

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 35 and 284

(Docket No. RM06-14-000)

Revisions to Record Retention Requirements for Unbundled Sales Service,
Persons Holding Blanket Marketing Certificates, and Public Utility Market-Based Rate
Authorization Holders

(Issued February 16, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations regarding the blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines, the blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce and the market-based rate authorizations held by certain sellers of electricity and related products. Specifically, the Commission is proposing to extend the record retention requirement in the sections of the Commission's regulations that apply to such sellers from three to five years.

DATES: Comments are due **[insert date 30 days after publication in the FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by docket number, by any of the following methods:

- Agency Web Site: <http://www.ferc.gov> . Follow the instructions for submitting comments electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>.
- Mail: Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street N.E., Washington, DC, 20426.

Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Revisions to Record Retention Requirements for Unbundled Sales Service,
Persons Holding Blanket Marketing Certificates, and
Public Utility Market-Based Rate Authorization Holders

Docket No. RM06-14-000

NOTICE OF PROPOSED RULEMAKING

(Issued February 16, 2006)

1. The Federal Energy Regulatory Commission is proposing to revise §§ 284.288(b) and 284.403(b) of its codes of conduct regulations,¹ as promulgated pursuant to Order No. 644.² Sections 284.288(b) and 284.403(b) of the codes of conduct regulations require sellers to maintain certain records for a period of three years to reconstruct prices charged for natural gas. Similarly, the Commission is proposing to revise new § 35.37(d) of the Commission's regulations. Section 35.37(d) is the codification of former Market

¹ 18 CFR 284.288(b) and 284.403(b) (2005). In a Final Rule in Docket No. RM06-5-000 issued simultaneously with this notice of proposed rulemaking (NOPR), the Commission is redesignating sections 284.288(c) and 284.403(c) of the Commission's regulations as sections 284.288(b) and 284.403(b), respectively. Unless otherwise specified, this NOPR will refer to these sections on record retention under their new designations, sections 284.288(b) and 284.403(b).

² Amendments to Blanket Sales Certificates, 105 FERC ¶ 61,217 (2003), reh'g denied 107 FERC ¶ 61,174; 68 FR 66323 (Nov. 26, 2003); 18 CFR 284.288 and 284.403 (2003) (Order No. 644). Order No. 644 is currently on appeal. See Cinergy Marketing & Trading, L.P. v. FERC, No. 04-1168 et al. (D.C. Cir. April 28, 2004).

Behavior Rule 5.³ Section 35.37(d) requires that sellers retain for a minimum three-year period all data and information upon which they billed the prices charged for electricity and related products in sales made under their market-based rate tariffs and authorizations or in transactions the prices of which were reported to price index publishers.⁴ Subsequent to the issuance of Order No. 644 and the Market Behavior Rules Order, Congress provided the Commission with specific anti-manipulation authority in the Energy Policy Act of 2005 (EPAcT 2005).⁵ To implement this new authority, the Commission recently issued Order No. 670, where we said we would adhere to a five-

³ Concurrently herewith, the Commission is codifying certain Market Behavior Rules, including Market Behavior Rule 5, which are currently tariff conditions for market-based rate sellers of electricity and related products. Conditions for Public Utility Market-Based Rate Authorization Holders, Docket No. RM06-13-000 (February 16, 2006) (Market Behavior Rules Codification Order). The Commission had promulgated Market Behavior Rule 5 along with the other Market Behavior Rules in the Market Behavior Rules Order. Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, “Order Amending Market-Based Rate Tariffs and Authorizations,” 105 FERC ¶ 61,218 (2003), reh’g denied, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order). The Market Behavior Rules are currently on appeal. Cinergy Marketing & Trading, L.P. v. FERC, Nos. 04-1168 et al. (D.C. Cir. April 28, 2004). Unless otherwise specified, this NOPR will refer to this rule on record retention under its new designation, section 35.37(d).

⁴ 18 CFR 35.37(d).

⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). Congress prohibited the use or employment of “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of natural gas or electric energy or transportation or transmission services subject to the jurisdiction of the Commission. Congress directed the Commission to give these terms the same meaning as under the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000).

year statute of limitations where we seek civil penalties for violations of the new anti-manipulation rules.⁶ This NOPR proposes to amend these regulations to extend the record retention requirement of §§ 284.288(b), 284.403(b) and 35.37(d) of the Commission's regulations from three to five years, in order to be consistent with the recently issued Order No. 670.

I. Background

2. On November 17, 2003, we issued Order No. 644, amending blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines and blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce. This rule requires that pipelines that provide unbundled natural gas sales service and all sellers of natural gas for resale adhere to a code of conduct with respect to certain natural gas sales. Sections 284.288(b) and 284.403(b) of the codes of conduct regulations require that sellers retain for a minimum three-year period all data and information upon which they billed the prices charged for natural gas sales made under §§ 284.284 or 284.402, or in transactions the prices of which were reported to price index publishers.

3. At the same time that Order No. 644 was adopted for pipelines that provide unbundled natural gas sales service and holders of blanket certificate authority that make

⁶ Prohibition of Energy Market Manipulation, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (Jan. 19, 2006) (Order No. 670).

sales for resale of natural gas, the Commission also issued the Market Behavior Rules Order to require wholesale sellers of electricity at market-based rates to adhere to certain behavioral rules when making sales of electricity. The record retention rule, now § 35.37(d) of the Commission's regulations, requires that sellers retain for a minimum three-year period all data and information upon which they billed the prices charged for electricity and related products in sales made under their market-based rate tariffs and authorizations or in transactions the prices of which were reported to price index publishers.

4. In a Notice of Proposed Rulemaking dated November 21, 2005,⁷ the Commission proposed to rescind §§ 284.288 or 284.403 of the Commission's regulations once we issued final regulations implementing the anti-manipulation provisions of EPAct 2005 and have had the opportunity to incorporate the non-duplicative aspects of §§ 284.288 or 284.403 of the Commission's regulations into other rules of general applicability. At the same time, we issued an order in Docket No. EL06-16-000 proposing similar changes to the behavior rules applicable to wholesale sellers of electricity at market-based rates.⁸ On January 19, 2006, the Commission issued Order No. 670, adopting regulations

⁷ Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, 113 FERC ¶ 61,189 (2005).

⁸ See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, "Order Proposing Revisions to Market-Based Rate Tariffs and Authorizations," 113 FERC ¶ 61,190 (2005).

implementing the EPAct 2005 anti-manipulation provisions.⁹ In Order No. 670, the Commission stated that it will adhere to a five-year statute of limitations where we seek civil penalties for violations of the new anti-manipulation rules.¹⁰

5. In a final rule and order issued simultaneously with this NOPR, we decided to rescind §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations,¹¹ and to rescind Market Behavior Rules 2 and 6.¹² The Commission stated that, although Order No. 670 made it unnecessary to retain §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations or to retain Market Behavior Rules 2 and 6, there is benefit to retaining §§ 284.288(b)-(c) and 284.403(b)-(c) (redesignated as §§ 284.288(a)-(b) and 284.403(a)-(b)) of the Commission's regulations, and to retaining Market Behavior Rules 1, 3, 4, and 5 (new §§ 35.37(a)-(d) of the Commission's regulations).

II. Discussion

6. Sections 284.288(b), 284.403(b) and 35.37(d) of the Commission's regulations require sellers to maintain certain records for a period of three years to reconstruct prices

⁹ 18 CFR 1c.1 and 1c.2, 71 FR 4,244 (2006).

¹⁰ Order No. 670, 114 FERC ¶ 61,047 at P 63.

¹¹ Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, Docket No. RM06-5-000 (February 16, 2006).

