requirement for certain sellers to file indicative screens will reduce the burden of filing a horizontal market power analysis for a large
portion of market-based rate sellers when filing triennial updated market power analyses, initial applications for market-based rate authority, and notices of change in status.

75. Burden Estimate: The estimated burden and cost for the requirements contained in this NOPR follow.116

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Number of respondents</th>
<th>Annual number of responses per respondent</th>
<th>Total number of responses</th>
<th>Average burden &amp; cost per response</th>
<th>Total annual burden hours &amp; cost</th>
<th>Annual cost per respondent ($)</th>
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</thead>
<tbody>
<tr>
<td>Market Power Analysis in New Applications for Market-based Rates for RTO/ISO Sellers</td>
<td>72</td>
<td>1</td>
<td>72</td>
<td>$21,020</td>
<td>$1,526,666</td>
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<tr>
<td>Triennial Market Power Analysis Updates for RTO/ISO Sellers</td>
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<td>$21,020</td>
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<td>105</td>
<td>$21,020</td>
<td>$2,226,388</td>
<td>$42,406</td>
</tr>
</tbody>
</table>

76. After implementation of the proposed changes, the total estimated annual reduction in cost burden to respondents is $2,226,388 [24,150 hours * $92.19118] = $2,226,388].

116 Other Sellers in the chart below are market-based rate sellers that do not have an RTO/ISO market with RTO/ISO-administered energy, ancillary services, and capacity markets as a relevant geographic market.

117 Due to the fact that change in status requirements may include the indicative screens in their market power analysis depending on the change reported, but are not necessary, we estimate the change in burden for change in status filings is de minimis. See 18 CFR 35.42. The Commission estimates this figure based on the Bureau of Labor Statistics data (for the Utilities sector, http://www.bls.gov/oes/current/oes22.htm, plus benefits information at http://www.bls.gov/news.release/ecwc.nr0.htm). The salaries (plus benefits) for the three occupational categories are: Economist: $71.98/hour, Lawyer: $143.68/hour, Electrical Engineer: $60.90/hour.

Burden Reductions as Proposed in NOPR in RM19–2–000

V. Environmental Analysis

77. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.119 The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.120 The actions proposed here fall within the categorical exclusions in the Commission’s regulations for rules that are clarifying, corrective, or procedural, or do not
substantially change the effect of legislation or regulations being amended.\textsuperscript{121} In addition, the proposed rule is categorically excluded as an electric rate filing submitted by a public utility under Federal Power Act sections 205 and 206.\textsuperscript{122} As explained above, this proposed rule, which addresses the issue of electric rate filings submitted by public utilities for market-based rate authority, is clarifying in nature. Accordingly, no environmental assessment is necessary and none has been prepared in this NOPR.

**VI. Regulatory Flexibility Act**

78. The Regulatory Flexibility Act of 1980 (RFA)\textsuperscript{123} generally requires a description and analysis of proposed rules that will have a significant economic impact on a substantial number of small entities. The Commission is not required to perform this sort of analysis if the proposed activities within the NOPR would not have such an effect.

79. Out of the market-based rate filers who are potential respondents subject to the requirements proposed by this NOPR, the Commission estimates approximately 86 percent will be small as defined by SBA regulations.\textsuperscript{124}

80. The proposed rule will eliminate some requirements and reduce burden on entities of all sizes (public utilities seeking and currently possessing market-based rate authority). Implementation of the proposed rule is expected to reduce total annual burden by 24,150 hours per year with a related reduced cost of $2,226,388 per year to the industry when filing triennial market power analyses and market power analyses in new applications for market-based rates, including small entities.

81. As discussed in Order No. 697,\textsuperscript{125} current regulations regarding market-based rate sellers under Subpart H to Part 35 of Title 18 of the Code of Federal Regulations exempt many small entities from significant filing requirements by designating them as Category 1 sellers.\textsuperscript{126} Category 1 sellers are exempt from triennial updates and may use simplifying assumptions, such as sellers with fully-committed generation may submit an explanation that their generation is fully committed in lieu of submitting indicative screens, that the Commission allows sellers to utilize in submitting their horizontal market power analysis.

82. The proposed rule to no longer require certain RTO/ISO sellers to file indicative screens will reduce the burden on all sellers in RTOs, including small entities in RTOs. The changes to the Commission’s regulations for market-based rate sellers are estimated to cause a reduction of 52 percent in total annual burden to market-based rate sellers when filing triennial market power analyses and market power analyses in new applications for market-based rates, including small entities.

83. Accordingly, the Commission certifies that the revised requirements proposed in this NOPR will not have a significant economic impact on a substantial number of small entities, and no regulatory flexibility analysis is required. The Commission finds that the regulations proposed here should not have a significant impact on small businesses.

**VII. Comment Procedures**

84. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due March 21, 2019. Comments must refer to Docket No. RM19–2–000, and must include the commenter’s name, the organization they represent, if applicable, and their address in their comments.

