## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. TM99–2–119–000]**

## Young Gas Storage Company, Ltd.; Notice of Tariff Filing

November 25, 1998.

Take notice that on November 20, 1998, Young Gas Storage Company, Ltd. (Young) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheet, with an effective date of December 1, 1998:

Seventh Revised Sheet No. 4

Young states it is adjusting the rates for Rate Schedules FS–1 and IS–1 resulting from the currently effective Average Thermal Content of Gas in Storage (ATC) posted on Young's electronic bulletin board on November 11, 1998, pursuant to Section 1.2 of the General Terms and Conditions of this tariff. Further, Young states the combination of the revised ATC, the revised contractual entitlements and the revised storage rates will not change the current customer storage reservation payments under the instant proposal.

Young states that copies of this filing have been served on Young's affected jurisdictional customers and public bodies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**David P. Boergers,**

*Secretary.*

[FR Doc. 98–31992 Filed 11–30–98; 8:45 am]

**BILLING CODE 6717–01–M**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RM99–2–000]**

## Regional Transmission Organizations, Notice of Intent To Consult Under Section 202(a)

November 24, 1998.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of Intent to Consult with State Commissions.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) intends to consult with State commissions for the purpose of affording them a reasonable opportunity to present their views with respect to the Commission's use of authority under section 202(a) of the Federal Power Act.

**SUPPLEMENTARY INFORMATION:** In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission. CIPS can be accessed via Internet through FERC's Homepage (http://www.ferc.fed.us) using the CIPS Link or the Energy Information Online icon. The full text of this document will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS is also available through the Commission's electronic bulletin board service at no charge to the user and may be accessed using a personal computer with a modem by dialing 202–208–1397, if dialing locally, or 1–800–856–3920, if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. User assistance is available at 202–208–2474 or by E-mail to cipsmaster@ferc.fed.us.

This document is also available through the Commission's Records and Information Management System (RIMS), an electronic storage and retrieval system of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Homepage using the RIMS link or the Energy Information Online icon. User assistance is available at 202–208–2222, or by E-mail to rimsmaster@ferc.fed.us.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, RVJ International, Inc. RVJ International, Inc. is located in the Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426.

As part of a broader inquiry concerning the Commission's policies on independent system operators (ISOs) and other regional transmission organizations (RTOs) in the electric utility industry,[1] the Commission is considering whether and how to use its authority under section 202(a) of the Federal Power Act (FPA), 16 U.S.C. § 824a(a) (1994), which was recently delegated to the Commission by the Secretary of Energy.[2] As a first step in that process, the Commission gives notice of its intent to initiate a consultation process with State commissions pursuant to section 202(a). The purpose of this initial consultation is to afford State commissions a reasonable opportunity to present their views and recommendations with respect to dividing the country into regional districts for development of independent regional transmission organizations.

The Commission intends initially to seek the views and recommendations of State commissions on the issues of what criteria should be used to establish regional boundaries for RTOs, and what should be the appropriate role of States in the formation and governance of RTOs, in the event that the Commission decides to exercise its authority. We will do so through one or more conferences to be held in January or early February 1999. After these conferences, there will be additional consultation, during which the Commission will solicit and consider the views of the States, and others, in a rulemaking or other generic proceeding on RTOs. Among the issues to be examined then will be whether to exercise section 202(a) authority to establish regional boundaries for RTOs.

[1] *See* Midwest Independent Transmission System Operator, Inc., 84 FERC ¶ 61,231 at 62,142 (1998), *reh'g pending (Midwest ISO).*

[2] A copy of section 202(a) is attached to this notice and will also be published in the **Federal Register**.

## Background

In Order Nos. 888[3] and 889,[4] the Commission required all public utilities that own, operate or control interstate transmission facilities to provide open access transmission services and to separate their transmission operations functions from their wholesale power marketing functions. The Commission took this step to ''remedy undue discrimination in access to monopoly owned transmission lines'' in order to ''remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.'' [5] During the course of that proceeding, the Commission received comments urging it to require generation divestiture or structural institutional arrangements such as regional ISOs to better assure non-discrimination. The Commission responded at that time that, while it believed that ISOs had the potential to provide significant benefits, efforts to remedy undue discrimination should begin by requiring the less intrusive functional unbundling approach.[6] Order No. 888 stated:

[W]e see many benefits in ISOs, and encourage utilities to consider ISOs as a tool to meet the demands of the competitive marketplace.

As a further precaution against discriminatory behavior, we will continue to monitor electricity markets to ensure that functional unbundling adequately protects transmission customers. At the same time, we will analyze all alternative proposals, including formation of ISOs, and, if it becomes apparent that functional unbundling is inadequate or unworkable in assuring non-discriminatory open access transmission, we will reevaluate our position and decide whether other mechanisms, such as ISOs, should be required.[7]

Order No. 888 also set forth eleven principles that would be used to assess ISO proposals that may be submitted to the Commission.[8] Since Order No. 888 was issued, the Commission conditionally approved proposals for the establishment of five ISOs. These are the California ISO,[9] the PJM ISO,[10] ISO New England,[11] the New York ISO,[12] and the Midwest ISO.[13] In addition, the Texas Commission has ordered an ISO for the Electric Reliability Council of Texas (ERCOT).[14] These organizations, and others rumored to be in development, vary widely with respect to their operational responsibilities, geographic scope, governance, and structure.