¹² Order Revising Market-Based Rate Tariffs and Authorizations, Docket No. EL06-16-000 (February 16, 2006).

charged for natural gas and electricity, respectively. This is different from the record retention requirements in Parts 125 and 225 of our regulations, which largely are related to cost-of-service rate requirements.¹³ Given the importance of records related to any investigation of possible wrongdoing and related to assuring compliance, and in order to avoid confusion, the Commission decided to retain §§ 284.288(b), 284.403(b) and 35.37(d) of the Commission's regulations.

7. In this NOPR, we propose increasing the record retention requirement from three years to five years. In Order No. 670, we did not adopt a specific statute of limitations on complaints or enforcement actions that may be brought pursuant to the Commission's anti-manipulation authority.¹⁴ However, we did note that, when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations (as is the case with respect to the Commission's anti-manipulation authority), a five-year limitation period applies.¹⁵ It would be inconsistent to allow complaints or enforcement actions seeking civil penalties for alleged violations to our anti-manipulation authority to be commenced more than three years after the transactions giving rise to such actions were carried out, but not to require that the data and information related to such transactions be

¹³ 18 CFR Parts 125, 225 (2005).

¹⁴ Order No. 670, 114 FERC ¶ 61,047 at P 62.

¹⁵ Id.

retained for at least that long. Accordingly, we propose, and seek comment on, an increase of the record retention requirement to five years.

III. Regulatory Flexibility Act Certification

8. The Regulatory Flexibility Act of 1980¹⁶ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.¹⁷ The Commission is not required to make such analyses if a rule would not have such an effect. The proposed rule merely extends an already existing record retention requirement from three to five years. Therefore, the Commission certifies that this proposed rule, if finalized, will not have a significant economic impact on a substantial number of small entities.

IV. Information Collection Statement

9. As discussed herein, the Commission is proposing to extend the existing record retention period of §§ 284.288(b), 284.403(b) and 35.37(d) of the Commission's regulations from three years to five years consistent with the statute of limitations that

¹⁶ 5 U.S.C. 601-612 (2000).

¹⁷ The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (Section 22, Utilities, North American Industry Classification System, NAICS) (2004).

applies to actions seeking civil penalties for violations of the Commission's new anti-manipulation rules that could be related to such data and information. The increased duration of information retention contained in this proposed revised rule has been submitted to the Office of Management and Budget (OMB) for review under the Section 3507(d) of the Paperwork Reduction Act of 1995.¹⁸ OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.¹⁹

10. The Commission's regulations, in §§ 284.288(b), 284.403(b) and 35.37(d), specify the existing record retention requirements applicable to certain sellers of natural gas and electricity. The information provided to the Commission under Part 284 for record retention purposes remains identified as FERC-549. The Commission identifies the information provided for under Part 35 as FERC-516. As discussed above, the Commission proposes to extend the records retention requirements in Parts 35 and 284 of its regulations for an additional two years consistent with Order No. 670.

11. Comments are solicited on the need for this increased records retention period, whether it will have practical utility, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. The burden estimates for complying with this proposed rule are as follows:

¹⁸ 44 U.S.C. 3507(d).

¹⁹ 5 CFR 1320.11.

Data Collection FERC-516 & FERC-549	No. of Respondents	No. of Responses	Hours Per Response	Total Annual Hours
Records Retention				
FERC-516	1,150	1	2	2300
FERC-549	222	1	2	444
Totals	1,372	1	2	2,744

Total Annual hours for Record Retention: Recordkeeping, 2,744 hours.

Information Retention Costs: The Commission projects an annualized average cost of all respondents as 2,744 hours @ \$17 an hour = \$46,648 (staffing) + \$2,538,200 (1,372 entities @ \$925 per year x 2 (storage)). This cost is based on 120 cubic feet (20 four-drawer file cabinets transferred off site to a storage facility). The costs include cubic feet of storage plus the cost of floor space plus the costs for records storage cartons. The Commission is requiring that entities retain records for an additional two years. Total costs = \$2,584,848. Greater savings can be accomplished if documents are stored electronically, i.e., one file cabinet (four-drawer) (10,000 pages on average) = 500 MegaBytes (MByte) = one CD ROM. The Commission seeks comments on the costs to comply with this requirement.