85. The Commission encourages comments to be filed electronically via the eFiling link on the Commission’s website at http://www.ferc.gov. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

86. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC, 20426.

87. All comments will be placed in the Commission’s public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

**VIII. Document Availability**

88. 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.

89. 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.

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

**List of subjects in 18 CFR Part 35**

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

By direction of the Commission, Commissioner McIntyre is not voting on this order. Commissioner McNamie is voting present.

Issued: December 20, 2018.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend part 35, chapter I, title 18, Code of Federal Regulations, as follows:

**PART 35—FILING OF RATE SCHEDULES AND TARIFFS**

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

\textsuperscript{121} 18 CFR 380.4(a)(2)(ii).
\textsuperscript{122} 18 CFR 380.4(a)(15).
\textsuperscript{123} 5 U.S.C. 601–612.
\textsuperscript{124} In 13 CFR 121.201, Subsector 22, the Commission uses the North American Industry Classification System codes 221122 (Electric Power Distribution), 221121 (Electric Bulk Power Transmission and Control), 221113 (Nuclear Electric Power Generation), 221114 (Solar Power Electric Power Generation), and 221115 (Wind Power Electric Generation). The highest threshold among these NAICS codes results in any respondent entities below 1,000 employees being considered as “small.”
\textsuperscript{125} Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 1126–1129.
\textsuperscript{126} Category 1 Sellers are power marketers and power producers that own or control 500 MW or less of generating capacity in aggregate and that are not affiliated with a public utility with a franchised service territory. In addition, Category 1 sellers must not own or control transmission facilities, and must present no other vertical market power issues. 18 CFR 35.36(a)(2).
§ 35.37 Market power analysis required.

* * * * *

In lieu of submitting the indicative market power screens, Sellers studying RTO or ISO markets that operate RTO/ISO-administered energy, ancillary services, and capacity markets may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power. Sellers may have in those markets.

In lieu of submitting the indicative market power screens, Sellers studying RTO or ISO markets that operate RTO/ISO-administered energy and ancillary services markets, but not capacity markets, may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power that Sellers may have in energy and ancillary services markets.

Sellers studying such RTOs/ISOs would need to submit indicative market power screens if they wish to obtain market-based rate authority for wholesale sales of capacity in these markets.

* * * * *

[FR Doc. 2019–00459 Filed 1–31–19; 8:45 am]

BILLING CODE 6717–01–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2017–0046]

RIN 0960–AH86

Removing Inability To Communicate in English as an Education Category

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to eliminate the education category “inability to communicate in English” when we evaluate disability claims for adults under titles II and XVI of the Social Security Act (Act). Changes in the national workforce since we added this category to our rules in 1978 demonstrate that this education category is no longer a reliable indicator of an individual’s educational attainment or the vocational impact of an individual’s education. The proposed revisions reflect research and data related to English language proficiency, work, and education; expansion of the international reach of our disability programs; and audit findings by our Office of the Inspector General (OIG). The proposed revisions would help us better assess the vocational impact of education in the disability determination process.

DATES: To ensure that your comments are considered, we must receive them by no later than April 2, 2019.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2017–0046 so that we may associate your comments with the correct regulation. CAUTION: You should be careful to include in your comments only information you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. Internet: We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at http://www.regulations.gov. Use the web page’s “Search” function to find docket number SSA–2017–0046 and then submit your comment. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. Fax: Fax comments to (410) 966–2830.

3. Mail: Address your comments to Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401. Comments and background documents are available for public viewing on the Federal eRulemaking portal at http://www.regulations.gov or in person, during regular business hours, by arranging with the contact person identified below.


SUPPLEMENTARY INFORMATION:

Background

Current Disability Rules for Adults

Title II of the Act provides for the payment of disability insurance benefits to fully insured individuals under the Act. Title II also provides for the payment of child’s insurance benefits for individuals who become disabled before attaining age 22, and for the payment of widow’s and widower’s insurance benefits for disabled widows, widowers, and surviving divorced spouses of insured individuals. In addition, title XVI of the Act provides for Supplemental Security Income (SSI) payments to eligible individuals who are aged, blind, or disabled and have limited income and resources.

For adults (including individuals claiming child’s insurance benefits based on disability under title II), the Act defines “disability” under both titles II and XVI as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

In many cases, the Act requires us to consider an adult claimant’s education when we determine whether or not he or she is disabled. The Act states that an adult shall be determined to be under a disability only if his physical or mental impairment(s) are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

We use a five-step sequential evaluation process to determine whether an adult is disabled based on this statutory definition. If we are unable to find an individual disabled or not disabled at a given step, we proceed


2 Section 1611(a) of the Act, 42 U.S.C. 1382c(a).


4 We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at http://www.regulations.gov or in person, during regular business hours, by arranging with the contact person identified below.