On April 15–16, 1998, the Commission held a public conference in Washington, D.C., in Docket No. PL98–5–000, to examine the future of ISOs in administering the electric transmission grid on a regional basis. The Washington conference highlighted the industry's change in thinking about types of regional transmission organizations other than ISOs that the Commission should consider. As a follow-up to the Washington conference, the Commission held seven regional conferences at locations around the country between May 28 and June 8, 1998. These regional conferences focused on specific regional characteristics and institutional factors that bear on the formation of regional transmission organizations. As a result of these conferences, the Commission received numerous oral and written comments on the appropriate size, scope, organization and functions of regional transmission organizations.

In our recent order conditionally approving the Midwest ISO, the Commission noted that many issues had been raised in that proceeding about the proper size and configuration of the ISO; the relative merits of ISOs, transcos, and other possible forms of regional organization; how much control the regional entity should have over various facilities, and other issues. The Commission stated that it would not attempt to resolve industry-wide issues in that proceeding, but that it would address such issues in a rulemaking or other generic proceeding in the future.[15]

On October 1, 1998, the Secretary of Energy delegated his authority under section 202(a) of the FPA to the Commission. The Secretary stated that section 202(a) ''provides DOE with sufficient authority to establish boundaries for Independent System Operators (ISOs) or other appropriate transmission entities.'' [16]

## Discussion

Under section 202(a) of the FPA, ''the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy.'' The purpose of this division into regional districts is for ''assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources.'' Section 202(a) states that it is ''the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.''

The Commission believes that an abundant supply of electric energy throughout the United States with the greatest possible economy can be best achieved with fully competitive wholesale power markets and open and non-discriminatory access to interstate transmission facilities. Order No. 888 has laid the necessary predicate for competition but, after more than two years of experience, the requirements of Order Nos. 888 and 889 may not alone

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[3] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 at 30,278–79 (1997), *order on reh'g,* Order No. 888–B, 62 FR 64688 (Dec. 9, 1997) 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998).

[4] Open Access Same-Time Information System and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996); *order granting request for clarification,* 62 FR 610 (Jan. 1, 1997), 77 FERC ¶ 61,335 (1996); *order on reh'g,* Order No. 889–A, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,049 (1997); and *order denying reh'g,* Order No. 889–B, 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (1997).

[5] Order No. 888, FERC Stats. & Regs. at 31,634.

[6] Functional unbundling requires the separation of transmission system functions and wholesale generation marketing functions, and a code of conduct to define impermissible contact between generation and transmission personnel. Under functional unbundling, a public utility must: (1) take transmission services under the same tariff of general applicability as do others; (2) state separate rates for wholesale generation, transmission, and ancillary services; and (3) rely on the same electronic information network that its transmission customers rely on to obtain information about its transmission system when buying or selling power. *See* Order No. 888, FERC Stats. & Regs. at 31,654–55.

[7] Order No. 888, FERC Stats. & Regs. at 31,655.

[8] *Id.* at 31,730.

[9] Pacific Gas & Electric Company, *et al.*, 77 FERC ¶ 61,204 (1996), *order on reh'g,* 81 FERC ¶ 61,122 (1997).

[10] Pennsylvania-New Jersey-Maryland Interconnection, *et al.*, 81 FERC ¶ 61,257 (1997), *reh'g pending.*

[11] New England Power Pool, 79 FERC ¶ 61,374 (1997), *order on reh'g,* 85 FERC ¶ 61,242 (1998) (order conditionally authorizing ISO New England); New England Power Pool, 83 FERC ¶ 61,045 (1998), *reh'g pending* (order on NEPOOL tariff and restructuring).

[12] Central Hudson Gas & Electric Corporation, *et al.*, 83 FERC ¶ 61,352 (1998), *reh'g pending.*

[13] *Midwest ISO,* 84 FERC ¶ 61,231 (1998).

[14] *See* 16 Texas Administrative Code § 23.67(p).

[15] *Midwest ISO,* 84 FERC at 62,142. The Commission also stated therein, among other things, that ''at this early stage in the restructuring of the U.S. electric power industry'' it believes that there is no ''single structural or operational arrangement that must apply universally to all utilities seeking to form regional transmission entities'' and that the better approach ''at this time'' is ''to encourage and accommodate regional experimentation.'' *Id.* The Commission further stated that coordination in the public interest is best served if a proposed transmission entity is as large as possible. *Id.* at 62,145.

[16] 63 FR 53889 (Oct. 7, 1998).

be sufficient to accomplish a completely competitive market. The Commission therefore is considering whether the goals of full competition and non-discriminatory access can be achieved in the absence of broad participation by transmission-owning electric utilities in regional transmission organizations.

