

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 35 and 284

(Docket No. RM06-14-000; Order No. 677)

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

(Issued May 19, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

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

EFFECTIVE DATE: This Final Rule will become effective [insert date 30 days from publication in the **FEDERAL REGISTER**].

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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

ORDER NO. 677

FINAL RULE

(Issued May 19, 2006)

**I. Introduction**

1. On February 16, 2006, the Commission issued a Notice of Proposed Rulemaking (NOPR) in which we proposed to revise §§ 284.288(b) and 284.403(b) of our regulations,<sup>1</sup> as promulgated by Order No. 644.<sup>2</sup> Sections 284.288(b) and 284.403(b) of the regulations require sellers to retain for a period of three years all data and information

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<sup>1</sup> 18 CFR 284.288(b) and 284.403(b) (effective Mar. 29, 2006). Prior to March 29, 2006, the record retention rules were contained in 18 CFR 284.288(c) and 284.403(c), but were re-designated at paragraphs (b) of those sections in Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, Order No. 673, 71 FR 9709 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,207 (2006).

<sup>2</sup> Amendments to Blanket Sales Certificates, Order No. 644, 68 FR 66323 (Nov. 26, 2003), FERC Stats. & Regs. ¶ 61,153 (2003), reh'g denied 107 FERC ¶ 61,174 (2004) (Order No. 644).

upon which they billed the prices charged for natural gas sales or prices they reported for use in price indices. Similarly, the Commission proposed revising new § 35.37(d) of the Commission's regulations under the Federal Power Act. Section 35.37(d) is the codification of former Market Behavior Rule 5.<sup>3</sup> Section 35.37(d) requires that sellers retain for a period of three years 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 prices they reported for use in price indices.<sup>4</sup>

## II. Background

2. In the NOPR, the Commission stated that subsequent to the issuance of Order No. 644 and the Market Behavior Rules Order, Congress provided the Commission with specific anti-manipulation authority in sections 315 and 1283 of the Energy Policy Act of 2005 (EPAct 2005).<sup>5</sup> To implement this new authority, the Commission issued Order

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<sup>3</sup> The Commission recently codified certain Market Behavior Rules, including Market Behavior Rule 5, which was formerly a tariff condition for market-based rate sellers of electricity and related products. Conditions for Public Utility Market-Based Rate Authorization Holders, 114 FERC ¶ 61,163 (2006). The Commission in that order also rescinded Market Behavior Rules 2 and 6. *Id.* The Commission had promulgated former Market Behavior Rule 5 along with the other Market Behavior Rules in 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).

<sup>4</sup> 18 CFR 35.37(d) (effective Feb. 27, 2006).

<sup>5</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), sections 315 and 1283.

No. 670, where we said we would adhere to the generally applicable five-year statute of limitations where we seek civil penalties for violations of the new anti-manipulation rules.<sup>6</sup> In the NOPR we pointed out that 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 retained for at least that long. Accordingly, the NOPR proposed to extend the record retention requirements of §§ 284.288(b) and 284.403(b) regarding natural gas records, and § 35.37(d) regarding electric records, from three to five years, in order to be consistent with the recently issued Order No. 670.<sup>7</sup>

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<sup>6</sup> Prohibition of Energy Market Manipulation, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, p. 30,069 at P 63 (2006) (Order No. 670). In Order No. 670, the Commission 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, but 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. Id. citing 28 U.S.C. 2462 (2000).

<sup>7</sup> NOPR at P 7.

### **III. Discussion**

3. Two parties, the Edison Electric Institute and its Alliance of Energy Suppliers (together, EEI) and the American Public Gas Association (APGA), filed comments.<sup>8</sup> EEI and APGA seek clarification regarding certain implementation issues involving the Commission's proposal to extend the record retention requirement from three to five years, but do not object to the proposed five-year retention period.

#### **A. Comments**

4. EEI states that under the current rule, a party is no longer required to maintain records created on March 1, 2002 after March 1, 2005.<sup>9</sup> EEI points out that if the proposed rule were finalized on May 1, 2006, then parties who no longer have records from March 2002 would technically be out of compliance with the Commission's rules because the March 2002 records were not maintained for five years.<sup>10</sup> Therefore, EEI requests that the Commission specify in the Final Rule that all new records must be maintained for five years and any existing records must be maintained for five years, but

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<sup>8</sup> Another party, Edison Mission Energy, Edison Mission Market and Trading, Inc., and Midwest Generation EME, LLC (Edison Mission), filed a motion to intervene pursuant to the Commission's Rules of Practice and Procedure, 18 CFR 385.212 and 385.214.

<sup>9</sup> EEI at 2.

<sup>10</sup> Id.

that removal of records three or more years old prior to issuance of the Final Rule will not be a rule violation.<sup>11</sup>

5. APGA supports the Commission's proposal to extend the record retention requirement provided in §§ 284.288 and 284.403 of the Commission's regulations from three to five years.<sup>12</sup> APGA, however, requests the Commission clarify that the five-year period is a minimum period, subject to extension if at the end of a five-year period private parties or the Commission have initiated an investigation or formal litigation (whether regulatory or judicial) against a jurisdictional entity.<sup>13</sup> Accordingly, APGA urges the Commission to make clear that destruction of records at the end of the five-year period (or thereafter) is not permitted so long as an investigation or formal litigation involving the affected entity is ongoing.<sup>14</sup>

**B. Commission Determination**

6. The Commission adopts the Final Rule as proposed in the NOPR and revises §§ 284.288(b) and 284.403(b) of our regulations to require applicable sellers to retain for a period of five years all data and information upon which they bill the prices charged for

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<sup>11</sup> Id.