Title: FERC- 549, Gas Pipeline Rates: Natural Gas Policy Act, Section 311; FERC-516, Electric Rate Schedule Filings.

Action: Proposed Collection.

OMB Control No: 1902-0086 and 1902-0096.

Respondents: Businesses or other for profit.

Frequency of Responses: Records of market-based rate transactions shall be retained for five years instead of three.

Necessity of the Information: It would be very difficult (if possible at all) for the Commission to monitor and prosecute violations of pipeline and blanket certificate sales of natural gas and market-based rate sales of electricity unless the underlying sales information were retained. This data retention requirement is consistent with the information and data retention requirements applicable to sellers having cost-based rates.²⁰ Requiring pipeline and blanket certificate sellers of natural gas, and market-based rate sellers of electricity, to retain records is also consistent with the Commission's past practices as set forth in §§ 284.288(b), 284.403(b) and 35.37(d) of the Commission's regulations, and, although the Commission proposes a retention period of five years (as opposed to the existing three-year requirement), such longer period is now required to ensure the information and data will remain available to support complaints and enforcement actions involving civil penalties for violations that occurred more than three years earlier.

Internal review: The Commission has conducted an internal review of the public reporting burden associated with the record retention of information and assured itself, by

²⁰ See 18 CFR parts 125, 225.

means of internal review, that there is specific, objective support for this information burden estimate. Moreover, the Commission has reviewed the increased duration of information retention proposed herein and has determined that these retentions of information are necessary and conform to the Commission's plans, as described in this order, for the use of the required information.²¹

12. Interested persons may obtain information on the proposed increased duration of information retention by contacting: Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502-8415, fax: (202) 273-0873, e-mail: michael.miller@ferc.gov. Comments on the requirements of the proposed rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attention: Desk Officer for the Federal Energy Regulatory Commission.

13. For submitting comments concerning the proposed increased duration of information retention and the associated burden estimate(s), please send comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503, Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202)395-7856, fax: (202)395-7285.

²¹ See 44 U.S.C. 3506(c) (2000).

V. Environmental Statement

14. 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.²² The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.²³ The actions proposed herein for the increased duration of information retention fall within categorical exclusions in the Commission's regulations for rules that are procedural in nature. Therefore, an environmental assessment is unnecessary and has not been prepared in this proposed rulemaking.

VI. Comment Procedures

15. The Commission invites interested persons to submit comments on the increased duration of record retention from three to five years proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due [**insert date 30 days from publication in the FEDERAL REGISTER**]. Reply comments are due fifteen days thereafter. Comments must refer to

²² Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. ¶ 30,783 (1987).

²³ 18 CFR 380.4(a)(2)(ii) (2005).

Docket No. RM06-14-000 and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

Comments may be filed either in electronic or paper format.

16. Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street N.E., Washington, DC, 20426.

17. 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.

VII. Document Availability

18. 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, N.E., Room 2A, Washington, D.C. 20426.

19. From the Commission's Home Page on the Internet, this information is available in the eLibrary. The full text of this document is available on eLibrary both 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.

20. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

List of subjects

18 CFR Part 35

Electric Power Rates, Electric Utilities, Reporting and Record Keeping Requirements

18 CFR Part 284

Continental Shelf, Natural Gas, Reporting and Record Keeping Requirements

By direction of the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission proposes to amend parts 35 and 284 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:

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

2. In § 35.37, paragraph (d), the word “three” is removed and the word “five” is inserted in its place.

PART 284 - - CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7532; 43 U.S.C. 1331-1356.

2. In § 284.288, paragraph (b), the word “three” is removed and the word “five” is inserted in its place.

3. In § 284.403, paragraph (b), the word “three” is removed and the word “five” is inserted in its place.