The Commission has identified in earlier orders several issues inherent in the present system that may interfere with the development of fully competitive markets. These include lack of sufficient separation between transmission and merchant functions, multiple pancaked transmission rates within a region, congestion management issues, loop flow issues, the complexities of current transmission planning, and generation market power that results when market size is constricted by transmission constraints.[17] As the Commission has previously explained, the establishment of and participation in properly structured regional transmission organizations can foster fully competitive markets. To be effective, the Commission believes that these regional transmission organizations must, at a minimum, have adequate operational authority, ensure comparable treatment for all transmission users, address loop flow issues, eliminate pancaked transmission rates, manage short-term transmission reliability, manage congestion, and plan transmission expansion.[18]

The Commission does not have preconceived notions as to what types of structures would be optimal for such regional transmission organizations, and they may in fact vary from region to region. ISOs are one type of regional institution, but there are other ways that interests in generation and transmission can be separated. These may include the creation of separate transmission companies.

Section 202(a) requires that before the Commission exercises its authority to establish regional districts and to fix or modify their boundaries:

> The Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

[17] *See, e.g.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,730–32; Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 at 30,247–51; Notice of Conference, Inquiry Concerning the Commission's Policy on Independent System Operators, Docket No. PL98–5–000; Louisville Gas and Electric Company, *et al.*, 82 FERC ¶ 61,308 at 62,222 (1998); *Midwest ISO* at 62,142, 62,145, 62,153–165.

[18] *Id.*

Accordingly, the Commission intends to hold one or more conferences during January or early February 1999 for the purpose of beginning the consultative process with the State commissions. The Commission currently envisions that one representative from each State commission would attend and discuss questions that would include, but not necessarily be limited to, the following:

(1) What criteria and policy considerations should be used to establish the boundaries for effective RTOs if the Commission later decides to do so?

(2) Are there factors that make it appropriate for the utilities in your state to belong in a specific region?

(3) What is the appropriate role of the States in the formation of RTOs?

(4) What is the appropriate role of the States in the governance of RTOs?

This notice is being given at this early time to permit interested State commissions sufficient time to consult with each other or with the industry on these technical matters. Details about the specific time, place, and format of this conference (or conferences) will be announced in the future.

Finally, as noted above, the Commission views the consultation with State commissions as an initial step in a broader inquiry on RTOs. If the Commission determines there is a need to establish regional boundaries for RTOs to further the goals of full competition and non-discriminatory access, it will do so as part of a rulemaking or other generic proceeding on RTOs. That proceeding will afford State commissions and others an opportunity to comment on the broader policy issues involved in creating RTOs, as well as specific regional boundaries.

By direction of the Commission. Commissioner Bailey concurred in part and dissented in part with a separate statement attached. Commissioner Breathitt concurred with a separate statement attached.

**David P. Boergers,**

*Secretary.*

Section 202(a) of the Federal Power Act, 16 U.S.C. § 824a(a) (1994).

**Interconnection and Coordination of Facilities; Emergencies; Transmission to Foreign Countries**

> Sec. 202. (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

**Regional Transmission Organizations**

[Docket No. RM99–2–000]

Issued: November 24, 1998.

*BAILEY, Commissioner, concurring in part and dissenting in part*

I support the initiation of a consultation process with State commissions. I do not support, however, at this time the exercise of whatever authority we possess under section 202(a) of the Federal Power Act, 16 U.S.C. § 824a(a) (1998), to divide up the country and to establish regional boundaries for the development of regional transmission organizations (RTOs). For these reasons, I respectfully concur in part and dissent in part with today's notice.

Today's notice does not decide the threshold question of whether the Commission should do anything more at this time other than to consult with State commissions. The notice is clear in its very first sentence that the Commission has not decided whether and how to use its authority under newly-delegated section 202(a) to establish regional boundaries for RTOs. In addition, the notice does not limit the scope of State consultation. While the notice articulates a number of questions for State consideration, focusing on the criteria that the Commission should employ in establishing regional boundaries for RTOS, those questions are decidedly inclusive rather than exclusive.

I have not reached any conclusions as to the issue of whether the Commission, acting pursuant to section 202(a), needs to establish regional districts to further the goals of full competition and non-discriminatory access. I am interested in hearing from the States as to whether it is imperative for the Commission to take this aggressive and immediate step. My own view is that after two years of operational experience under the procedures of Order Nos. 888 and 889, less aggressive steps could be pursued.

As the notice indicates, in Order Nos. 888 and 889, the Commission purposefully favored functional unbundling of utility operations over more dramatic structural separation. I understand that transmission customers have challenged whether transmission providers are continuing to offer their wholesale merchant function or affiliates with preferential access to transmission and transmission information. But I am not convinced that functional unbundling, backed by the Commission's vigilance and commitment in responding to customer complaints, is ineffectual in deterring and detecting preferential access and undue discrimination.

However, as events in the last year have demonstrated, transmission providers are increasingly reaching the conclusion that competitive market forces—as opposed to Commission directive—favor some type of structural disaggregation. The Commission has acted on a number of recent filings that seek Commission authorization for the divestiture of generation assets. The Commission also is aware of a number of recent proposals to place transmission assets in the control and operation of a separate regional transmission entity (going under various names and forms).