<sup>12</sup> APGA at 2.

<sup>13</sup> Id.

<sup>14</sup> Id.

natural gas sales or prices they report for use in price indices. Similarly, we revise § 35.37(d) of the Commission's regulations to require applicable sellers to retain for a period of five years all data and information upon which they bill the prices charged for electricity and related products in sales made under their market-based rate tariffs and authorizations or prices they report for use in price indices. These revisions reflect a two-year increase in the record retention requirement applicable to transactions pursuant to blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines, blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce, and market-based rate authorizations held by certain sellers of electricity and related products. The extension of the record retention requirement we adopt here is necessary to ensure consistency with the new rule prohibiting market manipulation adopted in Order No. 670 and the generally applicable five-year statute of limitations where we seek civil penalties for violations of the new anti-manipulation rules or other rules, regulations, or orders as to which the price data may be relevant.

7. In response to EEI's comments, the Final Rule does not apply retroactively to records that were not retained because they were three or more years old. The Final Rule requires that all new records must be retained for five years and any existing records, including those more than three years old, must be retained for five years. However, the failure to retain records more than three years old, prior to the effective date of the Final Rule, will not be a violation of the Final Rule.

8. In response to APGA's comments, the Commission notes that upon the commencement of an investigation, whether formal or informal, the entity being investigated is routinely directed to preserve and retain all existing and future records relevant to the subject matter of the investigation. Moreover, we note that §§ 125.2(l) and 225.2(l) of our regulations require that entities involved in litigation are to retain all relevant records.<sup>15</sup>

#### **IV. Information Collection Statement**

9. As discussed herein, the Commission is extending the 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 applies to actions seeking civil penalties for violations of the Commission's new anti-manipulation rule or other rules, regulations, or orders as to which price data and information may be relevant. The increased duration of information retention contained in this Final 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.<sup>16</sup> OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.<sup>17</sup>

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<sup>15</sup> 18 CFR 125.2(l) and 225.2(l) (2005).

<sup>16</sup> 44 U.S.C. 3507(d) (2000).

<sup>17</sup> 5 CFR 1320.11 (2005).

10. The Commission’s regulations in §§ 284.288(b), 284.403(b) and 35.37(d) specify the mandatory 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 is extending the mandatory record retention requirements in Parts 35 and 284 of its regulations for an additional two years.

11. Comments were solicited in the NOPR on the need for the increased record retention period, whether it will have practical utility, the accuracy of burden estimates in the NOPR, and for suggested methods of minimizing respondents’ burdens. No comments were received on the need for, or burden or costs, of the increased records retention period. The burden for complying with this Final Rule is estimated as follows:

| Data Collection<br>FERC-516 &<br>FERC-549 | No. of<br>Respondents | No. of<br>Responses | Hours Per<br>Response | Total Annual<br>Hours |
|---|-----------------------|---------------------|-----------------------|-----------------------|
| Records<br>Retention                      |                       |                     |                       |                       |
| FERC-516                                  | 1,150                 | 1                   | 2                     | 2,300                 |
| 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.

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 data and information supporting the prices charged for sales were retained. This data retention requirement is consistent with the information and data retention requirements applicable to sellers having cost-based rates.<sup>18</sup> Requiring pipeline and blanket certificate sellers of

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<sup>18</sup> See 18 CFR parts 125 and 225 (2005).

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 adopts a retention period of five years (as opposed to the previous 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.

#### V. Environmental Analysis

12. 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.<sup>19</sup> 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.<sup>20</sup> This Final Rule does not substantially change the regulations being amended, but merely extends for an additional period of time the existing retention requirements of the regulations and,

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<sup>19</sup> Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. ¶30,783 (1987).

<sup>20</sup> 18 CFR 380.4(a)(2)(ii) (2005).

therefore, falls under this exception; consequently, no environmental assessment is necessary.

#### **VI. Regulatory Flexibility Act Certification**

13. The Regulatory Flexibility Act of 1980<sup>21</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.<sup>22</sup> The Commission is not required to make such analyses if a rule would not have such an effect. The Final Rule merely extends an already existing record retention requirement from three to five years. Therefore, the Commission certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

#### **VII. Document Availability**

14. 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

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<sup>21</sup> 5 U.S.C. 601-612 (2000).

<sup>22</sup> 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).

(<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. E.S.T.) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

15. 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.

16. 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](mailto:FERCOnlineSupport@FERC.gov)), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov)).

### **VIII. Effective Date and Congressional Notification**

17. This Final Rule will be effective [insert date 30 days from publication in **FEDERAL REGISTER**]. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory

Enforcement Fairness Act of 1996.<sup>23</sup> The Commission will submit the Final Rule to both houses of Congress and the Government Accountability Office.

List of subjects

18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements

18 CFR Part 284

Continental shelf, Natural gas, Reporting and recordkeeping requirements

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>23</sup> See 5 U.S.C. 804(2) (2000).

In consideration of the foregoing, the Commission amends 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.