I continue to encourage all of these undertakings, and I do not want to see these efforts stymied awaiting the outcome of our process. I am pleased to see that utilities are voluntarily agreeing to go beyond the directions of Order Nos. 888 and 889. I expect these types of voluntary undertakings to increase in the future, as utilities increasingly come to the conclusion that they can best respond to competitive market pressures by transforming themselves into generation- or transmission-only entities, thus providing the type of structural separation that better protects against undue discrimination or preference in the provision of transmission services. I am wary of Commission action that might act to undermine the initiative of utilities to come forward with their own voluntary proposals.

Moreover, I am not convinced that the Commission, should it decide to provide greater guidance and prescription as to regional or unbundling filings, necessarily must proceed to an action pursuant to this newly-delegated section 202(a) authority. I am willing to commit to some type of generic proceeding, as I believe that it is in the public interest to do more to encourage the filing of regional transmission entities that enhance competition and offer improvements with respect to pricing, reliability, and market monitoring. I understand that voluntary efforts to promote and develop these type of regional entities have stalled, or have failed to commence, in many parts of the country. I am willing to provide Commission instruction on the subject, beyond that already found in Order No. 888 and our ISO orders, to jump start dormant or otherwise lagging discussions on the subject.

But why must that instruction necessarily come in the form of a generic initiative intended to result in the formation of regional districts, encompassing all regions of the country? While today's notice is drafted very carefully, I feel there is a strong bias in favor of the Commission's exercising its section 202(a) authority—whatever that entails—and establishing regional boundaries and districts in which all public utilities will be urged, subtlely or more overtly, to join. I am not endorsing such a process, especially when I do not know where that process is heading. I want the States to answer that threshold question for me.

At this juncture, I believe that the Commission is endorsing a process that is among the most aggressive it could have chosen to encourage the formation of RTOs. There are a number of alternatives to consider, and I urge the States to consider and consult with us as to whether less aggressive steps can be taken by the Commission to encourage the formation of ISOs.

There are other options the Commission could consider in encouraging the formation of RTOs. I enumerate them below, proceeding from the most mild and passive to the most aggressive option. Of course, there are numerous variations on these options for us all to consider.

First, the Commission could issue nothing in this docket. It could simply provide generic instruction in the context of its review of the filings it receives proposing ISOs, transcos, and related structures. In the Midwest ISO proceeding, for example, in an order issued only two months ago, the Commission, noting the early stage of restructuring of the U.S. electric power industry, proceeded very cautiously and refrained from endorsing any particular ISO model or ideal.[1]

Second, the Commission could issue a non-binding statement of Commission policy indicating more proactively what it is seeking when it receives and reviews a voluntary utility-specific or region-specific filing. This would provide badly-needed guidance to utilities which are now uncertain as to the size and configuration, for example, of any regional entity they propose.

Third, the Commission could do more to encourage the voluntary filing of RTO initiatives. Specifically, it could issue a policy statement or rulemaking that encourages voluntary regional filings that satisfy certain minimum criteria. Or, in addition to such minimum criteria (or ''lowest common denominators''), the Commission could articulate various incentives encouraging utilities to participate actively in RTOs—such as transmission pricing or rate of return incentives.

Fourth, moving to the more aggressive of options, the Commission could require utility participation in RTOs, establishing basic criteria but leaving many or most of the details for the utility participants themselves. In other words, the Commission could let the participants decide for themselves, in consultation with appropriate state officials, how best to comply with Commission criteria and mandates.

Fifth, the Commission could issue a rulemaking that not only requires participation in RTOs, but also involves the Commission in the setting and review of regional boundaries. Such a process could involve the invocation of section 202(a) authority in combination with the Commission's obligation under sections 205 and 206 of the Federal Power Act to act to ensure against undue discrimination and preference in the provision of jurisdictional services.

Today's notice, according to my reading, places the Commission solidly on steps 4 and 5. Since the Commission is initiating a consultative process, I ask the States to offer their advice as to how aggressive a posture the Commission should assume.

From a policy perspective, I personally much prefer providing incentives to encourage utilities to voluntarily step forward in promoting the development of regional entities. I am very wary of sitting here in Washington, D.C., and acting as a central planner with a large map of the utility grid on my wall, with a magic marker at my disposal. The competitive evolution of the industry has been very dramatic and is ongoing and quite fluid. I am exceedingly uncomfortable dictating to utilities how best to configure the industry in order to best take advantage of competitive opportunities, or how best to alleviate concern for unfair competitive advantages. Despite the expert advice of this Commission's staff, I believe that I am not situated in as good a position as

[1] *See* Midwest Independent Transmission System Operator, 84 FERC ¶ 61,231 at 62,142 (1998), *reh'g pending.*

the utilities we regulate in determining the map and boundaries of utility companies, acting alone or in concert with other utilities, operating in the future.

From a legal perspective, I have many questions as to the legitimacy of any generic Commission action that forces utilities, overtly or subtlely, into regional districts of our choosing. This is a difficult matter. Neither the Department of Energy nor the Commission has exercised section 202(a) authority to divide the country into regional districts. Moreover, the case law and legislative history on this point are obscure, and provide no definitive judgment as to the extent of the Commission's authority to encourage or compel utility participation in regional districts.

In a separate attachment, I lay out for the interested reader my understanding of relevant legislative history and precedent. It is my opinion that while the Commission can act affirmatively to encourage, promote and supervise utility participation in regional districts, it lacks the power to compel participation. Rather, Congress left it, in the language of the legislative history of section 202(a), to the ''enlightened self-interest'' of utilities to work cooperatively in the advancement of the cause of utility interconnection and coordination. I think the Commission should work to better ''enlighten'' utilities why it may be in their best economic self-interest to cooperate with their neighbors in advancing regional solutions to lingering competitive problems, rather than adopt a more heavy-handed approach.

While today's notice has compelled me to lay out my views in as comprehensive a manner as possible, I do appreciate its provisions to the extent the notice stops short of endorsing any one model of regional cooperation. I certainly agree that there are a number of types of structures that, depending on circumstances, might be optimal for a particular RTO. I leave it to individual utilities to decide for themselves whether, if they decide to proceed, a classic ISO structure best suits their needs, or whether a separate transmission company or other structure may be most appropriate.

For all of these reasons, I concur with today's notice to the extent it initiates a process allowing for consultation with the States as to how best to proceed to encourage utility participation in regional groupings. I dissent with today's notice to the extent it can be perceived as formally initiating a process intended to lead to the creation of regional districts, and to the extent this process might undermine the ability of utilities to determine for themselves how best to respond to emerging competitive opportunities and challenges.

Vicky A. Bailey,

*Commissioner.*

**Attachment to Commissioner Bailey's Concurrence in Part/Dissent in Part**

Presented below is the text and legislative history of section 202(a) of the Federal Power Act (FPA), 16 U.S.C. § 824a(a) (1994), as well as a brief discussion as to how it has been administered by the Department of Energy (DOE) and the Federal Energy Regulatory Commission. Relevant case law and Commission precedent, adding context to section 202(a), follows.

This analysis has been prepared entirely by the Office of Commissioner Bailey. It is intended to further explain her interpretation of the scope of section 202(a).

**The Statute**

Section 202(a) reads in its entirety as follows:

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Broken down into its most important constituent parts, section 202(a):

(1) ''empowers'' and ''directs'' the Commission ''to divide the country into regional districts for the voluntary interconnection and coordination of facilities;''

(2) obligates the Commission ''to promote and encourage such interconnection and coordination within each such district and between such districts;'' and

(3) obligates the Commission to work in concert with affected states prior to ''establishing any such district and fixing or modifying the boundaries thereof.''

Section 202(a) is part of a more comprehensive section of the Federal Power Act—section 202, 16 U.S.C. § 824a (1994)—entitled ''Interconnection and coordination of facilities; emergencies; transmission to foreign countries.'' Other subsections of section 202 deal with: (1) Commission-directed interconnections in certain limited circumstances (section 202(b)); (2) Commission-directed temporary interconnections in emergency circumstances (sections 202 (c)–(d)); (3) limitations on the transmission or sale of electricity to or from foreign countries (Canada and Mexico) (sections 202 (e)–(f)); and (4) utility reports to the Commission and contingency plans in times of electricity shortages.

**Legislative History**

There is little legislative history that illuminates the precise meaning of section 202(a). The single best piece of legislative history that is particular to section 202(a) focuses on the ''enlightened self-interest'' of utilities and Congress' preference for voluntary coordination and interconnection:

Under this subsection the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The committee is confident that enlightened self-interest will lead the utilities to cooperate with the commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on the subject.

Senate Report No. 621 (Senate Committee on Interstate Commerce), 74th Cong., 1st Sess. (1935) at p. 49.

Courts reviewing this piece of legislative history appear to have reached the conclusion that Congress, in enacting section 202(a) (and related subsections) in 1935, was motivated by a desire to leave the coordination and joint planning of utility systems to the voluntary judgment of individual utilities, ''and it was not willing to mandate that they do so.'' *Central Iowa Power Cooperative* v. *FERC*, 606 F.2d 1156, 1167–68 (D.C. Cir. 1979); *see also Municipalities of Groton* v. *FERC*, 587 F.2d 1296, 1298 (D.C. Cir. 1978).

Other passages from the legislative history amplify the ''voluntary'' nature of utility conduct under section 202(a) and the absence of Commission

mandates. Another section of the Senate Report provided as follows:

> Section 202(a) of [the original Senate bill] imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate sections (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a) * * * for the first Federal effort in this direction * * * Furthermore, the provisions of the old section 203(b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another * * * have been eliminated; these matters are left to the voluntary action of the utilities.

Senate Report No. 621, 74th Cong., 1st Sess. (1935) at p.19. In addition, the report of the House Committee on Interstate and Foreign Commerce similarly emphasized the voluntary character of the coordination of utility facilities:

> This section authorizes the Commission to establish regional districts and to encourage the voluntary interconnection and coordination of facilities within and between such districts, but the coordination of facilities is left to the voluntary action of the utilities.

H.R. Report No. 1318, 74th Cong., 1st Sess. (1935) at p.27.

Taken together, the pieces of legislative history quoted above focus on the voluntary conduct of utilities and the cautious, limited exercise of federal authority in this area. There is no apparent discussion of the extent of the Commission's authority to divide the country up into regional districts—or what the Commission affirmatively can do under section 202(a) if utilities are not ''voluntarily'' moving in the manner (or as quickly as that) favored by the Commission.

*Exercise of Section 202(a) Authority*

Section 202(a) authority to ''divide the country into regional districts for the voluntary interconnection and coordination of facilities'' originally was vested in the Federal Power Commission (FPC). This authority was transferred to DOE in 1977 when Congress enacted the Department of Energy Organization Act. The DOE Act vested in the newly-created FERC only specifically-enumerated statutory authority. Because the DOE Act did not specifically vest in the FERC the FPC's existing section 202(a) authority with respect to dividing the country into regional districts, that authority remained with DOE.

The DOE did not exercise its section 202(a) authority during the 21 years in which it controlled that authority. On October 1, 1998, DOE Secretary Richardson, in DOE Delegation Order No. 0204–166, ''delegated and assigned to the [Commission] the authority to carry out such functions as are vested in the Secretary under section 202(a) of the Federal Power Act.''

In delegating section 202(a) authority, Secretary Richardson concluded that the Commission is the ''most appropriate agency'' to exercise this authority. In support, Secretary Richardson explained, without citation to any legal authority, that section 202(a) affords the Commission ''sufficient authority to establish boundaries for Independent System Operators (ISOs) or other appropriate transmission entities.'' He added that ''[p]roviding FERC with the authority to establish boundaries for ISOs or other appropriate transmission entities could aid in the orderly formation of properly-sized transmission institutions and in addressing reliability-related issues, thereby increasing the reliability of the transmission system.'' The press release accompanying the delegation order added that the DOE delegation of section 202(a) authority ''gives FERC much-needed authority it now lacks.''

*Judicial Precedent*

Not surprisingly, given the dormant nature of this section for its 63-year history, the United States Supreme Court has never ruled directly on the precise meaning of section 202(a). It has, however, addressed more generally the ''voluntary'' scheme of utility action running throughout the Federal Power Act.

In the landmark case of *Otter Tail Power Company* v. *United States,* 410 U.S. 366 (1973), the Supreme Court ruled that Commission regulation of electric utility rates and practices under the FPA does not immunize electric utilities from antitrust scrutiny and liability. In so ruling, the Supreme Court rejected the utility argument that its refusal to deal with certain municipal customers was immune from antitrust prosecution because the Commission has the authority to compel involuntary electrical interconnections pursuant to section 202(b) of the FPA. The Court responded that ''[t]he essential thrust of § 202, however, is to encourage voluntary interconnections of power.'' *Id.* at 373 (citing legislative history).

The Court continued with an analysis of the overall scheme of Part II the FPA (which includes section 202) and its legislative history:

> As originally conceived, Part II would have included a ''common carrier'' provision making it ''the duty of every public utility to * * * transmit energy for any person upon reasonable request. * * *'' In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be ''necessary or desirable in the public interest.'' These provisions were eliminated to preserve ''the voluntary action of the utilities.''
>
> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.

*Id.* at 374 (citations to legislative history omitted).

In an earlier Supreme Court citing section 202, the Court ruled in *Penn Water & Power Company* v. *FPC,* 343 U.S. 414 (1952), that the statutory language of sections 202(a), 202(b), and 206(b) of the FPA justified a bilateral, existing contractual ''practice'' of two utilities integrating their power output. In relevant part, the Court found that the regional coordination of power facilities ''ready made by prior contractual arrangements'' was precisely the type of coordinated action authorized under section 202(a) of the FPA. *Id.* at 423.

The few lower court decisions to address section 202(a), like the *Penn Water* case, address situations in which utilities voluntarily banded together to coordinate their activities in such a manner as to achieve efficiencies and economies unachievable by unilateral, utility-specific conduct. Two cases in particular—involving voluntary pooling arrangements by utilities—are instructive as to the reach of section 202(a) and the Commission's historical hesitation to invoke that statutory authority to compel utilities to do more than what they voluntarily had committed to do.

In *Central Iowa Power Cooperative* v. *FERC,* 606 F.2d 1156 (D.C. Cir. 1979), the D.C. Circuit affirmed the Commission's approval of the Mid-Continent Area Power Pool (MAPP), a tight power pool among Midwestern utilities, as modified in only one respect (membership). In so doing, the court affirmed the Commission's judgment not to accede to the request of intervenors to try to turn the power pool—which provided for the coordinated operation of generating facilities and short-term exchanges of power (reserve sharing)—into a better power pool.

Specifically, the court upheld the Commission's judgment to decline to expand the scope of pool services, as requested by intervenors, to require

MAPP utilities to construct larger generating units and to engage in single-system planning with central dispatch. The Commission had reasoned that section 202(a) of the FPA does not compel the Commission, against the wishes of the pool utilities, to transform MAPP from its limited scope to one offering a wider array of pool services:

> While Section 202(a) of the Federal Power Act speaks in terms of ''voluntary interconnection and coordination'' and to ''promote and encourage'' the same, the pooling agreement is an FPC tariff which must pass muster under Sections 205 and 206 of the Federal Power Act. For example, we have already found the membership provisions unacceptable. Nevertheless, the scope of a power pool is in the first instance a matter for the utilities involved. The mere fact that a particular pool does not offer the same range of services as another pool does not permit the Commission to direct expansion of the narrower pools' scope. Unless the limited scope of the MAPP Agreement is for some other reason unjust, unreasonable or unduly discriminatory, we are not authorized under Part II of the Federal Power Act to direct the pool to offer more services. While we can and do ''encourage and promote'' greater use of pooling, the peculiarities of each region necessitate that the member utilities determine the services to be offered. One cannot automatically apply the broader scope of NEPOOL, based upon very different geography, industry history and make-up in New England, to the mid-continent region with its tremendous area, sparse load and different industry make-up.

*Id.* at 1167 (quoting underlying Commission order).

The reviewing court found the Commission's reluctance to direct the pooling utilities to do more than what they had voluntarily committed to do to represent an ''informed and reasoned decision consistent with congressional purposes.'' *Id.* In support, the court reviewed the language and legislative history of section 202(a) and concluded that Congress intended to leave the coordination of electric systems to the *voluntary* decisions of utilities acting in their ''enlightened self-interest.'' For this reason,

> Given the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the Agreement, and failure of the MAPP participants to establish a fully-integrated electric system could not justify rejection of the [MAPP] Agreement filed.

*Id.* at 1168. The court recognized that, pursuant to section 202(a), regional coordination of electric power systems is in the public interest. Nevertheless,

> This does not mean, however, that a pooling plan is unlawful * * * merely because a more comprehensive arrangement might better achieve the purposes of section 202(a). To so conclude would undermine Congress' determination that coordination under section 202(a) be voluntary. Moreover, we cannot agree with South Dakota that in approving the [MAPP] Agreement the Commission abdicated its duty under section 202(a) to promote and encourage regional interconnection and coordination of electric facilities.

*Id.*

The findings and rationale of the D.C. Circuit, in upholding the Commission's limited exercise of its section 202(a) authority, mimic its conclusions in an earlier case, also involving the voluntary actions of utilities to create a coordinated power pool in another region of the country. In *Municipalities of Groton* v. *FERC*, 587 F.2d 1296 (D.C. Cir. 1978), the court affirmed the Commission's approval, with one modification (as to a deficiency charge), of the New England Power Pool (NEPOOL), a tight power pool among New England utilities.

In so doing, the court affirmed the Commission's judgment to reject the argument of certain municipal electric systems that the NEPOOL Agreement was necessarily discriminatory and anticompetitive because it omits certain services (including firm power sales). The court explained that section 202(a) of the FPA ''sanctions and encourages these voluntary pooling agreements,'' and that the Commission's conclusions that the NEPOOL Agreement is not unduly discriminatory or anticompetitive, despite its limited size and scope, ''is reasonable in light of the voluntary nature of this agreement.'' *Id.* at 1298–99. *See also Duke Power Company* v. *FPC*, 401 F.2d 930, 943–44 (D.C. Cir. 1968) (emphasizing that section 202(a) encourages *voluntary* interconnection and coordination of facilities, that the Commission's responsibility under that section is only to *promote* and *encourage* such interconnection and coordination, and that the Commission is not authorized to ''*compel* any particular interconnection or technique of coordination.'').[2]

*BREATHITT, Commissioner, concurring*

I view today's Notice of Intent to Consult Under Section 202(a) as the initiation of important discussions between the FERC and state commissions and others on whether and how the Commission will use its authority under Section 202(a) of the Federal Power Act. These initial discussions will begin to shape the debate of how and under what time frame the Commission intends to proceed with a broader inquiry into the formation of regional transmission organizations. The direction we take in this endeavor is of utmost importance to me. It is for this reason that I respectfully concur with today's Notice of Intent to Consult. As I will explain, the Notice does not adequately frame our initial discussion with state commissioners.

I believe it is crucial that we conduct thorough and meaningful discussions with our state colleagues. Efforts by this Commission to draw regional boundaries for transmission organizations will have a tremendous impact on state commissions and on the utilities and their customers that conduct business and reside in those states. We must acknowledge that states are at varying points in the development of retail open access plans and that actions by this Commission will have different impacts on states depending on the level of functional unbundling and retail competition that has occurred in those states. Furthermore, we must consider the significant regional differences that exist in this country and the degree to which transmission planning and pricing issues will affect a state's analysis and consideration of RTOs. Obviously, this consultation process is not a simple exercise. Indeed it is one that requires a great deal of consideration. That is why the Commission must ensure that every pertinent question, even the most fundamental ones, are asked and answered.

The Notice we are voting on today asks important and relevant questions and invites comments from state commissioners on issues pertaining to the formation of regional transmission organizations and the establishment of boundaries for these RTOs. However, the Notice does not invite state commissioners, in this initial discussion, to comment on, what I believe to be, the fundamental, threshold question. That is, whether there is a need to establish regional boundaries in order to further the goals of full competition and non-discriminatory access or whether there are other means that can be equally as effective. This should be the first question we ask ourselves and state commissioners. Furthermore, I believe it

[2] In *Duke Power Company*, the court reviewed the language and legislative history of section 202(a), and other subsections of section 202 ((b)–(d)) dealing with interconnections and emergency authorizations, as part of its interpretation of the statutory reach of section 203 of the FPA, dealing with the sale, lease, disposition, merger or consolidation of jurisdictional facilities. The court found that the Commission does not have jurisdiction under section 203 to review the utility acquisition of limited local distribution facilities.

is crucial that we define the scope of our authority under Section 202(a).

I fully support the Notice of Intent to Consult and look forward to our discussions with state commissioners and, later on, with other parties. This dialogue is important and necessary. However, I do not want the Commission to lose sight of fundamental, threshold issues pertaining to the establishment of regional boundaries and the formation of RTOs. I therefore respectfully concur with this decision.

*Linda K. Breathitt,*

*Commissioner.*

[FR Doc. 98–31959 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## Privacy Act of 1974; New System of Records

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

**ACTION:** Notice of existence and character of new system of records.

**SUMMARY:** The Federal Energy Regulatory Commission (''Commission'' or ''FERC''), under the requirements of the Privacy Act of 1974, 5 U.S.C. 552a, is publishing a description of a new system of records.

**DATES:** Comments may be filed on or before February 1, 1999.

**ADDRESSES:** Comments should be directed to the following address: Julia A. Lake, Privacy Act Officer, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Room 91–21, Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:** Julia A. Lake, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Room 91–21, Washington, DC 20426; 202–208–0457.

**SUPPLEMENTARY INFORMATION:** The Privacy Act of 1974, 5 U.S.C. 552a, requires that each agency publish a notice of the existence and character of each new or altered ''system of records.'' 5 U.S.C. 552a(a)(5). This Notice identifies and describes the Commission's new system of records. There are no altered systems to report. A copy of this Notice identifies and describes the Commission's new system of records. There are no altered systems to report. A copy of this report has been distributed to the Speaker of the House of Representatives and the President of the Senate, as the Act requires.

The new system of records does not duplicate any existing agency systems. In accordance with 5 U.S.C. 552a(e)(4), the Commission lists below the following information about this system: name; location; categories of individuals on whom the records are maintained; categories of records in the system; authority for maintenance of the system; each routine use; the policies and practices governing storage, retrievability, access controls, retention, and disposal; the title and business address of the agency official responsible for the system of records; procedures for notification, access and contesting the records of each system; and the sources of the records in the system.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

### FERC/36

**SYSTEM NAME:**

*Management, Administrative, and Payroll System* ''MAPS'' FERC/36.

**SYSTEM LOCATION:**

Hard copy of personnel and timekeeping data is located at the Federal Energy Regulatory Commission (FERC), Washington, D.C. 20426. Hard copy of payroll transactions and reports are located at the Department of Veterans Affairs, Shared Services Center (SSC), Topeka, Kansas 66604 and the Department of Veterans Affairs, Financial Services Center (FSC), Austin, Texas 78772, respectively. Computerized data is located at the Department of Veterans Affairs, Austin Automation Center (AAC), Austin, Texas 78772.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

All employees (Senior Executive Service and non-Senior Executive Service, bargaining unit and non-bargaining unit) employed by the Federal Energy Regulatory Commission.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

All official personnel action and/or payroll transaction information on Commission employees.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, 2302(b)(20)(B), 2302(b)(10), 7311, 7313; Executive Order 10450; 5 CFR 731.103.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

- To the Merit Systems Protection Board, the Office of Special Counsel, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, in connection with functions vested in those agencies.
- To a Congressional office in response to an inquiry made at the request of that individual.
- To the Office of Management and Budget in connection with private relief legislation.
- In litigation before a court or in an administrative proceeding being conducted by a Federal agency.
- To the National Archives and Records Administration for records management inspections.
- To Federal agencies as a data source for management information through the production of summary descriptive statistics and analytical studies in support of the functions for which the records are maintained for related studies.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

On paper in Official Folders located at the FERC, SSC, and FSC. Computerized on a DEC Alpha Server which resides at the AAC.

**RETRIEVABILITY:**

Data can be retrieved by employee's name, employee identification number, or social security number.

**SAFEGUARDS:**

The Austin Automation Center is located in a secured Federal complex. Within this secured building, the Computer Operations Center is located in a controlled access room. Specific employees have been identified as system and database administrators having specific responsibilities allowing access to FERC personnel and payroll data. Security is embedded within the software, in both the operating system and at the application level. Individuals not granted access rights cannot view or change data. The database is monitored by software applications that provide audits of log-ins, both successful and failed.

Output documents from the system are maintained as hard copy documents by FERC's Human Resources Division and the VA's Payroll Operations and Finance Offices and are safeguarded in secured cabinets located within secured rooms.

**SYSTEM MANAGERS(S) AND ADDRESS:**

The Federal Energy Regulatory Commission and the Department of Veterans Affairs share responsibility for system management. The first point of contact is the Director, Division of Management, Administrative and